Senate Democracy

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Abstract

The Senate is radically unrepresentative of American citizens. More populous states such as California, Texas, Florida, and New York are underrepresented, and less populous states such as Alaska, North Dakota, Vermont, and Wyoming are overrepresented. Not only are the views and interests of citizens in different states given significantly more or less weight arithmetically, but the representativeness of the Senate is also strongly biased in terms of sex, age, and most egregiously, race and color.

In the past, the Seventeenth Amendment confirmed a shift in thinking to make the Senate more democratic by mandating a popular vote rather than selection by state legislatures. This Article proposes to make the Senate more democratic again through the adoption of a Senate Reform Act that would reallocate the number of senators to each state by relative population. It recommends a Rule of One Hundred to determine population units by which senate seats would be allocated according the official decadal census, with a minimum of one senator per state. This reform would maintain the Senate at roughly the same size. It would also make the Electoral College more representative, and would open the door for easier access to statehood for underrepresented citizens in the District of Columbia and Puerto Rico.

The Senate Reform Act finds its constitutional authority in the Fourteenth, Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments—collectively, the Voting Rights Amendments. After explaining details of how the reform would work, an examination of its constitutionality follows traditional interpretative modes of textual analysis, structural considerations, historical context, moral principles, and legal precedents. The political feasibility of the reform is then also considered.

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> It often comes to pass, that in governments, where part of the legislative consists of representatives chosen by the people, that in tract of time this representation become very unequal and disproportionate to the reasons it was first established upon . . . . This strangers stand amazed at, and everyone must confess needs a remedy; tho' most think it hard to find one, because the constitution of the legislative being the original and supreme act of the society, antecedent to all positive laws in it, and depending wholly on the people, no inferior power can alter it. And therefore the people, when the legislative is once constituted, having, in such a government . . ., no power to act as long as the government stands; this inconvenience is thought incapable of a remedy.
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> - John Locke

> Heaven lends me ability, to use my voice, my pen, or my vote, to advocate the great and primary work of the universal and unconditional emancipation of my entire race.
>
> - Frederick Douglass

Introduction

Every state in the United States gets at least two senators and only two senators. The plain text of the Constitution says so, and this rule cannot be amended.[1] This conventional wisdom, however, isn't necessarily so. The Senate can and should be made more democratic by the enactment of a federal statute. This Article proposes such a statute and defends its constitutionality.

The United States Senate is today radically unrepresentative of American citizens and violates basic principles of political equality and democracy. Each federal election reveals and reinforces this basic fact. In the midterm elections of the Senate in 2018, for example, Democratic candidates received 57 percent of the total votes of citizens in the nation, and Republican candidates received only 42 percent, but Republicans *gained* two seats.[2]

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[1] U.S. CONST., art. 1, § 3, cl. 1; U.S. CONST. art. V; U.S. CONST. amend. XVII § 1.

[2] *U.S. Senate Election Results 2018*, POLITICO, https://www.politico.com/election-results/2018/senate/. In contrast, Democrats gained 40 seats in the House. Ed Kilgore, *With One Final Democratic Victory, Midterms Finally End*, INTELLIGENCER, Nov. 28, 2018, http://nymag.com/intelligencer/2018/11/with-one-last-democratic-victory-in-california-midterms-end.html.

The controversial confirmation of Judge Brett Kavanaugh to the Supreme Court in October 2018 illustrates the Senate's unequal representation. Senators voted 50 to 48 to confirm, but this bare majority represented only 44 percent of American citizens.[3] Similarly, the Senate confirmed Justice Neil Gorsuch in April 2017 by a 52 to 45 vote, with the majority representing only 42 percent of the population.[4]

These are only a few examples of the unbalanced representation that appears in legislative and other actions taken by the Senate. It's time to make the Senate more democratic, by which I mean more equally representative of the American people as a whole.

At previous junctures in American history, the constitutional structure of the Senate has been reformed to make it more democratic. Most notably, the Seventeenth Amendment established the popular vote as the required method of election, replacing the original constitutional structure that gave state legislatures the authority to name U.S. senators.[5] Because the Constitution allocates two senators to each state regardless of the size of population, however, the comparative representation of smaller states vastly outweighs larger states—and this inequality of representation has been increasing over time, as James Madison predicted.[6]

One measure of the degree of unequal representation in the Senate compares the relative voting power of an average citizen. The allocation of senators today gives a citizen of Wyoming, for example, more than *sixty-seven times* the voting power of a citizen of California. This compares with

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[3] Parker Richards, *The People vs. the U.S. Senate*, ATLANTIC, Oct. 10, 2018, https://www.theatlantic.com/politics/archive/2018/10/senators-kavanaugh-represented-44-percent-us/572623/.

[4] Kevin J. McMahon, *Will The Supreme Court Still "Seldom Stray Very Far"?: Regime Politics In A Polarized America*, 93 CHI. KENT L. REV. 343, 344 & tbl. 1 (2018). The first Supreme Court appointment confirmed by senators representing only a minority of the population was Clarence Thomas. He was confirmed by a vote of 52 to 48 with the majority representing 48 percent of the population. Justice Samuel Alito was confirmed by a vote of 58 to 42 with the majority representing 49 percent of the population. Id. Justices Kavanaugh and Gorsuch share the dubious distinction also of being appointed by a president who received only a minority of the popular vote, thus making them the first minority-appointed, minority-confirmed justices.

[5] U.S. CONST. amend. XVII § 1; U.S. CONST. art. I, § 3, cl. 1. Many states had already begun electing senators by popular vote, but the Seventeenth Amendment made it mandatory for all states. DAVID A. STRAUSS, THE LIVING CONSTITUTION 132-35 (2010).

[6] STRAUSS, supra note [5], at 10 (describing Madison's prediction at the Constitutional Convention).

a differential of about twelve times between the smallest state of Delaware and the largest of Virginia at the founding.[7]

Another measure of the inequality examines the minimum percentage of the total population needed for a majority of the smallest states to achieve a majority vote in the Senate.[8] Since 1790, the minimum percentage of the population needed for a majority vote in the Senate has fallen from around thirty percent to under twenty percent.[9] This means it has become possible for senators representing less than one-fifth of the total population to pass a bill or confirm a Supreme Court justice.[10] In addition, this malapportionment will only get worse, given current demographic trends that predict that the most populous states, such as California, Florida, and Texas, are growing faster than smaller states.[11]

In 1995, Senator Daniel Patrick Moynihan of New York remarked: "Sometime in the next century the United States is going to have to address the question of apportionment in the Senate. Already we have seven states with two senators and one representative. The Senate is beginning to look like the pre-reform British House of Commons."[12]

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[7] Compare Table 1 in the text infra page [63] (based on 2017 data) with MICHAEL J. KLARMAN, THE FRAMER'S COUP: THE MAKING OF THE UNITED STATES CONSTITUTION 626-27 (2016) (ratio at the founding).

[8] For the relevant methodologies and their application, see FRANCES E. LEE & BRUCE I. OPPENHEIMER, SIZING UP THE SENATE: THE UNEQUAL CONSEQUENCES OF EQUAL REPRESENTATION 10-11 & app. A (1999). For explanation of the difference between "voting power" and "voting weight," see also Nicola Maaser & Stefan Napel, *Equal Representation in Two-Tier Voting Systems*, 28 SOCIAL CHOICE & WELFARE 401 (2007).

[9] LEE & OPPENHEIMER, supra note [8], at 10-11 & fig. 1.1. The percentage has remained below 20 percent since 1900. Id.

[10] For many years, the Senate mitigated this problem with respect to judges by following an internal rule that required sixty votes for confirmation. In 2013, the Democratic majority in the Senate, frustrated by the slow walking by Republicans on confirmations, exercised "the nuclear option": adopting a simple majority rule for judicial confirmations except for the Supreme Court. Then in 2017, the Republican-controlled Senate extended the nuclear option to include Supreme Court nominations, clearing the path to confirmations of Justices Gorsuch and Kavanaugh by bare majority votes. Matt Flegenheimer, *Republicans Gut Filibuster Rule to Lift Gorsuch*, N.Y. TIMES, Apr. 7, 2017, at A1. See also David S. Law & Lawrence B. Solum, *Judicial Selection, Appointments Gridlock, and the Nuclear Option*, 15 J. CONTEMP. LEG. ISSUES 51, 60 (2006) (explaining the "nuclear option").

[11] LEE & OPPENHEIMER, supra note [8], at 11.

[12] Id. at 11-12 (quoting Senator Moynihan). Prior to the Great Reform Act of 1832, the British House of Commons severely underrepresented growing cities and had "rotten boroughs" characterized by very small populations. For an overview, see ERIC J. EVANS, THE GREAT REFORM ACT OF 1832 (2d ed. 1994).

Legal and other scholars have mostly ignored this problem because they regard challenging the basic representative structure of the Senate as "unthinkable."[13] The Constitution explicitly adopts a one state, two senators rule.[14] It says further that the rule cannot be changed, even by constitutional amendment.[15] Scholars have therefore concluded "the chances for reform are slim to none."[16]

The advancement of democracy in America, however, has been a story of an expanding recognition of rights to vote, and in order for this progress to continue, scholars, citizens, and politicians must address the structural problem of a radically unrepresentative Senate. The reform recommended here addresses this challenge, and provides answers to skeptics.

To begin, some historical background on voting rights in the United States is useful. When the Constitution was written and ratified, only so-called "white" men who held property were considered citizens.[17] The

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[13] Cf. STRAUSS, supra note [5], at 103-04 ("The Constitution says that the Senate 'shall be composed of two Senators from each state,' and not even the most audacious proponent of the living Constitution would argue that that provision should now be construed to require that states have different numbers of senators . . . . The requirement of one person, one vote, has compelled states to abolish their own versions of the Senate . . . . But to interpret the Constitution to require a comparable change in the Senate is unthinkable."). See also ROBERT A. DAHL, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION? 48-54, 144-45 (2d ed. 2003) (criticizing the Senate as a dramatic departure from the principle of democratic equality, but concluding that change is "virtually impossible"); STRAUSS, supra, at 7 (giving the one state, two senator rule as an example of constitutional provisions that are "quite precise and leave no room for quarreling, or for fancy questions about interpretation"); Misha Tseytlin. Note, *The United States Senate and the Problem of Equal State Suffrage*, 94 GEO. L.J. 859, 859 (2006) (noting that "scholars have given only sparse attention to the far more undemocratic Senate" compared with attention to the unrepresentative Electoral College).

[14] U.S. CONST. art. I, § 3, cl. 1; U.S. CONST. amend. XVII § 1.

[15] U.S. CONST. art. V.

[16] LEE & OPPENHEIMER, supra note [8], at 12. See also DAHL, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION?, supra note [13], at 154 ("The likelihood of reducing the extreme *inequality of representation in the Senate* is virtually zero.")

[17] KLARMAN, supra note [7], at 622; LAPORE, supra note [17], at 56. There were exceptions. "Some states at the Founding allowed free blacks to vote on equal terms," but "most states applied property qualifications of one sort or another" precluding everyone except white men from voting. AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 184 (2012).

The idea of "white" people is, of course, a social, political, and legal construct. IAN HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE xxi-xxii (rev. ed. 2006). The "ideology of race" justified the restriction of the franchise to male colonists of European ancestry. JILL LAPORE, THESE TRUTHS: A HISTORY OF THE UNITED STATES 55 (2018). See also DOROTHY ROBERTS, FATAL INVENTION: HOW SCIENCE, POLITICS, AND BIG BUSINESS RE-CREATE RACE IN THE TWENTY-FIRST CENTURY 301(2011) ("The toxic

Constitution excluded African slaves, counted them as only a fraction of a person in its notorious Three Fifths Clause, and adopted a proslavery tilt.[18] Indigenous people and women were also excluded.[19] Over time, the franchise was extended to all white men regardless of property or wealth.[20] In the aftermath of the Civil War, male former slaves were guaranteed the right to vote, at least formally, by the Fourteenth and Fifteenth Amendments.[21] The

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convergence of race, biology, and politics is rooted in the very origin of this nation. Race was instituted as a system of governance and 'moral apology' for keeping Africans in chains and violently dispossessing Indian tribes.").

[18] U.S. CONST. art. I, § 2, cl. 3 (determining representation by the number of "free persons" and "three fifths of all other persons"); Paul Finkelman, *How the Proslavery Constitution Led to the Civil War*, 43 RUTGERS L.J. 405, 407-08 (2013) (reviewing constitutional provisions that protected slavery and the slave trade). See also KLARMAN, supra note [7], at 257-304 (discussing the central role of slavery as an issue at the founding). The proslavery origins of the Constitution continue to affect the law today in a number of areas, including the election of the president by an Electoral College. See Juan F. Perea, *Echoes of Slavery II: How Slavery's Legacy Distorts Democracy*, 51 U. CAL. DAVIS L. REV. 1081, 1087-91 (2018). The Constitution's "proslavery tilt" also "gave slaveholding regions extra clout in every election as far as the eye could see—a political gift that kept giving. And growing." AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 97 (2005).

[19] U.S. CONST. art. I, § 2, cl. 3 (excluding "Indians who are not taxed"); U.S. CONST., amend. XIV, § 2 (continuing the same exclusion even after the abolition of slavery). European colonists regarded indigenous people as members of foreign nations with whom treaties were made, and then repeatedly and consistently broken. ROXANNE DUNBAR-ORTIZ, AN INDIGENOUS PEOPLES' HISTORY OF THE UNITED STATES 142, 202-05 (2014). No reference to women appears in the original Constitution.

[20] Pennsylvania was an early leader in the movement to extend the franchise to all white men who paid taxes, which extended the right to vote from two-thirds to 90 percent of white men. LAPORE, supra note [17], at 112-13. Originally, voting rights were left to the states. Id. at 122. By 1821, property qualifications for voting by white men had been eliminated in twenty-one of the twenty-four states. Id. at 183. By 1860, "the property qualification for voting [for white men] had been eliminated everywhere." STRAUSS, supra note [5], at 119. As David Strauss argues, the constitutional principle forbidding property qualifications is an example of one that evolved as part of "the living constitution" even though it did not have a textual basis. Id. at 118-20. The Supreme Court eventually affirmed this principle in civil rights cases protecting the right to vote in the 1960s. See, e.g., Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966) (striking down ownership of wealth and payment of poll taxes as voting qualifications). As Justice Douglas argued: "Wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process. Lines drawn on the basis of wealth or property, like those of race, are traditionally disfavored." Id. at 668.

[21] U.S. CONST. amends. XIV & XV. The right to vote for black Americans was subverted by other means, however, especially in the southern states, until the Voting Rights Act of 1965. See STRAUSS, supra note [5], at 128-32. Suppression of the right to vote based on race continues today. In 2018, credible allegations of racist voter suppression techniques were made in midterm elections in Florida, Georgia, Indiana, Missouri, Nevada, North Carolina, and North Dakota. See German Lopez, *The Right to Vote Is under Siege in 2018*, VOX, Nov. 6, 2018, https://www.vox.com/policy-and-politics/2018/11/6/18065970/

Nineteenth Amendment rendered women's suffrage a constitutional right in 1920.[22] A federal statute in 1887 opened a path to citizenship for indigenous people.[23] Approximately two-thirds of them had become citizens by 1924, when the Indian Citizenship Act extended the right to vote to all Native Americans born within U.S territories.[24] The Twenty-Sixth Amendment, ratified in 1971, expanded the right to vote to all citizens who were age eighteen or older.[25]

These landmark extensions of voting rights tell the story of the United States since its founding as one of a democratic government with an ever-expanding scope of the franchise. At the same time, a competing narrative tells a tale of restrictions of rights of participation, beginning with the original sin of slavery, the subjugation of indigenous peoples, and the exclusion of women from politics. The American ideal of inclusive civil rights for all—regardless of race, ethnicity, skin color, national origin, sex, gender, sexual orientation, religion, wealth, education, and various disabilities or physical differences—is a relatively recent, and still unevenly achieved, reality.

The American ideal of representational government requires reform of the Senate. The unequal representation created by the original one state, two senators rule violates basic principles found in the Voting Rights Amendments (including the Fourteenth, Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments). The allocation of only two senators each to California with almost 40 million people and Wyoming with less than 600,000 makes no rational or moral sense.[26] The Senate, as I will show, has become heavily unrepresentative not only mathematically for everyone,

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midterm-elections-voting-rights-suppression-2018.

[22] U.S. CONST. amend. XIX. Suffragettes including Susan B. Anthony and Elizabeth Cady Stanton had earlier lost an attempt to include women's rights in the Fourteenth Amendment. STRAUSS, supra note [5], at 13. See also U.S. CONST., amend. XIV, § 2 (guaranteeing voting rights only to "male inhabitants" and "male citizens").

[23] The path to citizenship for indigenous people was conditioned, however, on their acceptance of theft of their land and renouncing tribal loyalties: a "forced assimilation" rather than a free extension of the franchise. LAPORE, supra note [17], at 337. For an historical overview, see DUNBAR-ORTIZ, supra note [19].

[24] *Securing Indian Voting Rights*, 129 HARV. L. REV. 1731, 1733 (2016).

[25] U.S. CONST. amend. XXVI.

[26] See DAHL, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION?, supra note [13], at 48-50, 144 (describing this difference as "a gross inequality of representation"); Paul Krugman, *Real America Versus Senate America*, N.Y. TIMES, Nov. 9, 2018, at A31 ("The Senate, which gives each state the same number of seats regardless of population—which gives fewer than 600,000 people in Wyoming the same representation as almost 40 million in California—drastically overweights . . . rural areas and underweights the places where most Americans live.")

discriminating against citizens in big states as compared with smaller states, but also along other dimensions, including racial and ethnic criteria specifically targeted by the Voting Rights Amendments. The Senate, as one scholar finds, has become the most malapportioned legislature in the world.[27] It should be reformed.

My proposal is for Congress to address the problem by enacting a statute under its express authority granted under the Voting Rights Amendments.[28] This statute would replace the one state, two senators rule with one that more closely reflects the disparity of population in the states, and at the same time

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[27] AREND LIJPHART, DEMOCRACIES: PATTERNS OF MAJORITARIAN AND CONSENSUS GOVERNMENT IN TWENTY-ONE 174 (1984). At least, the Senate is one of the worst. Legislatures in Argentina, Brazil, and Russia are also radically unrepresentative. See DAHL, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION?, supra note [13], at 50.

[28] Previous recommended reforms have not put forward the idea of a federal statute as a solution and defended its constitutionality. See, e.g., Lynn A. Baker & Samuel H. Dinkin, *The Senate: An Institution Whose Time Has Gone?*, 13 J.L. & POL. 21, 83 (1997) (suggesting possible solutions including judicial review finding the current Senate unconstitutional, a national referendum, a "work stoppage" by more populous states to force "consent" by smaller states to reform, and "a revolution, whether bloody or bloodless"); Scott J. Bowman, Note, *Wild Political Dreaming: Constitutional Reformation of the United States Senate*, 72 FORDHAM L. REV. 1017 (2004) (recommending a constitutional amendment of Article V's amending provision as the first step toward change).

On a national referendum as solution, see Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1069-71 (1988). But see Paul Monaghan, *We the People(s), Original Understanding, and Constitutional Amendment*, 96 COLUM. L. REV. 121 (1996) (arguing against this idea). Amar expanded his argument to include a national right to petition for a constitutional convention to amend or replace the Constitution. Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 459 (1994).

Amar has sketched a view for the future that would include changing the Constitution along the lines of the reform suggested here, but he does not advocate, as I do, a federal statute to solve the problem. AMAR, AMERICA'S UNWRITTEN CONSTITUTION, supra note [17], at 470 (suggesting that "the federal constitution should be changed to reduce Senate malapportionment—say, by giving each state at least one senator, and capping even the largest state at eight senators").

For a proposal to solve Senate malapportionment by dividing large states into small ones to increase their number of senators, see Burt Neuborne, *Divide States to Democratize the Senate*, WALL ST. J., Nov. 19, 2018, https://www.wsj.com/articles/divide-states-to-democratize-the-senate-1542672828#comments_sector. This reform would involve high transitional costs in building new state governments, however, and it would provide a less precisely calibrated, forward-looking solution than mine.

Lastly, a former Congressman makes a simple appeal: "Abolish the Senate." John D. Dingell, *I Served in Congress Longer Than Anyone. Here's How to Fix It.*, ATLANTIC, Dec. 2012, https://www.theatlantic.com/ideas/archive/2018/12/john-dingell-how-restore-faith-govenment/577222/. This is much more radical than my proposed reform, and Dingell admits that it would be very difficult to accomplish. Id. It's also probably unconstitutional and would impose structural weaknesses. For further discussion, see infra note [86].

respects the basic principle of federalism and "equal suffrage" of the states. In technical terms, my recommended approach is a variant of degressive proportionality, which balances a one person, one vote principle with a need to provide representation to political entities such as states.[29] I argue further that this statutory reform is, contrary to a first impression, constitutional.

The Article proceeds as follows. Part I presents the legislative solution. Congress, acting within its proper scope of constitutional authority under the Voting Rights Amendments, should enact a statute reforming the allocation of senators to the states. The legislation replaces the rule of one state, two senators with one that allocates senators to the states in a manner that both respects the original commitment to federalism (allocating at least one senator to each state) and the rights of U.S. citizens to participate on an equal basis in their political democracy (allocating a greater number of senators to more populous states). I recommend a Rule of One Hundred as a formula for determining this new allocation in a process that piggybacks on the use of the official census conducted every ten years to allocate members to the House of Representatives. Other than this adjustment regarding allocation, all other structural features of the bicameral system remain the same.

Part II offers a constitutional defense. Contrary to the conventional wisdom that the number of senators per state is set in stone by the text of the Constitution, I argue that the Voting Rights Amendments provide sufficient delegated authority for Congress to act. A textual analysis supports this conclusion. In brief, the original text establishing the one state, two senators rule conflicts with the texts of the Voting Rights Amendments, and this conflict should be resolved, I argue, in favor of congressional power. Other standard modes of interpretation, including reference to constitutional structure, history, moral principles, and Supreme Court precedents further support the argument.

Part III turns to political feasibility. Again contrary to a first impression, the proposed solution is likely to find support in at least in some future political scenarios of alignment and bargaining. In this context, several pragmatic, structural arguments may have political appeal. First, the proposed Senate reform would address widespread concern with the unrepresentativeness of the Electoral College without moving to a nation-wide popular vote as a solution. Second, the reform would make tractable

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[29] See, e.g., Yukio Koriyama et al., *Optimal Apportionment*, 121 J. POL. ECON. 584 (2013) (providing an economic theory of degressive proportionality). The Electoral College in the United States and some governance structures in Europe are examples. Id. at 589 n.3. For my interpretation of the Equal Suffrage Clause, U.S. CONST. art. V, see infra Part II.A.

some long-standing problems with underrepresented and non-represented U.S. citizens in the District of Columbia, Puerto Rico, and perhaps other non-state territories. Third, the reform may reduce long-term political pressure toward secession from the union, especially in large states such as California or Texas, which might otherwise build from justified unhappiness about their increasingly unfair representation in the Senate.

I. Proposal for a Senate Reform Act

My proposed reform of the Senate draws on a number of foundational principles expressed in the Constitution, including federalism and equal voting rights, to recommend a congressional statute to put the Senate on a more democratic foundation. I call it the Senate Reform Act. Or, if you prefer a catchier acronym: the Sanely Ordered Senate (SOS) Act or Simple Arithmetic for Voter Equality (SAVE) Act.[30] Here's how it would work.

The proposal mandates a minimum of one senator for each state. It departs from the original one state, two senators rule, however, and allocates a greater number of senators to more populous states in accordance with the constitutional principle of equal protection of the right to vote.

For almost sixty years since the admission of Alaska and Hawaii in 1959, the United States has been comprised of fifty states. Because the Senate has consisted of a one hundred members for such a long time, the proposal begins with this number as a foundation. (Plus it's easy to do the math and therefore easy for citizens to understand.)

Since 1790, an official census of the population has been conducted every ten years in order to determine allocations of members of the House to the states.[31] With a nod to federalism, the Constitution allocates at least one representative to each state even if its population falls below the total population of the country divided by 435—a number that has been set by statute on a semi-permanent basis since 1911.[32] The decadal census also

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[30] Thanks to Julian Jonker for these suggestions.

[31] Jeffrey W. Ladewig, *One Person, One Vote, 435 Seats: Interstate Malapportionment and Constitutional Requirements*, 43 CONN. L. REV. 1125, 1127 (2011).

[32] U.S. CONST. art. I, § 2, cl. 3; Comment, *Apportionment of the House of Representatives*, 58 YALE L.J. 1360, 1363 (1949). There is debate about whether the number of representatives should be increased to better approximate what appears to be the Framer's intent of relatively small districts. The original number in the Constitution was 30,000, and the average number now represented in each district is 750,000. See *American Needs a Bigger House*, N.Y. TIMES, Nov. 11, 2018, at 6 (editorial). This topic lies outside my scope here, but note that a slightly larger Senate contemplated here would fit well structurally with

forms the basis for the proposal here.

First, calculate the number and allocation of Senators as follows. Start with the total population of the United States. For 2017, this number is 325,719,178. I use this number as an illustration, though of course it will be somewhat higher in 2020 when the next official census is done.

Second, divide this number by one hundred. This gives the unit to be used to allocate seats to each state. I call this the Rule of One Hundred. In the illustration, each Senate unit for a seat represents 3,257,192 people.

Third, compare seat allocation units with the populations of each state which is also determined by the census. Following the principle of federalism used also by the House, each state is allocated at least one senator. For more populous states, the number of senators is equal to the number of units determined by the Rule of One Hundred. A state with less than or approximately 3,257,192 people gets one senator. States with twice as many get two senators, states with three times as many get three, and so on.

See Table 1 for an allocation of senators based on the 2017 census estimates. One may assume that the allocation would be generally the same if the proposal were adopted to follow the 2020 census.

[Insert Table 1 about here.]

As Table 1 indicates, this reform corrects the significant mathematical underrepresentation of some states. California, the most populous state, is allocated twelve senators—showing how dramatically underrepresented the state currently is. Texas is allocated nine senators. Florida and New York get six. Illinois, Ohio, and Pennsylvania receive four. States that gain one senator are Georgia, Michigan, New Jersey, North Carolina, and Virginia.

Twelve states remain at the original number of two senators. Twenty-six states lose a senator—though some still remain overrepresented from a purely mathematical perspective. Eleven of the smallest states count less than one-half of a Rule of One Hundred unit (i.e., less than .05/100 of the population). All states continue to be entitled to one senator nevertheless, following a general federalism principle of "equal suffrage" of the states.[33]

The resulting total given in the illustration of allocations is 110 senators.

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a larger House.

[33] U.S. CONST. art. V. I discuss this interpretation of "equal suffrage" infra Part II.A.

The proposal would follow the same procedures as the House in adjusting allocations going forward according to the decadal census. If this proposal were to be adopted in the near term, then the 2020 census would be used, with changes to be made in 2030, 2040, etc.

A grandparent provision would provide that senators currently serving may continue for their full terms. If the proposed statute went into effect, for example, and a small state had two senators with four and six years remaining in their respective terms, they would continue in office until one term expired. In a state allocated only one seat, the senator who first had a term end would not be eligible for another term, and the seat would be retired.

Statutory provisions would adhere to the Three Classes Clause that divides senators into classes in order to balance elections given six-year terms.[34] See Table 2. How and when to add senators would be subject to negotiation when adopting the statute—with a constitutional objective of maintaining evenly balancing elections. As in the original scheme (and when new states are added), additions of new senators to each of the three classes would be determined by lot or a coin toss.[35] See Table 3. States allocated three or more senators would have elections every two years. In Texas, for example, if population allocations remain the same, three senators would eventually be elected every two years.

[Insert Table 2 and Table 3 about here.]

Adding senators would be calibrated to the Three Classes Rule over time. If a state is allocated three senators, then a new senator would be added when an open class slot for the state becomes available. For example, Michigan has Class 1 and 2 senators, and so it would add a Class 3 senator in 2022. The new process would also allow for a relatively gradual transition from the current allocation structure to the new, more representative structure, thus providing institutional stability while making the change. See Table 3.

Allocation of multiple senators to more populous states would allow for experimentation in the states to enhance representative democracy. For example, states could follow a process similar to the one used in California's open primary to select the top vote-getters to serve for as many seats as are

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[34] U.S. CONST. art. I, § 3, cl. 2 (providing that senators "shall be divided as equally as may be into three classes" so that "one third may be chosen every second year").

[35] Adam M. Samaha, *Randomization in Adjudication*, 51 WM. & MARY L. REV. 1, 25 (2009) ("Allocation of the first Senators to three different election classes was done, in part, by lot.").

up (eventually, in California, four senators in each biennial election).[36] At least in theory, this top-vote election structure would contribute to reducing political polarization, given that parties could win an election by coming in second or third (in Texas) or even fourth (in California), rather than the current winner-take-all tournaments.[37] In Texas, for example, one might imagine a future top-vote election in which citizens would vote in a Republican, a Democrat, and a Libertarian as three of their nine senators (e.g. Ted Cruz and Beto O'Rourke plus one more).

The proposal may also ease a path toward statehood for currently unrepresented or underrepresented groups, given the new minimum of only one senator. Both the District of Columbia and Puerto Rico would qualify for this treatment. Their populations are comparable to other small states. Stretching a bit further, the Pacific Islands taken together might compose the newest smallest state, with a total population only slightly less than Wyoming or Vermont. Indigenous Americans might also qualify to petition for statehood, if they wished.[38] See Table 1 above at page [63].

The Senate Reform Act should ideally be passed by Congress and signed by the President. (See a simple draft version in the Appendix.) Although it is possible to imagine the reform passing by a supermajority vote of a future Congress, its constitutional legitimacy would be enhanced if it were adopted by both branches.

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[36] In 2010, California adopted a "top-two" election structure using an open primary that went into effect in 2012. This means that the top-two winners of the primary compete against each other in the general election, even if they hail from the same political party. See Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CAL. L. REV. 273, 301–02 (2011) (describing the California system). In 2018, for example, two Democrats, Diane Feinstein and Kevin de Leon, won the most votes in the open primary and then faced each other in the general election for the seat. Kathleen Ronayne, *California Returns Feinstein to Another Senate Term*, SAN FRAN. CHRON., Nov. 7, 2018, https://www.sfchronicle.com/news/article/California-voters-choosing-between-2-Democrats-13365769.php. Washington also adopted a version of this system, and it was upheld against constitutional challenge. Washington State Grange v. Washington State Republican Party, 552 U.S. 442 (2008). The Supreme Court emphasized that states possess a "broad power to prescribe the 'Times, Places and Manner of holding Elections for Senators and Representatives' under the Constitution." Id. at 451 (quoting U.S. CONST. art. I, § 4, cl. 1). Under the same provision, Congress has the authority to prescribe the "manner" of state elections for senators, so Congress could itself mandate top-vote elections for senators in large states. U.S. CONST. art. I, § 4, cl. 1.

[37] For a diagnosis of "hyperpolarized democracy" in the United States and recommended reforms, see Pildes, supra note [36].

[38] Cf. Rebecca Tsosie, *The Politics of Inclusion: Indigenous Peoples and U.S. Citizenship*, 63 UCLA L. Rev. 1692 (2016) (discussing different frames regarding citizenship for indigenous Americans).

One may question the political feasibility of this proposal, given that twenty-six states (a simple majority) would be asked to vote for a loss of one of their senate seats. I consider political feasibility in Part III.

Part II first examines the question of the constitutionality of this proposal given that it seems to fly in the face of the "plain meaning" of the one state, two senators rule in the original constitutional text.[39]

II. Constitutionality

If my proposal for a Senate Reform Act is adopted, then one or more states losing a senator will probably challenge it as unconstitutional. The Supreme Court may exert original jurisdiction.[40]

At the outset, it is not clear that the Court should exercise the authority to judge the kind of structural shift recommended here. The proposed reform addresses a "political question" regarding democratic representation of "We the People," and the Court should arguably defer to the political branches of Congress and the President on the issue and decline to recognize standing.[41] The reform is not an ordinary statute, but rather one that restructures the Senate by exercising the constitutional authority granted to Congress under

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[39] See, e.g., Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1184 (1989) (noting that "it is perhaps easier for me than it is for some judges to develop general rules, because I am more inclined to adhere closely to the plain meaning of a text"); Frederick Schauer, *The Constitution As Text and Rule*, 29 WM. & MARY L. REV. 41, 47 (1987) (advocating "taking text seriously" in constitutional interpretation).

[40] U.S. CONST. art. III, § 2, cl. 2.

[41] The "political question" doctrine is fraught with confusion. See Louis Henkin, *Is There A "Political Question" Doctrine?*, 85 YALE L.J. 597 (1976). Henkin adopts a view that comports with my argument here. In his words: "a meaningful political question doctrine . . . implies . . . that some issues which prima facie and by usual criteria would seem to be for the courts, will not be decided by them but, extra-ordinarily, left for political decision. . . . [I]n 'pure theory' a political question is one in which the courts forego their unique and paramount function of judicial review of constitutionality." Id. at 599. For clarification of a "political question" as a reason for the courts to defer judgment on constitutionality to another co-equal branch of government, see also Tara Leigh Grove, *The Lost History of the Political Question Doctrine*, 90 N.Y.U.L. REV. 1908 (2015).

Scholars have lamented "the demise of the political question doctrine," finding that it "correlates with the ascendancy of a novel theory of judicial supremacy." Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 240 (2002). See also J. Peter Mulhern, *In Defense of the Political Question Doctrine*, 137 U. PA. L. REV. 97, 101 (1988) (arguing in favor of the political question doctrine against the "judicial monopoly assumption" in constitutional law).

the Voting Rights Amendments.[42] At a minimum, the Court should give Congress the benefit of the doubt. It might even revive "the rule of clear mistake" from an era of less active judicial review. Under this rule, "the Justices would presume that legislators had found the legislation that they enacted to be constitutionally permissible and would hold such legislation unconstitutional only if the legislature had made a 'clear mistake' in constitutional reasoning." [43]

From a political theory as well as a public perception standpoint, it would be ironic for nine unelected justices to strike down a congressional statute designed to enhance democratic representation, including fair representation of people of color, based on an interpretation of the original text of a 200-year-old document written by white men and, at least in large part, for white men (many of them slaveholders).[44] Given the decidedly democratic nature

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[42] See infra Part II.A.

[43] RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT 160 (2018). This approach would allow the Court to exert jurisdiction, thus preserving its ability to check potential abuses of the Congress making its own rules for itself, and at the same time recognize the unusual challenge posed by this reform and giving deference to Congress when its actions are supported by good evidence as well as delegated constitutional authority. See also Mitchell N. Berman, *Our Principled Constitution*, 166 U. PA. L. REV. 1325, 1332 (2018) (describing the principle of "clear mistake" and citing James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893) (arguing a statute should be overturned only if the legislature "made a very clear" mistake)).

For a contemporary case expressing something close to a "clear mistake" doctrine, see NFIB v. Sebelius, 567 U.S. 519, 537–38 (2012) (articulating "a general reticence to invalidate the acts of the Nation's elected leaders" and asserting that "we strike down an Act of Congress only if 'the lack of constitutional authority to pass [the] act in question is clearly demonstrated'") (quoting United States v. Harris, 106 U.S. 629, 635 (1883)).

[44] Of the "homogenous collection of fifty-five" founders: "They were all white, they were all Protestant, they were all comparatively well-off property owners, and they were all men." Schauer, supra note [40], at 41. Twenty-five were slaveholders, and almost all were implicated in either owning slaves or participating in the slave trade. Only three (including Benjamin Franklin) belonged to abolition societies. ANDREW DELBANCO, THE WAR BEFORE THE WAR: FUGITIVE SLAVES AND THE STRUGGLE FOR AMERICA'S SOUL FROM THE REVOLUTION TO THE CIVIL WAR 66 (2018). Some of the most prominent founders owned slaves, including James Madison (who sold a slave to buy books to do research on political philosophy), Thomas Jefferson (who fathered six children with one of his slaves, Sally Hemmings), and George Washington (who with his wife owned about 300 slaves and refused even to free his share of them at his death). See DELBANCO, supra, at 3, 18, 50-52, 64, 99-100; LAPORE, supra note [17], at 93-94, 104, 106-07, 133-34, 147, 173-76, 186. One slave escaped from Washington to join the British army during the Revolution. LAPORE, supra note [17], at 94, 104. Another ran away from Madison during the Constitutional Convention. Id. at 125. It is therefore not surprising that the original Constitution strongly favored slavery. PAUL FINKELMAN, SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON 7-8 (3d ed. 2014) (listing five direct clauses protecting slavery and a number of indirect protections). See also supra note [18] and accompanying text.

of the proposed reform, the Court would also risk a strong and justified response from the democratically elected branches if it found the reform unconstitutional.[45] In other words, striking down the legislation would risk the Court's legitimacy.[46]

On the assumption that the Court would nevertheless exert judicial review, then it may initially seem that the objecting states or citizens might easily and quickly prevail. (Citizens, the Congress, and the President should also ask themselves whether the proposed reform is constitutional.[47]) The text of the Constitution says that "the Senate of the United States shall be composed of two Senators from each State. . . ; and each Senator shall have one vote."[48]

More text supports the argument that the one state, two senators rule is unassailable. The Seventeenth Amendment, which established that senators must "be elected by the people" rather than selected by state legislatures, repeats the rule of "two Senators from each State" and "each Senator shall have one vote."[49] Article V's provision for amending the Constitution seems also to protect the rule from any change—even by constitutional amendment! Immediately following a clause saying "no Amendment" may interfere with

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[45] Court-packing would supply one effective response. See Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Four: Law's Politics*, 148 U. PA. L. REV. 971 (2000) (discussing this threat from the perspective of an unhappy public). See also NOAH FELDMAN, SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR'S GREAT SUPREME COURT JUSTICES 103-21 (2011) (describing the court-packing plan during the New Deal).

[46] See FALLON, LAW AND LEGITIMACY IN THE SUPREME COURT, supra note [43], at 155-65 (warning that the Supreme Court has been losing public legitimacy and should exercise greater judicial restraint when considering overturning Congressional statutes).

One may also frame the enactment of a Senate Reform Act as an exercise in "popular constitutionalism" and, if so, cast suspicion on any exercise of "judicial supremacy" to overturn it. See, e.g., Larry D. Kramer, *The Supreme Court 2000 Term Foreword: We the Court*, 115 HARV. L. REV. 4, 162-65 (2001) (explaining "popular constitutionalism" as "a domain in which the people are free to settle questions of constitutional law by and for themselves in politics" as an alternative to "judicial supremacy"). See also, Berman, supra note [43], at 1379-81 (describing contemporary versions of "popular constitutionalism").

[47] For the view known as "departmentalism" that different branches of government should exercise independent views about the constitutionality of their actions, see FALLON, LAW AND LEGITIMACY IN THE SUPREME COURT, supra note [43], at 115. There is debate about whether, in cases of extra-judicial interpretation, the judgments of the Court should followed. Compare Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997) (arguing for judicial supremacy in these contexts) with Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773 (2002) (arguing against).

[48] U.S. CONST. art. I, § 3, cl. 1.

[49] U.S. CONST., amend. XVII, § 1.

the slave trade or taxes on it until 1808, Article V adds that "no State, without its consent, shall be deprived of its equal suffrage in the Senate."[50]

Given the plain meaning of these provisions, one might conclude that it's "unthinkable" the one state, two senators rule can be abrogated, even if several legal scholars believe it to be "the stupidest part of the Constitution" or "one of the stupidest."[51] According to conventional wisdom, Congress cannot change the number of senators per state. To try to do so, one might say, would be equivalent to Congress trying to lower the minimum age required to serve as president or a senator. The text says plainly that the president must "have attained to the age of thirty five years."[52] Senators must be at least thirty.[53] If Alexandria Ocasio-Cortez, for example, who became the youngest U.S. Representative in history at age twenty-nine in 2019, decided to run for president in 2020, one could not say that that the "meaning" of age has changed, or complain that the presidential age qualification had been written by dead old white men.[54] The text establishing the one state, two senators rule—the argument would go—is as plain and clear as the text regarding age qualifications, allowing no room for debate.

However, it's not only possible to think that a Senate Reform Act can pass constitutional muster, but the much better argument—deriving even from "the sanctity of the text"—favors this finding.[55]

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[50] U.S. CONST., art. V.

[51] See supra note [13] and accompanying text; LEE & OPPENHEIMER, supra note [8], at 3 (citing *Constitutional Stupidities Symposium*, 12 CONST. COMM. 139 (1995)). One scholar calls the rule "the most problematic in Constitution" because it is "anti-democratic" and privileges what he calls the "sagebrush values" of small states. He agrees, however, that it "cannot be ameliorated by conventional or interpretive mechanisms." William N. Eskridge, Jr., *The One Senator, One Vote Clause*, 12 CONST. COMMENTARY 159, 161–62 (1995).

[52] U.S. CONST., art. II, § 1, cl. 5.

[53] U.S. CONST., art. I, § 3, cl. 3. Representatives of the House must be at least twenty-five. U.S. CONST., art. I, § 2, cl. 2.

[54] Li Zhou, *Alexandria Ocasio-Cortez Is Now the Youngest Woman Elected To Congress*, VOX, Nov. 2018, https://www.vox.com/2018/11/6/18070704/election-results-alexandria-ocasio-cortez-wins. See also Berman, supra note [43] 1396-98 (arguing why this would be an "easy case").

[55] David Strauss makes the argument in favor of "the sanctity of the text" as follows:

> [F]rom time to time, [some people say that] we should decide that particular provisions of the Constitution are so antiquated, or so indefensible, that we should just ignore them. But one of the absolute fixed points of our legal culture is that we cannot do that. We cannot say that the text of the Constitution doesn't matter. We cannot make an argument for any constitutional principle without purporting to show, at some point, that the principle is consistent with the text of the Constitution.

STRAUSS, supra note [5], at 102-03. At the same time, we should guard against the propensity to treat constitutional text "as too sacred to be touched." KLARMAN, supra note [7], at 631

In advancing this argument, I follow the lead of Laurence Tribe who sets out the following modes of constitutional interpretation: "text, structure, history, ethos, and doctrine."[56] In an actual case, these "modes or facets of constitutional interpretation" are intertwined, but I divide the discussion into these general categories for ease of exposition.[57] My conclusion is that all of these modes of interpretation point toward finding the proposed statute departing from the one state, two senators rule to be constitutional.[58]

(quoting Thomas Jefferson).

[56] LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 85 (3d ed. 2000). See also PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 1, 12-13 (1991) (describing "constitutional modalities" including historical, textual, structural, doctrinal, moral, and prudential); RICHARD H. FALLON, JR., THE DYNAMIC CONSTITUTION: AN INTRODUCTION TO AMERICAN CONSTITUTIONAL LAW 1 (2004) (noting that interpretation "depends on a variety of considerations external to the text," including history, legal precedents, "public expectations," "practical considerations," and "moral and political values"). As Tribe writes, constitutional text and even text with "plain meaning" are important, but "a proposition of constitutional law need not find its most obvious support in the Constitution's text to be deemed part of the supreme law of the land—even by a reader whose ultimate lodestar is the text." TRIBE, supra, at 35.

The approach here is also congruent with other "pluralist" constitutional theories. Berman, supra note [43], at 1337-44, 1353, 1412-13 (reviewing various pluralist theories and describing his own approach based on the identification of various principles as pluralist). I do not adopt an originalist approach, but present arguments that respond to originalist arguments. See, e.g., infra notes [173-79] and accompanying text.

[57] TRIBE, AMERICAN CONSTITUTIONAL LAW, supra note [56], at 85.

[58] If modes of analysis conflict and in tension, then the problem is more complicated, and one must choose which interpretative values or principles to weigh the most. For one approach to this complexity, see Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987). For another see Berman, note [43]. Here, I argue that all modes and principles cohere in a finding of constitutionality.

It is also true that there are "i*ntra*modal" conflicts (such as competing texts) as well as "*inter*modal" conflicts (such as between text and history, or between history and moral principles). TRIBE, AMERICAN CONSTITUTIONAL LAW, supra note [56], at 87-88 (original emphasis). See also J.M Balkin & Sanford Levinson, *Constitutional Grammar*, 72 TEX. L. REV. 1771, 1796-81 (1991 (making this distinction in terms of "intra-modal" and "cross-modal" interpretation in Philip Bobbit's set of categories).

Some provisions in the reform proposal, such as provisions regarding the Three Classes Clause, fall into the category known as "congressional procedure" and would be unlikely to be challenged. See Adrian Vermeule, *The Constitutional Law of Congressional Procedure*, 71 U. CHI. L. REV. 361, 380 (2004) (conceptualizing and reviewing details of this area of law). Reforms of some procedures could also make the Senate more democratic—for example, restoring a supermajority rule for Senate judicial confirmations. See supra note [10], and accompanying text. But this is not my focus here.

A. Textual Analysis

The most relevant text supporting congressional reform of the Senate to provide fair and equal representation is the Fourteenth Amendment. Passed immediately following the Civil War, it extends citizenship to "[a]ll persons born or naturalized in the United States" and promises "the equal protection of the laws."[59] Supreme Court cases have applied the principle of equal protection in the context of federal standards for voting rights in the states. Important here is the Fourteenth Amendment's enforcement clause: "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article."[60] The plain implication is that Congress has the delegated power to assure "equal protection of the laws" for U.S. citizens, including their right to vote.

One might object that the power of Congress in the Fourteenth Amendment is textually limited to protecting infringements of citizens' rights by the states rather than the United States itself. However, it makes no sense to say, for example, that Congress has the power to prohibit racial discrimination by the states, but can do nothing about racial discrimination by the federal government. In parallel situations, the Supreme Court held the Fourteenth Amendment to apply to the United States as well as the states.[61]

Additional text in the Constitution confers to Congress the power—indeed the duty—to protect the right to vote. This text appears in the Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments.

The Fifteenth Amendment provides: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or any State on account of *race, color, or previous condition of servitude*."[62]

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[59] U.S. CONST., amend. XIV, § 1.

[60] U.S. CONST., amend. XIV, § 5.

[61] See Bolling v. Sharpe, 347 U.S. 497, 500 (1954) (finding it "unthinkable" that the Fourteenth Amendment would not apply also to the federal government in the context of racial segregation of schools). See also FALLON, THE DYNAMIC CONSTITUTION, supra note [56], at 109 (noting that "the Supreme Court today applies the equal protection guarantee to *federal* as well as state legislation, even though the Equal Protection Clause refers only to what "no *State*" may deny"); FALLON, LAW AND LEGITIMACY IN THE SUPREME COURT, supra note [43], at 37 (arguing that even if "the legal case for *Bolling* was weak in terms of text or previous precedents, the Supreme Court acted morally legitimately in deciding *Bolling* as it did"); Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 768 (1999) (arguing with respect to *Bolling* that the Constitution "should mean no less for the federal government than for the states. . . .—what's sauce for the state should be sauce for the feds").

[62] U.S. CONST. amend. XV, § 1 (emphasis added).

The Nineteenth Amendment: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or any State on account of *sex*."[63]

The Twenty-Fourth Amendment: "The right of citizens of the United States to vote [in federal elections] shall not be denied or abridged by the United States or any State by reason of *failure to pay any tax or poll tax*."[64]

The Twenty-Sixth Amendment: "The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of *age*."[65]

The kicker is that *all* of these Voting Rights Amendments—adopted over a century stretching from 1870 to 1971—include exactly the same language in their enforcement clause: "The Congress shall have power to enforce this article by appropriate legislation."[66]

From a purely textual point of view, then, Congress has been delegated power to protect voting rights based, first, on the principle of equality of all citizens under the Fourteenth Amendment and, second, on the prohibition of discrimination with regard to race, skin color, ethnicity, sex, and age.[67] The Voting Rights Amendments taken together provide a strong textual basis for Congress to take action to correct any "denial" or "abridgment" of these rights in elections for federal office including the Senate.[68] To "abridge," to

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[63] U.S. CONST. amend. XIX, § 1 (emphasis added).

[64] U.S. CONST. amend. XXIV, § 1 (emphasis added). Poll taxes were a device employed to suppress black votes, mostly in the southern states. AMAR, AMERICA'S UNWRITTEN CONSTITUTION, supra note [17], at 185, 402. Although the text of the Twenty-Fourth Amendment applies only to the United States, the Court approved of congressional authority to prohibit disenfranchisement for failure to pay a poll tax under earlier Voting Rights Amendments. Harper v. Virginia, 383 U.S. 663 (1966) (striking down a state poll tax as a violation of the Fourteenth Amendment).

[65] U.S. CONST. amend. XXVI, § 1 (emphasis added).

[66] U.S. CONST. amends. XV, XIX, XXIV, & XXVI, § 2. The Thirteenth Amendment abolishing slavery contains an identical provision. U.S. CONST. amend. XIII, § 2.

[67] As originally proposed, the Fourteenth Amendment would have explicitly covered "race, color, nativity, property, education, or religious beliefs" as prohibited categories. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, 446-47 (updated ed. 2014). Women protested at the time of the amendment's adoption that "sex" should also have been included. See supra note [22].

There is potential tension between constitutional protections of "equal rights to vote for all citizens" and "equal rights to vote for specific categories of citizens." The reform avoids any conflict, however, because it is based on a calculation of equal rights for all, which by implication includes remedies for specially protected categories too.

[68] The Twentieth-Fourth Amendment explicitly refers to the "right of citizens of the

take a standard dictionary definition, is to "reduce the scope" of a right or to "shorten the extent" of it.[69]

The evidentiary basis for an abridgment "by the United States" of the equal voting rights of citizens in Senate elections is conclusively established by the census data reported in Table 1. (See page [63].) There is no intentionality or "animus" requirement in the text of the Voting Rights Amendments, and none should be conjured.[70] The United States itself—in its inherited and evolving governance structure—abridges its citizens' equal rights to vote for senators.

In addition to the argument based on unequal treatment of each person measured mathematically in larger states, there is another feature in the census data that strengthens the case for congressional power to enact the proposed reform. The data (and one survey) show that the same inequality of distribution that penalizes larger states in the allocation of senators tracks, at least to a significant and measurable extent, racial and ethnic diversity.[71] See Table 4. Because several Voting Rights Amendments aim directly at the protection against any abridgment of rights on the basis of race, color, sex, and age, the reform is justified in order to remediate these differences as well.

[Insert Table 4 about here.]

The four most populous states, for example, have significantly higher percentages of nonwhite citizens compared with the national average of 61 percent white. White citizens are a minority in California (38 percent) and Texas (43 percent), as well as in Florida (55 percent) and New York (57 percent). At least, this means that nonwhite citizens in these states are doubly disadvantaged in their right to vote: both mathematically, along with every

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United States to vote in any primary or other election . . . for Senator or Representative in Congress . . . ." U.S. CONST. amend. XXIV, § 1. For the argument that this text informs the interpretation of the scope of the other Voting Rights Amendments as well, see AMAR, AMERICA'S UNWRITTEN CONSTITUTION, supra note [17], at 405-08.

[69] Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/abridge.

[70] The maintenance of "a preferred status or a status hierarchy is not less real simply because hatred or animus is absent." J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2332 (1997). A definition of abridgment includes "the action of abridging something" and "the state of being abridged." Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/abridgment.

[71] There is controversy surrounding how categories of "race" and ethnic identity are tabulated and reported. In particular, intercultural mixing and marriages produce increasing numbers of people who identity as "two or more" or no particular "race" or color. See Sabrina Tavernise, *Racial Projection by the Census Is Making Demographers Uneasy*, N.Y. TIMES, Nov. 23, 2018, at A1 (discussing these issues in the next official census in 2020).

other citizen in their states, and racially and ethnically, as compared with compositions of citizens in other states. In other words, nonwhite citizens in California, Texas, Florida, New York, and other large states suffer an abridgment of their rights to vote for senators, and Congress has the delegated power to correct this abridgment.

The four least populous states illustrate the flip-side: states with higher than average percentages of white citizens have greater voting influence. Alaska (60 percent white) is close to the national average, but the three other smallest states are not: North Dakota (85 percent white), Vermont (94 percent white), and Wyoming (86 percent white).

Taking a larger slice of the data confirms a finding of bias favoring white citizens in the allocation of senate seats.[72] The top twelve states with the highest percentages of whites qualify under the reform for only one senator (except for Indiana which gets two).[73] The top twelve states with the highest nonwhite percentages include the most populous states of California, Texas, Florida, and New York, with allocations of twelve, nine, and six senators.[74] Two states would qualify for an increase to three senators, two would stay at two senators, and only four would drop to one senator.[75]

A comprehensive empirical analysis confirms that the current allocation of senators disfavors—and thus "abridges"—the rights of nonwhite citizens. Comparing the national population of whites, blacks, Hispanics, and Asians with the median representation in each state, researchers find that "whites are the only group that Senate apportionment advantages."[76] See Table 5. "With regard to issues of race and ethnicity," they conclude, "Senate apportionment works contrary to the purpose of protecting minorities" and "most dramatically disadvantages Hispanics."[77]

[Insert Table 5 about here.]

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[72] For raw numbers of these rankings, see Table 1 above at page [63]. For a ranking of the states in order of population, see also http://worldpopulationreview.com/states/.

[73] In descending order from 94 to 81 percent, the whitest states are Vermont, West Virginia, Maine, New Hampshire, Montana, Iowa, Wyoming, North Dakota, Kentucky, Idaho, South Dakota, and Indiana.

[74] In descending order from most nonwhite to most diverse, the states are Hawaii, New Mexico, California, Texas, Georgia, Nevada, Maryland, Arizona, Florida, New York, Mississippi, and New Jersey.

[75] Georgia and New Jersey would get three senators. Arizona and Maryland remain at two. Hawaii, Mississippi, New Mexico, Nevada, and Mississippi drop to one.

[76] LEE & OPPENHEIMER, supra note [8], at 21.

[77] Id. at 20, 22 & tbl. 2.2.

This evidence reinforces the argument that Congress has power to address Senate apportionment not only under the Fourteenth Amendment ("equal protection" for all citizens) but also under the Fifteenth Amendment (forbidding abridgment of the right to vote on the basis of "race" or "color"). The legislative reform addresses both problems at once.

In addition, empirical data support the argument that differentials in population distribution hurt other constitutionally protected categories of citizens, though the percentage differences are not as high as for race, color, and ethnicity. See Table 6.

[Insert Table 6 about here.]

The Nineteenth Amendment forbids abridgment of the right to vote on the basis of "sex," and census data shows that some states are unequally represented in this respect. For example, the small states of Alaska, Nevada, and North Dakota represent men disproportionately (52 or 51 percent) compared with other states. The Nineteenth Amendment likely applies to voting apportionment.[78]

Citizens who self-identify as lesbian, gay, bisexual, or transsexual (LGBT) are also likely protected under the Fourteenth and Nineteenth Amendments.[79] Survey data show a disparity of distribution. Large states including California and New York report a significantly higher percentage of LGBT citizens than smaller states, for example, though the overall distribution is rather even (within a percentage point or two throughout the country).

Voting rights with respect to "age" are protected by the Twenty-Sixth Amendment, and census data indicate differences in distribution here too. The large state of Florida has a relatively higher percentage of older residents who are therefore underrepresented. Younger voters (measured by census data available for the range of eighteen to twenty-four) appear to be relatively evenly distributed, though this age group may be overrepresented given

[78] See AMAR, AMERICA'S UNWRITTEN CONSTITUTION, supra note [17], at 286-91 (arguing the Nineteenth Amendment articulates a "feminist Constitution" that applies to apportionment cases); Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 960 (2002) (arguing for a "synthetic reading of the Fourteenth and Nineteenth Amendments").

[79] See Russell K. Robinson, *Unequal Protection*, 68 STAN. L. REV. 151 (2016) (examining a trend in Supreme Court cases of increasing constitutional protections for LGBT citizens while cutting back on voting rights protections for racial and ethnic minorities).

slightly larger percentages in North Dakota and Rhode Island.

Resolving the textual arguments does not require a final weighing of this empirical evidence. In the event that Congress enacts the proposed reform, one would expect it to assemble an empirical record going into greater detail. The point here is only to indicate the probability that this evidence would support congressional power to act.

Taken together, the Voting Rights Amendments present a strong textual argument for a general "right to vote" that extends to Congress the power to protect this right by "appropriate legislation." As Akhil Amar writes:

> Given emphatic repetition of the phrase "right to vote" . . . in the text of the amended and re-amended Constitution, there arose a strong argument to treat each right-to-vote amendment as not an isolated island, but as an archipelago. At a certain point, it became textually, historically, and structurally apt to read each affirmation of a "right to vote" not by negative implication but by positive implication. On this view, certain textually specified bases for disenfranchisement were per se unconstitutional—race, sex, age (above eighteen)—whereas all other disenfranchisements were presumptively suspect as violating a more general right-to-vote principle.[80]

The Voting Rights Amendments, one must conclude, provide a broad textual foundation for the proposed reform.

A final textual thicket concerns Article V's apparent restriction on any change to the "equal suffrage of the Senate."[81] Again at first glance, it appears that this provision locks in the one state, two senators rule forever, forbidding any change even by amendment. There are a number of textual arguments, however, that this provision should not impede reform.

First, this clause refers to a limitation on constitutional *amendments*, and the proposed reform invokes constitutional authority for the Congress to enact *a statute*. Therefore Article V does not apply.[82]

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[80] AMAR, AMERICA'S UNWRITTEN CONSTITUTION, supra note [17], at 191. See also LAURENCE H. TRIBE, THE INVISIBLE CONSTITUTION 69-70 (1988) (arguing that voting rights evolved over time to become a "core" constitutional principle).

[81] U.S. CONST. art. V (providing with respect to amendments that "no State, without its consent, shall be deprived of its equal suffrage in the Senate").

[82] Article V is written as one paragraph without sentence breaks. It is therefore a fair reading that all provisions, including the final phrase regarding "equal suffrage in the Senate," refer to amendments and not statutes.

This is not mere legal sleight of hand. Remember that the Voting Rights Amendments were adopted a century or more after the original constitutional text. My reading here is analogous to how the various pro-slavery provisions, such as the Fugitive Slave Clause, were simply ignored after the Thirteenth, Fourteenth, and Fifteen Amendments were passed.[83] Similarly, reference in the Fourteenth Amendment to "male" residents and citizens is automatically cancelled out by the Nineteenth Amendment.[84]

In addition, this interpretation does not render the Equal Suffrage Clause superfluous. For example, an amendment to eliminate a state, allocate zero senators to a state, or abolish the Senate would run afoul of the provision because no legitimate justification for these actions can be given that they are aimed to protect voting rights within other structural constitutional constraints. Statutes to do the same would also fail because they lack a foundation of delegated congressional power to protect equal voting rights.[85]

Second, even if one admits that Article V may limit the authority of Congress to enact legislation that is the equivalent of an amendment, the plain meaning of the language does not constrain congressional action in this context. Arguably, the states would "consent" to this reform legislatively through their representatives in the Congress. By its plain meaning too, "equal suffrage in the Senate" implies some measure of equal voting rights for the citizens in Congress, at least as read in connection with the later texts of the Voting Rights Amendments. In other words, U.S. citizens living in California today do not enjoy "equal suffrage" under a contemporary understanding of "equal."

With respect to the constitutional meaning of "consent," Arthur Machen

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[83] U.S. CONST. art. IV, § 2, cl. 3. See also supra note [44].

[84] U.S. CONST. amend. XIV, § 2.

[85] See Arthur W. Machen, Jr., *Is the Fifteenth Amendment Void?*, 23 HARV. L. REV. 169, 172-73 (1910) (arguing that Article V must be read at least to preserve the existence of states and the Senate itself).

One might argue that Representative Dingell's proposal to abolish the Senate would advance the cause of voting equality. Dingel, supra note [28]. It would do violence, however, to other structural components of the Constitution that provide separate functional roles to the Senate (e.g., approval of treaties and judicial appointments) and the House (e.g. origination of financial expenditures). An abolition of the Senate would violate Article V unless the states somehow "consented" to this more radical change.

Another Representative proposed abolishing the Senate in 1911, and it caused a stir that contributed to the adoption of the Seventeenth Amendment. See House Member Introduces Resolution to Abolish the Senate, https://www.senate.gov/artandhistory/history/minute/House_Member_Introduces_Resolution_To_Abolish_the_Senate.htm.

argued in the early twentieth century that the Fifteenth Amendment was "void" under Article V with respect to those states that refused to ratify the amendment.[86] Three-quarters of the states ratified the Fifteenth Amendment, but many did so only at the point of Union generals' guns.[87] A minority of states did not ratify at all, and so even though the Fifteenth Amendment went into effect, Machen argued that it did not apply to individual states that did not "consent" to the change.[88] Some states withheld their ratifications until quite late: the last being Tennessee in 1997![89]

Machen's view has not been followed, but his argument is instructive as to why Article V should not constrain the proposed reform. He focused attention on the meaning of "state" in Article V, as well as "consent."[90] He argued correctly that a "state" does not simply mean an abstract entity, a government, or even a territory with boundaries. A "state," at least with respect to the idea of "consent," must mean the "people" in it.[91]

What Machen missed is that the Civil War and the Thirteenth, Fourteenth, and Fifteenth Amendments worked a revolution in the very "people" who constituted the states. The war liberated four million slaves, and the amendments made them (or at least the adult males) into voting citizens.[92] The people who composed the "states" were therefore fundamentally changed—especially in the formerly rebellious southern states.[93] Abraham Lincoln and Frederick Douglass recognized that this fundamental change

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[86] Machen, supra note [86].

[87] See LAPORE, supra note [17], at 32 (describing this kind of consent as "constitutional coercion").

[88] Machen, supra note [86], at 172-76.

[89] ARTHUR E. PALUMBO, THE AUTHENTIC CONSTITUTION: AN ORIGINALIST VIEW OF AMERICA'S LEGACY 172 (2009). Other laggards: Delaware ratified in 1901, Oregon in 1959, California in 1962, Maryland in 1973, and Kentucky in 1976. Id.

[90] Machen, supra note [86], at 175-76.

[91] Id. at 174 ("In the Constitution the term state most frequently expresses the combined idea . . . of people, territory, and government. A state . . . is a political community of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed."). James Wilson and Alexander Hamilton made similar arguments in opposing the one state, two senators rule at the Constitutional Convention. KLARMAN, supra note [7], at 185-86.

[92] See DAVID W. BLIGHT, FREDERICK DOUGLASS: PROPHET OF FREEDOM 480-81 (2018). See also FONER, supra note [68], at xxiv (observing the post-war Reconstruction "redefined the meaning of American citizenship" including "an unprecedented commitment to the ideal of national citizenship whose equal rights belonged to all Americans regardless of race").

[93] The "people" legally composing the "states" were changed again by the Nineteenth Amendment and again by the Twenty-Sixth. Arguments that each state would have to "consent" specifically and individually to these changes would also not hold water.

resulted in a "Second American Revolution."[94] As Douglass observed, the "destiny" of the Civil War was to "unify and reorganize the institutions of this country," and otherwise the war would have been "little better than a gigantic enterprise for shedding human blood."[95]

The better reading of the constitutional text—taking into account what Tribe calls "time's arrow" in its evolution—is to interpret the post-Civil War amendments as changing the meaning of both "consent" and "equal suffrage" in Article V, at least in the context of a congressional statute.[96] Other Voting Rights Amendments follow in the same train. The composition of the "people" in states has been revolutionized and their voting rights as U.S. citizens put on "equal protection" footing. Congress has been delegated new power to protect these voting rights, and the states have "consented" to the use of this power through their adoption of the amendments. "Equal suffrage" in Article V means something very different after the blood spilled in the war to eliminate slavery, and Congress at the national level is given broad constitutional authority to protect these hard-won rights.

This textual analysis of the proposed Senate Reform Act exposes what has been called an *intra*modal conflict when different parts of the Constitution pull in different directions.[97] There is a conflict between (1) the plain meaning of original texts setting forth the one state, two senators rule and (2) the authoritative texts of the Voting Rights Amendments giving Congress power to protect voting rights.[98] Taking account of "time's arrow"

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[94] BLIGHT, supra note [93], at 415 (observing also that "Lincoln and Douglass spoke from virtually the same script" in emphasizing a "new birth of freedom" based on "equality" after the Civil War).

[95] Id. at 421 (quoting Douglass).

[96] As Tribe describes "time's arrow":

> A revision to avoid conflicts with new constitution text occurs when a constitutional amendment so alters the rest of the Constitution that, upon referring back to the constitutional provision in question, we are bound—unless we are satisfied with a Constitution that merely collects contradictions—to recognize a revision in that constitutional provision even if the amendment did not in so many words decree in a change in that provision's words.

TRIBE, AMERICAN CONSTITUTIONAL LAW, supra note [56], at 67. See also FALLON, LAW AND LEGITIMACY IN THE SUPREME COURT, supra note [43], at 84-87 (arguing that despite the "manifest coercion" exerted to achieve ratification of the Thirteenth and Fourteenth Amendments, they are still considered part of the "fundamental law of the United States").

[97] See supra note [58] (discussing the distinction between intramodal and intermodal conflicts of interpretation).

[98] The Seventeenth Amendment adopted in 1913 is best read as repeating the original one state, two senators rule in order to clarify its primary purpose of establishing the direct "election by the people" of senators. U.S. CONST. amend. XVII § 1. The "time's arrow" argument is triggering only by an affirmative action of Congress in adopting a Senate Reform

makes clear that the force and substance of the Voting Rights Amendments should be read to favor the power of Congress to advance the cause of democracy. In this respect, the Senate Reform Act would follow in the steps of the Voting Rights Act of 1965, which has been described as "undoubtedly the most important and most effective civil rights statute ever enacted."[99]

B. *Structural Considerations*

There is a balance in the constitutional order between federalism—and a proper recognition of the place and role of the states—and the guarantee of fundamental political rights such an equal right to vote.[100] The proposed Senate Reform Act strikes the needed balance within the federal structure.[101]

The strongest structural argument in favor of the reform is that it delivers on the foundational promise of the Declaration of Independence that "all men [and women] are created equal."[102] Voting rights are antecedent to the protection of other rights. As the Supreme Court observed in *Yick Wo v. Hopkins*, the right to vote is a "fundamental political right" because it is

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Act under conditions of significant inequality, not by the Voting Rights Amendments alone.

[99] Pildes, supra note [36], at 287; see also AMAR, AMERICA'S UNWRITTEN CONSTITUTION, supra note [17], at 267 (describing the Voting Rights Act and the Civil Rights Act of 1964 as "two of the most important pieces of legislation in American history," and they are qualitatively different from all other statutes because these "two iconic laws are washed in the blood of American martyrs and heroes" from Abraham Lincoln to John F. Kennedy and Martin Luther King, Jr); Pamela S. Karlan, *Section 5 Squared: Congressional Power to Extend and Amend the Voting Rights Act*, 44 HOUS. L. REV. 1, 2 (2007) (describing the Voting Rights Act as "celebrated as the cornerstone of the 'Second Reconstruction'").

[100] Laurence Tribe refers to these considerations as Model I (emphasizing "separated and divided powers") and Model VI (emphasizing "equal protection"). TRIBE, AMERICAN CONSTITUTIONAL LAW, supra note [56], at 6.

[101] For an argument that structural concerns regarding federalism do not conflict with strong protection of some individual rights (including the right to vote), see Ozan O. Varol, STRUCTURAL RIGHTS, 105 GEO. L.J. 1001, 1035 (2017) ("Under any definition of democracy, the right to vote forms the core of structural democratic governance. It is through the right to vote that citizens select their executive and legislative representatives that make up their constitutional structure of government.").

[102] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). As Louis Pollack wrote:

> The ever-widening impact of the nation's early commitment to the equality of "all men" compellingly illustrates what Benjamin N. Cardozo . . . termed "the tendency of a principle to expand itself to the limit of its logic." In this sense, the Declaration of Independence is the apt progenitor of the Emancipation Proclamation, the Gettysburg Address, [and] the Fourteenth Amendment's guarantee of "the equal protection of the laws" . . . .

LOUIS H. POLLAK, THE CONSTITUTION AND THE SUPREME COURT: A DOCUMENTARY HISTORY, vol. 1 at 16-17 (1968).

"preservative of all rights."[103] The Voting Rights Amendments confirm the structural importance of these rights. If democracy means, as its ancient Greek roots suggest, that the people rule (*demos crat*), then voting rights for all citizens are foundational. They enable the sensible translation of the expressed will of "We the People" into practical realities.[104]

The principal structural objection to the proposed reform is most likely to come from champions of federalism who emphasize the importance of state's rights against the encroachment of federal power.[105] This challenge would argue that changing the one state, two senators rule would constitute an assault on the "equal suffrage" of the states qua states, and therefore their comparative power.[106] To change this rule, the argument might hold, would undermine the original structure of federalism.

This argument fails, however, because the reform would strengthen the federal structure, while at the same time giving force to the principle of equal voting rights. The following arguments respond to the challenge.

1. *The reform changes nothing regarding the independence and the authority of the states regarding the election of U.S. senators*. The reform changes only the allocation of the number of senators to the states. It respects the principle of federalism by allocating a minimum of one senator to each state. It also respects the rights of states to set the conditions for the election of senators, as currently provided under the Constitution.[107]

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[103] 118 U.S. 356, 370 (1886.

[104] U.S. CONST. preamble. As Akhil Amar explains, this is an "enactment argument" that relies on the text "We the People" but also goes beyond the text to include a structural argument in historical context. AMAR, AMERICA'S UNWRITTEN CONSTITUTION, supra note [17], at 54-56, 72-73. See also BRUCE ACKERMAN, WE THE PEOPLE, VOLUME 2: TRANSFORMATIONS (1998) (describing how the Civil War period and its aftermath established "equality," including voting equality, as a central constitutional principle).

[105] Federalism considerations were central, for example, in *Shelby County v. Holder*, 570 U.S. 529 (2013), which trimmed a part of the Voting Rights Act on grounds that it was an unconstitutional violation of state prerogatives. However, as discussed infra in Part II.E, the facts of this case are inapposite to the proposed reform which focuses on the structure of the *federal* government and not the practices of the states. *Shelby County* reaffirmed the Court's commitment to principles of equal voting rights and the power of Congress to vindicate them. Id. at 553 ("The Fifteenth Amendment commands that the right to vote shall not be denied or abridged on account of race or color, and it gives Congress the power to enforce that command.").

[106] U.S. CONST. art. V.

[107] U.S. CONST. art. I, § 4, cl. 1; U.S. CONST. amend. XVII. See also *Shelby County*, 570 U.S. at 543 (reviewing the prerogatives of the states regarding voting process).

In addition, more populous states allocated four or more senators may decide to use a top-two, top-three, or top-four election method to provide structural breadth of representation for various groups, interests, and ideological preferences.[108] States would have authority to decide the details of these elections within the confines of the Seventeenth Amendment and general protections of federal rights to vote. If adopted at the discretion of the larger states, these elections may reduce the current tendency toward extreme partisanship in senate elections, enabling the election of senators who represent competing points of view and yet command support from significant percentages of state populations.[109]

2. *The reform retains the general federal structure of electing senators for six-year terms, and the Three Classes Clause is respected as well.* The Senate Reform Act would make no structural changes here.

3. *The reform addresses structural inefficiencies that allow small states to bargain for larger per capita economic benefits than larger states.* Small states leverage their disproportionate representation to claim more than their fair share of government expenditures. Francis Lee and Bruce Oppenheimer confirm that "smaller states tend to receive more federal dollars per capita than large states, controlling for differences in states' need for federal funds" and excluding federal entitlement programs for the poor and elderly.[110] The reform would eliminate this unequal and unfair economic bargaining advantage of small states.

4. *The federal structure allowing small states to have enormously greater clout per citizen than much larger states has become structurally unstable*.[111] Large states are likely to resent the inequality of representation over time,

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[108] See supra note [35-36] and accompanying text.

[109] See supra note [36] and accompanying text. For empirical measurement of this phenomenon, see Pew Research Center, Political Polarization in the American Public, June 12, 2014, available at http://www.people-press.org/2014/06/12/political-polarization-in-the-american-public/ ("Republicans and Democrats are more divided along ideological lines—and partisan antipathy is deeper and more extensive—than at any point in the last two decades.").

[110] LEE & OPPENHEIMER, supra note [8], at 158-60. Cf. Valentino Larcinese et al., *Why Do Small States Receive More Federal Money? U.S. Senate Representation and the Allocation of Federal Budget*, 25 ECON. & POL. 257 (2013) (finding small states to receive more defense-spending than larger states, but also correlating differentials to other variables such as how fast different states are growing).

[111] Stability is arguably another objective of constitutional structure. See Sonia Mittal & Barry R. Weingast, *Constitutional Stability and the Deferential Court*, 13 U. PA. J. CONST. L. 337 (2010) (arguing for various aspects of this view, including a need for the Court to sometimes defer to public opinion).

especially given that it's increasing, and in an extreme case a large state (or set of states) may even contemplate secession. A Civil War costing more than 750,000 lives cemented the "union" against a sustained attempt of eleven southern states to secede in a "confederacy."[112] Subsequent world wars in which the United States played a decisive role may cast further doubt on the prospect of a possible future secession. However, the contemporary examples of Catalonia, Scotland, and Quebec suggest that this structural concern may lie dormant in regions of the United States too.[113]

For example, California or Texas, the most populous states, may seriously contemplate the option of a democratic secession justified in part by an unrepresentative Senate.[114] California constitutes a population and an economy of sufficient size to become a nation-state on its own. Led by Hollywood and Silicon Valley, its economy of approximately $2.7 trillion would count, if it stood alone, as the fifth largest economy in the world (behind the United States itself, China, Japan, and Germany).[115] Beginning in 2015, a group has been circulating a petition "to give citizens a direct vote on whether they want to turn California into 'a free, sovereign and independent country,' which could trigger a binding 2021 referendum on the question already being called 'Calexit.'"[116]

Texas has a long tradition of independence as the Lone Star State.[117] As President Lincoln observed at the outbreak of the Civil War, Texas was the only state that had separate sovereignty prior to being annexed (except for the original thirteen colonies).[118] Notwithstanding Lincoln's warning—and the

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[112] LAPORE, supra note [17], at 293. See also DREW GIPLIN FAUST, THIS REPUBLIC OF SUFFERING: DEATH IN THE AMERICAN CIVIL WAR (2008) (examining the role of mass deaths amounting to two percent of the population in the formation of new public commitments).

[113] See Montserrat Guibernau, et al., *Introduction: A Special Section on Self-Determination and the Use of Referendums: Catalonia, Quebec and Scotland*, 27 INT'L J. POL., CULTURE & SOC'Y 1 (2014) (reviewing these several movements).

[114] For an account of contemporary secession movements in the United States, see Sasha Issenberg, *Divided We Stand*, INTELLIGENCER, http://nymag.com/intelligencer/2018/11/maybe-its-time-for-america-to-split-up.html (republished from N.Y. Magazine, Nov. 12, 2018).

[115] Lisa Marie Segarra, *California's Economy Is Now Bigger Than All of the U.K.*, FORTUNE, May 5, 2018, http://fortune.com/2018/05/05/california-fifth-biggest-economy-passes-united-kingdom/.

[116] Issenberg, supra note [114].

[117] For an overview, see RANDOLPH B. CAMPBELL, GONE TO TEXAS: A HISTORY OF THE LONE STAR STATE (3d. ed. 2017).

[118] Abraham Lincoln, Message to Congress in Special Session, July 4, 1861, http://founding.com/founders-library/american-political-figures/abraham-lincoln/message-to-congress-in-special-session-july-4-1861/ ("[N]o one of our States, except Texas, ever was a sovereignty. And even Texas gave up the character on coming into the Union; by which

terrible experience of the Civil War itself—some Texas politicians have again threatened secession, including former Governor Rick Perry. At a Tea Party rally in 2009, Perry suggested examining the option of independence, and his lieutenant governor met with the Texas Nationalist Movement.[119]

One poll found that as many as one-quarter of American citizens favored secession of their own states from the union.[120] In 2012, the White House reported receiving petitions from all fifty states for secession, with 150,000 signatures from Texas leading the list.[121]

The Senate reform would alleviate the unfairness in representation that affects the largest states most severely. By knitting these states more closely into the union, it would increase the long-term stability of the federal system.

5. *The estimated 110 senators under the reform compares to the current structure of 100 senators, and the reform provides an open and more reasonable structure to solve the long-standing problem of finding a path to statehood for unrepresented or underrepresented U.S citizens*. The Rule of One Hundred is designed to approximate the current structure of the Senate, and at the same time provide for flexibility in the expansion of new states, particularly the District of Columbia, Puerto Rico, and perhaps the Pacific Islands, if U.S. citizens or nationals in these places desire statehood.[122] "No taxation without representation" is a founding principle of the United States, and the reform would ease the accommodation of these unrepresented or underrepresented populations.[123]

Because the Senate is a comparatively smaller size and serves longer terms than the House, it has been said to act as a more "deliberative" body.[124]

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act, she acknowledged the Constitution of the United States, and the laws and treaties of the United States made in pursuance of the Constitution, to be, for her, the supreme law of the land. The States have their status *in* the Union, and they have no other legal status.").

[119] Issenberg, supra note [114].

[120] Id. (citing Reuters poll).

[121] Id. For a dystopian futuristic view of renewed civil war between the "red" and the "blue" in the United States, see OMAR EL AKKAD, AMERICAN WAR (2017).

[122] New states are admitted by Congress. U.S. CONST. art. IV, § 3, cl. 1.

[123] See Grant Dorfman, *The Founders' Legal Case: "No Taxation Without Representation" Versus Taxation No Tyranny*, 44 HOUS. L. REV. 1377 (2008) (giving historical background). Citizens of the District of Columbia and Puerto Rico have been denied constitutional claims to vote for Representatives to the House because they are not states. E.g., Adams v. Clinton, 90 F. Supp. 2d 35, 41 (D.D.C.), aff'd, 531 U.S. 941 (2000) (D.C.); Igartua v. U.S., 626 F.3d 592 (1st Cir. 2010) (Puerto Rico).

[124] See LEE & OPPENHEIMER, supra note [8], at 18 ("Defenders of the Senate often argue that its primary function is to serve as a more deliberative legislative body than the House.").

The Rule of One Hundred keeps total Senate numbers in check, and with six-year terms continuing, the Senate would continue to act as the more deliberative, stable legislative body.[125]

The reform would change the ground rules for the admission of new states. One unwritten constitutional rule is the "equal footing doctrine" by which new states are admitted on the same basis as the original states, including two senators and at least one representative in the House.[126] This rule would apply today if the District of Columbia and Puerto Rico were to be admitted as the fifty-first and fifty-second states. The reform would change the "equal footing" rule for all states, thus reducing political resistance to admitting D.C. or Puerto Rico because they would each receive only one senator based on their populations. See Table 1 at page [63].

The Twenty-Third Amendment allocates votes in the Electoral College to the District of Columbia, for example, as if it were a state.[127] However, this is a poor excuse for real representation of citizens in a capital city with a population larger than the two smallest states (Vermont and Wyoming).[128] Under the reform, statehood for the District of Columbia would give it only one senator, reducing the political difficulty of convincing other states to go along. Note also that D.C. has a much higher population of people of color, as well as LGBT citizens, than the U.S. average, enhancing the argument for representation. See Tables 4 and 6 above at pages [69 & 71].

Similarly, the reform may pave the way to statehood for Puerto Rico. The population of Puerto Rico is about one-hundredth of the U.S. population, and so it would qualify for one senator. It is larger than twenty-one of the smallest states. See Table 1 at page [63]. Puerto Rico, which is also ethnically diverse, deserves representation too.[129]

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[125] Id. ("Although many institutional features of the Senate—such as its small size, its long terms of office, and its rule for debate—may help to create a more deliberative body, Senate apportionment bears no connection to this aim.").

[126] See AMAR, AMERICA'S UNWRITTEN CONSTITUTION, supra note [17], at 258-60.

[127] U.S. CONST. amend. XXIII.

[128] See Mary M. Cheh, *Theories of Representation: For the District of Columbia, Only Statehood Will Do*, 23 WM. & MARY BILL RIGHTS J. 65, 87 (2014) (arguing for statehood).

[129] A large majority of Puerto Ricans want statehood. Joseph Blocher & Mitu Gulati, *Puerto Rico and the Right of Accession*, 43 YALE J. INTL. L. 229, 269 (2018). Around 98 percent of Puerto Ricans identify as Hispanic or Latino. U.S. Census, QuickFacts: Puerto Rico, https://www.census.gov/quickfacts/fact/table/pr/BZA210216. The case for Puerto Rican statehood is even stronger given that the Hispanic population seems to suffer the worst abridgment of representation of any discrete minority group in the Senate. See supa note [77] and accompanying text.

In this context, the deaths of almost 3,000 Puerto Rican U.S. citizens in the path of Hurricane Maria in 2017 is germane.[130] The disaster and its aftermath would have garnered much greater political and media attention if Puerto Rico had been a state, and the response by the federal government and review of it would have been improved if Puerto Rico had one senator and a complement of five representatives in Congress—as well as Electoral College votes.[131]

Stretching a bit further, one can imagine the creation of a new state comprising the other non-represented U.S. territories of American Samoa, Guam, the Northern Mariana Islands, and the U.S. Virgin Islands (or some combination of them), which might together qualify for one senator and one representative.[132] A new Pacific Islands state would qualify as the smallest state in the union.[133]

If one may include geographic integrity as a structural issue, adding D.C., Puerto Rico, and the Pacific Islands as states, as well as granting larger and fairer representation to the coastal states of California, Texas, Florida, and New York, would significantly improve representation of states affected significantly by sea level rises associated with global climate change.

6. *The reform improves the Electoral College.* The reform would address the unrepresentativeness of the Electoral College because that the weight of each state is determined by the number of representatives and senators.[134]

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[130] Vann R. Newkirk II, *A Year After Hurricane Maria, Puerto Rico Finally Knows How Many People Died*, ATLANTIC, Aug 28, 2018, https://www.theatlantic.com/politics/archive/2018/08/puerto-rico-death-toll-hurricane-maria/568822/.

[131] See Eliza Barclay et al., *Hurricane Maria: 4 Ways the Storm Changed Puerto Rico—And the Rest of America*, VOX, Sept. 20, 2018, https://www.vox.com/2018/9/20/17871330/hurricane-maria-puerto-rico-damage-death-toll-trump (giving lessons from the disaster and noting renewed interest in statehood); Blocher & Gulati, supra note [129], at 232 (noting that if Puerto Rico were admitted as a state, it would qualify for five representatives in the House); Frances Robles, *$3,700 Generators and $666 Sinks: FEMA Contractors Ran Up Puerto Rico Costs*, *N.Y. Times*, Nov. 27, 2018, at A1 (reporting corruption and mismanagement by the Federal Emergency Management Agency).

[132] See Table 1 supra at page [63]. For an overview of the complex legal circumstances of the various territories, see *Developments in the Law—U.S. Territories*, 130 HARV. L. REV. 1617 (2017). See also Robert A. Katz, Comment, *The Jurisprudence of Legitimacy: Applying the Constitution to U.S. Territories*, 59 U. CHI. L. REV. 779 (1992) (discussing difficulties that the ambiguous status of the Pacific Islands raises).

[133] The total population is only about 200,000 less than Wyoming. See Table 1 above in the text at page [63].

[134] U.S. CONST. art. II, § 1, cl. 2. See also Note, *Rethinking the Electoral College Debate: The Framers, Federalism, and One Person, One Vote*, 114 HARV. L. REV. 2526, 2544 (2001) (arguing that "the chief objection to the [Electoral College] system is generally

The reform would cure this problem, with a small degree of remaining unrepresentativeness required by the federal structure.

An alternative proposal for an interstate compact among the states to eliminate reliance on the Electoral College has gathered steam in recent years—fueled by public dismay about two recent elections of presidents who did not receive a majority of the popular vote.[135] Under the National Popular Vote initiative, a number of states have agreed to cast their electoral votes according to the majority vote in the country.[136] This compact does an end-run around the Electoral College. The current status is that twelve states with 172 electoral votes have adopted the plan, which leaves only 98 electoral votes to go.[137] There is, then, some prospect of success.

However, the national popular vote idea raises problems related to federalism.[138] The National Popular Vote interstate compact may also be unconstitutional.[139]

Richard Posner points out several structural problems with abolishing the Electoral College.[140] First, it provides relative certainty of election outcomes. Close elections in one or two states requiring a recount are bad enough, but a close election in the entire country could cause disastrous delay, uncertainty,

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that it violates the one-person, one-vote principle").

[135] Only five Presidents have been elected with a minority of the popular vote: Donald Trump, George W. Bush, Benjamin Harrison, Rutherford B. Hayes, and John Quincy Adams. Rachel Revesz, *Five Presidential Nominees Who Won Popular Vote But Lost the Election*, INDEPENDENT, Nov. 16, 2016, https://www.independent.co.uk/news/world/americas/popular-vote-electoral-college-five-presidential-nominees-hillary-clinton-al-gore-a7420971.html.

[136] For background on the idea (including its origin), see AMAR, AMERICA'S UNWRITTEN CONSTITUTION, supra note [17], at 457-61.

[137] See National Popular Vote, https://www.nationalpopularvote.com/.

[138] For criticisms along these lines, see, e.g., Derek T. Muller, *Invisible Federalism and the Electoral College*, 44 ARIZ. ST. L.J. 1237 (2012); Norman R. Williams, *Reforming the Electoral College: Federalism, Majoritarianism, and the Perils of Subconstitutional Change*, 100 GEO. L.J. 173 (2011).

[139] See Norman R. Williams, *Why the National Popular Vote Compact Is Unconstitutional*, 2012 B.Y.U. L. REV. 1523 (2012) (arguing the approach violates the Presidential Elections Clause); Stanley Chang, Recent Development, *Updating the Electoral College: The National Popular Vote Legislatio*n, 44 HARV. J. LEGIS. 205, 213 (2007) (observing "the constitutionality of the NPV interstate compact has not been definitively established"). For a defense, see Vikram David Amar, *Response: The Case for Reforming Presidential Elections by Subconstitutional Means: The Electoral College, the National Popular Vote Compact, and Congressional Power*, 100 GEO. L.J. 237, 242 (2011).

[140] Richard A. Posner, *In Defense of the Electoral College*, SLATE, Nov. 12, 2012, https://slate.com/news-and-politics/2012/11/defending-the-electoral-college.html.

and discord. Second, the Electoral College requires presidential candidates to pursue a regional block-vote assembly method of assembling a path to victory—rather than simply piling up huge voting margins in particular states—thus encouraging regional balance in a big, continent-sized country. Third, the Electoral College prevents costly and potentially divisive run-off elections.[141]

The Senate Reform Act would make the Electoral College more representative and at the same time would retain its positive structural features related to federalism and political stability. The overall balance of the current system would not significantly change. See Figure 1.

[Insert Figure 1 about here.]

Because democratic representativeness is the primary objection to the current Electoral College, the reform would supply a constitutionally nonintrusive structural solution.

C. *Historical Context*

The history of the Constitution—and the United States itself as a nation—combines two primary, and contradictory, narratives. One is the story of progressive enlightenment and a founding revolution fought for the assertion of basic political and human rights. This story includes the expansion of the franchise, extending the right to vote, unevenly and slowly, from white male property-owners, to all white men, to all men regardless of skin color including former slaves, to women, to Native Americans who agreed to accede to mandatory conditions, and to all adults regardless of age.[142]

Another story is a darker one of conquest and slavery—including the often violent expansion of the geographic scope of the country and the explosion of a Civil War that ended slavery, but ushered in a short period of Reconstruction in the south followed by retrenchment and a century of racial segregation under Jim Crow, then a revitalized civil rights movement in the 1960s and the passage of landmark federal civil and voting rights statutes.[143]

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[141] Id.

[142] See supra notes [17-25] and accompanying text.

[143] See LAPORE, supra note [17], at 38 (stating that "liberty and slavery" represent "the American Cain and Abel"). See also MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 20-58 (describing the history of legalized racism in the United States from its founding in slavery to today's mass incarceration); ANDERS WALKER, THE BURNING HOUSE: JIM CROW AND THE MAKING OF MODERN AMERICA (2018) (providing a legal and literary tour of the post-Reconstruction period and the

The first black president was elected for two terms beginning in 2008, and then a president was elected in 2016 who traded in overtly racist commentary and condoned the rise (again) of white nationalism in America.[144] The two historical narratives continue to compete.

The states and their representation in the Senate comprise a central part of this dual historical narrative. The Three Fifths and Fugitive Slave Clauses, as well as a slavery-slanted Electoral College, assured overrepresentation of slave states until after the Civil War.[145] At the founding, Pennsylvania and Virginia had an equal number of free citizens, but Virginia's count of slaves enabled it to have a stronger influence in Congress and to dominate early presidential elections.[146] For thirty-four of the first thirty-six years of the new republic, presidents hailed from Virginia.[147] An observer in 1812 complained that "one slave in Mississippi has nearly as much power in Congress as five free men in the State of New York."[148] David Walker, a free black writer and early abolitionist, argued that the expansion from thirteen states to twenty-four amounted to "the whites . . . dragging us around in chains and handcuffs, to their new States and Territories, to work their mines and their farms, to enrich them and their children." He was also one of the first to insist that "[t]his country is as much ours as it is the whites, whether they will admit it now or not . . . ." [149]

The problem of representativeness of the states extended to a long-

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emergence of the idea of "diversity"); Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 35 (1983) (describing "the place of slavery within the union" as "a fault line in the normative topography of American constitutionalism").

[144] Ta-Nehisi Coates, *My President Was Black*, ATLANTIC, Jan./Feb. 2017, https://www.theatlantic.com/magazine/archive/2017/01/my-president-was-black/508793/; Ta-Nehisi Coates, *The First White President*, ATLANTIC, Oct. 2017, https://www.theatlantic.com/magazine/archive/2017/10/the-first-white-president-ta-nehisi-coates/537909/. See also Lindsay Pérez Huber, *"Make America Great Again!": Donald Trump, Racist Nativism and the Virulent Adherence to White Supremacy Amid U.S. Demographic Change*, 10 CHARLESTON L. REV. 215, 223-32 (2016) (reviewing instances of Trump's appeals to "native racism" and "white nationalism" during his campaign).

[145] LAPORE, supra note [17], at 125. See also supra note [18]. On the importance of the Fugitive Slave Clause, U.S. CONST. art. IV, § 2, cl. 3, see DELBANCO, supra note [44].

[146] See LAPORE, supra note [17], at 157 (noting the compromise creating the Electoral College "stood on the back of yet another compromise: the slave ratio"); Paul Finkelman, *The Proslavery Origins of the Electoral College*, 23 CARDOZO L. REV. 1145, 1146–47 (2002) (arguing that because the "electoral college" was "based in part on the three-fifths clause," "there is an immediate connection between slavery and the electoral college").

[147] LAPORE, supra note [17], at 157-58.

[148] Id. at 173 (quoting a citizen in Massachusetts).

[149] Id. at 204 (quoting Walker).

standing concern about maintaining political "balance" between slave and free states.[150] The chronology of admission of states shows an uneven pattern of balancing slave and free states—until negotiations broke down over the admission of new states, leading eventually to the Civil War.[151] See Table 7. West Virginia gained statehood when its population broke from Virginia over the Confederacy.[152]

[Insert Table 7 about here.]

With respect to constitutional interpretation, this history teaches that we should not valorize the states—or put them on a pedestal of an uncritical federalism. The creation and growth of the states occurred under a constitutional framework that the abolitionist William Lloyd Garrison called "a covenant with evil" involving slavery.[153] Even as others such as Frederick Douglass argued that the Constitution was "not a proslavery document," it remains true that more than half the states—including the original thirteen—were formed within a framework that promoted or at least condoned slavery.[154] Thirty-six states were formed before or during the Civil War. See Table 7. The state lines on the map were drawn in part as "color lines" with shades of "slave" and "free."[155] Geographical distributions of diverse groups

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[150] Id. at 235-36 (referring, for example, to President Tyler's plan to admit Oregon at the same time as annexing Texas to maintain "the balance between slave states and free").

[151] Id. at 266-71. See also DELBANCO, supra note [44], at 323 (recounting a number of causes leading to war, including the persistent divide about slavery and disputes about new states including Texas, Nebraska, and Kansas); KLARMAN, supra note [7], at 630 (noting that southern states warned in 1850 that admitting California as a free state threatened to upset "the balance of power" between fifteen free and fifteen slave states would lead to war).

[152] LAPORE, supra note [17], at 157-58. Ironically, West Virginia is today one of the most overrepresented small, mostly "white" states. There is also debate about whether West Virginia is actually constitutional, given that it was created from territory belonging to another state without "consent." See U.S. CONST., art. IV, § 3 (providing that "no new State shall be formed or erected within the Jurisdiction of any other State . . . without the Consent of the Legislatures of the States concerned as well as of the Congress"). See also Vasan Kesavan & Michael Stokes Paulsen, *Is West Virginia Unconstitutional?* 90 CAL. L. REV. 291 (2002) (discussing details and finding other problematic examples).

[153] BLIGHT, supra note [93], at 215 (quoting Garrison).

[154] Id. (quoting Douglass). See also Noah Feldman, *Imposed Constitutionalism*, 37 CONN. L. REV. 857, 883–84 (2005) ("The Constitution in its earliest form can be understood as a deal between northern and southern elites to tighten ('perfect') a mutually beneficial political union. That is why the Constitution preserved African slavery. Without guarantees to this effect, southern states would not have been prepared to enter the Union; and indeed when the threats to their interests became great enough, those who inherited power in these southern states were prepared to secede.").

[155] As W.E.B. Du Bois said in a more general context: "The problem of the Twentieth Century is the problem of the color line." BLIGHT, supra note [93], at 759 (quoting Du Bois),

of citizens reflect the history of original settlement as well as later migrations.[156] "The problem of the twenty-first century," as the historian David Blight says, "is still some agonizingly enduring combination of legacies bleeding forward from color lines and slavery."[157] Unequal patterns of representation are part of this "enduring combination of legacies."

Only after the cataclysm of the Civil War were the Three Fifths and Fugitive Slave Clauses superseded, and representation in the House reverted to "whole people" rather than fractions.[158] Union armies and Reconstruction Republicans destroyed the Confederate ideology of "state's rights" and "white supremacy" (at least temporarily).[159] Former slaves became citizens under the Fourteenth and Fifteenth Amendments, and for a brief time during Reconstruction black men voted and ran for office in the south—with over 800 of them serving in state legislatures and more than 1000 in local governments.[160] By 1870, fifteen percent of southern governmental officials were black.[161]

It did not last long. President Lincoln hoped for "a new birth of freedom" and "a government of the people, by the people, for the people."[162] Congress passed a Civil Rights Act in 1866.[163] Reconstruction Republicans pushed through the Thirteenth, Fourteenth, and Fifteenth Amendments. Then, following the assassination of Lincoln, came a counter-reaction, and the eventual rise to power (again) of white southern Democrats. White terrorist lynchings by the Ku Klux Klan and the adoption of Jim Crow laws set back

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[156] The inequality of racial and ethnic distribution among the states today results in part from ongoing migrations, particularly of black populations first out of the south, and then back again (to some states) in response to complex social, political, and economic dynamics. See Kevin E. McHugh, *Black Migration Reversal in the United States*, 77 GEOGRAPHICAL REV. 171 (1987) (reviewing history and statistics of migrations). Racial violence, including lynching, drove at least part of this historical migration. See, e.g., Stewart E. Tolnay & E. M. Beck, *Racial Violence and Black Migration in the American South, 1910 to 1930*, 57 AM. SOCIOLOGICAL REV. 103 (1992) (finding violence to be a causal explanation for the Great Migration of blacks northward in the early twentieth century).

[157] BLIGHT, supra note [93], at 764.

[158] LAPORE, supra note [17], at 320; U.S. CONST. amend. XIV, § 2 (apportionment in the House by "whole numbers of persons").

[159] LAPORE, supra note [17], at 290. As Berman observes, "white supremacy" once had status as a constitutional principle, but does no longer. Berman, supra note [43], at 1390.

[160] LAPORE, supra note [17], at 323. See also FONER, supra note [68], at 351-64 (describing black participation in government).

[161] ALEXANDER, supra note [143], at 29.

[162] Abraham Lincoln, Gettysburg Address (Nov. 19, 1863), https://www.britannica.com/ event/Gettysburg-Address.

[163] See LAPORE, supra note [17], at 319-20 (noting an override of President Andrew Johnson's veto was required).

progress on racial equality for another century.[164] In the words of W.E.B. Du Bois, "the slave went free, stood a brief moment in the sun; then moved back again toward slavery."[165] Even the New Deal depended on a devil's bargain with white southern "Dixiecrats."[166]

This historical backdrop challenges any interpretation that would take the cold text of the original Constitution and assert that we must uphold the integrity and independence of the states against the demands of progress for greater and deeper respect for equal representation in voting, especially on grounds of race and color, as expressed in the Voting Rights Amendments.

The sordid role played by the Supreme Court must be remembered too. In *United States v Cruikshank*, the Court restrained the federal government from pursuing prosecutions under the Enforcement Act of 1870 against mass murders of black citizens committed by white nationalists in Louisiana.[167] *Dred Scott v. Sandford*[168] and *Plessy v. Ferguson*[169] rank among the worst, most racist decisions ever issued.[170] *Plessy* upheld the noxious "separate but equal" doctrine used to justify segregation in the south long after the Civil War had been fought and, ostensibly, won by the north.[171] Earlier, *Dred Scott*

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[164] ALEXANDER, supra note [143], at 30-35. See also Feldman, supra note [154], at 884 (noting how the post-Civil War amendments were reinterpreted "to authorize the exclusion of African Americans from equal rights," and "it was not until almost a century later . . . that the time had come to impose equal rights again").

[165] ALEXANDER, supra note [143], at at 20 (quoting Du Bois).

[166] For an account of the pact made by Roosevelt with white southern Democrats, see IRA KATZNELSON, FEAR ITSELF: THE NEW DEAL AND THE ORIGINS OF OUR TIMES (2013).

[167] 92 U.S. 542, 556–57, 559 (1875). See also A. LEON HIGGINBOTHAM, JR., SHADES OF FREEDOM: RACIAL POLITICS AND THE PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS 87-90 (1996) (describing *Cruikshank* as a key component in "the judicial betrayal of African Americans" in which "white supremacists received the imprimatur of the Supreme Court"); Martha T. McCluskey, *Facing the Ghost of* Cruikshank *in Constitutional Law*, 65 J. LEG. EDUC. 278, 280–81 (2015) (finding *Cruikshank* and related decisions "cleared the way for violent restoration of a white supremacist legal order that replaced Reconstruction with the Jim Crow system of segregation, inequality, and racial violence that reigned largely unchecked by the Court for nearly a century").

[168] 60 U.S. 393 (1857), superseded by U.S. CONST. amend. XIV.

[169] 163 U.S. 537 (1896), overruled by Brown v. Board of Educ., 347 U.S. 483 (1954).

[170] HIGGINBOTHAM, supra note [167], at 117 ("From a race-relations standpoint, *Plessy v. Ferguson* was one of the two most venal decisions ever handed down by the United States Supreme Court. It is equaled only by the pernicious *Dred Scott v. Sandford*."). Competing for most racist Supreme Court opinion is *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding World War II internment of Japanese Americans), abrogated by Trump v. Hawaii, 138 S. Ct. 2392 (2018).

[171] *Plessy*, 163 U.S. at 552 (Harlan, J., dissenting) (using the "separate but equal" language in dissent from holding allowing racial segregation on railroad cars). Even in his famous dissent, Justice Harlan exhibited racial bias, writing that "[t]he white race deems

was even worse: knocking aside congressional compromises, finding slaves to have no constitutional rights at all, and setting spark to the fire of war.[172] This sorry history of judicial racism should counsel any future Court to tread carefully before striking down a statute designed in part to correct historical and present racial injustices, as does the proposed Senate Reform Act.[173]

The strongest historical argument against the reform is that the original one state, two senators rule resulted from a compromise between large and small states at the founding. Massachusetts, Pennsylvania, and Virginia accounted for forty-five percent of the population, and a practical deal accommodated the smaller states.[174] However, the motivation for this compromise was not to assure any long-term balance between small and large states—which might support an originalist interpretation in favor of the one state, two senators rule today.[175] Instead, small closed-in "four-sided" states (mostly Delaware, Maryland, and New Jersey) feared the expansion westward of open "three-sided" states (led by Virginia).[176] Today, more than two centuries of history have filled in the continental (and world) map, obviating this original concern. In addition, Madison (who opposed the compromise), made clear that the major issues at the founding involved slavery and not large-versus-small states.[177] As he wrote, "the States were

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itself to be the dominant race in this country." Whites are dominant "in prestige, in achievements, in education, in wealth and in power," and "will continue to be for all time." Balkin, supra note [71], at 2329 (quoting Harlan).

[172] *Dred Scott* held that black slaves constituted "a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them." 60 U.S. 393, 404–05. See also Robert M. Cover, *Atrocious Judges: Lives of Judges Infamous as Tools of Tyrants and Instruments of Oppression*, 68 COLUM. L. REV. 1003 (1968) (arguing that "the decade preceding the civil war marked the nadir of the American judiciary"). On the contribution of *Dred Scott* to the outbreak of the Civil War, see DELBANCO, supra note [44], at 323-24, 329-35, 346.

[173] See also supra notes [41-46] and accompanying text (urging judicial restraint).

[174] LEE & OPPENHEIMER, supra note [8], at 32-35.

[175] "Senate seats were allocated to States on an equal basis," Justice Ruth Bader Ginsburg recently observed, "to respect state sovereignty and increase the odds that the smaller States would ratify the Constitution." Evenwel v. Abbott, 136 S. Ct. 1120, 1130 (2016). The compromise was basically a transaction—a deal without a long-term horizon in mind. See also Wesberry v. Sanders, 376 U.S. 1, 10-17 (1964) (describing details about the compromise and Benjamin's Franklin's encouragement to "join in some accommodating proposition").

[176] LEE & OPPENHEIMER, supra note [8], at 34-35.

[177] Madison viewed the compromise as a "major flaw' in the Constitution, as did James Wilson of Pennsylvania. William Ewald & Lorianne Updike Toler, *Early Drafts of the U.S. Constitution*, 135 PA. MAG. HIST. & BIOGRAPHY 227, 227-28, 233-34 (2011). Alexander Hamilton agreed: "There can be no truer principle than this—that every individual in the

divided into different interests not by their difference in size, but by other circumstances, the most material of which resulted partly from climate, but principally from the effects of their having or not having slaves."[178]

Historical path dependence, then, is the only viable explanation for the survival of the one state, two senators rule.[179] The original so-called Great Compromise was one made on the basis of interest rather than principle.[180] This is a weak reed to support the representational unfairness in the Senate that has grown to a ratio of 67:1, comparing voting power of citizens in the largest and smallest states, almost six times the 12:1 ratio at the founding, and projected to get worse.[181] Note also that founders such as Madison, Hamilton, and Wilson argued strongly against the one state, two senators rule and predicted that long-term problems would result from it.[182]

Even if one accepts an originalist argument in favor of the one state, two senators rule, historical context reflects a parallel intramodal conflict seen in the textual analysis.[183] An originalist interpretation must account for the

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community at large has an equal right to the protection of government. If therefore three states contain a majority of the inhabitants of America, ought they to be governed by a minority?" LEE & OPPENHIEMER, supra note [8], at 32 (quoting Hamilton).

[178] DELBANCO, supra note [44], at 65 (quoting Madison). See also ALEXANDER, supra note [143] ("The structure and content of the original Constitution was based largely on the effort to preserve a racial caste system—slavery—while at the same time affording political and economic rights to whites, especially propertied whites. The Southern slaveholding colonies would agree to form a union only on the condition that the federal government would not be able to interfere with the right to own slaves.")

[179] LEE & OPPENHIEMER, supra note [8], at 43 ("Equal state apportionment persists not because it serves any current function, but as a path-dependent consequence of [an] initial agreement made over agreement over two hundred years ago.").

[180] Id. at 33 (finding that "the small state delegates were motivated by their own states' particular interests rather than by an adherence to principle"). See also KLARMAN, supra note [7], at 182-25 (providing a detailed account of the negotiations leading to the compromises regarding representation, including cross-cutting interests of small-versus-large states and slave-versus-free states).

[181] See supra note [6-7 & 11] and accompanying text.

[182] KLARMAN, supra note [7], at 182-87, 198-99. Some features of the Senate Reform Act recommended here in fact appeared as arguments at the Constitutional Convention. For example, James Wilson argued for a minimum of one senator per state in a population-based proposal, and Charles Pinckney argued at one point for a "sliding scale by which the smallest states would get a single senator and the largest state, Virginia, would receive five." Id. at 200, 207-08,

[183] See supra notes [58 & 97] and accompanying text (discussing intramodal conflicts). It is also questionable whether "original intent" in constitutional interpretation should be taken as dispositive. See, e.g., FALLON, LAW AND LEGITIMACY IN THE SUPREME COURT, supra note [43], at 133-34, 137-41 (describing different versions of originalism and arguing that reference to "moral rights" and other values is often necessary for interpretation even

intentions also of those who passed the various Voting Rights Amendments as well. They did not likely imagine a future Congress passing a Senate Reform Act specifically, but they authorized Congress to pass legislation broadly "appropriate" to protect equal voting rights. As Eric Foner, a leading historian of the period concludes, "the [Fourteenth] Amendment's central principle remained constant: a national guarantee of equality before the law."[184] On the dimension of imagination, surely the founders had no better foresight than those who enacted the Voting Rights Amendments. As Lee and Oppenheimer observe,

> In their wildest dreams, the framers of the Constitution never imagined that the population of the United States would one day approach 300 million. Nor did they imagine that a single state—on the Pacific coast of the continent no less—would have a population almost ten times that of the entire country at the first census. . . . The entire country at the first census had roughly the same population as Connecticut today.[185]

The radical malapportionment of the contemporary Senate could not have been foreseen by either the original founders or those who wrote and ratified the Voting Rights Amendments, but the latter empowered Congress to act on principle to protect against this unforeseen development.

On historical grounds, then, the Senate Reform Act sets forth a positive future trajectory based on protecting voting rights embedded in a century of

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under an originalist approach); MICHAEL J. PERRY, MORALITY, POLITICS, & LAW 122-69 (1988) (arguing that originalism cannot give voice to aspirational democratic constitutional values); STRAUSS, supra note [5], at 7-31 (critiquing the "sins of originalism"); TRIBE, AMERICAN CONSTITUTIONAL LAW, supra note [56], at 48-85 (arguing that though one must take "original meaning as a starting point," constitutional interpretation requires other modes of analysis); Berman, supra note [43], at 1340-47 (describing different constitutional theories of originalism and finding even the best one "does not jibe well with any widely entertained general theory of law").

[184] FONER, supra note [68], at 257; see also Paul Finkelman, O*riginal Intent and the Fourteenth Amendment: Into the Black Hole of Constitutional Law*, 89 CHI.-KENT L. REV. 1019, 1026 (2014) ("Virtually all supporters of supporters of the Amendment agreed that it would protect the 'civil rights' of blacks and everyone else," though evidence of original intent on key provisions is sparse).

Justice Alito, recognizing the huge inequality of representation in the Senate, points out in dicta that the Fourteenth Amendment was negotiated "in the shadow" of this inequality and did nothing expressly to address it. Evenwel v. Abbott, 136 S. Ct. 1120, 1144 & n.4 (2016) (Alito, J., concurring). He does not, however, suggest that an affirmative use of congressional power authorized by Voting Rights Amendments should be limited for this reason. *Evenwel* upheld the use of "total population" by states in apportionment. Id. at 1123, 1130-33.

[185] LEE & OPPENHEIMER, supra note [8], at 44.

Voting Rights Amendments, including the Equal Protection Clause of the Fourteenth Amendment.[186] If the reform were adopted, one hopes a future Supreme Court would not once again trample on the long-term narrative of enhancing democracy in America. If it did, then one should recall the words Frederick Douglass. "The Supreme Court of the United States is not the only power in the world," he said in the immediate aftermath of *Dred Scott*, for "the Supreme Court of the Almighty is greater." The Court "could not change the essential nature of things, making evil good, and good evil."[187]

D. *Moral Principles*

If textual analysis is the most difficult part of constitutional interpretation for the proposed reform, the question of moral principles is probably the easiest. It is difficult to conceive any serious objection to the reform on moral or ethical grounds—other than maybe an unarticulated preference for "settled expectations" or "governmental regularity."[188] Presented with evidence of gross voting inequality, Congress (and the Supreme Court) should simply follow Spike Lee's advice and "do the right thing."[189]

Philosophers, political scientists, and legal scholars agree that "quantitative equality" is an important value with respect to voting rights.[190] "Today," says Robert Dahl, "we have come to assume that democracy must guarantee virtually every adult citizen the right to vote."[191]

It is also true that "equality" standing alone amounts only to an "empty

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[186] U.S. CONST., amend. XIV, § 1.

[187] BLIGHT, supra note [93], at 279 (quoting Douglass). Douglass was particularly incensed by the Court's invocation of the Declaration of Independence. Id. at 277-79; *Dred Scott*, 60 U.S. at 409-11.

[188] See TRIBE, AMERICAN CONSTITUTIONAL LAW, supra note [56], at 6 (describing "settled expectations" and "governmental regularity" as among a number of "models" in constitutional law). These models are in tension with others including "equal protection" and "structural justice," as well as "separation of powers" and "limited government." Tribe suggests that "settled expectations" and "government regularity" present only "an appearance of neutrality and objectivity." Id. at 14. Closer analysis shows them to be based "for the most part on an illusion," and "the edifice of doctrine built on the ideals of respecting expectations and acting with regularity has been defensible only in terms of rarely articulated substantive beliefs." Moreover, "to the extent that the models genuinely avoid reliance on such beliefs, they prove circular, or empty, or both." Id.

[189] DO THE RIGHT THING (Universal Pictures 1989).

[190] CHARLES R. BEITZ, POLITICAL EQUALITY: AN ESSAY IN DEMOCRATIC THEORY 141 (1989) ("The meaning of quantitative fairness has become a settled matter: it requires adherence to the precept 'one man, one vote.'").

[191] ROBERT A. DAHL, ON DEMOCRACY 3 (2d ed. 2015).

idea."[192] One must have a theory for why equality in voting matters, and this theory should include concepts of human dignity and self-respect, and providing an equal chance or opportunity to affect the results of elections for important government offices and otherwise to participate in elections.[193] In addition, a theory of political equality in voting assumes some other factors, such as a basic cognitive competence of voters. Civic education is needed if voters are to understand what is at stake in elections and why they matter. For good political outcomes, more than quantitative equality to participate is needed because inequality of wealth or other social imbalances in conditions can skew political outcomes.[194] Nevertheless, there is a broad consensus favoring quantitative equality in voting as a precondition for a vibrant and healthy modern democracy.

In law, the principle of equal rights in voting expresses general values of "equal treatment" and "treating like cases alike." As Justice Antonin Scalia said, "the appearance of equal treatment" is one of the "most substantial" values in the law.[195] He continued:

> As a motivating force of the human spirit, that value cannot be overestimated. Parents know that children will accept quite readily all sorts of arbitrary substantive dispositions—no television in the afternoon, or no television in the evening, or even no television at all. But try to let one brother or sister watch television when the others do not, and you will

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[192] Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982). Westen argues that all arguments based on the idea of equality should be translated into concepts of rights. Id. at 539-41, 592. Accepting his argument would do no damage to the moral case for "equal voting rights," because one could simply formulate the argument in terms of the character of the "voting rights" that every person should have as an American citizen. If some citizens' votes are significantly diminished compared to others, then the "right" to have a say in governance is damaged, and the situation must be corrected in order to achieve fairness in the use of one's right to vote.

[193] See DAHL, ON DEMOCRACY, supra note [191], at 63-67, 76-78 (arguing for a conception of "intrinsic equality" supported also by the world's major religions, as well as a value of "inclusion"). See also SIDNEY HOOK, REASON, SOCIAL MYTHS, AND DEMOCRACY 285, 294 (1940) ("A democratic society is one where the government rests upon the freely given consent of the governed," and this includes values embracing "the belief that every individual should be regarded as possessing inherent worth or dignity"). For an argument that "human dignity" should stand as a fundamental constitution principle, see also Berman, supra note [43], at 1334, 1406.

[194] See Thomas Christiano, *Deliberative Equality and Democratic Order*, in POLITICAL ORDER: NOMOS XXXVIII 253, 257-66 (Ian Shapiro & Russell Hardin eds. 1996) (arguing that "political equality" is "a core ideal" in democratic decision-making because it "lends legitimacy to its outcomes" and provides "a just way of resolving certain kinds of conflicts of interest" and deliberations about views of the common good).

[195] Scalia, supra note [39], at 1178.

> feel the fury of the fundamental sense of justice unleashed. The Equal Protection Clause epitomizes justice more than any other provision of the Constitution.[196]

An analogous argument applies in the context of voting. How can it be fair for a citizen to move from California to neighboring Nevada or to Alaska and see their voting power multiplied by fifteen or fifty times?[197] It's not justifiable by any measure of common sense and respect of citizens to have an equally weighted say in their national government.

Many theories of political order rely on a moral principle of voting equality. John Rawls' theory of justice provides an example.[198] For Rawls, a just political order relies on "a just constitution" that establishes "a just procedure arranged to ensure a just outcome." To design a "just procedure," "the liberties of equal citizenship must be incorporated into and protected by the constitution." And "these liberties include those of liberty of conscience and freedom of thought, liberty of the person, and equal political rights." [199] Specifically, Rawls argues for a "principle of (equal) participation":

> It requires that all citizens are to have an equal right to take part in, and to determine the outcome of, the constitutional process that establishes the laws with which they are to comply. Justice as fairness begins with the idea that where common principles are necessary and to everyone's advantage, they are to be worked out from the viewpoint of a suitably defined initial situation of equality in which each person is fairly represented.[200]

"All sane adults," Rawls concludes, "have the right to take part in political affairs, and *the precept of one elector one vote is honored as far as possible*."[201]

Other philosophers agree that equal representation should be treated as a basic value. One may disagree with Rawls about how far to go in order to achieve political equality, but there is little controversy over the formal requirement of equal voting rights. As one survey describes the principle:

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[196] Id. See also Berman, supra note [43], at 1389 (describing constitutional principles of equality and liberty).

[197] DAHL, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION?, supra note [13], at 48-49. See also Table 1 supra in text at page [63].

[198] JOHN RAWLS, A THEORY OF JUSTICE (rev. ed. 1999).

[199] Id. at 173.

[200] Id. at 194-95.

[201] Id. at 195 (emphasis added).

> Democratic equality embraces the norm that law-makers and top public officials should be selected in democratic elections. All mentally competent adult citizens should be eligible to vote and run for office in *free elections* that operate against a backdrop of freedom of speech and association, and *in which all votes count equally* and majority rule prevails.[202]

The moral principle of equal voting rights finds wide agreement in different schools of thought. Deontologists and social contract theorists, for example, emphasize the need for voting to express rights of human dignity and enabling the pursuit of one's vision of the good life for oneself and the common good for society as a whole. Utilitarian and welfare theorists see equal voting as means of expressing interests and preferences that must be fairly counted to add to an overall measurement of social good and happiness. Libertarians agree that everyone should have a right to protect their property and advance their interests on a legally equal basis with others.[203]

One objection may recall "states' rights" in theories of federalism. The equal rights that citizens may claim in the United States, runs this objection, extend primarily to their rights as citizens of their respective states, and not as citizens of their national government. In other words, the voting rights of citizens need not be treated equally regarding their status as *citizens of the United States* compared with their status as *citizens of their states*.

This issue was raised tangentially in *U.S. Term Limits, Inc. v. Thornton*, which struck down a state law in Arkansas imposing term limits on U.S. senators and representatives in a closely divided five-to-four opinion.[204] Writing for the majority, Justice John Paul Stevens argued that "sovereignty is vested in the people, and that sovereignty confers on the people the right to choose freely their representatives to the National Government."[205] He read constitutional text and precedents to restrict states from interfering with federal election qualifications.

In a long dissenting opinion, Justice Clarence Thomas objected that the "Constitution simply does not recognize any mechanism for action by the

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[202] Richard Arneson, Egalitarianism, Stanford Encyclopedia of Philosophy, Apr 24, 2013 (revised), https://plato.stanford.edu/entries/egalitarianism/ (emphasis added).

[203] Cf. RONALD DWORKIN, LAW'S EMPIRE 297 (1986) (describing these different philosophical perspectives in terms of the idea of equality).

[204] 514 U.S. 779 (1995).

[205] Id. at 794.

undifferentiated people of the Nation." He added:

> In short, the notion of popular sovereignty that undergirds the Constitution does not erase state boundaries, but rather tracks them. The people of each State obviously did trust their fate to the people of the several States when they consented to the Constitution; not only did they empower the governmental institutions of the United States, but they also agreed to be bound by constitutional amendments that they themselves refused to ratify. See Art. V . . . . At the same time, however, the people of each State retained their separate political identities. As Chief Justice Marshall put it, "[n]o political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass.[206]

Nevertheless, it is no dream that the Civil War and the subsequent Voting Rights Amendments altered the constitutional landscape to establish federal voting rights protections—operative on the national government as well as the states. Recall the universal language used in the Voting Rights Amendments: "The *right of citizens of the United States* to vote shall not be denied or abridged *by the United States or any State*."[207] There is no doubt in this language that the people of the United States are acting, and they are delegating power to protect their rights to Congress and not the states (or the Supreme Court). One may observe also that U.S. Senators swear an oath to "support and defend the Constitution of the United States against all enemies, foreign and domestic" and to "bear true faith and allegiance to the same."[208] Senators owe their constitutional duties to their constituents as U.S. citizens.

Justice Anthony Kennedy's concurrence in *Term Limits* sounds the right note of compromise: Americans are citizens of *both* the United States and their individual states. In Kennedy's words,

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[206] Id. at __ (Thomas, J., dissenting) (quoting McCulloch v. Maryland, 4 Wheat. 316, 403 (1819).

[207] See supra notes [66-69] and accompanying text (emphasis added). See also Seth F. Kreimer, *Lines in the Sands: The Importance of Borders in American Federalism*, 150 U. PA. L. REV. 973, 983-84 (2002) (arguing that "national citizenship" has been "primary" over "state citizenship" ever since "the Civil War resolved the issue by force of arms, and the resolution was embodied in the Citizenship Clause of the Fourteenth Amendment: persons born or naturalized in the United States are indissolubly citizens of the United States and only derivatively or contingently citizens of 'the state in which they reside'") (quoting Fourteenth Amendment).

[208] U.S. Senate, Oath of Office, https://www.senate.gov/artandhistory/history/common/briefing/Oath_Office.htm.

> Federalism was our Nation's own discovery. The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other. The resulting Constitution created a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, . . . its own set of mutual rights and obligations to the people who sustain it and are governed by it. It is appropriate to recall these origins, which instruct us as to the nature of the two different governments created and confirmed by the Constitution.[209]

The Senate Reform Act redeems the voting rights of U.S citizens. It respects the structure and history of federalism, and applies the moral and political principle of equal voting rights at a national level for national elections.[210]

E. *Legal Doctrine*

The last mode of interpretation to consider is whether the Senate Reform Act finds support in constitutional doctrine announced in Supreme Court precedents.

The reform would follow in the same path as the powerful Voting Rights Act of 1965, with Congress focusing on the practices and structure of the United States itself rather than the states.[211] Most directly relevant are therefore cases that have upheld congressional authority to promulgate the Voting Rights Act. In *South Carolina v. Katzenbach*, for example, the Court rejected claims by the state that the Voting Rights Act exceeded the constitutional authority of Congress under the Fifteenth Amendment.[212] South Carolina argued that "the principle of the equality of States" meant that Congress could not adopt measures reaching into the states to review or supervise elections.[213] The Court replied by announcing a general principle that applies also to the reform here.

> The language and purpose of the Fifteenth Amendment, the prior decisions construing its several provisions, and the general doctrines

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[209] 514 U.S. at 838–39 (Kennedy, J., concurring).

[210] Robert Dahl would agree with the reform. He criticized the Senate as a dramatic departure from the basic principle of democratic equality. DAHL, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION?, supra note [13], at 46-50.

[211] See supra note [99] and accompanying text.

[212] 383 U.S. 301 (1966).

[213] Id. at 323.

> of constitutional interpretation, all point to one fundamental principle. As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting.[214]

Although recent cases have questioned the need for some remedial measures under the Voting Rights Act, the constitutional authority and indeed the "success" of the statute has not been challenged.[215] The only difference in an application of this doctrine to the Senate Reform Act is that the Congress would be addressing action "of the United States" rather than "the states," and the Fifteenth Amendment explicitly covers "the United States" as a legitimate target for congressional legislation.[216]

The reform aims at the same problem as the Voting Rights Act: denial or abridgment of equal voting rights. When the Constitution explicitly authorizes Congress to legislate, then its power reaches its zenith. *Katzenbach* quoted *McCulloch v. Maryland*: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."[217] *Katzenbach* praised Congress also for its "inventive manner" in adopting the Voting Rights Act to address a recalcitrant historical problem.[218] The historical context is important because Congress had retreated after the first Reconstruction and allowed racist white southerners to reassert power over elections and voting.[219] The Voting Rights Act was a part of what has been called the Second Reconstruction.[220]

Katzenbach upheld federal oversight to prohibit impediments to voting such as literacy tests in the states. Other cases addressed the same broader problem of geographical malapportionment at the state level as targeted by

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[214] Id. at 324.

[215] See, e.g., Northwest Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 202 (2009) (noting the "success" of the Voting Rights Act while at the same time cutting back its scope regarding preclearance plans). See also id. at 217 (Thomas, J., concurring in part and dissenting in part) (agreeing there is "certainly no question" the Voting Rights Act was "passed pursuant to Congress' authority under the Fifteenth Amendment") (quoting Lopez v. Monterey County, 525 U.S. 266, 282 (1999)).

[216] U.S. CONST. amend. XV, § 1.

[217] 383 U.S. at 326 (quoting McCulloch v. Maryland, 4 Wheat. 316, 421 (1819)).

[218] Id. at 327-28.

[219] See supra Part II.C. See also Northwest Austin, 557 U.S. at 218-22 (Thomas, J., concurring in part and dissenting in part) (recounting post-Reconstruction history and the need for the Voting Rights Act).

[220] See Karlan, supra note [99], at 2.

the Senate Reform Act at the federal level.

In 1962, *Baker v. Carr* found Tennessee's legislative apportionment scheme to be racially discriminatory and an unconstitutional violation of the Equal Protection Clause.[221] The next year, *Gray v. Sanders* struck down a legislative scheme in Georgia as malapportioned under the Voting Rights Amendments.[222] In reviewing Georgia's voting system, the Court asked,

> How then can one person be given twice or 10 times the voting power of another person in a statewide election merely because he lives in a rural area or because he lives in the smallest rural county? Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment. The concept of "we the people" under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications.[223]

This argument and the principle of equal voting rights that it expresses are directly applicable to the malapportioned U.S. Senate. The Court in *Gray*, with Justice William Douglas writing for majority, went on to say that "[t]the conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote."[224]

Then in 1964, the Court dropped what one scholar called the "bombshell" of *Reynolds v. Sims*.[225] *Reynolds* found Alabama's legislative apportionment system to be unconstitutional under the Equal Protection Clause. Going further than previous precedents, the Court "minted a new rule that every district had to be equally populous."[226] The Court reasoned, following *Gray* and other precedents:

> Legislators represent people, not trees or acres. Legislators are elected

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[221] 369 U.S. 186, 198 (1962).
[222] 372 U.S. 368 (1963).
[223] Id. at 379-80.
[224] Id. at 381.
[225] AMAR, AMERICA'S UNWRITTEN CONSTITUTION, supra note [17], at 194 (citing 377 U.S. 533 (1964)).
[226] Id. at 193-94.

> by voters, not farms or cities or economic interests. As long as ours is a representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system. . . . [I]f a State should provide that the votes of citizens in one part of the State should be given two times, or five times, or 10 times the weight of votes of citizens in another part of the State, it could hardly be contended that the right to vote of those residing in the disfavored areas had not been effectively diluted. It would appear extraordinary to suggest that a State could be constitutionally permitted to enact a law providing that certain of the State's voters could vote two, five, or 10 times for their legislative representatives, while voters living elsewhere could vote only once. And it is inconceivable that a state law to the effect that, in counting votes for legislators, the votes of citizens in one part of the State would be multiplied by two, five, or 10, while the votes of persons in another area would be counted only at face value, could be constitutionally sustainable.[227]

At one stroke, the Court in *Reynolds* knocked out more than forty state electoral systems as unconstitutionally unequal.[228]

My argument here is not that the U.S. Senate can or should be challenged as unconstitutional by private citizens or the states acting on their behalf.[229]

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[227] Reynolds v. Sims, 377 U.S. 533, 562 (1964). See also Wesberry v. Sanders, 376 U.S. 1, 7-8 (1964) (striking down Georgia's apportionment of U.S. congressional districts in which two or three times more citizens were placed in some districts than others and arguing that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's").

[228] AMAR, AMERICA'S UNWRITTEN CONSTITUTION, supra note [17], at 194. See also BARRY FRIEDMAN, THE WILL OF THE PEOPLE 268 (2009) (reporting Senator Strom Thurmond's lament that *Reynolds* had invalidated the apportionment systems of at least forty-four states).

[229] At least one scholar recognizes that a possible constitutional challenge might be raised against the apportionment scheme of the Senate on the equal protection grounds enunciated in *Reynolds*. AMAR, AMERICA'S UNWRITTEN CONSTITUTION, supra note [17], at 194 ("If the Court could on one day say that most states had unconstitutional governments that required major restructuring after the next census, what was to stop the Court on the next day from saying the same thing about the Senate?"); see also Baker & Dinkin, supra note [28] (suggesting a similar argument).

In my view, the United States Senate today violates the principle of equal protection of voting rights, and expressions of the principle in cases such as *Reynolds*, but it does not follow that the Senate as currently structured should be found unconstitutional in the absence of congressional action along the lines of a Senate Reform Act.

First, without a federal statute, there is no clear intramodal conflict between texts. See supra Part II.A. The distinction between "constitutional interpretation" and "constitutional

The basic principles of voting equality and fairness enunciated in cases such as *Baker*, *Gray*, and *Reynolds*, however, apply with similar persuasive force to the proposed reform. Congress has express power to act under these principles and apply them also to "the United States" as well as "the states."

Recall also that the mathematical inequality in the U.S. Senate is much higher than the ratios struck down in the cases against state regimes. Mathematical inequality in the Senate counts voters in California as sixty-seven times less influential than voters Wyoming.[230] The degree of voting inequality in some of the state cases seems quaint by comparison. In principle, the inequality in representation in the current Senate violates the same kind of equal voting rights vindicated in *Baker*, *Gray*, and *Reynolds*. A congressional statute to remedy the same kind inequality should be found constitutional.

More recent cases are not to the contrary. In *Bush v. Gore*, for example, the Supreme Court intervened in a state recount of votes in a presidential election and applied an equal protection rationale to protect voters' rights.[231] Ostensibly at least, the Court acted to protect all Florida voters from unequal treatment in the recounting of votes in a close election. The case has been criticized as result-oriented: five Republican-appointed Justices holding in favor of the Republican candidate.[232] At a minimum, however, the case

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construction" may prove useful here. See Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U.L. REV. 549, 566-69 (2009) (examining the role of Congress and the President in constitutional construction). If Congress acts, then it is constructing the meaning of the Voting Rights Amendments, and the Court should then defer to that construction in the absence of "clear mistake." See supra note [43] and accompanying text. In the absence of congressional action, the textual meaning of the Voting Amendments Act is less specific and less determinative.

Second, the Court should not put itself into a position of judicial oversight of the structure of a co-equal branch of the federal government independently of action by the political branches. For the Court to order the political branches to reform the Senate would also set up an untenable power contest. Federal courts should therefore decline a free-standing constitutional case as not justiciable for prudential reasons under the political question doctrine. See supra note [41] and accompanying text. But cf. William S. Bailey, Comment, *Reducing Malapportionment in Japan's Electoral Districts: The Supreme Court Must Act*, 6 P. RIM L. & POLICY J. 169, 174-81 (1997) (discussing cases in Japan finding voter lawsuits challenging national legislature apportionment ratios justiciable).

[230] See supra note [7] and accompanying text.

[231] 531 U.S. 98, 103 (2000) (holding that "the use of standardless manual recounts" under state election laws violates . . . the Equal Protection Clause").

[232] See, e.g., ALAN DERSHOWITZ, SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000 (2001) (criticism by a law professor who played a role on the losing side of the case). See also BUSH V. GORE: THE COURT CASES AND THE COMMENTARY (E.J. Dionne, Jr. & William Kristol eds. 2001) (collecting different, but mostly critical, views of the

followed in the tradition of applying the Equal Protection Clause to protect voting rights. The Court observed that states could not "value one person's vote over that of another" in federal elections.[233] The Court also followed *Reynolds v. Sims* in arguing that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by prohibiting the free exercise of the franchise."[234] In this respect, said the majority, there was "no difference between the two sides of the present controversy."[235] The minority opinions also followed the leading cases on equal protection of voting rights, though coming to the opposite conclusion on the merits as applied to vote recounting.[236]

Shelby County v. Holder, decided in 2013, also does not impede a view that the affirmative use of congressional power in a Senate Reform Act should be found constitutional.[237] The Court in *Shelby County* referred favorably to the history of the Voting Rights Amendments and the passage of the Voting Rights Act.[238] The challenge involved the Voting Rights Act singling out southern states for special review and oversight, and the Court found this provision of the Voting Rights Act to conflict with concerns about federalism. Dubiously, the Court claimed that history and social culture in the United States had evolved beyond the racial discrimination of the past, especially in the old southern slave states.[239] In making this judgment, the Court nonetheless recognized that the Voting Rights Act had been successful,

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Court's decision).

[233] 531 U.S. at 104-05 (citing Harper v. Virginia, 383 U.S. 663, 665 (1966).

[234] Id. at 105 (quoting Reynolds v. Sims, 377 U.S. 533, 555 (1964)).

[235] Id. at 105. See also AMAR, AMERICA'S UNWRITTEN CONSTITUTION, supra note [17], at (noting that conservative as well as liberal justices "accept the basic teachings" of cases including *Baker* and *Reynolds*).

[236] 531 U.S. at 126 (Stevens, J., dissenting) (recognizing the Equal Protection Clause might apply in a "remedial scheme" involving vote recounts); id. at 143 (Ginsburg, J., dissenting) (recognizing that an "equal protection claim" might make sense if "perfection [was] the appropriate standard for judging the recount" but responding that "we live in an imperfect world").

[237] 570 U.S. 529 (2013)

[238] Id. at 536-37.

[239] Id. at 529 ("Nearly 50 years later, things have changed dramatically."). Justice Ginsburg, writing for four Justices in dissent, contested the main empirical premise of the Court's opinion, namely, that racial discrimination in the former Confederate states had been eliminated. Instead, Ginsberg noted that the enactment of new racist impediments to voting rights had historically sprung up like "battling the Hydra" in the form of many "second-generation barriers." Id. at 560, 563 (Ginsburg, J., dissenting). See also Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 176 (2007) (examining the extensive record that Congress assembled when reauthorizing the Voting Rights Act).

and recognized its importance as well as its constitutionality.[240]

Writing for the majority, Chief Justice John Roberts explicitly endorsed a future-oriented interpretation: "The Fifteenth Amendment commands that the right to vote shall not be denied or abridged on account of race or color, and it gives Congress the power to enforce that command. The Amendment is not designed to punish for the past; its purpose is to ensure a better future."[241] The Senate Reform Act is designed precisely in this fashion: to remedy the radical inequality of representation in the Senate and to provide equal voting rights for all American citizens in "a better future."

III. Political Feasibility

Assuming Congress has the constitutional authority to make the Senate more representative, the reform may nevertheless seem politically infeasible. Under the Senate Reform Act, twenty-six states would lose a Senator. Why would any of them agree?

If senators and representatives voted only in the interest of their own states' relative power, then the reform would fail. Representatives in the House may follow the interests of their states and vote in favor of the reform given their majority representation of population. Senators, though, would vote the proposal down. Those in twelve states that would gain under the reform may vote yes. Those in another twelve states that stay the same may say yes too. Those in the twenty-six states that lose a senator would kill the bill.[242]

However, sectional politics of this kind no longer rules the day.[243] In the post-World War II period, the presidential leadership of ideologically split parties matters more than sectional or geographical differences.[244] Since the 1970s, ideology has grown more important—with Democrats becoming more

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[240] 570 U.S. at 548 ("There is no doubt that these improvements [particularly with respect to voter registration and voter turnout] are in large part because of the Voting Rights Act. The Act has proved immensely successful at redressing racial discrimination and integrating the voting process.")

[241] Id. at 553.

[242] See supra text accompanying note [33] and Table 1 at page [63] for the count.

[243] For the old view, see FREDERICK J. TURNER, THE SIGNIFICANCE OF SECTIONS IN AMERICAN HISTORY (1932). Note that southeastern states still appear to oppose racial justice more than other states, though, with history as the main explanation of this sectional difference. See infra note [246] and accompanying text.

[244] See Peter H. Odegard, *Presidential Leadership and Party Responsibility*, 307 ANNALS AM. ACAD. POL. & SOCIAL SCI. 66 (1956) (presenting evidence for this view).

"liberal" and Republicans more "conservative." Ideological polarization now trumps regional and geographical divisions.[245] Indicating the depth of racial division remaining in the United States, scholars identify a key watershed in the ideological fervor of the civil rights reforms of the 1960s, including the Voting Rights Act.[246] The election of a black president likely stoked implicit as well as explicit racist reactions.[247] In response, there is a growing social movement aimed at a "Third Reconstruction."[248] In this context, a Senate Reform Act is politically feasible.

Although the proposal is drawn in politically neutral terms, following mathematical equality within a federalism constraint, the truth is that Democrats are likely to gain more from the reform politically. In general terms, the proposal is balanced in its political effects for Republicans and Democrats, the "red" and the "blue." Big red states such as Texas and Florida gain eleven senators, balanced by ten extra senators for big blue California.

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[245] See Christopher Hare & Keith T. Poole, *The Polarization of Contemporary American Politics*, 46 POLITY 411 (2014) (finding more ideological differences characterizing both political elites and masses of citizens today than at any time since the Civil War); Pildes, supa note [36], at 332 (observing that "the radically polarized politics, and the absence of a center in American democracy today, reflect long-term structural and historical changes in American democracy that are likely to endure for some time to come"). See also supra note [109] (additional empirical evidence of polarization).

[246] Hare & Poole, supra note [245], at 415-16 ("The roots of the modern trend to greater polarization can in part be found in the passage of the 1964 Civil Rights Act and the 1965 Voting Rights Act. Southern Whites began voting for Republican candidates as the process of issue evolution over race played out. Southern Republicans first gained a strong foothold in presidential elections, then in elections for the U.S. Senate and House, and finally most of the southern state legislatures became dominated by Republicans. The old southern Democratic Party has, in effect, disintegrated. The exodus of conservative Southerners from the Democratic Party at both the elite and mass levels has created a more homogenously liberal party. The net effect of these changes is that race—once a regional, second-dimension issue—has been drawn into the liberal-conservative dimension because race-related issues are increasingly questions of redistribution.").

[247] See supra note [144] and accompanying text; Dana Milbank, *Obama Was Right: He Came Too Early*, WASH. POST, June 1, 2018, https://www.washingtonpost.com/opinions ("[W]hat was naively proclaimed in 2008 as post-racial America was instead kindling for white insecurity, and Trump cunningly exploited and stoked racial grievance with his subtle and overt nods to white nationalism. He is now leading the backlash to the Obama years and is seeking to extend white dominion as long as possible, with attempts to stem immigration, to suppress minority voting and to deter minority census participation."); Erika Wilson, *The Great American Dilemma: Law and the Intransigence of Racism*, 20 CUNY L. REV. 513, 519 (2017) (arguing that "as the election of Donald J. Trump to the presidency revealed, racism remains the Great American Dilemma.").

[248] For the view of one of the leaders of this movement, see WILLIAM J. BARBER II, THE THIRD RECONSTRUCTION: HOW A MORAL MOVEMENT IS OVERCOMING THE POLITICS OF DIVISION AND FEAR (2016).

Losses of senators in small states roughly even out: low-population western red states on one side, and small blue states of New England on the other.

Overall, however, a comparison of the reform's allocations of senators using the Electoral College map that elected President Trump in 2016 as a guide shows that the net gains and losses would yield eight more senators for Democrats and only two more for Republicans. See Table 8. On strictly partisan grounds, Republicans will likely oppose the reform. Note, though, that hypothetically applying the reform retrospectively would not have changed the outcome of the presidential election in 2016, perhaps lending some comfort to Republicans.[249]

[Insert Table 8 about here.]

Republicans would also likely oppose the reform because they benefit from the current status quo bias in the Senate favoring white voters. In both the 2016 presidential election and the 2018 midterms, Republicans appealed more strongly to white voters (by ten to twenty percent margins), while Democrats had an edge in nonwhite categories (including approximately 80 percent margins among black voters, 40 to 50 percent among Asian voters, and almost 40 percent among Hispanic voters).[250] In the midterm elections, these differentials translated into a "blue wave" of a gain of forty seats for Democrats in the House—in the same election in which Republicans gained two seats in the Senate.[251]

Under these circumstances, one can imagine a scenario in which a "blue

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[249] The Electoral College, including so-called faithless electors, voted for 304 for Trump and 227 for Clinton, and the pledged outcome was 306 to 232. Plus-eight for Clinton would therefore have made no difference. See *Presidential Election Results: Donald J. Trump Wins*, N.Y. TIMES, Aug. 9, 2017, https://www.nytimes.com/elections/2016/results/president.

[250] See Coates, *The First White President*, supra note [144] (reporting on white majorities across all categories won by Trump in 2016, and Trump's lack of support in almost all nonwhite categories); William H. Frey, 2018 Exit Polls Show Greater White Support for Democrats, Brookings, Nov, 8, 2018, fig. 2 (compiling data from CNN exit polls showing whites favoring Republicans but by lesser margins than 2016), https://www.brookings.edu/blog/the-avenue/2018/11/08/2018-exit-polls-show-greater-white-support-for-democrats/.

The plain truth is also that many Republicans support voter suppression campaigns against minority voters. See Lopez, supra note [21] (recounting voting suppression in the 2018 elections). Contemporary Republicans have become a decidedly "pro-white" party—if not implicitly a white nationalist one—with its strength lying almost entirely in white majorities. A turning point was the decision of Richard Nixon to adopt a "southern strategy" in his presidential campaign. See ALEXANDER, supra note [143], at 44-45.

[251] RealClear Politics, 2018 Elections: House, https://www.realclearpolitics.com/elections/live_results/2018/house/; see supra note [1] and accompanying text.

wave" would continue to build, and Democrats could win control of the Senate and the Presidency, as well as the House, in 2020 (or 2024 or 2028). If the proposed Senate Reform Act gained support from both a Democratic President and Democrats in Congress, then it seems likely that enough Democrats in small states could be persuaded to support the change on grounds of fairness as well as politics.[252] A Senate Reform Act would then pass into law.

Conclusion

The unrepresentative structure of the Senate in the constitutional fabric of the United States has been stitched into our nation from the beginning. From the beginning too, this structure has reflected the inheritance of the original sin of African slavery as well as the exclusion of indigenous people and women. Over time, a civil war was fought and political battles won that expanded the franchise beyond the group of property-owning, often slaveholding white men who wrote and ratified the original Constitution. These victories over-stitched permanent constitutional patches in the form of the Fourteenth, Fifteenth, Nineteenth, Twenty-Fourth, and Twentieth-Sixth Amendments which extend a general right to vote to all adults equally, without regard to categories such as race, ethnicity, color, national origin, sex, sexual orientation, wealth, and age—and delegating explicit power to Congress to enforce equal voting rights. The right to vote "shall not be denied or abridged" by "the United States" or "any state."[253]

It has been said that the arc of history bends toward justice.[254] This has been true in the United States with respect to the evolution of constitutional protections of voting rights, though there have been zigs and zags in the historical progression.[255]

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[252] It's still true that the reform would face difficulty with smaller states. Power is rarely relinquished voluntarily. Note also that Republican senators in large states may also face political pressure: why would they oppose greater and fairer representation for their states?

[253] See supra text accompanying notes [63-66].

[254] Martin Luther King, Jr., repeated the phrase in his speeches: "The arc of the moral universe is long, but it bends toward justice." President Barack Obama used the phrase as well, attributing it to King, and even had it inscribed into a rug in the Oval Office. The abolitionist Unitarian minister Theodore Parker, however, gets credit for the first use of the idea. In an 1853 sermon, Parker preached: "I do not pretend to understand the moral universe. The arc is a long one. My eye reaches but little ways. I cannot calculate the curve and complete the figure by experience of sight. I can divine it by conscience. And from what I see I am sure it bends toward justice." Theodore Parker and the "Moral Universe," National Public Radio, Sept. 2, 2010, https://www.npr.org/templates/story/story.php?storyId=129609461.

[255] Cf. *Transcript: President Obama's Remarks 0n Donald Trump's Election*, WASH.

The Senate, as shown here, has become radically unrepresentative. It is an outlier among modern democracies in its severe malapportionment in general terms disfavoring citizens in large states.[256] Its malapportionment is also heavily biased in favor of white populations in a manner that violates the Fourteenth and Fifteenth Amendments. The Senate is biased as well with respect to women and other protected categories of citizens in a manner that violates the Fourteenth, Nineteenth, and Twenty-Sixth Amendments. Congress should act to correct this injustice at the core of American democracy and to put all Americans on an equal footing in *their* Senate.

The Senate Reform Act recommended here provides a simple solution, using a Rule of One Hundred to adjust the representation of citizens in the allocation of senators to states more fairly to represent the U.S. population. Some big states such as California, Texas, Florida, and New York will get more senators, and many smaller states will lose a senator. Other states will stay with two senators or gain one or two. The overall number of senators will remain around 110. All other constitutional rules regarding the Senate and its relationship to the states will remain the same.

There are other advantages to the proposal. An easier path to statehood would be provided for the District of Columbia, Puerto Rico, and perhaps the U.S. Pacific Islands because it would be easier politically to add a new state with one senator rather than two. The Electoral College would automatically become more representative of the nation, relieving pressure for other potentially more disruptive changes, such as an interstate compact for a national popular vote. The tendency for senators in small states to siphon off more than their fair share of government spending would also be corrected.

Despite these advantages, some may still contend that the one state, two senators rule can never change—because the plain text of the Constitution says so! As I have shown, however, traditional modes of constitutional interpretation give a different answer. The plain text of the later Voting Rights Amendments empowers Congress to override the one state, one senator rule because it "abridges" the equal voting rights of U.S. citizens. In addition to textual analysis, other modes of constitutional interpretation—including considerations of structure, history, moral principles, and legal

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POST, Nov. 9, 2016, https://www.washingtonpost.com/news/the-fix/wp/2016/11/09/transcript-president-obamas-remarks-on-donald-trumps-election/ ("[T]he path that this country has taken has never been a straight line. We zig and zag and sometimes we move in ways that some people think is forward and others think is moving back, and that's OK.").

[256] See supra note [27] and accompanying text.

precedents—support the constitutionality of the proposed reform. Another argument might be added here at the end: it is absurd to say that a bad constitutional rule can never be changed (except maybe by revolution). We should not read the Constitution to put a straightjacket on democracy.

Tables, Figure, and Appendix

Table 1: Proposed Reform Allocation for Senators

State	2017 Population*	Share of 1 percent of total U.S. population	Proposed Senators
United States	325,719,178		
Alabama	4,874,747	1.49**	2
Alaska	739,795	.23	1
Arizona	7,016,270	2.15	2
Arkansas	3,004,279	.92	1
California	39,536,653	12.13	12
Colorado	5,607,154	1.72	2
Connecticut	3,588,184	1.10	1
Delaware	961,939	.30	1
Florida	20,984,400	6.44	6
Georgia	10,429,379	3.20	3
Hawaii	1,427,538	.44	1
Idaho	1,716,943	.53	1
Illinois	12,802,023	3.93	4
Indiana	6,666,818	2.05	2
Iowa	3,145,711	.97	1
Kansas	2,913,123	.89	1
Kentucky	4,454,189	1.37	1
Louisiana	4,684,333	1.44	1
Maine	1,335,907	.41	1
Maryland	6,052,177	1.86	2
Massachusetts	6,859,819	2.11	2
Michigan	9,962,311	3.06	3
Minnesota	5,576,606	1.71	2
Mississippi	2,984,100	.92	1
Missouri	6,113,532	1.88	2
Montana	1,050,493	.32	1
Nebraska	1,920,076	.59	1
Nevada	2,998,039	.92	1
New Hampshire	1,342,795	.41	1
New Jersey	9,005,644	2.76	3
New Mexico	2,088,070	.64	1
New York	19,849,399	6.09	6
North Carolina	10,273,419	3.15	3
North Dakota	755,393	.23	1

Ohio	11,658,609	3.58	4
Oklahoma	3,930,864	1.21	1
Oregon	4,142,776	1.27	1
Pennsylvania	12,805,537	3.93	4
Rhode Island	1,059,639	.33	1
South Carolina	5,024,369	1.54**	2
South Dakota	869,666	.27	1
Tennessee	6,715,984	2.06	2
Texas	28,304,596	8.69	9
Utah	3,101,833	.95	1
Vermont	623,657	.19	1
Virginia	8,470,020	2.60	3
Washington	7,405,743	2.27	2
West Virginia	1,815,857	.56	1
Wisconsin	5,795,483	1.78	2
Wyoming	579,315	.18	1
Total Senators			**110**
District of Columbia	693,972	.21	1
Puerto Rico	3,337,177	1.02	1
Pacific Islands†	375,165	.11	1
American Indians and Alaskan natives ††	2,726,278	.73	1

* U.S. Census estimates for 2017.

** In borderline cases, I err in favor of greater representation and round up.

† U.S. Census data for 2010 combined for American Samoa (55,519) Guam (159,358), North Mariana Islands (53,883), and the U.S. Virgin Islands (106,405).

†† U.S. Census estimates for 2017 living in territory of U.S. states.

Table 2: The Three Classes of Senators by State

State	Class 1	Class 2	Class 3
Alabama	X	X	
Alaska		X	X
Arizona	X		X
Arkansas		X	X
California	X		X
Colorado		X	X
Connecticut	X		X
Delaware	X	X	
Florida	X		X
Georgia		X	X
Hawaii	X		X
Idaho		X	X
Illinois		X	X
Indiana	X		X
Iowa		X	X
Kansas		X	X
Kentucky		X	X
Louisiana		X	X
Maine	X	X	
Maryland	X		X
Massachusetts	X	X	
Michigan	X	X	
Minnesota	X	X	
Mississippi	X	X	
Missouri	X		X
Montana	X	X	
Nebraska	X	X	
Nevada	X		X
New Hampshire		X	X
New Jersey	X	X	
New Mexico	X	X	
New York	X		X
North Carolina		X	X
North Dakota	X		X
Ohio	X		X
Oklahoma		X	X
Oregon		X	X
Pennsylvania	X		X
Rhode Island	X	X	
South Carolina		X	X

South Dakota		X	X
Tennessee	X	X	
Texas	X	X	
Utah	X		X
Vermont	X		X
Virginia	X	X	
Washington	X		X
West Virginia	X	X	
Wisconsin	X		X
Wyoming	X	X	

Table 3: Allocations of Senators over Time*

State	2020 [2]	2022 [3]	2024 [1]	2026
Alabama	2	2	2	2
Alaska	2	2	2	1
Arizona	2	2	2	2
Arkansas	2	1	1	1
California	2	4**	8**	12**
Colorado	2	2	2	2
Connecticut	2	1	1	1
Delaware	2	2	1	1
Florida	2	4**	5**	6**
Georgia	2	2	3	3
Hawaii	2	1	1	1
Idaho	2	1	1	1
Illinois	2	2	3	4**
Indiana	2	2	2	2
Iowa	2	1	1	1
Kansas	2	1	1	1
Kentucky	2	1	1	1
Louisiana	2	1	1	1
Maine	2	2	1	1
Maryland	2	2	2	2
Massachusetts	2	2	2	2
Michigan	2	3	3	3
Minnesota	2	2	2	2
Mississippi	2	2	1	1
Missouri	2	2	2	2
Montana	2	2	1	1
Nebraska	2	2	1	1
Nevada	2	1	1	1
New Hampshire	2	1	1	1
New Jersey	2	3	3	3
New Mexico	2	2	1	1
New York	2	4**	5**	6**
North Carolina	2	2	2	3
North Dakota	2	1	1	1
Ohio	2	3**	4**	4
Oklahoma	2	1	1	1
Oregon	2	1	1	1
Pennsylvania	2	3**	4**	4
Rhode Island	2	2	1	1
South Carolina	2	2	2	2

South Dakota	2	1	1	1
Tennessee	2	2	2	2
Texas	2	4**	7**	9**
Utah	2	1	1	1
Vermont	2	1	1	1
Virginia	2	3	3	3
Washington	2	2	2	2
West Virginia	2	2	1	1
Wisconsin	2	2	2	2
Wyoming	2	2	1	1

* Brackets after years indicates senate class up for election.

† Indicates choices to be made by drawing lots with other states. Additions are correlated with openings in classes for states.

Table 4: Percentage Racial/Ethnic Profiles of the States*

	White	Black	Hispanic	Asian	Native American	Pacific Islander
United States	**61%**	**12%**	**18%**	**6%**	**1%**	**>1%**
Alabama	66	27	4	-	-	-
Alaska†	60	3	7	5	17	2
Arizona	54	4	34	3	2	-
Arkansas	72	15	7	-	1	-
California††	38	5	39	15	2	1
Colorado	70	4	19	4	-	-
Connecticut	67	10	16	5	-	>1
Delaware	62	21	11	3	-	>1
Florida††	55	15	26	3	>1	-
Georgia	52	32	10	4	-	-
Hawaii	19	2	10	39	-	17
Idaho	82	1	13	2	-	-
Illinois	61	14	17	6	-	-
Indiana	81	9	6	2	-	-
Iowa	86	3	6	2	-	-
Kansas	74	6	14	2	-	-
Kentucky	84	8	5	-	-	-
Louisiana	59	32	5	-	-	-
Maine	92	1	2	-	-	-
Maryland	53	29	11	5	-	-
Massachusetts	72	7	12	7	-	-
Michigan	75	14	5	3	-	-
Minnesota	80	6	6	4	-	-
Mississippi	58	37	3	-	-	-
Missouri	79	11	4	2	-	-
Montana	89	1	3	1	-	-
Nebraska	78	4	13	3	-	>1
Nevada	52	9	27	8	-	-
N.H.	92	1	3	2	-	-
New Jersey	58	13	18	11	-	-
New Mexico	37	2	46	-	-	-
New York††	57	14	18	9	>1	-
North Carolina	61	21	10	3	-	-
North Dakota†	85	3	4	-	4	-
Ohio	78	12	4	2	-	-
Oklahoma	64	7	12	-	8	-
Oregon	75	2	14	4	-	-

Pennsylvania	76	11	7	4	-	-
Rhode Island	72	6	16	4	-	-
South Carolina	65	26	5	2	-	-
South Dakota	82	2	5	-	-	>1
Tennessee	73	17	6	2	-	-
Texas††	43	12	38	5	>1	-
Utah	79	1	14	2	-	-
Vermont†	94	1	1	-	-	-
Virginia	61	18	11	7	-	-
Washington	66	3	14	10	-	-
West Virginia	93	3	1	-	-	>1
Wisconsin	80	6	8	3	-	>1
Wyoming†	86	1	9	-	-	-
D.C.	38	46	10	5	-	-

* Kaiser Family Foundation, Population Distribution Based on Race/ Ethnicity (based on U.S. Census Bureau data, Annual Social and Economic Supplements (Mar. 2017), https://www.kff.org/other/state-indicator/distribution-by-aceethnicity/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D. Excluded: percentage of two races/ethnicities ranging from one percent to fourteen percent (in Hawaii) with a U.S. average of two percent.

† Four smallest states in population.

†† Four largest states in population.

Table 5: Percentage of Nation's Population in Selected Racial and Ethnic Groups Compared with Percentages in the Median State*

	National Population	In Median State
Black	12.5	7.1
Hispanic	10.0	2.8
Asian	3.4	1.3
American Indian, Eskimo, Aleut	0.8	0.4
White (non-Hispanic)	74.0	82.2
All minorities	26.8	18.1

* From Frances E. Lee & Bruce I. Oppenheimer, *Sizing Up the Senate* (1999) at page 21, table 2.1, based on 1996 data.

Table 6: Percentage Gender, Age, and LGBT Identification in States*

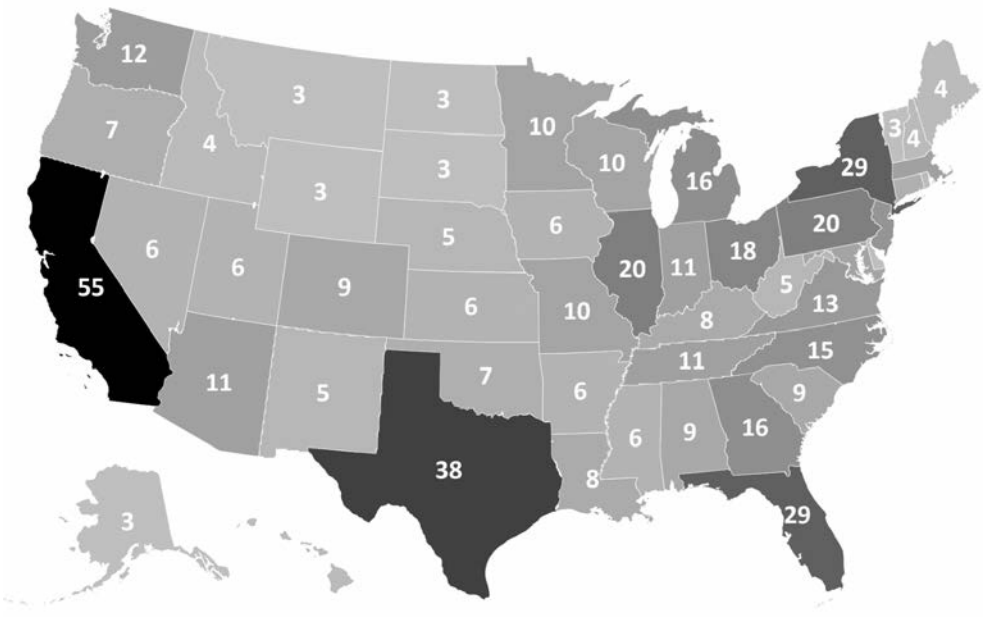
	Female	**Age 18-24**	**Age 65-plus**	**LGBT**
Alabama	51	10	16	3
Alaska	48	10	10	3
Arizona	50	10	16	4
Arkansas	51	10	17	3
California	50	10	13	5
Colorado	50	9	13	4
Connecticut	51	9	16	3
Delaware	51	10	17	5
Florida	51	9	20	4
Georgia	51	10	12	4
Hawaii	50	9	17	3
Idaho	50	10	15	3
Illinois	51	9	15	4
Indiana	51	10	15	4
Iowa	50	10	17	3
Kansas	50	10	15	3
Kentucky	51	9	16	3
Louisiana	51	10	14	4
Maine	51	8	19	5
Maryland	52	9	14	4
Massachusetts	52	10	16	5
Michigan	51	10	16	4
Minnesota	50	9	15	5
Mississippi	51	10	15	3

Missouri	51	10	16	4
Montana	50	9	17	3
Nebraska	50	10	15	4
Nevada	49	9	14	5
N.H.	51	9	16	5
New Jersey	51	9	16	3
New Mexico	50	10	16	5
New York	52	10	16	5
North Carolina	51	10	15	4
North Dakota	49	12	17	3
Ohio	51	9	16	4
Oklahoma	50	10	16	3
Oregon	50	9	16	5
Pennsylvania	51	10	18	4
Rhode Island	52	11	17	4
South Carolina	51	10	16	3
South Dakota	50	10	16	2
Tennessee	51	9	16	3
Texas	50	10	12	4
Utah	50	11	11	4
Vermont	51	10	17	5
Virginia	51	10	14	3
Washington	50	9	14	5
West Virginia	51	9	19	3
Wisconsin	50	9	16	3
Wyoming	49	10	15	3
D.C.	53	14	14	9

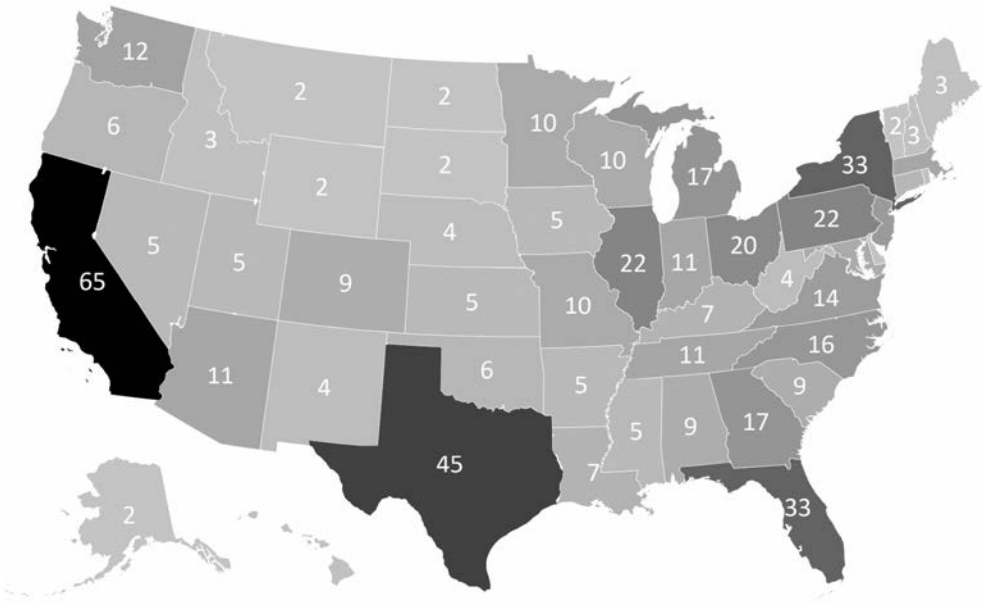
* U.S. Census Data from 2017 estimates compiled via Simply Analytics. LGBT percentages via Gallup Analytics poll in 2016 U.S. Dailies survey program based on the question: “I have one final question we are asking only for statistical purposes. Do you, personally, identify as lesbian, gay, bisexual, or transgender?” All percentages rounded to nearest whole number.

Figure 1: Electoral College: Before and After

Current



Reformed



* Geographically small states not shown: Connecticut (7 to 6), Delaware (3 to 2), Hawaii (3 to 2), Maryland (10 and 10), Massachusetts (11 and 11), New Jersey (14 to 15), and Rhode Island (3 to 2).

Table 7: Chronology of the State Admissions

State	Date of Admission	Historical Context
1. Delaware	1787	Founding slave state †
2. Pennsylvania	1787	Founding state [a]
3. New Jersey	1787	Founding state [b]
4. Georgia	1788	Founding slave state ††
5. Connecticut	1788	Founding state [c]
6. Massachusetts	1788	Founding state [d]
7. Maryland	1788	Founding slave state †
8. South Carolina	1788	Founding slave state ††
9. New Hampshire	1788	Founding state [e]
10. Virginia	1788	Founding slave state ††
11. New York	1788	Founding state [f]
12. North Carolina	1789	Founding slave state ††
13. Rhode Island	1790	Founding state [c]
14. Vermont	1791	Free state [g]
15. Kentucky	1792	Slave state †
16. Tennessee	1796	Slave state ††
17. Ohio	1803	Free state
18. Louisiana	1812	Slave state ††
19. Indiana	1816	Free state
20. Mississippi	1817	Slave state ††
21. Illinois	1818	Free state
22. Alabama	1819	Slave state ††
23. Maine	1820	Free state
24. Missouri	1821	Slave state †
25. Arkansas	1836	Slave state ††
26. Michigan	1837	Free state
27. Florida	1845	Slave state ††
28. Texas	1845	Slave state ††
29. Iowa	1846	Free state
30. Wisconsin	1846	Free state
31. California	1850	Free state
32. Minnesota	1858	Free state
33. Oregon	1859	Free state
34. Kansas	1861	Free state
35. West Virginia	1863	Slave state: Civil War †
36. Nevada	1864	Free state: Civil War
37. Nebraska	1867	Post-Civil War
38. Colorado	1876	Post-Civil War

39. North Dakota	1889	Post-Civil War
40. South Dakota	1889	Post-Civil War
41. Montana	1889	Post-Civil War
42. Washington	1889	Post-Civil War
43. Idaho	1890	Post-Civil War
44. Wyoming	1890	Post-Civil War
45. Utah	1896	Post-Civil War
46. Oklahoma	1907	Post-Civil War
47. New Mexico	1912	Post-Civil War
48. Arizona	1912	Post-Civil War
49. Alaska	1959	Post-World War II
50. Hawaii	1959	Post-World War II
District of Columbia	[1790]	Capital City
Puerto Rico	[1900]	Spanish-American War
Guam	[1900]	Spanish-Ameican War
U.S. Virgin Islands	[1916]	Purchase from Denmark
Northern Marianas Islands	[1978]	Post-World War II
American Samoa		[self-governed]

[a] Pennsylvania became the first state in the union to abolish slavery in 1780.

[b] New Jersey outlawed slavery by statute in 1786.

[c] Connecticut and Rhode Island abolished slavery by statute in 1784.

[d] The Massachusetts Supreme Court abolished slavery in 1783.

[e] New Hampshire adopted a statute interpreted to end slavery in 1857 (though slavery had dwindled to close to none in the state by then).

[f] New York abolished slavery by statute in 1785.

[g] Vermont abolished slavery in its independent constitution in 1777.

† Border states that stayed in the union during the Civil War.

†† The eleven Confederate States of America.

Sources: *Slavery in the United States: A Social, Political, and Historical Encyclopedia, Volume 1* (Junius P. Rodriguez ed. 2007); Douglas Harper, Slavery in the North (2003), http://slavenorth.com/index.html.

Table 8: Net Gains of Senators for Red and Blue States

	Vote in 2016	New Senators	Net Gain/Loss
Alabama	Trump	2	0
Alaska	Trump	1	-1
Arizona	Trump	2	0
Arkansas	Trump	1	-1
California	Clinton	12	+10
Colorado	Clinton	2	-1
Connecticut	Clinton	1	-1
Delaware	Clinton	1	-1
Florida	Trump	6	+4
Georgia	Trump	3	+1
Hawaii	Clinton	1	-1
Idaho	Trump	1	-1
Illinois	Clinton	4	+2
Indiana	Trump	2	0
Iowa	Trump	1	-1
Kansas	Trump	1	-1
Kentucky	Trump	1	-1
Louisiana	Trump	1	-1
Maine	Clinton/Trump	1	0
Maryland	Clinton	2	0
Masssachusetts	Clinton	2	0
Michigan	Trump	3	+1
Minnesota	Clinton	2	0
Mississippi	Trump	1	-1
Missouri	Trump	2	0
Montana	Trump	1	-1
Nebraska	Trump	1	-1
Nevada	Clinton	1	-1
N.H.	Clinton	1	-1
New Jersey	Clinton	3	+1
New Mexico	Clinton	1	-1
New York	Clinton	6	+4
North Carolina	Trump	3	+1
North Dakota	Trump	1	-1
Ohio	Trump	4	+2
Oklahoma	Trump	1	-1
Oregon	Clinton	1	-1
Pennsylvania	Trump	4	+2
Rhode Island	Clinton	1	-1

South Carolina	Trump	2	0
South Dakota	Trump	1	-1
Tennessee	Trump	2	0
Texas	Trump	9	+7
Utah	Trump	1	-1
Vermont	Clinton	1	-1
Virginia	Clinton	3	+1
Washington	Clinton	2	0
West Virginia	Trump	1	-1
Wisconsin	Trump	2	0
Wyoming	Trump	1	-1
Net gain/loss			Blue +8/Red +2

Source: 2016 Presidential Election Actual Results, 270toWin, https://www.270towin.com/map-images/2016-actual-electoral-map.

APPENDIX

[This model statute format is set forth for illustrative purposes only. It was drafted based on an earlier version of this paper for use in the Congressional Debate by the National Speech & Debate Association (February 2019 docket) organized by the Harvard Debate Council.]

Senate Reform Act

BE IT ENACTED BY THE CONGRESS HERE ASSEMBLED THAT, ACTING UNDER ITS DELEGATED POWERS UNDER THE FOURTEENTH, FIFTEENTH, NINETEENTH, TWENTY-FOURTH, AND TWENTY-SIXTH AMENDMENTS:

SECTION 1. Each state shall be represented by at least one senator.

SECTION 2. At each decadal census of the total population of the United States shall be divided by one hundred to determine a seat allocation unit. A state with population approximate to or less than the seat allocation unit shall have one senator; a state with population approximately twice as much as the seat allocation shall have two senators, and so on, using the same ratio.

SECTION 3. The total number of senators shall be increased to allow for equitable distribution of representation among the states.

SECTION 4. New states admitted to the union shall have senators allocated according to the procedures provided in this Act.

SECTION 5. Senators currently serving may continue their full terms. In a state allocated one seat, the seat of senator whose term ends first would be retired. In states with more than two senators, when to hold elections in alternating two-year class rotations would be subject to lot, rotating first among states with fewer senators, and finishing with states with the most. Senators of new states would be allocated similarly when admitted. The Senate shall adopt rules so that the Three Classes Clause shall continue to be observed to evenly balance biennial elections of senators.

SECTION 6. This act shall take effect following the 2020 Census. All laws in conflict with this legislation are hereby declared null and void. All laws not in conflict with this legislation shall remain in effect.