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Senate Democracy: Our Lockean Paradox

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LEAD ARTICLE

SENATE DEMOCRACY: OUR LOCKEAN PARADOX

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The United States Senate is radically unrepresentative. American citizens in populous states such as California, Texas, Florida, and New York have much less voting weight than citizens in lightly populated states. Senate representation is also significantly biased in terms of race, ethnicity, and color, as well as other constitutionally protected characteristics such as age and sex. Effective reform of the Senate, however, presents a Lockean paradox because amendment of its representational structure is prohibited by Article V of the Constitution, and the amendment of Article V is blocked by supermajority hurdles.

This Article proposes a Senate Reform Act to resolve this paradox. This reform would adjust the number of senators allocated to each state by relative population. It recommends a Rule of One Hundred to determine population

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units by which to allocate senate seats according the official decennial census, with a minimum of one senator per state. The reform would thus respect the principle of federalism and maintain the Senate at roughly the same size. It would yield structural co-benefits such as a more representative Electoral College and an easier path to statehood for underrepresented citizens in the District of Columbia, Puerto Rico, and elsewhere.

The proposed Senate Reform Act finds its constitutional authority in the Fourteenth, Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments. After explaining how the reform would work, this Article defends its constitutionality through traditional modes of interpretation: text, structure, history, moral principle, and legal precedent. It concludes with an examination of political balance and feasibility.

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[I]t 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 becomes very unequal and disproportionate to the reasons it was at first established . . . . This strangers stand amazed at, and everyone must confess needs a remedy; though 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 . . . .

Whatsoever cannot but be acknowledged to be of advantage to the society and people in general . . . will always, when done, justify itself; and whenever the people shall choose their representatives upon just and undeniably equal measures, suitable to the original frame of government, it cannot be doubted to be the will and act of the society, whoever permitted or caused them so to do.

—John Locke[1]

[L]aws and institutions must go hand in hand with the progress of the human mind. [A]s that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times.

—Thomas Jefferson[2]

Heaven lends me ability, to use my voice, my pen, or my vote, to advocate the . . . emancipation of my entire race.

—Frederick Douglass[3]

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1. JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT §§ 157–58, at 89–91 (Thomas P. Peardon ed., 1952) (1690).

2. Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), *in* 10 THE PAPERS OF THOMAS JEFFERSON 226 (J. Jefferson Looney ed., 2013).

3. FREDERICK DOUGLASS, MY BONDAGE AND MY FREEDOM 406 (1857).

INTRODUCTION

The United States Senate is radically unrepresentative. At the founding, the ratio of voting weight in the Senate between citizens in the smallest state of Delaware and the largest state of Virginia was around nine to one or twelve to one, depending on whether slaves are counted.[4] James Madison predicted that this inequality would get worse, and he was right.[5] As new states were added, and as people multiplied and migrated, the ratios of voting inequality of citizens in the smallest and largest states widened. Today, the ratio of voting weight of citizens in the smallest state of Wyoming compared with those in the largest state of California has ballooned to *sixty-seven to one*.[6] The disparities will only worsen because more populous states, such as California,

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4. MICHAEL J. KLARMAN, THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION 184 (2016) (calculating a ratio of 12.5 to one). Subtracting Virginia's 400,000 slaves, the ratio falls to about nine to one. RICHARD BEEMAN, PLAIN, HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION 310 (2000); *see also* U.S. CENSUS BUREAU, 1790 CENSUS, https://www.nationalgeographic.org/media/us-census-1790 [https://perma.cc/FPB7-CKBC]. In the five southern states of the original thirteen, forty percent of the population was enslaved. KLARMAN, *supra*, at 266.

5. *See* FRANCES E. LEE & BRUCE I. OPPENHEIMER, SIZING UP THE SENATE: THE UNEQUAL CONSEQUENCES OF EQUAL REPRESENTATION 10 (1999). Madison along with other founders including James Wilson of Pennsylvania argued unsuccessfully for proportional representation in the Senate. *See* BEEMAN, *supra* note 4, at 55, 105; KLARMAN, *supra* note 4, at 130–31; *see also* Larry D. Kramer, *Madison's Audience*, 112 HARV. L. REV. 611, 627, 654–56 (1999) (describing Madison's plan for a strong national government with proportional representation of citizens in both houses of Congress); David Brian Robertson, *Madison's Opponents and Constitutional Design*, 99 AM. POL. SCI. REV. 225, 227–29 (2005) (describing Madison's plan). The Connecticut Compromise adopted a principle of popular representation in the House of Representatives, but not in the Senate. *Id.* at 231, 235–37. It transmuted the one colony, one vote rule of decision under the Articles of Confederation into a rule of one state, two senators. U.S. CONST. art. I, §§ 1–3; *see also* BEEMAN, *supra* note 4, at 118–19, 150–51, 156; KLARMAN, *supra* note 4, at 198–201, 205. Madison "continued to feel deeply aggrieved about the compromise that had given the smaller states equal representation in the Senate" and "persisted in believing that the Connecticut Compromise was a serious blow to the fundamental principle that the new government was to be directly representative of the people of the nation and not of the states." BEEMAN, *supra* note 4, at 367. He felt "vexed" that his theory of popular national representation had not been fully adopted. Kramer, *supra*, at 678–79.

6. *See infra* Table 1; *see also* KLARMAN, *supra* note 4, at 626–27 (noting how "the Senate's malapportionment has grown significantly worse" moving from a ratio of "roughly twelve times" at the founding to "more than sixty-five times" today).

Florida, and Texas, are growing faster than many smaller ones.[7] By 2040, if present trends continue, two-thirds of American citizens will be represented by only thirty senators.[8] Compared with almost every other democratically elected national legislature in the world, the malapportionment of the U.S. Senate is an outlier.[9] It should therefore be reformed.

In addition to comparative *voting weight* of individual citizens, another measure of representational inequality examines the minimum percentage of the total population needed for a majority of the smallest states to achieve a majority in the Senate—a measure of *voting power*.[10] Since 1790, this percentage has fallen from around

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7. *See, e.g.*, LEE & OPPENHEIMER, *supra* note 5, at 11; *see also* U.S. CENSUS BUREAU, NEVADA AND IDAHO ARE THE NATION'S FASTEST-GROWING STATES (Dec. 19, 2018), https://www.census.gov/newsroom/press-releases/2018/estimates-national-state.html [https://perma.cc/42RY-94F5] (showing California, Florida, and Texas as top three states in population gains). According to one projection for 2100, Texas will become the largest state and Vermont the smallest with the ratio in voting weight rising to 154 to one. TODD N. TUCKER, ROOSEVELT INST., FIXING THE SENATE: EQUITABLE AND FULL REPRESENTATION FOR THE 21ST CENTURY 8 (2019), http://rooseveltinstitute.org/wp-content/uploads/2019/03/RI_Fixing-The-Senate_report-201903.pdf [https://perma.cc/X5ZX-ELAS] (citing study by sociologist Mathew Hauer).

8. Philip Bump, *By 2040, Two-Thirds of Americans Will Be Represented by 30 Percent of the Senate*, WASH. POST (Nov. 28, 2017), https://www.washingtonpost.com/news/politics/wp/2017/11/28/by-2040-two-thirds-of-americans-will-be-represented-by-30-percent-of-the-senate [https://perma.cc/4AQT-885S].

According to another projection based on census data, this means thirty percent of the population will control a veto-proof sixty-eight senators by 2040. Jamelle Bouie, *The Senate Is as Much of a Problem as Trump*, N.Y. TIMES, May 10, 2019, at SR4 (citing study by the Weldon Cooper Center for Public Service, University of Virginia).

9. AREND LIJPHART, PATTERNS OF DEMOCRACY: GOVERNMENT FORMS AND PERFORMANCE IN THIRTY-SIX COUNTRIES 194–97 (2d ed. 2012) (finding only Argentina to have a more unequally representative legislative branch); *see also* ROBERT A. DAHL, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION? 49–50 (2d ed. 2003) (criticizing the Senate and noting that legislatures in Brazil and Russia are also radically unrepresentative). In other democratic countries, including Australia, Canada, Germany, and India, voting weight ratios do not exceed twenty-one to one. Adam Liptak, *Smaller States Find Outsize Clout Growing in Senate*, N.Y. TIMES, Mar. 11, 2013, at A1 (citing Dahl).

10. *See* LEE & OPPENHEIMER, *supra* note 5, at 10–11 & app. A at 237 (explaining methodologies); Nicola Maaser & Stefan Napel, *Equal Representation in Two-Tier Voting Systems*, 28 SOC. CHOICE & WELFARE 401–02 (2007) (explaining the difference between voting power and voting weight).

thirty percent to less than twenty percent.[11] In other words, it is now possible for senators representing only one-fifth of the population to pass a bill or confirm a Supreme Court justice.[12]

The confirmations of Brett Kavanaugh and Neil Gorsuch to the Supreme Court show why this inequality matters. In October 2018, the Senate confirmed Kavanaugh by a vote of fifty to forty-eight senators, and this bare majority represented only forty-four percent of the general population.[13] In April 2017, the Senate confirmed Gorsuch by a fifty-four to forty-five vote, with the majority representing only forty-two percent of the people.[14] Similarly, senators representing only a minority of the total population voted to confirm Clarence Thomas and Samuel Alito.[15] Justices Kavanaugh and Gorsuch share the dubious distinction, however, of being both confirmed by senators representing a minority of the population and nominated by a president who himself won election with only a minority of the total vote.[16] They are the first of what we might call minority-minority justices. President Trump and the Republican-controlled Senate have also

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11. LEE & OPPENHEIMER, *supra* note 5, at 10–11 & fig.1.1.

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

13. 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 [https://perma.cc/XXS5-LZWE].

14. 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).

15. Justice Thomas was confirmed by a vote of fifty-two to forty-eight with the majority representing forty-eight percent of the population. *Id.* Justice Alito was confirmed by a vote of fifty-eight to forty-two with the majority representing forty-nine percent. *Id.*

16. Hillary Clinton won 48.5% of the popular vote compared with 46.4% for Donald Trump. Clinton earned 2.8 million more votes than Trump. *Presidential Results*, CNN (2016), https://www.cnn.com/election/2016/results/president [https://perma.cc/PZ7N-WB3M]; *see supra* notes 13 & 14.

appointed and confirmed a record number of minority-minority judges to the lower courts.[17]

The federal midterm elections in 2018 showed how inequality of representation in the Senate can have more direct political consequences. Democrats rode a blue wave in the popular vote and gained forty seats in the House.[18] However, even though Democratic senate candidates received fifty-seven percent of all senate votes cast nationally, compared to forty-two percent for Republicans, Democrats ended up losing two senate seats.[19] One should not make too much of this difference given that only one-third of senators are elected every two years, and the Democrats were defending twenty-six incumbent seats compared with nine for Republicans.[20] Nevertheless, this outcome augurs what Laurence Tribe has called "the rise of minority rule."[21] "Our Federalism" may require some degree of unequal representation

17. These appointments include eighty-four federal judges to the appellate and district courts, and about one hundred more are expected since Republicans maintained control of the Senate in the 2018 midterms. Bob Bryan, *The GOP's Senate Triumph Means Trump Can Continue the Work on 'The Single Most Important Legacy' of His Presidency*, BUS. INSIDER (Nov. 8, 2018), https://www.businessinsider.com/midterm-elections-senate-gop-judge-confirmations-2018-11 [https://perma.cc/TE4Q-NXQK].

18. *See* 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 [https://perma.cc/VTV2-6TKG] (describing Democratic popular vote margins and electoral success in the House of Representatives).

19. *Id.*; *see also U.S. Senate Election Results 2018*, POLITICO (May 28, 2017), https://www.politico.com/election-results/2018/senate [https://perma.cc/XF7Q-YCUH].

20. Sabrina Siddiqui, *Democrats Got Millions More Votes—So How Did Republicans Win the Senate?* THE GUARDIAN (Nov. 8, 2018), https://www.theguardian.com/us-news/2018/nov/08/democrats-republicans-senate-majority-minority-rule [https://perma.cc/2CU-V7M2].

21. *Id.* (quoting Tribe); *see also* John D. Griffin, *Senate Apportionment as a Source of Political Inequality*, 31 LEGIS. STUD. Q. 405, 406 (2006) (finding "citizens of states with less voting weight are today more likely to identify with the Democratic Party and to espouse liberal positions on some issues, such as spending on health care and environmental protection" and "have been more likely, since 1980, to vote for the presidential candidates of the Democratic Party").

privileging smaller states,[22] but to invoke a famous line from *Star Wars*, unequal representation in the Senate "is getting out of hand."[23]

To be sure, other governing bodies such as the European Union and the United Nations face similar issues of how to balance representation of historically defined sovereign territories with changing populations and relative influence.[24] I do not invoke here an absolute principle of equal voting for citizens in all governance contexts and situations. This Article focuses only on the inequality of representation of citizens in the U.S. Senate, which is increasingly difficult to justify or excuse.[25]

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

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22. Younger v. Harris, 401 U.S. 37, 44–45 (1971) (describing "Our Federalism," a concept that recognizes the value in a national government permitting states to perform functions in differing ways, as a "slogan" that "occupies a highly important place in our [n]ation's history and its future").

23. STAR WARS: EPISODE I—THE PHANTOM MENACE (Lucasfilm 1999); *see also* MICHAEL TOMASKY, IF WE CAN KEEP IT: HOW THE REPUBLIC COLLAPSED AND HOW IT MIGHT BE SAVED 204 (2019) (arguing that unequal representation in the Senate is "totally indefensible" and has "gotten completely out of hand"). On the transcendent wisdom of Star Wars, see CASS R. SUNSTEIN, THE WORLD ACCORDING TO STAR WARS xi–xii (2016).

24. *See, e.g.*, DAVID HELD, MODELS OF DEMOCRACY 291, 294–95, 297–98, 303–04 (3d ed. 2006) (arguing for a need for new democratic theories and structures to address global "disjunctures" and international issues); *see also* Jan Aart Scholte, *Reconstructing Contemporary Democracy*, 15 IND. J. GLOB. LEGAL STUD. 305, 322 (2008) (reviewing various democratic theories to account for global and "polycentric" governance needs).

25. Charles Fried agrees that the increase in the Senate's representation ratio from around 12:1 to more than 65:1 may seem as if it is "carrying a good joke too far," but then defends it. Charles Fried, *The Cunning of Reason: Michael Klarman's* The Framers' Coup, 116 MICH. L. REV. 981, 997 (2018) (reviewing MICHAEL KLARMAN, THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION (2016)). Fried argues that the constitutional structure of the Senate respects "the equal dignity of even the smallest" states and draws an analogy to the contemporary situation of governing bodies such as the European Union and the United Nations. *Id.* at 996–97. As discussed here, though, the problem becomes one of balancing "equal dignity" of states with "equal dignity" of citizens. At some point, a rebalancing is needed.

Commons."[26] This Article argues that Moynihan was correct—as Madison was before him.[27] It is time to reform the Senate and put it on a more equally representative footing with its citizens.

According to conventional wisdom, the Connecticut Compromise, which established the one state, two senators rule,[28] is so firmly embedded in the original constitutional framework that it can never be changed, except by calling a constitutional convention, which has never been done in the 230-plus years since the founding.[29] Some have proposed other solutions. Former Representative John Dingell has called for abolition of the Senate.[30] Akhil Amar has recommended a national referendum to call the constitutional question.[31] Burt Neuborne has suggested dividing large states such as California into

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26. LEE & OPPENHEIMER, *supra* note 5, at 11–12 (quoting 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. *See generally* ERIC J. EVANS, THE GREAT REFORM ACT OF 1832 6–7 (2d ed. 1994). At one point before the reform, a majority of representatives in the Commons represented only 1/170 of the total population. ROSEMARIE ZAGARRI, THE POLITICS OF SIZE: REPRESENTATION IN THE UNITED STATES, 1776–1850 37 (1987).

27. For Madison's view favoring proportional allocation in the Senate, see *supra* note 5.

28. *See supra* note 5.

29. *See* SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) 11, 49–53, 174 (2006) (criticizing Senate apportionment as "illegitimate" and arguing for a new constitutional convention). Constitutional conventions, however, are both difficult to call and the results difficult to ratify. U.S. CONST. art. V.; *see also infra* Part I.

30. John D. Dingell, *I Served in Congress Longer Than Anyone. Here's How to Fix It*, ATLANTIC (Dec. 4, 2018), https://www.theatlantic.com/ideas/archive/2018/12/john-dingell-how-restore-faith-government/577222 [https://perma.cc/XF3L-76E8]. In 1911, Representative Victor Berger also proposed abolishing the Senate, which contributed to the adoption of the Seventeenth Amendment mandating popular elections of senators. *See* LEVINSON, *supra* note 29, at 161–62.

31. Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1044, 1069–71 (1988); *see also* Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 459 (1994) ("I believe that Congress would be obliged to call a convention to propose revisions if a majority of American voters so petition; and that an amendment or new Constitution could be lawfully ratified by a simple majority of the American electorate."). *But see* Henry Paul Monaghan, *We the People[s], Original Understanding, and Constitutional Amendment*, 96 COLUM. L. REV. 121, 121–22 (1996) (contesting the constitutionality of Amar's approach).

two or three new states to add senators.[32] Others have said the Supreme Court should declare the Senate unconstitutional, or that people should rally for "a revolution, whether bloody or bloodless."[33]

This Article proposes a more moderate, targeted, and practical solution. Congress should enact a statutory reform of the Senate to protect "the right to vote" against abridgment by "the United States" under its powers delegated by the Fourteenth, Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments, collectively the voting-rights amendments.[34] The amendments extend "the equal protection of the laws" to voting rights for all U.S. citizens, and they guard specifically against the abridgment of voting rights based on "race" or "color," "sex," and "age."[35] Each of them charges Congress expressly with "power to enforce [this amendment] by appropriate legislation."[36]

The obvious objection to my proposed reform is that it is impossible because the Constitution explicitly adopts the one state, two senators rule, and a mere statute cannot change it.[37] Furthermore, the Constitution appears to forbid the one state, two senators rule from *ever* being amended. Article V provides not only one of the most restrictive amendment procedures in the world, requiring a two-thirds vote of a bicameral Congress and ratification by three-quarters of the states, but also declares specifically that "no State, without its Consent, shall be deprived of its equal Suffrage in the Senate."[38] Only one third of senators, currently representing less than eight percent of the U.S. population—or thirteen state legislatures representing less than five percent—are sufficient to block any reform by

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32. Burt Neuborne, Opinion, *Divide States to Democratize the Senate*, WALL ST. J., Nov. 20, 2018, at A15; *see also* Bouie, *supra* note 8 (citing a similar proposal by political scientist David Faris).

33. Lynn A. Baker & Samuel H. Dinkin, *The Senate: An Institution Whose Time Has Gone?*, 13 J.L. & POL. 21, 83 (1997); *see also* Daniel Lazare, *A Constitutional Revolution*, JACOBIN (Jan. 3, 2017), https://jacobinmag.com/2017/01/constitution-trump-democracy-electoral-college-senate [https://perma.cc/MH6Z-23PK] (arguing for an extra-constitutional "constituent assembly" for a revolutionary re-founding of the nation by "the people").

34. U.S. CONST. amends. XIV, XV, XIX, XXIV, XXVI.

35. *Id.* amends. XV, § 1; XIX; XXVI, § 1.

36. *Id.* amends. XIV § 5; XV § 2; XIX; XXIV, § 2; XXVI § 2.

37. *Id.* art. 1, § 3, cl. 1; *id.* amend. XVII, § 1.

38. *Id.* art. V; *see also* Aziz Z. Huq, *The Function of Article V*, 162 U. PA. L. REV. 1165, 1166–67 (2014).

amendment.[39] Arguably at least, no amendment of a state's "equal suffrage" can be adopted unless each and every state gives its "consent."[40] Leading scholars have therefore declared that changing the status quo is "unthinkable"[41] or at least "virtually impossible."[42]

Again then, according to the conventional wisdom, our Constitution traps us in what I will call a Lockean paradox. We may want to follow the principle that "the people shall choose their representatives upon just and undeniably equal measures," but our own Constitution prevents us from doing so.[43] "We the People" seem to be locked (pun intended) into an undemocratic structure forever by our revered founding document.[44]

The primary contribution of this Article is to show "it ain't necessarily so."[45] We can resolve our Lockean paradox of Senate representation

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39. *U.S. States—Ranked by Population 2019*, WORLD POPULATION REV., http://worldpopulationreview.com/states [https://perma.cc/57ZG-XH9B] (providing percentages for the calculations).

40. *See* U.S. CONST. art. V (outlining the procedures for amending the Constitution).

41. DAVID A. STRAUSS, THE LIVING CONSTITUTION 103–04 (2010) ("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."). Strauss is referring to an unlikely Supreme Court challenge to the Senate's constitutionality. *See infra* Section III.G. He may remain open to the possibility of a legislative fix as proposed here.

42. DAHL, *supra* note 9, at 48–49, 144–45 (criticizing the Senate as a dramatic departure from the principle of democratic equality, but concluding that reform is "virtually impossible"); TOMASKY, *supra* note 23, at 205 (criticizing Senate representation but concluding it is "[s]eemingly impossible" to change); *see also* KLARMAN, *supra* note 4, at 626–27 (recognizing the one state, two senators rule as severely "undemocratic," but finding it "expressly rendered unamendable without the consent of every state," making it "a truly extraordinary instance of dead-hand control that we should not expect to see eliminated even if we live a very long time"). On the meaning of "consent" and "equal suffrage," see also Section III.C.2.

43. *See supra* note 1 and accompanying text; *see also* LEVINSON, *supra* note 29, at 21 (observing that "Article V . . . brings us all too close to a Lockean dream (or nightmare) of changeless stasis"); *cf.* Michael Steven Green, *The Paradox of Auxiliary Rights: The Privilege Against Self-Incrimination and the Right to Keep and Bear Arms*, 52 DUKE L.J. 113, 119–22 (2002) (describing a different kind of "Lockean paradox" regarding rights of civil disobedience).

44. *See* LEVINSON, *supra* note 29, at 21 (describing the nearly impossible amendment process of the Constitution and its seemingly guaranteed static nature).

45. GEORGE GERSHWIN & IRA GERSHWIN, *It Ain't Necessarily So*, *in* PORGY & BESS (1935); *cf.* Richard H. Pildes, *The Constitutionalization of Democratic Politics*, 118 HARV.

through a congressional statute closely tailored to the exercise of powers delegated by the voting-rights amendments to protect U.S. citizens' equal rights to vote. Making the Senate more democratic also follows in the tradition of the Seventeenth Amendment, which has already once changed the meaning of "equal suffrage" of the states to mean a democratic popular vote rather than selection of senators by state legislatures.[46] The proposed reform would make the Senate more democratic, once again, by proportionally adjusting the allocation of senators to the states while at the same time respecting a constraint of federalism.

The Article proceeds as follows. Part I briefly describes our Lockean paradox. Part II presents a legislative solution. Congress, acting within its delegated powers under the voting-rights amendments, should adopt a statute to reform the distribution of senators. The statute would replace the one state, two senators rule with one that allocates senators in a manner that both respects the original commitment to federalism, with at least one senator to each state, and upholds the rights of U.S. citizens to participate in their political democracy on a relatively equal basis, with a greater number of senators allocated to more populous states. I recommend what I will call the Rule of One Hundred as a formula for determining this allocation in a process that piggybacks on the use of the official census conducted every ten years to allocate members of the House. All other features and functions of the Senate remain the same.

Part III offers a constitutional defense. Contrary to the conventional view that the number of senators per state is set in stone by the original constitutional text, I argue that the later voting-rights amendments delegate power to Congress to contravene the one state, two senators rule. Textual analysis supports this argument. Congressional action would create an intratextual constitutional conflict, which I argue should be resolved in favor of the exercise of congressional power. Other standard modes of interpretation, including considerations of structure, history, moral principle, and legal doctrine, support the reform's constitutionality.

L. REV. 28, 153 (2004) ("Democratic institutions must be stable enough to provide relatively fixed frameworks within which organized political competition can take place but flexible enough to respond to appropriate demands for changes in the way democracy is practiced and experienced."); *supra* text accompanying note 2.

46. U.S. CONST. amend. XVII.

Two interrelated constitutional arguments justify the reform. First, it fulfills a congressional mandate to protect the rights of U.S. citizens to a rough mathematical equality of voting weight in their national government—within a federalism constraint. This argument extends the same principle of equal voting rights to the U.S. Senate that the Supreme Court followed in cases such as *Reynolds v. Sims*[47] to strike down similarly unequal state legislatures.[48] Protection of the equal voting rights of U.S. citizens in general is one sufficient justification for congressional reform under the Fourteenth Amendment.[49]

Second, unequal representation in the Senate violates the equal voting rights of specifically protected categories of citizens. Most egregiously, empirical research shows that "whites . . . constitute the only [racial or ethnic] group that Senate apportionment advantages."[50] Even though the median distribution of white citizens in the United States is

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47. 377 U.S. 533 (1964).

48. *See id.* at 568; *infra* Section III.G.

49. *See, e.g.*, Bush v. Gore, 531 U.S. 98, 103 (2000) (per curiam) (striking down unequal treatment of citizens in a presidential recount under the Fourteenth Amendment); *see also* Pildes, *supra* note 45, at 48 (arguing that *Bush v. Gore* established "an individual right to an equally weighted vote" in federal elections); *cf.* Laurence H. Tribe, *eroG .v hsuB and Its Disguises: Freeing* Bush v. Gore *from Its Hall of Mirrors*, 115 HARV. L. REV. 170, 221–22, 269 (2001) (arguing that the Court's equal protection theories were empty and based on various "shell game[s]," but noting that "the day might yet come when a pearl is drawn from that oyster").

50. LEE & OPPENHEIMER, *supra* note 5, at 21; *see also* Griffin, *supra* note 21, at 406 (finding that African Americans and Latinos reside disproportionately in states with less voting weight); Neil Malhotra & Connor Raso, *Racial Representation and U.S. Senate Apportionment*, 88 SOC. SCI. Q. 1038, 1045 (2007) (finding "both African Americans and Hispanics are substantially underrepresented" in the Senate "due to their greater presence in high-population states as compared to in low-population states," and predicting this bias with respect to Hispanic populations will increase over the next few decades); *cf.* John D. Griffin & Michael Keane, *Are African Americans Effectively Represented in Congress?*, 64 POL. RES. Q. 145, 145 (2011) (finding less effective representation on most standard measures).

The idea of "white" people is, of course, a social, political, and legal construct, but one that continues to have pernicious effects. IAN HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE xxi-xxii (rev. ed. 2006); *see also* DOROTHY ROBERTS, FATAL INVENTION: HOW SCIENCE, POLITICS, AND BIG BUSINESS RE-CREATE RACE IN THE TWENTY-FIRST CENTURY x (2011) ("Contrary to popular misconception, we are not naturally divided into genetically identifiable racial groups. Biologically, there is one human race. Race applied to human beings is a *political* division: it is a system of governing people that classifies them into a social hierarchy based on invented biological demarcations.").

approximately 61 percent, for example, the most populous state of California is only 38 percent white, and second-most-populous Texas is 43 percent white.[51] Many small states are disproportionately white, including the two smallest states of Vermont (96 percent) and Wyoming (84 percent).[52] It therefore does not go too far to describe the current apportionment of the Senate as a vehicle for entrenching white supremacy.[53] Other statistically smaller inequalities appear with respect to sex, age, and other protected categories.[54] Protecting the equal voting rights of these citizens supplies another constitutional justification for the reform.

The statutory reform is narrowly tailored to vindicate the promise of equal voting rights in the national polity. It follows the political theories of both Locke and Madison—as well as later constitutional theorists such as Frederick Douglass, who helped to make the expansion of equal voting rights a central narrative in American history.[55]

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51. *See* WORLD POPULATION REV., *supra* note 39 (outlining state populations); *infra* Table 4.

52. *See* WORLD POPULATION REV., *supra* note 39 (outlining the population of the states); *infra* Table 4.

53. *See* TUCKER, *supra* note 7, at 16 ("Through the institution of the Senate, the foundational document of the United States entrenches white rule . . . ."). An earlier version of my conclusion was criticized as assuming that all whites are racist, but the critic misses the point. David Marcus, *No, Senate Apportionment Is Not White Supremacy*, FEDERALIST (Jan. 4, 2019), https://thefederalist.com/2019/01/04/no-senate-apportionment-not-white-supremacy [https://perma.cc/ZZ7G-NM46]. My argument is instead that a Senate imbalance favoring whites significantly over other racial and ethnic groups increases the leverage that white citizens can use to entrench superior positions of power that have been historically inherited. This is a broad use of the term "white supremacy" to mean "a political, economic and cultural system in which whites overwhelmingly control power and material resources, conscious and unconscious ideas of white superiority and entitlement are widespread, and relations of white dominance and nonwhite subordination are daily reenacted across a broad array of institutions and social settings"—as distinguished from a "narrow" use meaning only "the self-conscious racism of white supremacist hate groups." Vann R. Newkirk II, *The Language of White Supremacy*, ATLANTIC (Oct. 6, 2017), https://www.theatlantic.com/politics/archive/2017/10/the-language-of-white-supremacy/542148 [https://perma.cc/SH63-RQZ7] (quoting Frances Lee Ansley); *see also supra* note 46.

54. *See infra* Tables 1 & 4.

55. *See supra* notes 1 & 5 and accompanying text; *see also* DAVID W. BLIGHT, FREDERICK DOUGLASS: PROPHET OF FREEDOM xv, xx, 428, 454–55, 483 (2018)

The reform would also bring several structural co-benefits.[56] First, it would address a widespread concern with the unrepresentativeness of the Electoral College without the need to move to a national popular vote as a solution.[57] Second, it would make tractable the problem of underrepresentation of citizens in the District of Columbia, Puerto Rico, and elsewhere by making statehood politically easier to accomplish.[58] Third, the reform would reduce long-term potential political pressures for secession, especially in large states such as California or Texas, which might otherwise build from unhappiness about unfair representation.[59] The reform would promote stability as well as fairness.

Part IV presents an argument that the reform is politically balanced and may well prove feasible, perhaps even attracting bipartisan support. I conclude that adoption of the reform would enhance the greatness of American-style democracy.

I. OUR LOCKEAN PARADOX OF SENATE REPRESENTATION

At the dawn of limited constitutional government, John Locke recognized that a paradox can arise with respect to representative legal structures. The creation of legislatures to represent "the people" in government requires the designation of districts from which the legislators would hail, but the underlying features of these districts would then change over time, thus throwing the original scheme out of whack.[60] In Locke's words,

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(describing Douglass as "a serious constitutional thinker" focused on establishing the right to vote for black Americans). On Locke's political theory, see also *infra* Part I.

56. *See infra* Section III.D.

57. *See* Steven Shepard, *Poll: Voters Prefer Popular Vote Over Electoral College*, POLITICO (Mar. 27, 2019), https://www.politico.com/story/2019/03/27/poll-popular -vote-electoral-college-1238346 [https://perma.cc/5PLE-MVA8]; *see also infra* Section III.D.8.

58. *See* TUCKER, *supra* note 7, at 17 (outlining the lack of representation for large swaths of the country including the District of Columbia, Puerto Rico, and U.S. territories)*; see also infra* Section III.D.7.

59. *See infra* Section III.D.5 (discussing the dangers of political unrest in states with underrepresented populations).

60. *See* LOCKE, *supra* note 1, § 157, at 89.

> Things of this world are in so constant a flux that nothing remains long in the same state. Thus people, riches, trade, power change their stations, flourishing mighty cities come to ruin and prove in time neglected, desolate corners, while other unfrequented places grow into populous countries, filled with wealth and inhabitants. But things not always changing equally, . . . 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 becomes very unequal and disproportionate to the reasons it was at first established upon.[61]

Locke gave the example of a town that had fallen into "ruin" with a remaining population of only a shepherd and some sheep, but it maintained representation in the legislature equivalent to "a whole county numerous in people and powerful in riches."[62] This "rotten boroughs" problem eventually produced a situation in which only 1/170 of the total population accounted for a majority of representatives in the House of Commons.[63]

Locke's solution to this paradox of representation was, in a system with no written constitution, to allow the monarch or executive power to correct the representational imbalance.[64] Even though "the legislative is the supreme power,"[65] Locke argued that the executive should step in to "rectif[y] the disorders" and correct the representational discrepancy "not by old custom but true reason," allocating "the number of all members in all places that have a right to be distinctly represented."[66] For Locke, this extra-legislative action would "justify itself" by its end and not its means.[67] For "whenever the people shall choose their representatives upon just and undeniably equal measures, suitable to the original frame of government, it cannot be doubted to be the will and act of the society, whoever permitted or caused them so to do."[68]

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61. *Id.*
62. *Id.*
63. *See supra* note 26; *see also* TOMASKY, *supra* note 23, at 8–9 (describing this problem and noting that Madison was aware of the danger of recreating "rotten boroughs").
64. LOCKE, *supra* note 1, § 158, at 90.
65. *Id.* § 150, at 85.
66. *Id.* § 158, at 90.
67. *Id.* § 158, at 90–91.
68. *Id.* § 158, at 91; *supra* text accompanying note 1.

Eventually, the British Parliament itself addressed the problem through a series of Reform Acts over the course of the nineteenth century.[69] In Britain, "[t]he constitution was not a set of documents but a reading of history."[70] Although pressures of custom and tradition impeded change, no constitutional text blocked reform.[71]

Locke, as well as Hobbes and Montesquieu, heavily influenced the American constitutional founders, including Madison.[72] Although Locke was one of the most original and influential theorists of limited constitutional government, he was not a democratic theorist in the contemporary sense of believing in a broadly defined and wide-ranging franchise.[73] Nevertheless, the representation paradox that Locke identified appears again in the form of the contemporary U.S. Senate.

The Senate today presents an analogous Lockean paradox: a legislature growing increasingly disproportionate in its representation and yet bound against change by tradition and custom—compounded by the fact of a written constitution with extraordinarily rigorous constraints on its amendment.[74] The U.S. Constitution is the first and oldest of its kind.[75] No previous national government relied on a written constitution, and the U.S. example has since been followed by

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69. *See* Robert Saunders, *Parliament and People: The British Constitution in the Long Nineteenth Century*, 6 J. MOD. EUR. HIST. 72, 72–73 (2008) (describing these reforms and expansions of the franchise).

70. *Id.* at 76.

71. Note, however, that the British House of Lords, though weakened in recent years, continues to exercise an undemocratic power of delay. *See* Meg Russell, *Attempts to Change the British House of Lords into a Second Chamber of the Nations and Regions: Explaining a History of Failed Reforms*, 10 PERSP. ON FED. 268, 273 (2018).

72. HELD, *supra* note 24, at 70–71; *see also* James A. Gardner, *Consent, Legitimacy and Elections: Implementing Popular Sovereignty Under the Lockean Constitution*, 52 U. PITT. L. REV. 189, 212–13 (1990) (describing the Lockean influence on the Constitution and the reflection of Lockean theory in its popular sovereignty roots).

73. HELD, *supra* note 24, at 59, 62–65. Locke was one of the last influential political theorists to justify the institution of slavery as a relationship existing outside of civil society. DAVID BRION DAVIS, THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION, 1770–1823 45 (1999) ("John Locke, the great enemy of all absolute and arbitrary power, was the last major philosopher to see a justification for absolute and perpetual slavery.").

74. *See* LEE & OPPENHEIMER, *supra* note 5, at 223–30 (diagnosing the problem though not suggesting a reform).

75. Mila Versteeg & Emily Zackin, *American Constitutional Exceptionalism Revisited*, 81 U. CHI. L. REV. 1641, 1642 (2014).

many other countries.[76] Article V is the key provision that allows the Constitution to evolve slowly with changing times, but it is much stricter than the amending clauses of any other national written constitution.[77]

Finding a solution to the paradox of Senate representation is daunting. First, Article V explicitly forbids any interference with "equal suffrage" of the states without the "consent" of each state.[78] One proposed reform has argued nonetheless for a two-step approach around the problem: first eliminate the Equal Suffrage Clause by amendment, and then amend Article V to eliminate or reform the Senate.[79] This approach cannot dodge the Lockean paradox, however, because it is extremely unlikely that two thirds of both the House and the Senate *and* three quarters of the states would agree to amendments that would reduce the relative voting power of senators from small states.[80] For similar reasons, a constitutional convention, subject to the same super-majority constraints, is a non-starter.[81] Hence our Lockean paradox: our government purports to be "of the people, by the people, [and] for the people,"[82] yet our Senate has grown in the flux of time to be increasingly unequally representative of "We the People."[83]

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76. *Id.* at 1642–43. In substance, however, the influence of U.S. constitutionalism is waning globally. *Id.*; *see also* David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. 762 (2012) (comparing differences among national written constitutions).

77. Huq, *supra* note 38, at 1166 & n.1 (highlighting the consensus that Article V tremendously impedes any chance of constitutional revision or amendment, more than similar provisions in other national constitutions).

78. U.S. CONST. art. V.

79. Scott J. Bowman, Note, *Wild Political Dreaming: Constitutional Reformation of the United States Senate*, 72 FORDHAM L. REV. 1017, 1020 (2004).

80. U.S. CONST. art. V; *see also supra* notes 42–44 and accompanying text.

81. *See* U.S. CONST. art. V; *see also supra* note 29 and accompanying text.

82. Abraham Lincoln, Gettysburg Address (Nov. 19, 1863), *in* ROY P. BASLER, ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS 734 (1946).

83. U.S. CONST. pmbl. As one scholar has argued, the idea of an unamendable constitutional provision is inherently "undemocratic." *See* Yaniv Roznai, *Necrocracy or Democracy? Assessing Objections to Constitutional Unamendability*, 68 IUS GENTIUM 29, 36–39 (2018). He coins the term "necrocracy" to describe this kind of dead-hand control. *Id.* As G.K. Chesterton also quipped: "Tradition may be defined as the extension of the franchise. Tradition means giving votes to the most obscure of all classes, our ancestors. It is the democracy of the dead." ASTRA TAYLOR, DEMOCRACY MAY NOT EXIST, BUT WE'LL MISS IT WHEN IT'S GONE 281 (2019) (quoting Chesterton).

The solution to our Lockean paradox is for Congress to cut the Gordian knot.[84] As Lisa Disch has argued, elaborating on an idea first articulated by Hannah Pitkin, representatives in democratic governments act within a "constituency paradox" in which they both *reflect* the identities, interests, and views of those who elect them, and at the same time *compose* their constituents' identities, interests, and views.[85] By enacting the proposed reform, Congress would both embrace the Lockean paradox and resolve it. Oriented toward an understanding of the polity and the need to rectify its representational structure, Congress would act in its role as representatives of its current constituents, namely, "the People." Congressional legislation is the best and most democratic course of action short of out-and-out revolution to resolve our Lockean paradox.[86]

II. PROPOSAL FOR A SENATE REFORM ACT

The proposed reform draws on a number of 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. Call it the Senate Reform Act.[87] Here is how it would work.

The reform mandates a minimum of one senator for each state. It departs from the original one state, two senators rule, however, and allocates more senators to more populous states, following the constitutional principle of equal voting rights. In technical terms, this

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84. According to myth, Alexander the Great, when confronted with the difficult knot at Gordium in Phrygia that would allow him to lay claim to the kingdom and all of Asia beyond it, simply declared that "it makes no difference" how the knot is untied, and he sliced it with one blow from his sword. Evan Andrews, *What Was the Gordian Knot?*, HIST. (Aug. 29, 2018), https://www.history.com/news/what-was-the-gordian-knot [https://perma.cc/C7XE-SN3Z].

85. Lisa Disch, *Democratic Representation and the Constituency Paradox*, 10 PERSP. ON POL. 599, 601–05 (2012); *see also* TAYLOR, *supra* note 83, at 11 (describing democracy as a "balance of paradoxes" including the one associated with Jean Jacques Rousseau of "what comes first: the society and institutions that mold democratic citizens, cultivating and educating them, or citizens who are capable of creating such societies and institutions?").

86. *See supra* notes 31–33 and accompanying text.

87. Or, if you prefer a catchier acronym: the Sanely Ordered Senate ("SOS") Act or Simple Arithmetic for Voter Equality ("SAVE") Act. Thanks to Julian Jonker for these suggestions.

structure is known as degressive proportionality, which balances the democratic principle of one person, one vote with a need in federalism to allocate a representational minimum to subsidiary or secondary political entities such as states.[88] In other words, the proposed reform recognizes the legitimacy of representation of the states as independent units within the larger federal system, but rebalances the relative weight given to citizens within these units.

Since the admission of Alaska and Hawaii in 1959, the United States has been comprised of fifty states. Because the Senate has consisted of one hundred members for so long, the proposal begins with this number as a guideline. Plus, it is easy to do the math and therefore easy for citizens, as well as politicians, to understand.

Since 1790, an official census of the population has been conducted every ten years in order to determine allocations of House members.[89] 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.[90] The decennial census also forms the basis for the proposal here.

First, calculate the number and allocation of senators as follows. Start with the total U.S. population. For 2017, this number is 325,719,178.[91] I use this number as an illustration, though of course it will be somewhat higher in the next official census in 2020.

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

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88. *See, e.g.*, Yukio Koriyama et al., *Optimal Apportionment*, 121 J. POL. ECON. 584, 585, 589–90 (2013) (describing degressive proportionality). This approach is also used in other representational situations. *See supra* note 24 and accompanying text.

89. U.S. CONST. art. I, § 2, cl. 3; s*ee also Agency History*, U.S. CENSUS BUREAU, https://www.census.gov/history/www/census_then_now [https://perma.cc/VGL5-UJA4] (last modified May 30, 2019).

90. Jeffrey W. Ladewig, *One Person, One Vote, 435 Seats: Interstate Malapportionment and Constitutional Requirements*, 43 CONN. L. REV. 1125, 1127–28 (2011).

91. *Annual Estimates of the Residential Population: April 1, 2010 to July 1, 2017*, U.S. CENSUS BUREAU: AM. FACT FINDER, https://factfinder.census.gov/faces/table services /jsf/pages/product.view.xhtml [https://perma.cc/82MN-5B7M]. For continuing updates on current estimates of U.S. population, see U.S. CENSUS BUREAU, QUICK FACTS, https://www.census.gov/quickfacts/fact/table/US/PST045218 [https: //perma.cc/B9D9-UY5A].

Third, compare seat allocation units with the populations of each state as determined by the decennial census. Following the principle of federalism used also by the House, each state receives 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 one senate unit 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 on the next page for an allocation of senators based on the 2017 census estimate. One may assume it would be generally the same if the proposal were adopted following the 2020 census.

This reform, as shown, corrects the massive underrepresentation of some states. California, the most populous state, is allocated twelve senators—showing the dramatic current underrepresentation of citizens in this state. Texas is allocated nine senators. Florida and New York get six. Illinois, Ohio, and Pennsylvania receive four. States that each gain a senator are Georgia, Michigan, New Jersey, North Carolina, and Virginia.

Twelve states hold steady at the original number of two senators. Twenty-six states lose a senator—though some of these are still 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 following general principles of federalism and "equal suffrage in the Senate."[92]

The total generated in the illustration is 110 senators. The reform would follow similar procedures as the House and adjust allocations going forward according to the decennial census: first the 2020 census, with reallocations in 2030, 2040, et cetera.

92. U.S. CONST. art. V; *see also infra* Section III.C.2.

Table 1: Proposed Allocation of Senators under a Senate Reform Act

State	2017 Population*	Share of One 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, 2017 estimate, used for illustration purposes only.

** In borderline cases, I err in favor of greater representation and round up. I thus generally follow a mathematical method of "equal proportions" looking at .50 as the dividing line, but actual adoption of this approach would have to grapple politically with different mathematical line-drawing options. *See, e.g.*, Walter F. Willcox, *Last Words on the Apportionment Problem*, 17 LAW & CONTEMP. PROBS. 290 (1952) (discussing various other options including "rejected fractions" and "included fractions").

† 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, 2017 estimate, total in the territory of U.S. states.

A grandparent provision could allow senators to continue serving 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 whose term first ends would become ineligible for another term, and the seat would be retired. In Vermont, for example, Senator Bernie Sanders was re-elected in 2018, and Senator Patrick Leahy's term ends in 2022. If a Senate Reform Act were adopted in 2020, Senator Leahy's seat would be retired in 2022.

Statutory provisions would adhere to the Three Classes Clause that divides senators in order to balance the six-year terms.[93] See Table 2 on the next page.[94] How and when to add senators would be subject to negotiation when adopting the statute—with an objective of maintaining an even balance. As in the original scheme, additions of new senators to each of the three classes would be determined by lot or coin toss.[95] See Table 3 on page 2006. States allocated three or more senators would have elections every two years. In Texas, for example, three senators would be elected every two years.

Adding senators would be calibrated to the three classes. If a state gets 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. This process would also allow for a relatively gradual transition from the current status quo to the new representative structure, thus providing institutional stability while making the change.

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93. U.S. CONST. art. I, § 3, cl. 2 (providing senators "shall be divided as equally as may be into three Classes . . . so that one third may be chosen every second Year"); *see infra* Table 2.

94. *See* U.S. Senate Election Guidebook 3–14 (2010) (used to compile Table 2).

95. *See infra* Table 3; *see also* Adam M. Samaha, *Randomization in Adjudication*, 51 WM. & MARY L. REV. 1, 17–21, 24–26 (2009) (describing the prevailing justifications for randomized judicial decisions such as lotteries and coin flips).

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. Additions are correlated with openings in classes for states, and losses with expiration of terms.

** Indicates choice of classes to be made by lot drawn with other states.

Allocation of multiple senators to more populous states may allow for experimentation to enhance representative democracy and to moderate political polarization. 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 in the available seats—e.g., four senators in each biennial election in California under the proposed reform.[96] At least in theory, top-vote open primary elections would reduce political polarization, given that parties could win an election by coming in second, third in Texas, or even fourth in California, rather than the current winner-take-all tournaments.[97]

Instant runoff elections provide another option. In instant runoffs, voters rank their top candidates of any party, bypassing primaries, and the top vote-getters win.[98] In Texas, for example, one might imagine a future top-choice instant runoff in which citizens would elect a Republican, a Democrat, and maybe a Libertarian as three of their nine senators (e.g., Ted Cruz and Beto O'Rourke plus one, if the scheme had been in effect in 2018).

In yet another option, states might divide themselves into different senate districts, as they do for the House.[99] Congress or state governments,

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96. California adopted a "top-two" election structure using an open primary in 2012. *See* Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273, 301–02 (2011). The two winners of the open primary compete against each other in the general election, even if they hail from the same political party. *Id.* Washington adopted a version of this system too, and it survived a constitutional challenge. Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 444, 459 (2008). The 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 can prescribe the "manner" of elections, so Congress could itself mandate top-vote or other electoral options in large states. U.S. CONST. art. I, § 4, cl. 1; *see also* Rucho v. Common Cause, 139 S. Ct. 2484, 2495–96 (2019) (describing how state legislators are "checked and balanced" by Congress acting under the authority of the Elections Clause).

97. *Cf.* Pildes, *supra* note 96, at 307 (finding alternatives to closed primaries to be "the single most discrete institutional change" likely to reduce political polarization).

98. *Id.* at 303–04 (praising instant runoff voting). *But see* James P. Langan, Note, *Instant Runoff Voting: A Cure That is Likely Worse than the Disease*, 46 WM. & MARY L. REV. 1569, 1570–71 (2005) (worrying that instant runoffs can cause "confusion, uncertainty, and instability").

99. *See* Terry Smith, *Rediscovering the Sovereignty of the People: The Case for Senate Districts*, 75 N.C. L. REV. 1, 6–8 (1996) (arguing the Seventeenth Amendment allows for the creation of senate districts). Senate districts in big states would achieve the

however, should guard against the partisan gerrymandering that infects current legislative redistricting.[100] Congress may charge an independent bipartisan commission to apportion senate districts, "an avenue of reform" recognized recently by the Supreme Court.[101] California's approach appears to be a leader in the field.[102]

New states would get senators according to the same calculus.[103] The District of Columbia and Puerto Rico would qualify, if admitted, for one senator each. The Pacific Islands taken together might compose the newest, smallest state. Indigenous peoples might also qualify to petition for statehood, if they wished.[104]

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same aim as proposed reforms that would split big states into smaller new ones without the transaction costs of building new administrative infrastructure of entire states. *See supra* note 32 and accompanying text (discussing Burt Neuborne's proposal).

100. *See* Pildes, *supra* note 45, at 61 (describing prevalence of partisan gerrymandering). The Supreme Court recently declined to exercise jurisdiction to review the constitutionality of even the most extreme forms of partisan gerrymandering. *Rucho*, 139 S. Ct. at 2506–08.

Note that bipartisan "sweetheart" gerrymandering by incumbents from different parties is "emerging as a new, equally serious but different kind of threat to American democracy." Pildes, *supra* note 45, at 61–63 (equating bipartisan gerrymandering to "barons dividing up fiefdoms" instead of "democratically accountable representatives").

101. *See* Richard L. Hasen, *The House Democrats' Colossal Election Reform Bill Could Save American Democracy*, SLATE (Jan. 14, 2019), https://slate.com/news-and-politics/2019/01/nancy-pelosi-election-reform-bill-save-democracy.html [https://perma.cc/92GK-6N6G] (noting the "For the People" bill introduced in the House would mandate "independent redistricting commissions"); *see also* Catie Edmondson, *Democrats' For the People Act Passes House*, N.Y. TIMES, Mar. 9, 2019, at A11 (describing that the bill passed the House, but is unlikely to pass through Senate); *Rucho*, 139 S. Ct. at 2508 (citing bills introduced every year since 2005 for a federal Fairness and Independence in Redistricting Act that would "require every State to establish an independent commission to adopt redistricting plans" as an available constitutional "avenue for reform").

102. *See* Angelo N. Ancheta, *Redistricting Reform and the California Citizens Redistricting Commission*, 8 HARV. L. & POL'Y REV. 109, 140 (2014) (arguing that the California Redistricting Commission "demonstrated that redistricting models designed to limit legislative self-interest and to increase citizen involvement can be successful" through transparency, public participation, and following legal priorities).

103. U.S. CONST. art. IV, § 3, cl. 1 (describing the constitutional procedure for admitting new states to the union).

104. *See supra* Table 1. A proposal has been made, for example, to recognize the Navajo Nation, and perhaps other indigenous groups, with statehood or the

III. CONSTITUTIONALITY

If a Senate Reform Act is adopted, then one or more states losing a senator would likely challenge it as unconstitutional, given that it flies in the face of the plain meaning of the one state, two senators rule in the original constitutional text.[105] The Supreme Court may exert its original jurisdiction.[106] At the outset, however, it is unclear whether the Court should exercise its discretion to hear the case.

A. Deference to Congress

The 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. As the Court recently stated, when a "question is entrusted to one of the political branches," then "the claim is said to present a 'political question' and to be nonjusticiable—outside the courts' competence and therefore beyond the courts' jurisdiction."[107] The reform is not an ordinary statute, but rather one

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equivalent. TUCKER, *supra* note 7, at 19. The Cherokee and the Choctaw can claim treaty rights to congressional delegates that might be upgraded to statehood as well. Tristan Ahtone, *The Cherokee Nation Is Entitled to a Delegate in Congress. But Will They Finally Send One?* YES! MAG. (Jan. 5, 2017), https://www.yesmagazine.org/people-power/the-cherokee-nation-is-entitled-to-a-delegate-in-congress-but-will-they-finally-send-one-20170104 [https://perma.cc/H6DV-GDY4]*; cf.* Rebecca Tsosie, *The Politics of Inclusion: Indigenous Peoples and U.S. Citizenship*, 63 UCLA L. REV. 1692, 1692 (2016) (discussing different frames of citizenship for indigenous Americans). Note that the kingdom of Hawaii was first recognized as an independent country before being annexed as a U.S. state against the preferences of Native Hawaiians. *Id.* at 1705–06, 1712. Native American landholdings in the contiguous states reached their lowest point in the 1960s, but increased by fifteen percent to fifty-eight million acres by 2005. *See* CHARLES WILKINSON, BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS 207 (2005).

105. *Cf.* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1184 (1989) (arguing that interpretation should "adhere closely to the plain meaning of a text"); Frederick Schauer, *The Constitution as Text and Rule*, 29 WM. & MARY L. REV. 41, 47, 48 (1987) (arguing for "taking text seriously").

106. U.S. CONST. art. III, § 2, cl. 2.

107. Rucho v. Common Cause, 139 S. Ct. 2484, 2494 (2019) (first quoting Vieth v. Jubelirer, 541 U. S. 267, 277 (2004) (plurality opinion); and then quoting Baker v. Carr, 369 U.S. 186, 217 (1962)); *see also* Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597, 599 (1976) ("[A] political question is one in which the courts forego their unique and paramount function of judicial review of

that restructures the Senate by exercising the constitutional power delegated to Congress under the voting-rights amendments. At a minimum, the Court should give Congress the benefit of the doubt.

The Court might even revive "the rule of clear mistake" from an era of less active judicial review.[108] Following this rule "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."[109]

From a political theory and public-facing standpoint as well, 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 230-year-old document written by white men, of white men, and, in large part, for white men (many of them slaveholders).[110]

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constitutionality."); Note, *Political Questions, Public Rights, and Sovereign Immunity*, 130 HARV. L. REV. 723, 726 (2016) (arguing in favor of "the classical political question doctrine").

108. *See* RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT 159–60 (2018) (describing this doctrine of deference).

109. *Id.* at 160. This approach would allow the Court to exert jurisdiction, thus preserving its ability to check potential abuses of the Congress making 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 solid evidence as well as delegated constitutional power. *See* Mitchell N. Berman, *Our Principled Constitution*, 166 U. PA. L. REV. 1325, 1332 & n.13 (2018) (describing the principle of "clear mistake") (citing James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893)); *cf. Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 537–38 (2012) (expressing something close to a clear mistake doctrine in 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)).

Deference to Congress in this situation may also find analogous support in the "Thayerism" invoked to defer to the President in areas of decision-making when "justice and right" may "operate in a different register from legality." Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187, 2271–72 (2018) (quoting James Thayer who said "a court should not strike down a law unless its unconstitutionality is 'so clear that it is not open to rational question'").

110. As Stephen Douglas argued in 1858: "This Government was made by our fathers on the white basis . . . . It was made by white men for the benefit of white men and their posterity forever." Jill Lepore, *A New Americanism: Why a Nation Needs a*

Doing so would likely put in question the Court's political legitimacy.[111] It would also risk a strong and justified response from the politically elected branches.[112] One may also view the enactment of a Senate Reform Act as an exercise in "popular constitutionalism" and, if so, cast suspicion on the use of "judicial supremacy" to overturn it.[113]

National Story, FOREIGN AFF., Mar.–Apr. 2019, at 10, 14 (quoting Douglas). Of the "homogenous collection" of the 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 105, at 41. Twenty-five were slaveholders, and almost all either owned slaves or participated in the slave trade. Sixteen founders from southern states depended on slave plantations as their principal means of income. BEEMAN, *supra* note 4, at 67–68. Only three founders (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 who owned slaves included James Madison (who sold a slave to buy books 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). *Id.* at 18, 33, 50–52, 64, 99–100; JILL LEPORE, THESE TRUTHS: A HISTORY OF THE UNITED STATES 94, 106, 147, 173–76 (2018). One slave escaped from Washington to join the British army during the Revolution. Another ran away from Madison during the Constitutional Convention. LEPORE, *supra*, at 94, 104, 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 6–9 (2d ed. 2001) (listing five clauses protecting slavery and many indirect protections).

111. *See* FALLON, *supra* note 108, at 155–65 (warning the Supreme Court has been losing public legitimacy and should consider exercising greater judicial restraint before overturning congressional statutes); *see also* Brandon L. Bartels & Christopher D. Johnston, *On the Ideological Foundations of Supreme Court Legitimacy in the American Public*, 57 AM. J. POL. SCI. 184 (2013) (finding a correlation between public legitimacy and ideological perceptions).

112. *See* Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Four: Law's Politics*, 148 U. PA. L. REV. 971, 973–79 (2000) (examining the threat from an unhappy public and noting court-packing may supply an effective response); *see also* BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 3–4 (2009).

113. *See* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 248 (2004) ("The Supreme Court is not the highest authority in the land on constitutional law. We are."); 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" instead of relying on "judicial supremacy"). One should recognize, however, that popular constitutionalism can swing in racist and nativist directions. *See* Ariela Gross, *When Is the Time of Slavery? The*

B. The One State, Two Senators Rule

On the assumption that the Court would exert judicial review, it may initially seem that the objecting states might easily and quickly prevail.[114] The text of the Constitution says the "Senate of the United States shall be composed of two Senators from each State."[115] More text supports the argument that the rule is unassailable. The Seventeenth Amendment, which established that senators must be "elected by the people" rather than selected by state legislatures, repeats the basic rule.[116] Article V adds an apparent showstopper that seems to protect the rule from any change whatsoever—even by constitutional amendment. Immediately following a clause saying no amendment may interfere with the slave trade until 1808, Article V states that "no State, without its Consent, shall be deprived of its equal Suffrage in the Senate"—with no expiration date.[117]

Given the plain meaning of these provisions, it may seem that abrogating the one state, two senators rule is indeed "unthinkable,"[118] even if several legal scholars believe it to be "the stupidest part of the Constitution" or "one of the stupidest."[119] According to the traditional view, Congress cannot change the number of senators per state. To try to do so, one might argue, would be the equivalent of Congress trying to lower the minimum age required to serve as president. The text says that the president must "have attained to the

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History of Slavery in Contemporary Legal and Political Argument, 96 CALIF. L. REV. 283, 318–20 (2008) (recounting pro-slavery versions of popular constitutionalism).

114. Citizens, the Congress, and the President should also ask themselves whether the proposed reform is constitutional. *Cf.* FALLON, *supra* note 108, at 115 (describing "departmentalism" that holds different parts of government should exercise independent views about constitutionality of actions); KRAMER, *supra* note 113, at 106–09 (describing "departmental theory" in similar terms).

115. U.S. CONST. art. I, § 3, cl. 1.

116. *Id.* amend. XVII.

117. *Id.* art. V.

118. *See supra* note 41 and accompanying text.

119. LEE & OPPENHEIMER, *supra* note 5, at 3 (internal quotation marks omitted) (citing *Constitutional Stupidities Symposium*, 12 CONST. COMMENT. 139–226 (1995)); *see also* William N. Eskridge, Jr., *The One Senator, One Vote Clause*, 12 CONST. COMMENT. 159, 161–62 (1995) (calling the one state, two senators rule "the most problematic in the Constitution" because it is "anti-democratic" and privileges the "sagebrush" values of small states, but agreeing that it "cannot be ameliorated by conventional interpretive or practical mechanisms").

Age of thirty five years."[120] If Alexandria Ocasio-Cortez, who became the youngest U.S. Representative in history at age twenty-nine, decided to run for president in 2020, one could not say that the meaning of age has changed, or complain that age qualifications had been written by dead white men.[121] The text establishing the one state, two senators rule—the argument would go—is as clear as the text regarding age qualifications, allowing no room for debate.

However, it is 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.[122] We should also guard against a propensity to treat text "as too sacred to be touched."[123]

In advancing an argument in favor of constitutionality, this Article follows traditional modes of interpretation: "text, structure, history, ethos, and doctrine."[124] These "modes or facets of constitutional interpretation" are in practice intertwined.[125] If interpretive modes conflict, then one must weigh their values against each other.[126] In

120. U.S. CONST. art. II, § 1, cl. 5.

121. Li Zhou, *Alexandria Ocasio-Cortez Is Now the Youngest Woman Elected to Congress*, VOX (Nov. 7, 2018), https://www.vox.com/2018/11/6/18070704/election-results-alexandria-ocasio-cortez-wins [https://perma.cc/R3KR-GZN8]; *see also* Frederick Schauer, *Easy Cases*, 58 S. CALIF. L. REV. 399, 414 (1985) (arguing that is it an "easy case" that "a twenty-nine year-old is not going to be President of the United States").

122. STRAUSS, *supra* note 41, at 102–03.

123. KLARMAN, *supra* note 4, at 631 (quoting Thomas Jefferson).

124. 1 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 (1st ed. 2004) (noting that interpretation "depends on a variety of considerations external to the text," including history, precedents, "public expectations," "practical considerations," and "moral and political values"); DANIEL FARBER & NEIL S. SEIGEL, UNITED STATES CONSTITUTIONAL LAW 6–9 (2019) (reviewing "multiple modalities").

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." 1 TRIBE, *supra*, at 35. The approach followed here is congruent with other "pluralist" constitutional theories. *See* Berman, *supra* note 109, at 1337–44, 1353, 1412–13.

125. 1 TRIBE, *supra* note 124, at 85; *see also* FARBER & SEIGEL, *supra* note 124, at 9.

126. *See* Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1191–92 (1987).

addition, *intra*modal conflicts, such as competing texts, as well as *inter*modal conflicts, such as between text and history, or between history and moral principles, can arise.[127] In the case of a Senate Reform Act, all of the interpretive modes point toward finding the statute constitutional, though some modes such as history and moral principle may argue more strongly in its favor than others such as text.

C. Textual Analysis

Altering the one state, two senators rule via a Senate Reform Act under the authority of the voting-rights amendments would create an intertemporal, intramodal textual conflict requiring resolution. Article V's prohibition against amending the rule presents an obstacle as well.

1. The voting-rights amendments

The most relevant text supporting congressional reform of the Senate is the Fourteenth Amendment. Passed immediately following the Civil War, it promises "the equal protection of the laws."[128] Supreme Court cases have applied the principle of equal protection in the context of federal standards for voting rights in the states.[129] The Fourteenth Amendment expressly delegates enforcement power to Congress.[130] The plain implication is that Congress has been given power to assure "equal protection of the laws" for citizens, including their right to vote.

One might object that the delegated congressional power under the Fourteenth Amendment is limited to protecting against infringements of citizens' rights only by the states rather than the United States.[131] However, it makes no sense to say, for example, that Congress has power to prohibit racial discrimination by the states but can do nothing about similar racial discrimination by the federal government. In parallel

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127. 1 TRIBE, *supra* note 124, at 87–88; *see also* J.M. Balkin & Sanford Levinson, *Constitutional Grammar*, 72 TEX. L. REV. 1771, 1796–98 (1994) (discussing the role of conscience and intra-model conflict of statutory interpretation).

128. U.S. CONST. amend. XIV, § 1.

129. *See infra* Section III.G.

130. U.S. CONST. amend. XIV, § 5.

131. *Id.* amend. XIV, § 1 (stating that "no state shall" deny "equal protection of the laws" to "any person within its jurisdiction").

situations, the Supreme Court has held the Fourteenth Amendment to apply to the United States government too.[132]

Additional text in the Constitution confers to Congress the power—indeed the duty—to protect the right to vote. This text is found 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 by any State *on account of race, color, or previous condition of servitude*."[133]

The Nineteenth Amendment: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State *on account of sex*."[134]

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 poll tax or other tax*."[135]

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132. *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, *supra* note 124, 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, *supra* note 108, at 37 (arguing that even if "the legal case for *Bolling*" was weak in terms of text or previous precedents, the "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").

It is true that cases such as *Bolling* involve federal statutes rather than constitutional provisions, and I do not argue that the voting-rights amendments should be interpreted to strike down the one state, two senators rule directly. *See infra* Section III.G. I maintain only that these amendments give Congress power to abrogate the rule.

133. U.S. CONST. amend. XV, § 1 (emphasis added).

134. *Id.* amend. XIX, § 1 (emphasis added).

135. *Id.* amend. XXIV, § 1 (emphasis added); *see also* AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 185, 402 (2012) (noting poll taxes were employed to suppress black votes, mostly in the southern states). Although the text of the Twenty-Fourth Amendment applies only to the United States, the Court has approved congressional authority to prohibit disenfranchisement for failure to pay a poll tax by the states under other voting-rights amendments. *See* Harper v. Va. Bd. of Elections, 383 U.S. 663, 666 (1966) (striking down a state poll tax as a violation of the Fourteenth Amendment).

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*."[136]

The kicker is that *all* of these voting-rights amendments—adopted over the 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."[137]

From a purely textual point of view, then, the voting-rights amendments delegate power to Congress affirmatively to protect voting rights based, first, on the principle of equality of all citizens under the Fourteenth Amendment and, second, on the prohibition of any curtailment of the right to vote "on account of" race, skin color, ethnicity, sex, and age.[138] 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.[139]

To "abridge," according to a standard dictionary definition, is "to reduce in scope" or "to shorten in duration or extent."[140] To abridge a right, then, is to reduce or shorten its scope and extent. The Supreme Court agrees that "the core meaning" of "abridge" is to "shorten,"

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136. U.S. CONST. amend. XXVI, § 1 (emphasis added).

137. *Id.* amends. XV, § 2; XIX; XXIV § 2; & XXVI, § 2. The Thirteenth Amendment abolishing slavery contains an identical provision. *Id.* amend. XIII, § 2.

138. 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 (updated ed. 2014). Suffragettes lost an attempt to include women's rights in the Fourteenth Amendment. *See* U.S. CONST. amend. XIV, § 2 (guaranteeing voting rights only to "male inhabitants" and "male citizens"); *see also* STRAUSS, *supra* note 41, at 13.

Ruth Bader Ginsburg and others led the charge to reinterpret the Fourteenth Amendment to include women. *See* Serena Mayeri, *Constitutional Choices: Legal Feminism and the Historical Dynamics of Change*, 92 CALIF. L. REV. 755, 822–23 (2004); *see also* ON THE BASIS OF SEX (Focus Features 2018); RBG (CNN Films 2018).

139. The Twenty-Fourth Amendment explicitly refers to the "right of citizens of the 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 also informs the interpretation of the scope of the other voting-rights amendments, see AMAR, *supra* note 135, at 405–08.

140. *Abridge*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/abridge [https://perma.cc/yF3F-E4SL].

which "entails a comparison."[141] The relevant comparison here is the relative voting weight of U.S. citizens in the several states.[142]

Empirical evidence for abridgment "by the United States" of the equal voting rights of citizens in the Senate is established by census data reported in Table 1.[143] No intentionality or animus requirement appears in the voting-rights amendments, and none should be conjured.[144] The United States itself—in the inherited and evolving governance structure of the Senate—abridges its citizens' equal rights to vote.

In addition to the unequal treatment of all citizens in larger states, the census data (and one survey) show also that the same inequality of distribution penalizes citizens in large states with respect to racial and ethnic diversity, as well as other specifically protected categories.[145] See Table 4 on the next page.[146] Because several voting-rights amendments aim directly at the protection against abridgment of rights on the basis of race,

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141. Reno v. Bossier Par. Sch. Bd., 528 U.S. 320, 333–34 (2000); *cf.* Michael Hurta, Note, *Counting the Right to Vote in the Next Census: Reviving Section Two of the Fourteenth Amendment*, 94 TEX. L. REV. 147, 155–56 (2015) (finding little legislative history regarding the meaning of "abridge").

142. *See Reno*, 528 U.S. at 333–34 (noting that an abridgment must be "relative to what the right to vote *ought to be*" and how "the status quo itself must be changed").

143. *See supra* Table 1. Technically, official decennial census data would be used.

144. *See* J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2332 (1997) (observing that the maintenance of "a preferred status or a status hierarchy is no less real simply because hatred or animus is absent"); *see also Abridgement*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/abridgment [https://perma.cc/Q7UA-6JWZ] (abridgment means both "the action of abridging something" and "the state of being abridged").

Even if some standard of "discriminatory intent" would be required, the racially tinged history in the creation of the several states under slavery should be found sufficient to the purpose. *See infra* Section III.E; *cf.* Aziz Z. Huq, *What Is Discriminatory Intent?*, 103 CORNELL L. REV. 1211, 1225–29, 1231 (2018) (describing "plural" standards adopted in different contexts under the Fourteenth Amendment).

145. There is controversy surrounding how categories of "race" and ethnicity are tabulated and reported. In particular, intercultural mixing and marriages produce increasing numbers of people who identify 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.

146. *See Population Distribution Based on Race/Ethnicity*, KAISER FAMILY FOUNDATION, https://www.kff.org/other/state-indicator/distribution-by-raceethnicity/?currentTimeframe=0 (estimating population and demographic data based on analysis of the Census Bureau's American Community Survey from 2008–2017).

color, sex, and age, the reform is justified in order to remediate these differences.

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

State	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	-	-
New Hampshire	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	-	-	-
District of Columbia	38	46	10	5	-	-

* Excluded: percentage of two races/ethnicities reported 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.

The four most populous states, for example, have significantly higher percentages of nonwhite citizens compared with the national average. White citizens are a minority in California, Texas, Florida, and New York. Nonwhite citizens in these states are doubly disadvantaged in their right to vote: in general, along with every other citizen in their states, and racially and ethnically, compared with white citizens in other states.[147]

147. *See supra* Tables 1 & 4.

The four least populated states reveal the flip-side: states with higher than average percentages of white citizens have greater voting influence. Alaska is close to the national average, but the three other smallest states are not: North Dakota, Vermont, and Wyoming are eighty-five to ninety-four percent white.[148]

Taking a larger slice of the data confirms a bias favoring white citizens. The twelve states with the highest percentages of whites qualify under the reform for only one senator (except Indiana which gets two). The twelve states with the highest nonwhite percentages include not only the four most populous states of California, Texas, Florida, and New York, but also two states, Georgia and New Jersey, that would qualify for an increase to three senators. Two more would remain at two senators, and only four would drop to one.[149]

A comprehensive empirical analysis confirms that the representational structure of the Senate 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 "constitute the only group that Senate apportionment advantages."[150] See Table 5 on the next page.[151] "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."[152]

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148. *See supra* Tables 1 & 4.

149. In descending order, the twelve most nonwhite states are Hawaii, New Mexico, California, Texas, Georgia, Nevada, Maryland, Arizona, Florida, New York, Mississippi, and New Jersey. *See supra* Table 4.

150. LEE & OPPENHEIMER, *supra* note 5, at 21.

151. *Id.* at 21 & tbl.2.1 (based on 1996 data).

152. *Id.* at 20, 22 & tbl.2.2; *see also* Malhotra & Raso, *supra* note 50, at 1045–46 (finding racial inequality in senate representation of African American and Hispanic citizens, which results in harming them by reducing "distributive benefits" compared with white populations and creating a "veto point" to stop civil rights legislation); Griffin, *supra* note 21, at 406 (finding that "since 1960, African Americans have been more likely than whites to reside in states with less voting weight," and "this tendency has become much more pronounced over time;" finding the same trend for Latino populations; and finding that senators from states with less voting weight tend "to support the positions advocated by civil rights groups").

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

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 the Fifteenth Amendment (abridgment of the right to vote on the basis of "race" or "color"). The proposed reform addresses both problems at once.

In addition, empirical data show differentials in population distribution that disadvantage other constitutionally protected categories of citizens, though the percentage differences are not as great as for race, color, and ethnicity. See Table 6 on the next page.[153]

153. U.S. Census Data from 2017 estimates compiled via Simply Analytics. LGBT percentages via Gallup Analytics, U.S. Dailies survey program (2016) (accessed by Wharton Research Programming) based on the following: "I have one final question we are asking only for statistical purposes. Do you, personally, identify as lesbian, gay, bisexual, or transgender?" The question may not include all nonbinary identifications. *Cf.* Jessica A. Clarke, *They, Them, and Theirs*, 132 HARV. L. REV. 894, 904–08 (2019) (discussing the variety of nonbinary identifications). Percentages are rounded to nearest whole number.

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

State	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
New Hampshire	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
District of Columbia	53	14	14	9

The Nineteenth Amendment forbids abridgment of the right to vote "on account of sex," and census data shows some states to be unequally represented in this respect. For example, the small states of Alaska, Nevada, and North Dakota represent men disproportionately.[154]

Citizens who identify as lesbian, gay, bisexual, or transgender (LGBT) are also likely covered under the Nineteenth Amendment.[155] Survey data show a disparity of distribution. Large states including California and New York report a significantly higher percentage of LGBT citizens than small states, for example, though the overall distribution varies only within a percentage point or two throughout the country.[156]

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 only approximately by census data available for the range of eighteen to twenty-four) appear to be relatively evenly distributed, though they may be slightly overrepresented in the small states of North Dakota and Rhode Island.[157]

Resolving the textual argument for constitutionality does not require a final weighing of available empirical evidence. If Congress considers the proposed reform, it would assemble a detailed factual record. Census and survey data indicate a strong probability, however, that the 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 enact "appropriate legislation" to protect it.[158] Repetition of the same language in the enforcement provisions of the voting-rights

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154. *See supra* Table 6. The Nineteenth Amendment applies to voting rights in apportionment. *See* AMAR, *supra* note 135, at 286–91 (arguing the Nineteenth Amendment articulates a "feminist Constitution" that applies to apportionment); Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 949, 960 (2002) (arguing for a "synthetic reading of the Fourteenth and Nineteenth Amendments").

155. *See* Russell K. Robinson, *Unequal Protection*, 68 STAN. L. REV. 151, 153–56 (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).

156. *See supra* Table 6.

157. *See supra* Table 6.

158. U.S. CONST. amends. XIV, § 5; XV, § 2; XIX; XXIV, § 2; XXVI, § 2.

amendments "comprise an impressive colonnade of congressional power."[159] As Akhil Amar writes:

> Given the emphatic repetition of the phrase "right to vote" . . . , there arose a strong argument to treat each right-to-vote amendment not as an isolated island, but as part of 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.[160]

The voting-rights amendments provide a broad and deep textual foundation for the reform.[161]

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159. Akhil Reed Amar, *Architexture*, 77 IND. L.J. 671, 694–95 (2002).

160. AMAR, *supra* note 135, at 191; *see also* LAURENCE H. TRIBE, THE INVISIBLE CONSTITUTION 70 (1988) (arguing that voting rights evolved over time to become a "core" constitutional principle); *cf.* Gabriel J. Chin, *Reconstruction, Felon Disenfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?*, 92 GEO. L.J. 259, 260–63 (2004) (arguing that the Fifteenth Amendment repealed the weaker voting rights protections of the Fourteenth Amendment).

161. Two arguments based on canons of construction may argue against this conclusion. First, if a specific provision is clear, then other provisions should be read as consistent. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 402, 406 (1950). Second, if the language of the original Constitution is clear, there is a presumption against implied repeal except where the two provisions cannot be interpreted to be consistent. *Id.* at 404.

The "thrusts" of canons of construction are famously problematic, however, because they are subject to the "parries" of counter-canons. *Id.* at 401. Practical reasoning about purposes and ends is needed too. *See generally* Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law*, 45 VAND. L. REV. 533 (1992). "Canon wars" in constitutional law should leave room for an appreciation of purpose as well as text. *See* Anita S. Krishnakumar & Victoria F. Nourse, *The Canon Wars*, 97 TEX. L. REV. 163, 166–67 (2018) (book review).

On these grounds, one should reject arguments against the reform based on various canons. A general parry invokes the counter-canon that later constitutional provisions should trump earlier ones. The voting-rights amendments forged after the Civil War should prevail over one state, two senators rule born in the crucible of slavery.

2. Article V

A textual thicket arises from Article V's restriction on any change to "equal suffrage in the Senate."[162] Again at first glance (and again pun intended), Article V appears to lock in the one state, two senators rule now and forever, forbidding any change even by amendment. There are several textual arguments, however, that Article V should not impede reform.

First, Article V limits constitutional *amendments*, and the proposed reform invokes constitutional authority for the Congress to enact *a statute*.[163] Therefore, Article V does not apply.[164]

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 various pro-slavery provisions, such as the Fugitive Slave Clause and statutes enacted under it,[165] were simply ignored after the adoption of the Thirteenth, Fourteenth, and Fifteenth Amendments.[166] Similarly, the Nineteenth Amendment automatically and retroactively cancelled references in the Fourteenth Amendment to "male" residents and citizens.[167] It is true that the proposed Senate Reform Act is a statute enacted under the authority of constitutional provisions rather than a constitutional amendment itself, but this does not negate the argument. Statutes enacted under the voting-rights amendments that conflict with original pro-slavery or sexist constitutional provisions prevail by virtue of the new statutes' constitutional grounding in later amending text.[168]

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162. U.S. CONST. art. V.

163. *Id.*

164. Article V is written as one paragraph without sentence breaks. *Id.* 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 based on explicitly delegated constitutional powers. *Id.*

165. U.S. CONST. art. IV, § 2, cl. 3. *See generally* DELBANCO, *supra* note 110, at 5, 8–9, 12, 18–20 (describing the history and importance of the Fugitive Slave Clause and the Fugitive Slave Acts of 1793 and 1850).

166. *See* FINKELMAN, *supra* note 110, at 7–8 (listing other slavery-related clauses).

167. U.S. CONST. amend. XIV, § 2; 1 TRIBE, *supra* note 124, at 69–71; *see also supra* note 138 and accompanying text.

168. Prohibition and its demise provide another obvious example. A *statute* passed to regulate the production or distribution of "intoxicating liquors" under the authority of the Twenty-First Amendment does not violate the repealed *constitutional*

Second, the voting-rights amendments bestow power on Congress to protect a different kind of "equal suffrage"—the kind belonging to people rather than states. The Seventeenth Amendment, which established the popular vote as the required method of election of senators, replaced the original constitutional structure that gave state legislatures the authority to name U.S. senators.[169] State legislatures did not and could not claim a loss of "suffrage" without consent under Article V following the Seventeenth Amendment's change of the very meaning of "suffrage." If "equal suffrage in the Senate" referred originally to a power held by the states as entities, the Seventeenth Amendment removed this power and placed it firmly in the hands of individual citizens.[170]

Analogously, states would have no cause to contest a change to their "equal suffrage" under the voting-rights amendments and their construction and enforcement by Congress in a Senate Reform Act. By its plain meaning, and in conjunction with the Seventeenth Amendment as well as the voting-rights amendments, "equal suffrage in the Senate" implies a measure of equal voting rights for citizens in Congress.[171] Citizens in California today do not enjoy "equal suffrage in the Senate" under a contemporary understanding of what "equal suffrage" means.

This interpretation would not render the Equal Suffrage Clause superfluous. Attempting to eliminate a state, allocating zero senators to a state, or abolishing the Senate would run afoul of Article V because no legitimate justification could be given that these actions

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text of Eighteenth Amendment. U.S. CONST. amends. XVIII, XXI; *see also* LAWRENCE LESSIG, FIDELITY & CONSTRAINT: HOW THE SUPREME COURT HAS READ THE AMERICAN CONSTITUTION 283–84 (2019) (arguing for a method of "interpretive *synthesis*" of older text and newer amendments).

169. U.S. CONST. amend. XVII, § 1; *id.* 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. STRAUSS, *supra* note 41, at 132–35.

170. This analysis provides a partial response to Charles Fried's argument that the "equal dignity" of states should be preferred over the equal voting rights of citizens. *See supra* note 25 and accompanying text. The Seventeenth Amendment speaks clearly to the contrary.

171. U.S. CONST. art V; *see id.* amend. XVII; *id.* amends. XIV, XV, XIX, XXIV, XXVI (the voting-rights amendments).

are aimed to protect equal voting rights within other relevant constitutional constraints.[172]

Third, even if one concedes Article V limits the authority of Congress to enact legislation that is the equivalent of an amendment, the plain meaning of the text does not constrain all congressional action. Arguably, the states may "consent" to the reform through their representatives in Congress.[173]

With respect to the constitutional meaning of "consent," Arthur Machen argued long ago that the Fifteenth Amendment was "void" under Article V with respect to those states that refused to ratify the amendment.[174] Although three quarters of the states ratified the Fifteenth Amendment, many did so only at the points of Union generals' guns.[175] A minority of states did not ratify at all. Even though the Fifteenth Amendment went into effect, Machen argued that it did not apply to those states that did not specifically "consent" to it or explicitly rejected the change.[176]

Machen's view has fortunately not been followed, but his argument is instructive in providing another reason why Article V should not constrain the proposed reform. Because Congress is acting under the powers granted by the voting-rights amendments, the states have already "consented" to the use of this delegated authority, just as they

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172. *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 contend that Representative Dingell's proposal to abolish the Senate would advance the cause of voting equality. Dingell, *supra* note 30. It would do damage, however, to other structural components of the Constitution that provide separate functions to the Senate (*e.g.*, approval of treaties and judicial appointments, as well as a bicameral check on the House). At a minimum, it would be less well tailored to our constitutional structure than a Senate Reform Act.

173. *See* Machen, *supra* note 172, at 173.

174. Machen, *supra* note 172, at 173.

175. *See* LEPORE, *supra* note 110, at 32 (describing this kind of consent as "constitutional coercion"); *see also* FALLON, *supra* note 108, 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").

176. Machen, *supra* note 172, at 173.

have "consented" to congressional power to adopt other statutes, such as the Voting Rights Act of 1965.[177]

Fourth, Machen focused attention also on the meaning of "state" in Article V.[178] He argued correctly that a "state" does not simply mean an abstract entity, a government, or even a territory with boundaries.[179] A "state," at least in connection with the idea of "consent," must mean the "people" in it.[180] What Machen missed is that the Civil War and the Thirteenth, Fourteenth, and Fifteenth Amendments worked a revolution in the very "people" who constitute the states. The war liberated four million slaves, and the amendments converted them (or at least the adult males) into citizens.[181] "We the People" who compose the "states" were fundamentally changed—especially in the formerly rebellious southern Confederacy.[182] Abraham Lincoln and Frederick Douglass recognized that this change amounted to a "Second American Revolution,"[183] and the Fourteenth Amendment forged "a second Constitution."[184] As Douglass observed, the "destiny" of the Civil War was to "unify and

177. Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended at 42 U.S.C. §§ 1971, 1973–1973b(b)(1) (2012)).

178. Machen, *supra* note 172, at 174.

179. *Id.*

180. *Id.* James Wilson and Alexander Hamilton made similar arguments in opposing the one state, two senators rule at the Constitutional Convention. *See* KLARMAN, *supra* note 4, at 185–86.

181. *See* BLIGHT, *supra* note 55, at 480–81; *see also* FONER, *supra* note 138, at xxvi (observing that Reconstruction "redefined the meaning of American citizenship" through, in part, "an unprecedented commitment to the ideal of a national citizenship whose equal rights belonged to all Americans regardless of race"); 1 TRIBE, *supra* note 124, at 1293 (describing the Civil War as "a watershed in the direct federal protection of individual rights").

182. The "people" legally composing the "states" were changed again by the Nineteenth Amendment and yet again by the Twenty-Sixth. *See* U.S. CONST. amends. XIX, XXVI; *see also* ROGERS M. SMITH, POLITICAL PEOPLEHOOD: THE ROLES OF VALUES, INTERESTS, AND IDENTITIES 146 (2015) ("The knitting and reknitting of conceptions and coalitions espousing different visions of 'We the People' has been the warp and woof of American political development."); TAYLOR, *supra* note 83, at 81–125 (discussing the flexibility of defining "the people" in a democracy for various purposes of "inclusion/exclusion").

183. BLIGHT, *supra* note 55, at 415 (observing that "Lincoln and Douglass spoke from virtually the same script" emphasizing a "rebirth" of "freedom" based on "equality" after the Civil War).

184. *Id.* at 480.

reorganize the institutions of this country" because otherwise the war would have been "little better than a gigantic enterprise for shedding human blood."[185] In this context, the voting-rights amendments reconstituted the "people" in the "states" who are protected with "equal suffrage in the Senate" under Article V.

3. Intratextual conflict and "time's arrow"

The better reading of the constitutional text—taking into account what Laurence Tribe calls "time's arrow" in its evolution—is to interpret the voting-rights amendments as changing the meaning of "consent" and "equal suffrage" in Article V, at least in the context of a congressional statute narrowly tailored to protect the more recently established equal voting rights.[186] The amendments changed the composition of "We the People," and they put the voting rights of U.S. citizens on an "equal protection" footing. They delegate to Congress the power to protect the voting rights of people excluded from the original Constitution, and the states have "consented" to this power through their ratification of the amendments.

This textual analysis of the proposed reform exposes an *intra*modal and *inter*temporal conflict when different parts of the Constitution pull in different directions.[187] A conflict emerges between (1) the plain meaning of original text setting forth the one state, two senators rule and (2) the later texts of the voting-rights amendments

185. *Id.* at 420–21 (quoting Douglass); *see also* FONER, *supra* note 138, at 602–03 (arguing that even though Reconstruction must be judged a "failure" after the rise of the southern Redeemers, its constitutional changes provided "an unprecedented redefinition of the American body politic" that would bode well in the future).

186. As Tribe describes "time's arrow" in the evolution of interpretation of constitutional text:

> A revision to avoid conflicts with new constitutional 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 a change in that provision's words.

1 TRIBE, *supra* note 124, at 67; *see also* TRIBE, *supra* note 160, at 156–57 & fig. VI (showing "time's arrow" as part of a "gyroscopic construction" exhibiting "a capacity to grow" and "pull toward the future").

187. *See supra* note 127 and accompanying text.

establishing federally protected voting rights and giving Congress the power to protect them.[188]

"Time's arrow" favors an affirmative constructive act of Congress to reduce significant voting inequality. The voting-rights amendments grant Congress power to adopt a Senate Reform Act in a manner analogous to the Voting Rights Act of 1965, which has been described as "undoubtedly the most important and most effective civil rights statute ever enacted."[189]

D. 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.[190] The proposed Senate Reform Act respects both federalism and individual rights.[191]

1. Equal voting rights of "We the People"

The strongest structural argument in favor of the reform is that it delivers on the foundational promise of the Declaration of Independence that "all

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188. *See supra* note 127 and accompanying text. For example, the Seventeenth Amendment adopted in 1913 is best read as repeating the original one state, two senators rule only in order to clarify its primary purpose of establishing that senators are directly "elected by the people." U.S. CONST. amend. XVII. By making senators directly responsive to the voting public, it provides a bridge to a Senate Reform Act. *See also supra* notes 169–71 and accompanying text.

189. Pildes, *supra* note 96, at 287; *see also* AMAR, *supra* note 135, at 287 (describing the Voting Rights Act and the Civil Rights Act of 1964 as "two of the most important pieces of legislation in American history"); Terrye Conroy, *The Voting Rights Act of 1965: A Selected Annotated Bibliography*, 98 L. LIB. J. 663, 663 (2006) ("The Voting Rights Act of 1965 is widely considered one of the most important and successful civil rights laws ever enacted."); Pamela S. Karlan, *Section 5 Squared: Congressional Power to Extend and Amend the Voting Rights Act*, 44 HOUS. L. REV. 1, 2 (2007) (celebrating the Voting Rights Act as "the cornerstone of the 'Second Reconstruction'").

190. *See* 1 TRIBE, *supra* note 124, at 6 (referring to these considerations as two of several models for constitutional argument—Model I, emphasizing "separated and divided powers," and Model VI, emphasizing "equal protection").

191. *Cf.* 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.").

men [and women] are created equal."[192] Voting rights enable the protection of other rights. As the Supreme Court has explained, the right to vote is a "fundamental political right" because it is "preservative of all rights."[193] The voting-rights amendments confirm the structural importance of these rights.

If democracy means, as its ancient Greek roots suggest, that the people rule, then equal voting rights for all citizens are foundational.[194] They enable a sensible translation of the expressed will of "We the People" into concrete practices and realities.[195]

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192. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); *see also* 1 LOUIS H. POLLAK, THE CONSTITUTION AND THE SUPREME COURT: A DOCUMENTARY HISTORY 16–17 (1968) ("[T]he 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' . . . ."); Frederick Douglass, What to the Slave Is the Fourth of July?, Address Delivered in Rochester, New York (July 5, 1852), *in* 2 THE FREDERICK DOUGLASS PAPERS: SERIES ONE: SPEECHES, DEBATES, AND INTERVIEWS 1847–54, at 363–64 (John W. Blassingame ed., 1982) ("[T]he Declaration of Independence is the ring-bolt to the chain of your nation's destiny . . . . The principles contained in that instrument are saving principles. Stand by those principles, be true to them on all occasions, in all places, against all foes, and at whatever cost."); George F. Will, Opinion, *To Construe the Constitution, Look To the Declaration*, WASH. POST (July 3, 2019), https://www.washingtonpost.com/opinions/to-construe-the-constitution-look-to-the-declaration/2019/07/03/3e025ab8-9c43-11e9-b27f-ed2942f73d70 [https://perma.cc/HM5Z-ECMN] ("[R]ead the Declaration, which illuminates what came next: the Constitution and a nation worth celebrating.").

193. Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

194. As David Held explains,

> While the word 'democracy' came into English in the sixteenth century from the French *démocratie*, its origins are Greek. 'Democracy' is derived from *demokratia*, the root meanings of which are *demos* (people) and *kratos* (rule) . . . . Democracy entails a political community in which there is some form of *political equality* among the people.

HELD, *supra* note 24, at 1; *see also* TAYLOR, *supra* note 83, at 2 ("[T]he word *democracy* . . . conveys a seemingly simple idea: the people (*demos*) rule or hold power (*kratos*). Democracy is the promise of people ruling, . . . yet who counts as the people, how they rule, and where they do so remain eternally up for debate."); *infra* Section III.F (discussing moral principles supporting equal voting rights as a feature of democracy).

195. U.S. CONST. pmbl.; *see* AMAR, *supra* note 135, at 54–56 (describing the "enactment argument" as one that relies on the text of "We the People" but also goes beyond the text to include a structural argument in historical context). *See generally* 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (1998) (describing how the Civil War period and its aftermath established political equality, including voting

2. Preservation of federalism

A principal structural objection to the proposed reform is likely to come from defenders of federalism who emphasize the importance of states' rights against the encroachment of federal power.[196] 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.[197] On this view, to change this rule 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 reform changes nothing regarding the independence and the authority of the states regarding the election of U.S. senators. It changes only the allocation of the number of senators to each state. It respects the principle of federalism by allocating a minimum of one senator to each state, and respects the constitutional rights of states to set the conditions for the election of senators.[198] States may also decide to adopt innovative election schemes to improve democratic representation and potentially reduce political

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equality, as a central constitutional principle); LESSIG, *supra* note 168, at 426 (arguing that constitutional "synthesis" requires recognizing many "moments" over time that represent "a significant decision by 'we the people'").

At a telling moment at the founding, a final drafting committee amended the preamble to read "We the People of the United States" rather than "We the People of [list of all the states]." *See* BEEMAN, *supra* note 4, at 347–48. This change reinforces the proposition that citizens have voting rights as citizens of the United States and not only as citizens of their respective states. *See infra* notes 351–59 and accompanying text (discussing how people are both citizens of states and citizens of the United States).

196. Federalism considerations were central 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. *See id.* at 543–44, 557. However, as discussed *infra* Section III.G, 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 equal voting rights and the power of Congress to vindicate them. *See* 570 U.S. 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.").

197. U.S. CONST. art. V; *see, e.g.*, Fried, *supra* note 25, at 997 ("In the family of nations, there are small countries and vast ones, and yet we are committed to the independence, the equal dignity of even the smallest.").

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

polarization.[199] States would retain authority to decide the details of these elections within the confines of the Seventeenth Amendment and federal rights to vote.

It is true that abolishing the one state, two senators rule would reduce some semblance of equality of states qua states as entities within the federal structure. The balance of power would shift within the Senate to larger states. For example, the seven largest states of California, Texas, Florida, New York, Illinois, Ohio, and Pennsylvania would account for forty-five of 110 senators, and adding in the five states that gain one senator—Georgia, Michigan, New Jersey, North Carolina, and Virginia—produces a sixty-senator majority.[200] This rebalancing with respect to population, however, would not lead to any significant geographical or political imbalance.[201] A more compact group of large states would also likely increase the relative power of the states vis-à-vis the national government.

It is also true that citizens in some rural states would lose leverage, but there is no compelling constitutional or political reason for overrepresenting rural rather than urban populations. Note also that rural populations in some very large states such as California, Florida, New York, and Texas are currently *under*represented.[202] In addition, the proposed reform maintains mathematical overrepresentation of four states with less than one-quarter of one percent of the total population (Alaska, North Dakota, Vermont, and Wyoming) using a principle of federalism to avoid rounding to zero.[203] Some mostly rural states are therefore still relatively overrepresented in the reformed allocation.

Allocating a minimum of one senator to each state is a compromise that readjusts the dramatic current imbalance in representation, while preserving the "political safeguards of federalism."[204] Readjusting the

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199. *See supra* notes 96–102 and accompanying text.

200. *See supra* Table 1.

201. *See infra* Section III.D.8 (discussing the limited impact the reform would have on the Electoral College system's features of federalism and political stability); *infra* Part IV (explaining the reform's minimal effect on the political makeup of the Senate and the likelihood that ideological perspectives will guide politicians' views of the reform more than regional geographical considerations).

202. *See supra* Table 1; *see also supra* note 6 and accompanying text; *infra* notes 435–39 and accompanying text.

203. *See supra* Table 1.

204. Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

allocation of senators under the reform would strengthen rather than undermine our federal structure.[205] The historical drift toward increasing inequality of U.S. Senate representation is a bug, not a feature, of American-style federalism.

3. Preservation of senate functions

The reform changes only the allocation of senators. It retains the structure of six-year terms, respects the Three Classes Clause, and maintains all senate functions regarding treaties, impeachment, and confirmations of appointments.[206] It is therefore a relatively moderate change compared with other reform proposals.[207]

4. Removal of unfair bargaining advantages of small states

The reform would reduce structural unfairness and inefficiencies that allow small states to bargain for larger per capita economic benefits than larger states.[208] Small states may often leverage their disproportionate representation to claim more than their fair share of government expenditures. Empirical research confirms 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.[209]

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205. *See, e.g.*, Heather K. Gerken, *Our Federalism(s)*, 53 WM. & MARY L. REV. 1549, 1550–53, 1556, 1560 (2012) (describing leading versions of federalism as it has appeared in the American political system and noting that states manifest power in alternative ways).

206. *See* U.S. CONST. art. I, § 3, cl. 1–2, 6; *id.* art. II, § 2, cl. 2.

207. *See supra* notes 29–33 and accompanying text.

208. Some residual benefit for very small states may remain, given the mandatory minimum of one representative and one senator under the federalism constraint. *See supra* notes 90, 203–04 and accompanying text.

209. LEE & OPPENHEIMER, *supra* note 5, at 158–60; *see also* 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, 259, 275–76, 280 (2013) (finding small states receive more defense spending than larger states, but also correlating differentials to other variables such as how fast different states are growing); Frances E. Lee, *Senate Representation and Coalition Building in Distributive Politics*, 94 AM. POL. SCI. REV. 59, 61–66 (2000) (showing with case studies of transportation legislation how smaller state funding advantages are built through coalition-building with senators from larger states).

Senators from small states may also prove easier and less expensive to lobby or bribe. TUCKER, *supra* note 7, at 22–23.

A Senate Reform Act would mitigate this unfairness and inefficiency while abiding by federalism constraints.

5. Reduction of risks of secession and national instability

The federal structure giving citizens from small states enormously greater clout per citizen than those in much larger states risks long-term structural instability.[210] Citizens in large states are likely to resent representational inequality over time, especially given that it is increasing.[211] In extreme cases, they may go so far as to contemplate secession. A Civil War costing hundreds of thousands of lives cemented the Union against the attempt of eleven southern states to secede.[212] Subsequent world wars in which the United States played a decisive role may cast doubt on the prospect of a possible future secession. However, the recent examples of referendums seeking secession in Catalonia, Scotland, and Quebec suggest that this concern may also lie dormant within regions of the United States.[213]

For example, citizens in California or Texas, the most populous states, could consider the option of a democratic secession to be justified in part by an unrepresentative Senate.[214]

California constitutes a population and an economy of sufficient size to become a nation-state on its own. Led by Hollywood and Silicon

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210. *Cf.* TRIBE, *supra* note 160, at 208 (arguing for "stability" as a constitutional principle in a "gyroscopic" understanding of the Constitution); Sonia Mittal & Barry R. Weingast, *Constitutional Stability and the Deferential Court*, 13 U. PA. J. CONST. L. 337, 344–45 (2010) (arguing that stability is an important objective of constitutional structure, including a reason for the Supreme Court to defer on occasion to public opinion).

211. *See supra* notes 6–9 and accompanying text.

212. DREW GIPLIN FAUST, THIS REPUBLIC OF SUFFERING: DEATH AND THE AMERICAN CIVIL WAR xi, 255, 257 (2008) (counting more than 600,000 deaths); LEPORE, *supra* note 110, at 293 (estimating more than 750,000 casualties).

213. *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, 1–3 (2014). *But cf.* Huq, *supra* note 38, at 1171–72, 1206–07 (arguing that the rigidity of the amending process of the U.S. Constitution made secession less likely at least in the early antebellum period).

214. *See* Sasha Issenberg, *Divided We Stand: The Country is Hopelessly Split. So Why Not Make It Official and Break Up?*, N.Y. MAG.: INTELLIGENCER (Nov. 14, 2018), http://nymag.com/intelligencer/2018/11/maybe-its-time-for-america-to-split-up.html [http://perma.cc/CB3R-GC3D] (providing an account of contemporary U.S. secession movements).

Valley, its nearly $3 trillion economy would count, if it stood alone, as the fifth largest in the world behind only the United States itself, China, Japan, and Germany.[215] Since 2015, a group has been "circulating petitions 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.'"[216] California, joined by Oregon and Washington, has been increasingly at odds also with the Trump administration.[217]

Texas has a long tradition of independence as the Lone Star State.[218] As President Lincoln cautioned at the outbreak of the Civil War, Texas was the only state that claimed separate sovereignty prior to being annexed (except for the original thirteen colonies).[219] Notwithstanding Lincoln's warning—and the terrible experience of the Civil War itself—some Texas politicians have again begun to threaten secession, including former Governor Rick Perry.[220] At a Tea Party rally in 2009, Perry mentioned the

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215. Michael Greenberg, *California: The State of Resistance*, N.Y. REV. OF BOOKS (Jan. 17, 2019), https://www.nybooks.com/articles/2019/01/17/california-the-state-of-resistance [https://perma.cc/ZCK6-QM3C]; 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 [https://perma.cc/LDG5-FDLV].

216. Issenberg, *supra* note 214. *But see* Greenberg, *supra* note 215 (observing that Calexit has "little popular support").

217. *See* Timothy Egan, *Revenge of the Coastal Elites*, N.Y. TIMES, May 11, 2019, at A22.

218. *See generally* RANDOLPH B. CAMPBELL, GONE TO TEXAS: A HISTORY OF THE LONE STAR STATE (3d. ed. 2017) (characterizing the transformation of Texas from Spanish frontier, to a Mexican province, to an independent republic, and finally to an annex of the United States).

219. In Lincoln's words,

> [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 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.

Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), *in* BASLER, *supra* note 82, at 604.

Another exception is Hawaii, which was annexed without the consent of its inhabitants, and of course all states were formed from land originally claimed by indigenous peoples. *See supra* note 104 and *infra* note 259.

220. Issenberg, *supra* note 214.

option of independence, and his lieutenant governor had meetings with the Texas Nationalist Movement.[221]

One poll found fully one quarter of American citizens to favor secession of their states.[222] In 2012, the White House received petitions from all fifty states to secede, with 125,000 signatures from Texas leading the list.[223] Although probably very unlikely at present, Omar El Akkad imagines a dystopian future in which political polarization leads to a new and brutal civil war.[224]

Senate reform would alleviate the unfair representation that affects citizens in the largest states. Knitting these states more closely into the union would tap down secessionist talk and increase long-term national stability.[225]

6. Comparable size of the Senate

The estimated 110 senators under the Senate Reform Act compares to the current structure of 100 senators. The Rule of One Hundred approximates the current size of the Senate and will continue to do so over time.[226] Because the Senate is smaller and serves longer terms than the House, it has been said to act as a more "deliberative" body.[227] The Rule of One Hundred keeps total Senate numbers in check, and with six-year terms continuing, the Senate would continue to act as a deliberative body, if in fact it does so now.[228]

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221. *Id.*

222. *Id.* (citing Reuters poll).

223. *Id.*

224. OMAR EL AKKAD, AMERICAN WAR (2017) (describing a fictional future world of climate catastrophe in which Blue and Red states have fragmented into warring factions).

225. *See* JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 185–86 (Erin Kelly ed., 2001) (arguing that "the power of equal citizens" in a constitutional order promotes stability).

226. *See supra* Part II.

227. *See* LEE & OPPENHEIMER, *supra* note 5, at 18 ("Defenders of the Senate often argue that its primary function is to serve as a more deliberative legislative body than the House.").

228. *Id.* at 18–19 ("Although many institutional features of the Senate—such as its small size, its long terms of office, and its rules for debate—may help to create a more deliberative body, Senate apportionment bears no connection to this aim."). Recent accounts of the Senate in action, however, suggest that it is characterized lately more by partisan rancor than any true deliberation. *See* Joseph Postell, *What's the Matter with Congress?* 18 CLAREMONT REV. BOOKS 56, 58 (2018).

7. New states

The Senate Reform Act would smooth a path to possible statehood for underrepresented U.S. citizens, such as those living in the District of Columbia, Puerto Rico, and perhaps the Pacific Islands.[229] "No taxation without representation" is a founding principle of the United States, and it should apply to these U.S. citizens who should be allowed to form new states if they wish.[230] The District of Columbia has adopted the motto "Taxation Without Representation" on its license plates as a protest beginning in 2000.[231] Because the District of Columbia, Puerto Rico, and other territories are not states, their citizens have been denied constitutional claims for congressional representation.[232]

The reform would change only one of the ground rules for the admission of new states, but it is important one. The unwritten "equal footing doctrine" provides for the admission of new states on the same basis as the original ones, including two senators and a proportional number of representatives in the House.[233] This rule would likely apply today if the District of Columbia and Puerto Rico were admitted as the fifty-first and fifty-second states. Changing the "equal footing" rule for new states with respect to the Senate would reduce political resistance

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An alternative that considerations of political feasibility may recommend to avoid the problem of "loss aversion" would be to double the size of the allocation, using a baseline minimum of two senators per state and a Rule of Two Hundred. *See infra* notes 427–29 and accompanying text; *infra* Table 9.

229. *See supra* notes 103–04 and accompanying text. Federal law allows five official delegates from the District of Columbia, Puerto Rico, American Samoa, Guam, and the Virgin Islands to participate in activities of the House of Representatives. *See* Michel v. Anderson, 14 F.3d 623, 629, 630–31 (D.C. Cir. 1994) (reviewing history and citing statutory authority). Territorial delegates may vote in committee proceedings, but do not have a vote equivalent to an official representative of a state. *Id.* at 631–32 (upholding largely "symbolic" right of delegates to participate in the Committee of the Whole in the House).

230. *See* Grant Dorfman, *The Founders' Legal Case: "No Taxation Without Representation" Versus Taxation No Tyranny*, 44 HOUS. L. REV. 1377, 1408–10 (2008) (finding the political case for the principle stronger than the legal one).

231. *DC License Plates Through the Years*, WASHINGTONIAN (Oct. 8, 2015), https://www.washingtonian.com/2015/10/08/dc-license-plates-through-the-years [https://perma.cc/DQ8B-MK2R].

232. *E.g.*, Igartúa v. United States, 626 F.3d 592, 594–95 (1st Cir. 2010) (Puerto Rico); Adams v. Clinton, 90 F. Supp. 2d 35, 41 (D.D.C.), *aff'd sub nom.* Alexander v. Mineta, 531 U.S. 940 (2000), and *aff'd*, 531 U.S. 941 (2000) (District of Columbia).

233. *See* AMAR, *supra* note 135, at 259.

to admitting the District of Columbia or Puerto Rico because they would each receive only one senator.[234]

The Twenty-Third Amendment allocates votes in the Electoral College to the District of Columbia as if it were a state.[235] However, this is a poor excuse for full representation of citizens in a capital city with a population larger than the two smallest states.[236] Note also that the District of Columbia has a higher percentage of people of color, as well as LGBT citizens, than the U.S. average, enhancing the argument that the District should benefit from fair and equal representation.[237]

The U.S. territory of Puerto Rico, which is also ethnically diverse, deserves representation too. Around ninety-eight percent of Puerto Ricans identify as Hispanic or Latino.[238] A majority of them appear to want statehood.[239] The case for Puerto Rican statehood is even stronger

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234. *See supra* Table 1.

235. U.S. CONST. amend. XXIII, § 1.

236. *See* Mary M. Cheh, *Theories of Representation: For the District of Columbia, Only Statehood Will Do*, 23 WM. & MARY BILL RTS. J. 65, 86–87 (2014) ("When the District must give up one form of autonomy to secure another form of autonomy, there is neither a gain for residents nor movement forward.").

Another option is the retrocession of the District of Columbia (or a part of it) back into the state of Maryland. *See* Charles Lane, *The Answer to D.C. Congressional Representation? It's in Douglass County, Maryland*, WASH. POST (Feb. 18, 2019), https://www.washingtonpost.com/opinions/the-answer-to-dc-congressional-representation-its-in-douglass-county-maryland/2019/02/18/246635e2-33c1-11e9-af5b-b51b7ff322e9_story.html [https://perma.cc/U6XY-CNXL] (creatively naming the new county for Frederick Douglass). Retrocession has previously been used to allow Virginia to reclaim Alexandria from the District by federal statute in 1846. *See Adams*, 90 F. Supp. 2d at 53 (citing Act of July 9, 1846, ch. 35, 9 Stat. 35).

237. *See supra* Tables 4 & 6. Congress proposed an amendment to treat the District of Columbia as if it were a state in 1978, but only sixteen states approved it. AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 457 (2005). There is no reason Congress could not constitutionally reduce the extent of its jurisdiction over the federal district and grant the remaining residential areas statehood, as an expansion from what it has already allowed as municipal home rule. *See* U.S. CONST. art. I, § 8, cl. 17 (District Clause); *id.*, art. IV, § 3 (New States Clause); *see also Adams*, 90 F. Supp. 2d at 47, 49 (noting that Congress authorized home rule for the District, including a mayor, in 1973).

238. *QuickFacts: Puerto Rico*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/pr [https://perma.cc/X2NG-W35Y].

239. *See* Joseph Blocher & Mitu Gulati, *Puerto Rico and the Right of Accession*, 43 YALE J. INT'L L. 229, 269 (2018). In 2017, in a referendum designed by a pro-statehood government, ninety-seven percent favored statehood, though the turnout was only twenty-three percent of the population, partly because anti-statehood factions

given that Hispanic populations seems to suffer the worst abridgment in senate representation of any discrete minority group.[240] Because Puerto Rico equals about one-hundredth of the U.S. population, it would qualify for one senator. It is larger than twenty states.[241]

In this context, the deaths of almost 3000 Puerto Rican U.S. citizens in the path of Hurricane Maria in 2017, plus an estimated $9 billion in damages, are germane.[242] The disaster and its aftermath would have garnered greater political and media attention if Puerto Rico had been a state. The response by the federal government would also have been improved if Puerto Rico had one senator and a complement of five representatives in the House—as well as attendant Electoral College votes.[243]

One can also imagine the creation of a new state comprising the non-represented citizens in the U.S. territories of American Samoa, Guam,

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boycotted the referendum. Antonio Weiss & Brad Setser, *America's Forgotten Colony: Ending Puerto Rico's Perpetual Crisis*, FOREIGN AFF. 158, 161 (July/Aug. 2019). A new and fair referendum would provide an update of the general sentiment.

240. *See supra* notes 50 & 152 and accompanying text. *See generally* JUAN R. TORRUELLA, THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL (1985) (providing comprehensive historical legal background and arguing for statehood).

241. *See supra* Table 1.

242. 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 [https://perma.cc/C6H9-9DWE]; Weiss & Setser, *supra* note 239, at 158 (recounting "thousands of deaths, hundreds of thousands displaced, millions left without electricity, and, by some estimates, economic losses as high as $90 billion").

243. *See* Blocher & Gulati, *supra* note 239, at 232 (noting that if Puerto Rico were admitted as a state, it would qualify for five representatives in the House); 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 [https://perma.cc/3UD-DNYD] (giving lessons from the disaster and noting renewed interest in statehood); 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).

A suggestion has been made that a constitutional amendment similar to the Twenty-Third Amendment giving D.C. representation in the Electoral College should be adopted for Puerto Rico. U.S. CONST. amend. XXIII; Weiss & Setser, *supra* note 239, at 166. But statehood would provide citizens with equal health care and other federal benefits. Weiss & Setser, *supra* note 239, at 167. It would also be easier, requiring only congressional authorization rather than constitutional amendment.

the Northern Mariana Islands, and the U.S. Virgin Islands (or some combination of them), which may together qualify for one senator and one representative.[244] A new Pacific Islands state would create the smallest state in the union.[245]

There is another structural benefit related to geographical integrity of representation. Adding the District of Columbia, Puerto Rico, and the Pacific Islands as states would increase the representation of states affected by rising sea levels and increasing hurricane risks associated with global climate disruption. Granting proportional representation to larger coastal states, such as California, Texas, Florida, New Jersey, New York, North Carolina, and Virginia, would likewise increase senate representation of states impacted most by the climate crisis.[246]

8. A more representative Electoral College

The Senate Reform Act would improve the representativeness of the Electoral College because the electoral votes of each state are determined by the number of representatives and senators.[247] The reform would reduce overrepresentation of small states, with any remaining inequality required by our 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 after two recent elections of

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244. *See also* Developments in the Law, *The U.S. Territories*, 130 HARV. L. REV. 1616, 1617 (2017) (examining complex legal circumstances of the various territories).

245. *See supra* Table 1. One activist has argued for a constitutional amendment to provide non-state representation for U.S. citizens living in the various territories. Neil Weare, *Equally American: Amending the Constitution to Provide Voting Rights in U.S. Territories and the District of Columbia*, 46 STETSON L. REV. 259, 264–65 (2017). Simply granting statehood, however, seems a much easier course.

246. *See, e.g.*, RISKY BUSINESS: THE ECONOMIC RISKS OF CLIMATE CHANGE IN THE UNITED STATES 2–3 (2014), http://riskybusiness.org/report/national [https://perma.cc/SSM4-K8YR] (providing an overview of various risks posed by climate shifts in different regions in the United States). At the same time, it is true, as the Risky Business report also shows, that climate risks of different kinds severely affect all states. *Id.* at 19; *see also* TUCKER, *supra* note 7, at 18–19 (arguing that Pacific Island territories would push for climate regulation if granted representation).

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

presidents who did not receive a majority of the popular vote.[248] Under a proposed National Popular Vote (NPV) interstate compact, a number of states have agreed to cast their electoral votes according to the majority vote in the entire country, doing an end run around the Electoral College.[249] As of this writing, sixteen states have adopted the plan, accounting for 196 of the 270 electoral votes needed.[250] Legislation has moved forward seriously in eight additional states accounting for seventy-five electoral votes, so there is some prospect of success.[251]

The NPV idea raises some structural problems, however, related to federalism.[252] It may also prove unconstitutional.[253]

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248. The five presidents who were elected with a minority of the popular vote are Donald J. 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 [https://perma.cc/7ZE6-WKNX].

249. *See* CONG. RESEARCH SERV., THE NATIONAL POPULAR VOTE (NPV) INITIATIVE: DIRECT ELECTION OF THE PRESIDENT BY INTERSTATE COMPACT 10 (May 9, 2019), https://fas.org/sgp/crs/misc/R43823.pdf [https://perma.cc/QQW4-GELN]; *see also* AMAR, *supra* note 135, at 457–61 (providing background on the NPV idea).

250. NAT'L POPULAR VOTE, https://www.nationalpopularvote.com [https://perma.cc/NX4B-KY25]. The NPV compact would go into effect when the number of states signed up reaches the magic number of an electoral majority, which is 270 votes.

251. *Id.*

252. *See, e.g.*, Derek T. Muller, *Invisible Federalism and the Electoral College*, 44 ARIZ. ST. L.J. 1237, 1239 (2012) (discussing problems of oversight of voting and the eligibility of voters by the states); Norman R. Williams, *Reforming the Electoral College: Federalism, Majoritarianism, and the Perils of Sub-constitutional Change*, 100 GEO. L.J. 173, 203, 232–33 (2011) (emphasizing the problem of state authority over voting, the possibility of a national recount, and the possibility of election of a President by a plurality rather than majority vote).

253. Stanley Chang, *Updating the Electoral College: The National Popular Vote Legislation*, 44 HARV. J. LEGIS. 205, 213 (2007) ("The constitutionality of the NPV interstate compact has not been definitively established."); Norman R. Williams, *Why the National Popular Vote Compact is Unconstitutional*, 2012 BYU L. REV. 1523, 1527 (2012) (arguing the approach violates the Presidential Elections Clause). *But 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) (defending the NPV).

Richard Posner points out several structural problems with abolishing or skirting the Electoral College.[254] First, the Electoral College 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 of several hundred million people could cause disastrous delay, uncertainty, and discord. Second, the Electoral College requires presidential candidates to pursue a regional block-vote 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.

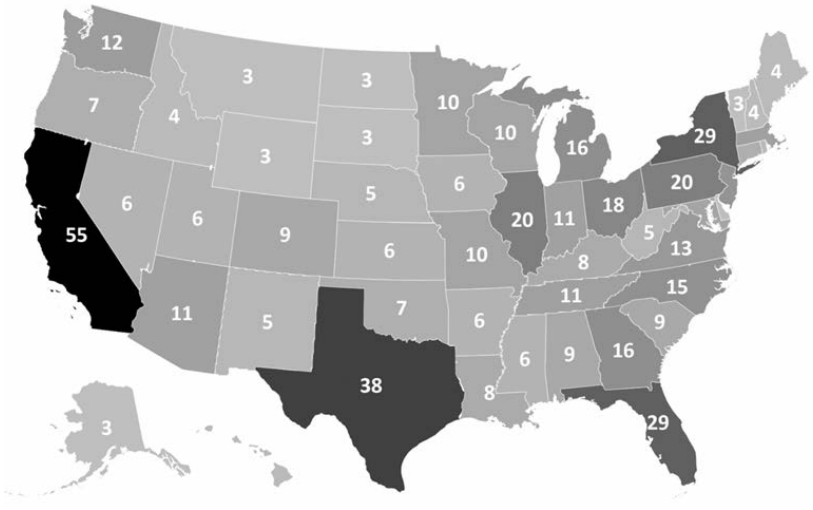
Assuming the Electoral College survives, the reform would make it more representative, and the Electoral College system would retain its positive structural features related to federalism and political stability. The overall balance of the current system would not significantly change. See Figure 1 on the next page.[255]

254. 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 [https://perma.cc/D6RE-D7GL].

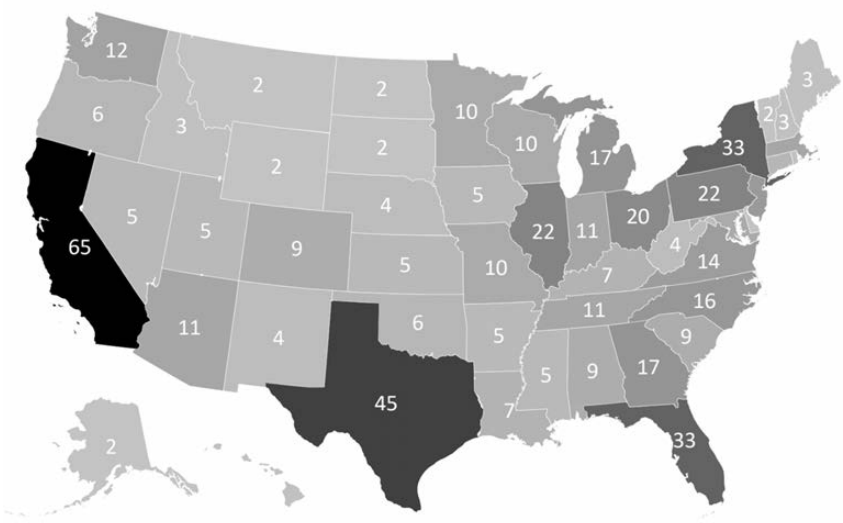
255. Figure from Table 1 and Electoral College map. See *2020 Presidential Election Map*, 270TOWIN, https://www.270towin.com [https://perma.cc/B5RY-JX2J].

*Figure 1: Electoral College: Before and After Proposed Reform**

Current



Reformed



* Geographically small states not shown are 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).

Because lack of one-person-one-vote representation is the primary objection to the Electoral College, the reform would supply a constitutionally nonintrusive solution yielding more voting rights equality while respecting federalism. Even if a National Public Vote interstate compact were to be adopted and upheld as constitutional, the Senate Reform Act would provide a needed rebalancing of representation for other reasons.

E. Historical Context

The history of the Constitution and the United States itself combines two primary and contradictory narratives. One is the story of progressive enlightenment after a founding revolution fought for the assertion of basic rights. This story includes the expansion of the franchise, extending the right to vote, unevenly and intermittently, from white male property-owners,[256] to all white men regardless of wealth,[257] to all men regardless of skin color including former slaves,[258] to women,[259] to indigenous peoples who acceded to mandatory conditions,[260] and finally to all adults

256. *See* KLARMAN, *supra* note 4, at 622 (recounting that the ideology of race was used to justify the restriction of the franchise to white males); *see also* LEPORE, *supra* note 110, at 55–56 (describing that few states allowed free blacks to vote on equal terms, but most states applied property qualifications of one sort or another and allowed only white men to vote). *See generally* AMAR, *supra* note 135, at 184.

257. Originally, voting rights were left entirely to the states. *See* Harper v. Va. Bd. of Elections, 383 U.S. 663, 668, 670 (1966) (striking down ownership of wealth and payment of poll taxes as voting qualifications and commenting that "[w]ealth, 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"); *see also* LEPORE, *supra* note 110, at 56–57, 122 (explaining that by 1860 the property qualification for voting for white men had been eliminated everywhere).

258. *See, e.g.*, U.S. CONST. amends. XIV, XV. However, tactics to suppress voting based on race continue. In 2018, for example, credible allegations of racist voter suppression were made in at least seven states. 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 [https://perma.cc/2RMA-H2V7].

259. *See* U.S. CONST. amend. XIX; *see, e.g.*, Guy-Uriel E. Charles, *Corruption Temptation*, 102 CALIF. L. REV. 25, 31 (2014) (arguing that women of color were guaranteed the right to vote only with the passage of the Voting Rights Act of 1965).

260. European colonists regarded indigenous people as members of foreign nations with whom they made treaties, and then repeatedly and consistently broke them. *See* ROXANNE DUNBAR-ORTIZ, AN INDIGENOUS PEOPLES' HISTORY OF THE UNITED STATES 142, 202–05 (2014). They were exempted from constitutional rights. U.S.

regardless of age.[261] These periodic extensions of voting rights tell the story of the United States since its founding as one of a democratic republic with ever-expanding voting rights.

Another narrative tells of conquest and slavery. Dorothy Roberts writes: "The toxic 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."[262] This narrative includes the violent expansion of the national map and the explosion of a Civil War that ended the sin of slavery. After a short Reconstruction, racist retrenchment and another century of segregation under Jim Crow followed, until a revitalized civil rights movement in the 1960s led to the passage of landmark federal civil and voting rights statutes in a Second Reconstruction.[263]

The unrepresentative Senate sounded some particularly sour notes in this history, such as when it filibustered House-passed federal anti-lynching laws *three times* in the 1920s and 1930s, and when it killed

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CONST. art. I, § 2, cl. 3 (excluding "Indians not taxed"); *id.* amend. XIV, § 2 (same). In 1887, a federal statute opened a path to citizenship for indigenous people, and approximately two-thirds of them had become citizens by 1924, when the Indian Citizenship Act extended the right to vote to all indigenous people born in U.S. territories. *See* Developments in the Law, *Securing Indian Voting Rights*, 129 HARV. L. REV. 1731, 1733 (2016). The path to citizenship for indigenous people was conditioned, however, on their acceptance of the theft of their lands and renouncing tribal loyalties: a "forced assimilation." LEPORE, *supra* note 110, at 337. States also dragged their feet in recognizing Indian rights to vote until as late as 1962. Becky Little, *Native Americans Weren't Guaranteed the Right to Vote in Every State Until 1962*, HIST. STORIES (Feb 12, 2019), https://www.history.com/news/native-american-voting-rights-citizenship [https://perma.cc/2PQY-UVBS].

261. U.S. CONST. amend. XXVI.

262. ROBERTS, *supra* note 50, at 309; *see also* Gross, *supra* note 113, at 321 ("Slavery is still the touchstone for all of our discussions about race in America—as it should be, because race was born out of slavery. It is our nation's original sin. Through the telling and re-telling of the history of slavery, we judge our own responsibility for the continuing injustices of racial inequality.").

263. *See* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 20–58 (rev. ed. 2011) (describing the history of legalized racism in the United States from its founding in slavery to today's mass incarceration); KLARMAN, *supra* note 4, at 262–65 (discussing the centrality of the issue of slavery at the founding); *see also* KARLAN, *supra* note 189, at 2 (describing "Second Reconstruction").

House-approved anti-poll tax bills *twice* in the 1950s.[264] This counter-narrative to the story of expanding voting rights speaks in tones of racism, sexism, and bias against "the other."

Jill Lepore describes the historical legacies of "liberty" and "slavery" as "the American Abel and Cain."[265] They continue to compete in the United States today. American citizens voted to elect the first black president for two terms beginning in 2008, and then elected a president in 2016 who traded in racist innuendo and condoned the rise (again) of white nationalism in America.[266]

The states and their representation in the Senate comprise a core part of this historical narrative. As legal scholar Robert Cover observed, "the place of slavery within the union" inscribes "a fault line in the normative topography of American constitutionalism."[267] The historian Richard Beeman reminds us that "we cannot avert our eyes from the magnitude of the evil sanctioned by the Founding Fathers."[268] The Three Fifths and Fugitive Slave Clauses,[269] as well as a slavery-slanted Electoral College,[270] assured overrepresentation of the southern slave states

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264. *See* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 451 (2004).

265. *See* LEPORE, *supra* note 110, at 38.

266. *See* 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) (documenting instances of Trump's appeals to "racist nativism" and "white nationalism" during his campaign); *see also* Ta-Nehisi Coates, *My President Was Black*, ATLANTIC, Jan.–Feb. 2017, https://www.theatlantic.com/magazine/archive/2017/01/my-president-was-black/508793 [https://perma.cc/2LTD-TEN7]; 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 [https://perma.cc/964Q-6CHY].

267. Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 35 (1983).

268. BEEMAN, *supra* note 4, at 334.

269. *See* U.S. CONST. art. I, § 2, cl. 3 (representation in the House determined by the number of "free persons" and "three fifths of all other Persons"); *id.*, art. IV, § 2, cl. 3 (requiring the return of "escaping" slaves and prohibiting their emancipation). Euphemisms for slavery that the founders used revealed the shame felt by some, but mostly showed political calculation looking toward ratification contests in non-slave states. *See* BEEMAN, *supra* note 4, at 213–15, 335.

270. *See* LEPORE, *supra* note 110, 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

until the Civil War.[271] The "proslavery tilt"[272] of the original Constitution "gave slaveholding regions extra clout in every election as far as the eye could see—a political gift that kept giving. And growing."[273]

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.[274] For thirty-two of the first thirty-six years of the republic, presidents hailed from the slave state of Virginia.[275] An observer in 1812 complained that "one slave in Mississippi has nearly as much power in Congress, as five free men in . . . New York."[276] David Walker, a free black writer and early abolitionist, described the expansion from thirteen to twenty-four states as "the whites . . . dragging us around in chains and in handcuffs, to their new States and Territories, to work their mines and farms, to enrich them and their children." He was 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 . . . ."[277]

The problem of national representation included a long-standing concern about maintaining a "balance" between the slave and free states.[278] The chronology of admission of states reveals the alternating

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the three-fifths clause," "there is an immediate connection between slavery and the electoral college").

271. LEPORE, *supra* note 110, at 125. *Compare* Sean Wilentz, Opinion, *The Electoral College Slavery Myth*, N.Y. TIMES, Apr. 4, 2019, at A19 (recanting his previous view that the Electoral College was designed to entrench slavery), *with* Akhil Reed Amar, Opinion, *Actually, the Electoral College Was a Pro-Slavery Ploy*, N.Y. TIMES (Apr. 6, 2019), [https://perma.cc/RV8E-7ULE] (arguing the Electoral College was designed to allow southerners to protect the institution of slavery until the Civil War).

272. *See* Wilentz, *supra* note 271.

273. AMAR, *supra* note 237, at 97.

274. *Id.* at 158. As a result, "no prominent antislavery leader" was elected president or appointed to the cabinet until the Lincoln administration. *Id.* (quoting DON E. FEHRENBACHER, CONSTITUTIONS AND CONSTITUTIONALISM IN THE SLAVEHOLDING SOUTH 54 (1989)).

275. *The Presidents Timeline*, WHITE HOUSE HIST. ASS'N, https://www.whitehousehistory.org/the-presidents-timeline [https://perma.cc/5GTL-URB6] (the exception was John Adams's four-year interlude).

276. LEPORE, *supra* note 110, at 173 (quoting a citizen in Massachusetts).

277. *Id.* at 204 (quoting Walker).

278. *See id.* at 235–36 (referring, for example, to President Taylor's plan to admit Oregon at the same time as annexing Texas to maintain "the balance of free states to slave"); *see also* FARBER & SIEGEL, *supra* note 124, at 282 (describing political calculations to preserve "the balance of power in the Senate between free and slave

pattern of slave and free states—until negotiations broke down over the admission of new states, leading eventually to the Civil War.[279] West Virginia, for example, split from Virginia over the issue of joining the Confederacy.[280]

The very existence of the states themselves and their boundaries express the inheritance of American slavery. See Table 7 on the next page.[281]

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states"); James Oakes, *The Great Divide*, N.Y. REV. BOOKS (May 23, 2019), https://www.nybooks.com/articles/2019/05/23/civil-war-history-great-divide [https://perma.cc/34CH-CUUD] ("The problem with Taylor's proposal [to add California as a free state], as Southerners saw it, was that in 1850 there were fifteen free states and fifteen slave states, and the admission of one more free state would destroy the 'equilibrium' that enabled the slave states to protect themselves, at least in the Senate, from the increasingly powerful antislavery North.").

279. *See* LEPORE, *supra* note 110, at 266–71; *see also* DELBANCO, *supra* note 110, 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 4, at 630 (noting 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).

280. LEPORE, *supra* note 110, at 293. Ironically, West Virginia is today one of the most overrepresented small "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 its "consent." *See* U.S. CONST. art. IV, § 3; Vasan Kesavan & Michael Stokes Paulsen, *Is West Virginia Unconstitutional?*, 90 CALIF. L. REV. 291, 293 (2002).

281. *See* DAVIS, *supra* note 73, at 23–36, 77–78, 87–89, 313, 319; 1 SLAVERY IN THE UNITED STATES: A SOCIAL, POLITICAL, AND HISTORICAL ENCYCLOPEDIA (Junius P. Rodriguez ed., 2007); Douglas Harper, *Introduction*, SLAVERY NORTH (2003), http://slavenorth.com/index.html [https://perma.cc/E3NX-KS3N].

Table 7: Chronology of the State Admissions Prior to the Civil War

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

* The generalizations of "free" and "slave" do not account for many variations in the legal status of slavery in various states, as some of the specific notes indicate.

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

†† The eleven Confederate States of America.

[a] Pennsylvania adopted a gradual emancipation law in 1780 and forbid its citizens from engaging in the slave trade in 1788.

[b] New Jersey adopted a gradual emancipation law in 1804.

[c] Connecticut and Rhode Island adopted gradual emancipation laws in 1784, and they forbade their citizens from engaging in the slave trade in 1787 and 1788, respectively.

[d] The Massachusetts Supreme Court removed legal support for slavery in 1783. Maine was part of Massachusetts at the time.

[e] New Hampshire adopted a statute interpreted to end slavery in 1857.

[f] New York forbade its citizens from engaging in the slave trade in 1788 and adopted a gradual emancipation law in 1799.

[g] Vermont outlawed slavery in its constitution in 1777.

[h] The Northwest Ordinance in 1787 banned slavery in the territories that became Ohio, Indiana, Illinois, Michigan, and Wisconsin. Several of these states, however, adopted legal restrictions against black migration.

[i] The admissions of California and Kansas as free states triggered the so-called "imbalances" that led in part to the Civil War.

With respect to constitutional interpretation, this history teaches that we should not valorize the states—and we should not put them on a pedestal of an uncritical federalism.

Most states were created within a constitutional framework that abolitionist William Lloyd Garrison called "a covenant with death."[282] Even though others such as Frederick Douglass argued that the Constitution was "[n]ot a proslavery instrument," it remains true that half the states—including the original thirteen—were formed within a framework that promoted slavery.[283] The thirty-five states formed

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282. BLIGHT, *supra* note 55, at 215 (quoting Garrison); *see also* FINKELMAN, *supra* note 110, at 3 (noting that Garrison also called the Constitution "an agreement with Hell").

283. BLIGHT, *supra* note 50, at 215 (quoting Douglass); *see also* BEEMAN, *supra* note 4, at 333–34 (noting pro-slavery consequences of the Constitution); Noah Feldman, *Imposed Constitutionalism*, 37 CONN. L. REV. 857, 883 (2005) ("The Constitution in its earliest form can be understood as a deal between northern and southern elites to

before the Civil War had their borders drawn with "color lines" of "slave" and "free."[284]

Geographical distributions of diverse populations reflected patterns of original settlement as well as later migrations.[285] Racial violence, including lynching and mass murder, drove some of these migrations.[286]

"The problem of the twenty-first century," as historian David Blight writes, "is still some agonizingly enduring combination of legacies bleeding forward from slavery and color lines."[287]

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.[288] Union armies followed by national policies of Reconstruction Republicans destroyed the Confederate ideologies of "states' rights" and "white supremacy" (at least temporarily).[289] 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.[290] By 1870, fifteen percent of southern officials were black.[291]

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tighten ('perfect') a mutually beneficial political union. That is why the Constitution preserved African slavery.").

284. *See supra* Table 7; BLIGHT, *supra* note 55, at 759 (quoting W.E.B. Du Bois: "The problem of the Twentieth Century is the problem of the color line").

285. *See* Kevin E. McHugh, *Black Migration Reversal in the United States*, 77 GEOGRAPHICAL REV. 171, 171 (1987) (describing how the inequality of racial and ethnic distribution among the states results in part from ongoing migrations, particularly of black populations first out of the south, and then back again in response to complex social, political, and economic dynamics).

286. *See, e.g.*, Stewart E. Tolnay & E. M. Beck, *Racial Violence and Black Migration in the American South, 1910 to 1930*, 57 AM. SOC. REV. 103, 105 (1992) (finding violence to be a causal explanation for the Great Migration of blacks northward in the early twentieth century).

287. BLIGHT, *supra* note 50, at 764.

288. U.S. CONST. amend. XIV, § 2 (apportionment in the House by "whole number of persons"); LEPORE, *supra* note 110, at 320.

289. LEPORE, *supra* note 110, at 290; *cf.* Berman, *supra* note 109, at 1390 (observing that "white supremacy" once had status as a constitutional principle, but no longer does).

290. LEPORE, *supra* note 110, at 323; *see also* FONER, *supra* note 138, at 351–64 (describing black participation in government).

291. ALEXANDER, *supra* note 263, at 29.

But the Reconstruction did not last long. President Lincoln had hoped for "a new birth of freedom" and "a government of the people, by the people, for the people."[292] Congress passed a Civil Rights Act in 1866.[293] Reconstruction Republicans pushed through the Thirteenth, Fourteenth, and Fifteenth Amendments. Then came a counter-reaction, ironically called the Redemption, and white southern Democrats returned to power. White terrorist lynching by the Ku Klux Klan and the adoption of Jim Crow laws set back progress on racial equality for another century.[294] 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."[295] Even the New Deal depended on a devil's bargain with white southern "Dixiecrats."[296]

This history challenges any interpretation of the cold text of the original Constitution asserting that we must uphold the integrity and independence of the states against the demands of progress for greater and deeper respect for the equal voting rights of individuals, especially regarding race and color.

Remember in this history, too, the sordid role played by the Supreme Court. In *United States v Cruikshank*,[297] the Court restrained the federal government from pursuing prosecutions under the Enforcement Act of 1870 against mass murders of black citizens committed by white supremacists in Louisiana.[298] *Dred Scott v.*

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292. Lincoln, *supra* note 82.

293. LEPORE, *supra* note 110, at 319–20 (noting an override of President Andrew Johnson's veto was required).

294. *See* ALEXANDER, *supra* note 263, at 30–35 (chronicling the birth and legacy of the Jim Crow laws); *see also* Feldman, *supra* note 283, at 884 (noting how the post-Civil War amendments were reinterpreted "to authorize the exclusion of African Americans from equal rights," and "[i]t was not until almost a century later . . . that the time had come to impose equal rights once again").

295. *See* FONER, *supra* note 138, at 602 (quoting Du Bois).

296. *See* IRA KATZNELSON, FEAR ITSELF: THE NEW DEAL AND THE ORIGINS OF OUR TIME 9–10 (2013) (describing the pact Roosevelt made with white southern Democrats).

297. 92 U.S. 542 (1875).

298. *See id.* at 556–57, 559; *see also* FONER, *supra* note 138, at 437, 530 (observing that an estimated 230 black people were murdered on Easter Sunday in the Colfax massacre that spawned the case, "the bloodiest single act of carnage in all of Reconstruction"); A. LEON HIGGINBOTHAM, JR., SHADES OF FREEDOM: RACIAL POLITICS AND 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

Sandford[299] and *Plessy v. Ferguson*[300] rank among the most racist decisions ever issued.[301] In *Plessy*, the Court upheld the noxious "separate but equal" doctrine that was used to justify segregation in the south long after the Civil War had been fought and ostensibly won by the north.[302] The Court's decision in *Dred Scott* was even worse. It knocked aside a congressional compromise, found slaves to have no constitutional rights at all, and set spark to the fire of war.[303] This sorry history of judicial racism should counsel any future Court to tread carefully before striking down a statute such as the Senate Reform Act designed in part to correct historical and present racial injustices.[304]

The strongest historical argument against the reform is that the one state, two senators rule resulted originally from the Connecticut

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T. McCluskey, *Facing the Ghost of* Cruikshank *in Constitutional Law*, 65 J. LEG. EDUC. 278, 280–81 (2015) (finding that *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").

299. 60 U.S. 393 (1856), *superseded by* U.S. CONST. amend. XIV.

300. 163 U.S. 537 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

301. *See* HIGGINBOTHAM, *supra* note 298, 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 [equaled only by *Dred Scott*]."); *see also Korematsu v. United States*, 323 U.S. 214, 218–20 (1944) (upholding war-time internment of Japanese-Americans), *abrogated by* Trump v. Hawaii, 138 S. Ct. 2392 (2018).

302. *See Plessy*, 163 U.S. at 552 (Harlan, J., dissenting) (using the "separate but equal" language in dissent from the holding allowing racial segregation on railroad cars). Even in dissent, Justice Harlan exhibited racist bias, writing that whites are dominant "in prestige, in achievements, in education, in wealth and in power," and "will continue to be for all time." *See id.* at 559; Balkin, *supra* note 144, at 2329 (quoting *Plessy*, 163 U.S. at 559) (noting that Harlan believed white superiority would remain regardless of racial equality).

303. *See Dred Scott*, 60 U.S. at 404–05 (holding 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"); *see also* DELBANCO, *supra* note 110, at 329–35, 346 (describing the contribution of the *Dred Scott* decision to the Civil War); Robert M. Cover, *Book Review*, 68 COLUM. L. REV. 1003, 1003–07 (1968) (reviewing RICHARD HILDRETH, ATROCIOUS JUDGES: LIVES OF JUDGES INFAMOUS AS TOOLS OF TYRANTS AND INSTRUMENTS OF OPPRESSION (1856)).

304. *See supra* Table 4 (showing present racial injustice in Senate representation); *supra* Section III.A (urging judicial restraint).

Compromise between large and small states.[305] Massachusetts, Pennsylvania, and Virginia accounted for forty-five percent of the population at the founding, and a practical deal accommodated the smaller states.[306]

However, the motivation for this compromise was not to assure any long-term balance between small and large states—which might otherwise support an originalist interpretation in favor of the one state, two senators rule today. "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."[307] The deal placated the small states who had the power to hold up the larger ones.[308] Small, closed-in "four-sided" states such as Delaware, Maryland, and New Jersey feared the consequences of westward expansion of open-ended "three-sided" states led by Virginia.[309] Today, more than two centuries of history have filled in the continental map, obviating this original concern.

In addition, the Connecticut Compromise cannot be separated from other compromises made regarding slavery. The most serious conflicts at the founding involved debates over slavery and not large-versus-small states.[310] In Madison's words, "the States were divided

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305. *See supra* notes 5 & 26 and accompanying text.

306. *See* LEE & OPPENHEIMER, *supra* note 5, at 32–35.

307. Evenwel v. Abbott, 136 S. Ct. 1120, 1130 (2016).

308. *See* Wesberry v. Sanders, 376 U.S. 1, 10–17 (1964) (describing details about the compromise and Benjamins Franklin's encouragement to "join in some accom[m]odating proposition"). One delegate denounced the negotiations as "a small states' power grab." KLARMAN, *supra* note 4, at 187 (paraphrasing Hugh Williamson of North Carolina); *see also* BEEMAN, *supra* note 4, at 355 (asserting that the small states wielded their power successfully in part because the one colony, one vote rule under the Articles of Confederation was also employed as the decision rule at the Constitutional Convention, against the wishes of some Pennsylvania delegates who wanted to change the rules of decision at the start so that "each state's votes in the Convention" would be "weighed according to its population").

309. *See* LEE & OPPENHEIMER, *supra* note 5, at 34–35; *see also* KLARMAN, *supra* note 4, at 190–92 (discussing issues of western lands).

310. Both James Madison and James Wilson objected strenuously to the Connecticut Compromise throughout the Constitutional Convention. William Ewald, *James Wilson and the Drafting of the Constitution*, 10 U. PA. J. CONST. L. 901, 981 (2008). At one point, a frustrated Wilson, arguing that the small states had no good theory to support their view, foretold that an error in "concoction" of the founding plan of representation "must be followed by disease, convulsions, and finally death

into different interests not by their difference in size, but by other circumstances, the most material of which resulted . . . principally from the effects of their having or not having slaves."[311] The one state, two senators rule was part and parcel of larger compromises concerning slavery, including the Three Fifths Clause giving slave states outsized influence in Congress until the Civil War. In this context, one historian concluded that "the cloud of slavery" combined with the "ambiguity of the part-national/part-federal" Connecticut Compromise likely helped to cause the Civil War "by distorting the sectional balance of power in Congress for decades and by allowing both sides of the war to portray their political claims to sovereignty as legitimate."[312]

At a minimum, the origins of the Connecticut Compromise within a pro-slavery representational structure, as well as its subsequent ideological history as a justification for "states' rights" claims in and after the Civil War, reveal no good political theory for the one state, two senators rule. Madison was right.[313] Failure to adopt a scheme of *national* representation of citizens apportioned by relative population in the Senate contributed to a terrible war, and this legacy still polarizes the nation with uneven representation and racial dysfunctionality. This history supports the following legal analogy: Just as the voting-rights amendments cancelled pro-slavery and sexist provisions in the original Constitution, so too a statutory reform grounded in the same voting-

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itself." *Id.* (quoting Wilson). Alexander Hamilton agreed: "There can be no truer principle than this—that every individual in the 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 & OPPENHEIMER, *supra* note 5, at 32 (quoting Hamilton)).

311. DELBANCO, *supra* note 110, at 65 (quoting Madison); *see also* ALEXANDER, *supra* note 263, at 25 ("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."); Amar, *supra* note 271 ("As James Madison made clear at the Constitutional Convention in 1787 in Philadelphia, the big political divide in America was not between big and small states; it was between North and South and was all about slavery.").

312. BEEMAN, *supra* note 4, at 225.

313. *See supra* notes 5 & 311 and accompanying text.

rights amendments and narrowly tailored to protect equal voting rights should override the original one state, two senators rule.

It is admittedly rare to allow a statute, even when grounded in power derived from later constitutional amendments, to contravene an original constitutional rule.[314] However, the Lockean paradox created by Article V's anti-amendment provision, which was added almost as an afterthought at the Constitutional Convention after a very long, hot summer of hard work, leaves no choice but to bite the bullet.[315] Our founding ancestors whom we most respect, including Madison, Hamilton, and Wilson, would, if they were alive, nod their heads in approval.[316]

Historical path dependence, then, rather than any viable theory of representation is the primary explanation for the one state, two senators rule.[317] The Connecticut Compromise, forged on the basis

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314. Again, the Seventeenth Amendment supplies a precedent. Changing the selection of senators to popular voting empowered states and the federal government to adopt statutes that contravened the previous constitutional rule of selection by state legislatures. *See* STRAUSS, *supra* note 41, at 132–35; *see also supra* notes 169–70 and accompanying text. *Compare* U.S. CONST. amend. XVII, § 1 (declaring that senators are elected by the people), *with id.* art. I, § 3, cl. 1 (providing that senators are chosen by state legislatures).

315. *See* BEEMAN, *supra* note 4, at 355 (noting that this last-minute addition, in Madison's words, was "dictated by the circulating murmurs of the small states" and adopted "without debate"); KLARMAN, *supra* note 4, at 201 (describing the same history on "the penultimate day of the convention's proceedings"). *See also supra* Part I.

316. *See supra* notes 5 & 310; *see also* KLARMAN, *supra* note 4, at 182–87, 198–99 (recounting arguments against the one state, two senators rule by Madison and Hamilton and their dire predictions about it).

Some features of the Senate Reform Act recommended here appeared in different form as arguments at the Constitutional Convention. *See* KLARMAN, *supra* note 4, at 200, 207–08. For example, James Wilson argued for a minimum of one senator per state in a population-based proposal for representation, 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.*

317. *See* LEE & OPPENHEIMER, *supra* note 5, at 43 ("Equal state apportionment persists not because it serves any current function, but as a path-dependent consequence of [an] initial agreement [made] more than two hundred years ago."); *see also* Robertson, *supra* note 5, at 240 (describing the original Constitution not as "the product of a systematic philosophical plan, but the by-product of a path-dependent sequence of political compromises largely forced on Madison and his allies by their Convention opponents").

of interest rather than principle,[318] is too weak a reed to support the representational unfairness in the Senate, which has multiplied more than six-fold since the founding, especially in light of later constitutional amendments protecting equal voting rights of U.S. citizens.[319]

An opponent might argue also that the one state, two senators rule shields states from overreaching by the national government.[320] The proposed reform, however, shifts power, in federalist terms, only *among* the states, and not in terms of empowering of the national government *against* the states. If anything, greater power accumulated in a fewer number of states may increase the power of the states vis-à-vis the national government.[321]

In addition, even if one accepts an originalist argument in favor of the one state, two senators rule, the historical context reflects an intramodal conflict that parallels the one in textual analysis.[322] An

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318. *See* KLARMAN, *supra* note 4, at 182–87 (providing an account of the compromises regarding representation, including cross-cutting interests of small-versus-large and slave-versus-free states); KRAMER, *supra* note 113, at 621 (noting that "a number of scholars have concluded that the New Jersey Plan must have been a ploy to force concessions rather than a serious alternative proposal"); LEE & OPPENHEIMER, *supra* note 5, at 33 (finding that "the small-state delegates were motivated by their own states' particular interests rather than by an adherence to principle"); Letter from Thomas Jefferson to Samuel Kercheval (Sept. 5, 1816), *in* THE PAPERS OF THOMAS JEFFERSON, *supra* note 2, at 367–69 (observing that "our state [of Virginia] is allowed a larger representation on account of [its] slaves but every one knows that [the] constitution was a matter of compromise, a capitulation between conflicting interests and opinions"); *see also* Reynolds v. Sims, 377 U.S. 533, 574 (1964) (explaining that the "compromise between the larger and smaller States on this matter averted a deadlock in the Constitutional Convention which had threatened to abort the birth of our Nation"). *But see* Fried, *supra* note 25, at 996 (arguing that "the Connecticut Compromise was not just a bargain; it was a conception" that recalled "the original conception of the nation, embodied in the Articles of Confederation, [that] was something like a multilateral treaty concluded between independent sovereigns").

319. *See supra* notes 5–6 and accompanying text; *see also supra* Section III.C.1.

320. *Cf.* DAVID E. KYVIG, EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776–2015 60 (rev. ed. 2016) (arguing that "Article V evinced the essential compromise struck between the proponents of a strong central government and the advocates of retained state power").

321. *See supra* text accompanying notes 200–01.

322. *See* Section III.C.3. It is questionable whether "original intent" in constitutional interpretation should be taken as dispositive. *See, e.g.*, FALLON, *supra* note 108, at 133–34, 137–41 (describing different versions of originalism and arguing that reference to "moral rights" and other values is often necessary even under an

originalist interpretation must account for the intentions and meaning also of those who passed the various voting-rights amendments. They could not have imagined a future Congress passing a Senate Reform Act specifically, but they authorized Congress to pass legislation broadly "appropriate" to protect equal voting rights.[323] As the historian Eric Foner concludes, "the [Fourteenth] Amendment's central principle remained constant: a national guarantee of equality before the law."[324]

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originalist approach); *see also* MICHAEL J. PERRY, MORALITY, POLITICS, AND LAW 122–69 (1988) (arguing that originalism cannot give voice to aspirational democratic constitutional values); STRAUSS, *supra* note 41, at 17–30 (critiquing "Originalism and its sins"); 1 TRIBE, *supra* note 124, at 48–49 (arguing that though one should take "original meaning as [a] starting point," constitutional interpretation requires other modes of analysis); Eric Berger, *Originalism's Pretenses*, 16 U. PA. J. CONST. L. 329, 329 (2013) (finding that various versions of originalism fail to provide either fixed or constrained meanings in interpretation); Berman, *supra* note 109, at 1340–47 (describing different theories of originalism and finding even the best one "does not jibe well with any widely entertained general theory of law"); Heidi Kitrosser, *Interpretive Modesty*, 104 GEO. L.J. 459, 459 (2016) (criticizing various versions of originalism as indeterminate); Larry Kramer, *Two (More) Problems with Originalism*, 31 HARV. J.L. & PUB. POL'Y 907, 907–11, 916 (2008) (criticizing "original intent originalism," sometimes referred to as plain meaning originalism, as neither historically coherent nor pragmatic); Jack N. Rakove, *Joe the Ploughman Reads the Constitution, or, The Poverty of Public Meaning Originalism*, 48 SAN DIEGO L. REV. 575, 576 (2011) (describing the criticisms of various elaborations of originalism). Comparatively, originalist theories of constitutional interpretation seem to have found purchase in only a few other national jurisdictions, including Malaysia, Singapore, and Turkey. *See* Versteeg & Zackin, *supra* note 75, at 1669–70 & n.127 (collecting sources).

323. *See supra* notes 137 & 158 and accompanying text.

324. FONER, *supra* note 138, at 257; *see also* WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 5, 8 (1988) (noting an intention to express broad "general principles of equality, individual rights, and local self-rule"); Paul Finkelman, *Original 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."). In general, the "game" of figuring out the intentions of those who wrote and ratified the Fourteenth Amendment has been shown to be substantively indeterminate. *See* NELSON, *supra*, at 5. Justice Alito, recognizing the huge inequality of representation in the Senate, pointed 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

Just as "time's arrow" favors the later constitutional rule in textual interpretation, so should the historical force of the voting-rights amendments hold sway. The founders had no better foresight than those who enacted the voting-rights amendments. As two scholars observe:

> In their wildest dreams the framers of the Constitution never imagined that the population of the United States would someday approach [and exceed] 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 in 1790 had roughly the same population as Connecticut today.[325]

The grossly unequal representation of the contemporary Senate was not foreseen by either the founders or those who wrote and ratified the voting-rights amendments, but the latter empowered Congress to act on principle to protect against this kind of development.

A Senate Reform Act would set a positive trajectory into the future for the national protection of equal voting rights. If adopted, one hopes a future Supreme Court would choose not to trample again on the long-term narrative of enhancing democracy in America. If it did, then one may recall the words Frederick Douglass. "The Supreme Court of the United States is not the only power in the world," he said in the aftermath of *Dred Scott*, for "the Supreme Court of the Almighty is greater."[326] The Court "could not change the essential nature of things, making evil good, and good evil."[327]

F. Moral Principle

If textual analysis poses the highest hurdle of constitutional interpretation for the proposed reform, the question of moral principle is probably the lowest. It is difficult to conceive of an objection to the reform on moral or ethical grounds—other than maybe an unarticulated preference for "settled expectations" or

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use of congressional power authorized by the voting-rights amendments should be limited for this reason. *Id.* at 1123, 1130–33.

325. *See, e.g.*, LEE & OPPENHEIMER, *supra* note 5, at 44; *see also* BEEMAN, *supra* note 4, at xi (observing that none of the founders "could have imagined the goliath of a nation that America was to become").

326. BLIGHT, *supra* note 55, at 279 (quoting Douglass).

327. *Id.*

"governmental regularity."[328] Presented with evidence of gross voting inequality, we should simply follow Spike Lee's advice and "do the right thing."[329]

Scholars in many disciplines agree that "quantitative" equality is an important value.[330] "Today," as Robert Dahl says, "we have come to assume that democracy must guarantee virtually every adult citizen the right to vote."[331]

It is also true that "equality" standing alone amounts to an "empty idea."[332] We must have a theory for why equality in voting matters, and this theory should include concepts of human dignity and self-respect, as well as equal opportunity to participate in the self-governance of elections.[333]

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328. *See* 1 TRIBE, *supra* note 124, at 6, 14 (demonstrating that models of "settled expectations" and "governmental regularity" are in tension with those of "equal protection" and "structural justice"). As Tribe argues, however, "settled expectations" and "government regularity" give 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." *Id.* Moreover, "[t]o the extent that the models genuinely avoid reliance on such beliefs, they prove circular, or empty, or both." *Id.*

329. DO THE RIGHT THING (Universal Pictures 1989).

330. *See, e.g.*, CHARLES R. BEITZ, POLITICAL EQUALITY: AN ESSAY IN DEMOCRATIC THEORY 141 (1989) ("[T]he meaning of quantitative fairness has become a settled matter: it requires adherence to the precept 'one person, one vote.'").

331. ROBERT A. DAHL, ON DEMOCRACY 3 (2d ed. 2015).

332. Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 540, 592 (1982) (arguing that all arguments based on equality should be translated into concepts of rights). Accepting Westen's argument would not damage the moral case for "equality of voting rights," because one can formulate the argument in terms of the "voting rights" that every person should possess as a citizen. If some citizens' votes are significantly diminished as compared to others' votes, then the "right" to have a say in government is diminished, and the situation should be corrected to achieve fairness in the use of one's right to vote.

333. DAHL, *supra* note 331, 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* Bush v. Gore, 531 U.S. 98, 104 (2000) (per curiam) (holding "the right to vote" in federal elections to be "fundamental" based on "the equal weight accorded to each vote and the equal dignity owed to each voter"); 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 intrinsic worth or dignity"); Berman, *supra* note

In addition, a theory of political equality in voting assumes some other factors, such as voters' basic cognitive competence. Voters need civic education to understand what is at stake in elections and why they matter. For good political outcomes, more than quantitative equality to participate is required because inequality of wealth or other social imbalances in conditions can skew political outcomes, especially if voters do not have the capacity to think for themselves.[334]

In law, the principle of equal voting rights expresses general values of "equal treatment" and "treating like cases alike," even if the values are not self-executing.[335] As Justice Antonin Scalia said, "the appearance of equal treatment" is one of the "most substantial" values in the law.[336] 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 feel the fury of the fundamental sense of justice unleashed. The Equal Protection Clause epitomizes justice more than any other provision of the Constitution.[337]

109, at 1334, 1406 (highlighting "human dignity" as a fundamental constitutional principle).

334. *See* Thomas Christiano, *Deliberative Equality and Democratic Order*, *in* POLITICAL ORDER: NOMOS XXXVIII 251, 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).

335. George Wright has argued:

> The basic idea of treating like cases alike, and unlike cases unlike, has a distinguished pedigree. Whether justice precisely requires such a universal principle has been doubted. But even if we assume the applicability of such a principle in equal protection cases, the principle in itself provides little useful guidance. It simply requires the production of some reason for treating any group less favorably than any other group, with no further guidance as to what should count as a sufficient reason for any form or degree of inequality.

R. George Wright, *Equal Protection and the Idea of Equality*, 34 L. & INEQ. 1, 8 (2016).

336. *See* Scalia, *supra* note 105, at 1178.

337. *Id.*; *see also* Berman, *supra* note 109, at 1389 (describing constitutional principles of equality and liberty).

An analogous argument applies in the context of voting. How can it be fair for a citizen to move from California to Nevada or Alaska and feel their voting weight multiplied by fifteen or fifty times?[338] Does a citizen in New Mexico deserve 13.5 times more say in the Senate than one across the border in Texas?[339] These discrepancies are not reconcilable with respect for citizens' equal rights to vote in their national government.

Many theories of political order rely on a moral principle of voting equality. Consider John Rawls' theory of justice as an example.[340] For Rawls, a just political order relies on "a just constitution" that establishes "a just procedure arranged to ensure a just outcome."[341] To this end, "the liberties of equal citizenship must be incorporated into and protected by the constitution," and "these liberties include . . . equal political rights."[342] Specifically, Rawls articulates a "principle of (equal) participation" that "requires that all citizens . . . 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."[343] He continues: "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."[344] "All sane adults," Rawls concludes, "have the right to take

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338. *See* DAHL, *supra* note 331, at 48–50, 144 (describing this difference as a "gross inequality in representation").

339. *See supra* Table 1.

340. *E.g.*, JOHN RAWLS, A THEORY OF JUSTICE (rev. ed. 1999).

341. *Id.* at 173.

342. *Id.*

343. *Id.* at 194.

344. *Id.* at 194–95. There are limits and complications. It is fair to ask, for example, whether the right to vote should be granted at the age of sixteen rather than eighteen, and whether resident non-citizens should sometimes have a right to vote. The House recently rejected a proposal to expand the franchise to sixteen-year-olds. John Nichols, *Let the 16-Year-Olds Who Are Marching for the Planet Vote to Save It*, NATION (Mar. 15, 2019), https://www.thenation.com/article/voting-age-16-climate-strike-green-new-deal-ayanna-pressley [https://perma.cc/QE2U-E59Q]. On the question of non-citizen suffrage, see, e.g., Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391, 1394 (1993). With respect to equal voting rights, a "threshold level of some relevant capability" regarding age, sanity, or citizenship is ordinarily thought to mean that "[a]bove that threshold level, any differences among persons in maturity,

part in political affairs, and *the precept of one elector one vote is honored as far as possible*. Elections are fair and free, and regularly held."[345]

Other philosophers agree that equal representation is 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. "Democratic equality," according to one survey, "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 . . . in which all votes count equally* and majority rule prevails."[346]

The moral principle of equal voting rights finds wide agreement in different schools of thought.[347] Deontologists and social contract theorists emphasize the need for voting to express rights of human dignity and the pursuit of one's vision of the good life for oneself and the common good.[348] Utilitarian and welfare theorists see equal voting as a means of expressing interests and preferences to aggregate them fairly into an overall measurement of social good and happiness.[349] Libertarians agree that everyone should have a right to protect their property and advance their interests on a legally equal basis with others.[350] All of these moral theories converge in supporting a principle of equal voting rights for individuals.

One objection may recall "states' rights" theories of federalism. According to this objection, the equal rights that citizens may claim in the

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informedness, interest, experiences, integrity, and sagacity would be irrelevant." Wright, *supra* note 335, at 21.

345. RAWLS, *supra* note 340, at 195 (emphasis added).

346. Richard Arneson, *Egalitarianism*, STAN. ENCYCLOPEDIA PHIL., (last updated Apr. 24, 2013), https://plato.stanford.edu/entries/egalitarianism [https://perma.cc/52LU-BMKN] (emphasis added).

347. *Cf.* RONALD DWORKIN, LAW'S EMPIRE 297 (1986) (describing different philosophical perspectives in terms of the idea of equality).

348. *See, e.g.*, RAWLS, *supra* note 340, at 194–95.

349. *Id.* at 193*; see also* David Miller, *Democracy's Domain*, 37 PHIL. & PUB. AFF. 201, 205 (2009) (describing a form of "liberal democracy" that "promotes welfare by ensuring that political decisions track the aggregate interests of its constituency").

350. *See generally* ROBERT NOZICK, ANARCHY, STATE AND UTOPIA (1974). *But cf.* H.L.A. Hart, *Between Utility and Rights*, 79 COLUM. L. REV. 828, 831–36 (1979) (describing Nozick's theory and arguing that it is too limited in its focus on negative rights and ignores distributional concerns).

United States extend primarily to their rights as *citizens of their respective states*, and not *citizens of the United States*.

The Supreme Court in *U.S. Term Limits, Inc. v. Thornton*[351] raised this issue tangentially in striking down, in a five-to-four opinion, an Arkansas law imposing term limits on U.S. senators and representatives.[352] Writing for the Court, 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."[353]

In a long dissenting opinion, Justice Clarence Thomas objected that the "Constitution simply does not recognize any mechanism for action by the undifferentiated people of the Nation."[354] He added:

> [T]he 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.'[355]

Nevertheless, it is no dream that the Civil War and subsequent amendments altered the constitutional landscape and established federal voting rights operative on the national government as well as the states.[356]

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."[357] "We the People" of the

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351. 514 U.S. 779, 783 (1995).

352. *Id.* at 783.

353. *Id.* at 794.

354. *Id.* at 848 (Thomas, J., dissenting).

355. *Id.* at 849 (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 403 (1819)).

356. *See supra* Section III.E. *But cf.* Maeve Glass, *Citizens of the State*, 85 U. CHI. L. REV. 865, 865 (2018) (describing the importance of state citizenship in the abolitionist movement against slavery).

357. *See supra* notes 133–36 and accompanying text; *see also* Seth F. Kreimer, *Lines in the Sand: The Importance of Borders in American Federalism*, 150 U. PA. L. REV. 973, 983–84 (2002) (observing that "national citizenship" has been "primary" over "state

United States are acting in this declaration, and delegating power to protect our voting rights to Congress and not the states (or, frankly, the Supreme Court). Note, also, that senators swear an oath to "support and defend the Constitution of the United States against all enemies, foreign and domestic," and "bear true faith and allegiance to the same."[358] U.S. senators owe their constitutional duties to their constituents as citizens *of the United States*.

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,

> 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.[359]

A Senate Reform Act would redeem the voting rights of U.S. citizens. It respects federalism and applies the moral and political principle of equal voting rights at a national level for national elections.

G. Legal Doctrine

Last but not least, the proposed reform finds support in legal doctrine announced in Supreme Court precedents. The Senate Reform Act would follow in the same path as the Voting Rights Act of 1965, with Congress focusing on the governing structure of the United States itself rather than the states.[360]

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citizenship" ever since the Civil War and the adoption of the Fourteenth Amendment).

358. *The Oath We Take*, U.S. SENATE, https://www.senate.gov/artandhistory/history/common/generic/Feature_Homepage_TheOathWeTake.htm [https://perma.cc/YG6X-9TW3].

359. 514 U.S. at 838 (Kennedy, J., concurring)*; see also* Peter H. Schuck, *Citizenship in Federal Systems*, 48 AM. J. COMP. L. 195, 199–200 (2000) (describing federalism as "a system that divides political authority between a nation-state and sub-national polities within its territory so that both the national and sub-national polities directly govern individuals within their jurisdiction, *and* that confers both national and sub-national citizenships").

360. *See supra* notes 177 & 189 and accompanying text.

The most relevant cases are those that upheld congressional authority to promulgate the Voting Rights Act. In *South Carolina v. Katzenbach*,[361] the Court rejected claims by a state that the Voting Rights Act exceeded the constitutional authority of Congress under the Fifteenth Amendment.[362] South Carolina argued that "the principle of the equality of States" meant Congress could not adopt measures reaching into state governments to review or supervise elections.[363] The Court replied by setting forth a principle that applies also to the proposed reform here.

> The language and purpose of the Fifteenth Amendment, the prior decisions construing its several provisions, and the general doctrines 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.[364]

Although more recent cases have questioned the continuing need for remedial measures under the Voting Rights Act, the constitutional authority and the "success" of the statute have been reaffirmed.[365] The only difference in an application of this doctrine to a Senate Reform Act would be that it addresses abridgment "by the United States" rather than "any state."[366] The reform aims at the same substantive 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. The Court in *Katzenbach* quoted the canonical case of *McCulloch v. Maryland*[367]: "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

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361. 383 U.S. 301 (1966).
362. *Id.* at 308.
363. *Id.* at 323.
364. *Id.* at 324.
365. *See, e.g.*, Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 202–03 (2009) (noting the "success" of the Voting Rights Act while at the same time cutting back its scope regarding preclearance plans).
366. *E.g.*, U.S. CONST. amend. XV, § 1.
367. 17 U.S. (4 Wheat.) 316 (1819).

prohibited, but consistent with the letter and spirit of the constitution, are constitutional."[368]

The Court in *Katzenbach* praised Congress for its "inventive manner" in addressing a recalcitrant historical problem.[369] History is important because Congress had retreated after Reconstruction and allowed racist white southerners to reassert power over elections and voting.[370] Because the Voting Rights Act was part of what has been correctly called the Second Reconstruction,[371] then a Senate Reform Act may constitute part of a Third Reconstruction.[372] In any event, both the Voting Rights Act and the proposed Senate Reform Act aim at a similar end of voting equality.

In *Katzenbach*, the Court upheld federal oversight to prohibit discriminatory impediments to voting such as literacy tests.[373] Other cases addressed the problem of geographical malapportionment in state legislatures. In 1962, in *Baker v. Carr*,[374] the Court found Tennessee's legislative scheme to violate the Equal Protection Clause.[375] The next year, in *Gray v. Sanders*,[376] the Court struck down the legislative structure in Georgia.[377] In reviewing the state's representational 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

368. 383 U.S. at 326 (quoting *McCulloch*, 17 U.S. at 421); *see also* J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 973–74 (1998) (discussing *McCulloch* as a preeminent precedent).

369. 383 U.S. at 327–28.

370. *See* Section III.E; *see also Nw. 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).

371. *See supra* note 189 and accompanying text.

372. *See* William J. Barber II, *We Are Witnessing the Birth Pangs of a Third Reconstruction*, AM. PROGRESS (Dec. 15, 2016), https://thinkprogress.org/rev-barber-moral-change [https://perma.cc/RJU-82Y9] ("We must begin to think in terms of a Third Reconstruction."); *see also* Richard Primus, *Second Redemption, Third Reconstruction*, 106 CALIF. L. REV. 1987, 1999 (2018) (expressing "the hope for a healthy American constitutional order" that will work toward creating "nothing less than a Third Reconstruction").

373. 383 U.S. at 334.

374. 369 U.S. 186 (1962).

375. *Id.* at 188, 237.

376. 372 U.S. 368 (1963).

377. *Id.* at 381.

> 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.[378]

Geographical disparities that emphasize the votes of rural populations merely because of their location on a map run afoul the Equal Protection clause and distort the concept of equal voting rights.

This principle of equal voting rights applies also to the U.S. Senate. The Court in *Gray*, with Justice William O. Douglas writing for the majority, said that "[t]he conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote."[379]

Then, in 1964, the Court dropped the "bombshell" of *Reynolds v. Sims*.[380] In *Reynolds*, the Court found Alabama's legislature to be unconstitutional under the Equal Protection Clause.[381] Going further than previous precedents, the Court "minted a new rule that every district had to be equally populous."[382] "Legislators represent people, not trees or acres," the Court reasoned, following *Gray* and other cases.[383] "[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."[384] Such a state electoral system could be easily manipulated, according to the Court, to disenfranchise some citizens by inflating the importance of

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378. *Id.* at 379.

379. *Id.* at 381; *see also* TRIBE, *supra* note 160, at 120 (stating that "the 'one person, one vote' principle . . . has attained an all but mythical status as a bedrock constitutional principle on which our democracy is built").

380. 377 U.S. 533 (1964); AMAR, *supra* note 135, at 194.

381. 377 U.S. at 547.

382. AMAR, *supra* note 135, at 193–94.

383. *Reynolds*, 377 U.S. at 562.

384. *Id.*

others.[385] In one stroke, the Court knocked out more than forty state electoral systems as unconstitutionally unequal.[386]

My argument here is *not* that the U.S. Senate can or should be struck down as unconstitutional in a case brought by private citizens or the states acting on their behalf.[387] The current structure of the Senate violates the principle of equal voting rights of citizens, but it does not follow that a free-standing constitutional claim should be justiciable. The federal courts should, in my view, decline to entertain such a challenge because it would create an impractical and unwise conflict between the courts and the political branches. If the Supreme Court ordered reform of the Senate, it would set up an untenable power contest, and courts should therefore deny standing in these cases on grounds of the political question doctrine.[388]

In addition, without an affirmative act of Congress, no intramodal textual constitutional conflict is presented.[389] The distinction between "constitutional construction" and "constitutional interpretation" helps to explain the difference.[390] If and when Congress adopts a Senate Reform Act, then it would construct the meaning of the voting-rights amendments, and courts should then defer to that construction, perhaps even adopting the doctrine of "clear mistake."[391] In the absence of

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385. *Id.; 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 person's vote in a congressional election is to be worth as much as another's").

386. AMAR, *supra* note 135, at 194; *see also* FRIEDMAN, *supra* note 112, at 268 (reporting Senator Strom Thurmond's lament that *Reynolds* had invalidated the apportionment systems of at least forty-four states).

387. *But cf.* AMAR, *supra* note 135, at 197 ("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 from saying the same thing the next day about the Senate?").

388. *See supra* note 107 and accompanying text. *But cf.* William S. Bailey, Comment, *Reducing Malapportionment in Japan's Electoral Districts: The Supreme Court Must Act*, 6 PAC. RIM L. & POL'Y J. 169, 174–81 (1997) (discussing Japanese cases striking down national legislative structures as excessively unequal).

389. *See supra* Section III.C.3.

390. *See* Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 566–69 (2009) (examining the roles of Congress and the President in constitutional construction).

391. *See supra* note 108–09 and accompanying text.

congressional action, the textual meaning of the voting-rights amendments regarding congressional apportionment is much less determinate.[392]

Nonetheless, the legal principles of voting equality and fairness enunciated in cases such as *Baker*, *Gray*, and *Reynolds* apply with similar persuasive force to the proposed reform. Recall that the levels of mathematical inequality of representation in the U.S. Senate today are much higher than the ratios struck down in these cases against the states. Compared with inequality in the Senate dividing the smallest and largest states in a ratio close to seventy-to-one, the ratios of voting inequality in some of the state legislative cases seem quaint.[393]

More recent cases are not to the contrary. In *Bush v. Gore*,[394] 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. Ostensibly, the Court acted to protect all Florida voters from unequal treatment in recounting votes in a close federal election.[395] The case has been criticized as result-oriented: five Republican-appointed justices holding in favor of the Republican candidate.[396] At a minimum, though, the Court in *Bush v. Gore* followed in the tradition of applying the Equal Protection Clause to protect federal voting rights. The Court observed that states could not "value one person's vote over that of another" in federal elections.[397] The Court 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."[398] In this respect, said the Court, there was "no difference

392. *See* Kent Greenawalt, *How Law Can Be Determinate*, 38 UCLA L. REV. 1, 38–42, 56 (1990) (describing how statutes can sometimes provide more determinate answers than constitutional norms or standards).

393. *See supra* note 6 and accompanying text.

394. 531 U.S. 98 (2000) (per curiam).

395. *Id.* at 103 (holding "the use of standardless manual recounts" under state election laws "violates the Equal Protection Clause").

396. *See* ALAN M. DERSHOWITZ, SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000 4 (2001) (arguing that *Bush v. Gore* was decided on grounds only of partisan politics); Tribe, *supra* note 49, at 178 (same).

397. 531 U.S. at 104–05 (citing Harper v. Va. Bd. of Elections, 383 U.S. 663, 665 (1966)).

398. *Id.* at 105 (quoting Reynolds v. Sims, 377 U.S. 533, 555 (1964)).

between the two sides of the present controversy."[399] The dissenting minority opinions followed leading equal protection cases too, though coming to the opposite conclusion on the merits.[400]

The recent case of *Shelby County v. Holder*[401] is also not to the contrary. In *Shelby County*, the Court referred favorably to the history of the voting-rights amendments and the passage of the Voting Rights Act.[402] Plaintiffs challenged the singling out of southern states for special review and oversight, and the Court found this part of the Voting Rights Act to conflict with concerns about federalism.[403] Dubiously, the Court claimed the political and social culture in the United States had evolved beyond the racial discrimination of the past, especially in the old southern slave states.[404] In making this empirical judgment, the Court nonetheless recognized the success of the Voting Rights Act, as well as its constitutionality.[405]

Chief Justice John Roberts, writing for the Court, 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."[406] The Senate Reform Act is designed precisely

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399. *Id.* at 105; *see also* AMAR, *supra* note 135, at 195 (noting that conservative as well as liberal justices "accept the basic teachings" of cases such as *Baker* and *Reynolds*).

400. 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 "we live in an imperfect world").

401. 570 U.S. 529 (2013).

402. *Id.* at 536–37.

403. *Id.* at 557.

404. *Id.* at 547 ("Nearly 50 years later, things have changed dramatically."). Justice Ginsburg contested the main empirical premise of the Court's opinion, noting that the enactment of new impediments to voting rights had sprung up in the form of many "second-generation barriers" that made fighting them like "battling the Hydra." *Id.* at 560, 563 (Ginsburg, J., dissenting).

405. *Id.* at 548 (majority opinion) (highlighting that the Voting Rights Act has been empirically successful and has "proved immensely successful at redressing racial discrimination and integrating the voting process," especially for voter registration and turnout).

406. *Id.* at 553.

in this fashion: to provide equal voting rights for all American citizens in "a better future."

IV. POLITICAL BALANCE AND FEASIBILITY

The proposed Senate Reform Act is drawn mathematically and in politically neutral terms.[407] Because it would produce relatively balanced political outcomes for Republicans and Democrats, the "red" and the "blue," it should also prove politically feasible.[408]

Consider the following analysis. Working from the template of the 2016 presidential election, and allocating all gains and losses of senators in the reform to states according to their votes in that election, big red states like Texas and Florida would gain eleven senators as against ten extra senators for big blue California. Losses of senators in small states would roughly even out: losses in low-population western red states countering losses in the blue states of New England. See Table 8 on the next page.[409]

407. *See supra* Part II.

408. *See* STEVE KORNACKI, THE RED AND THE BLUE: THE 1990S AND THE BIRTH OF POLITICAL TRIBALISM 4–5 (2018) (noting the origin of sports-like colors for the main political parties in the "accidental" coverage by multiple television networks which all used red and blue in the same way during the closely divided presidential election in 2000).

409. Table 8 provides rough estimates allocating party gains or losses in senators to outcomes based on the 2016 presidential election. *See 2016 Presidential Election Actual Results*, 270TOWIN, https://www.270towin.com/map-images/2016-actual-electoral -map [https://perma.cc/6ALA-8D5J].

Table 8: Estimated Net Gains/Losses of Senators in Red and Blue States

State	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
Massachusetts	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
New Hampshire	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*

† Maine split its electoral votes.

Overall, this simple, straightforward model yields a national gain of eight Democrats compared with a gain of two Republicans, but this does not account for the likely variations within states with respect to election methods likely to give "purple" outcomes of mixed-party representation in larger states.[410] Moreover, even if all votes in the Electoral College in 2016 had been, hypothetically, awarded according to the reformed apportionment as illustrated in Table 8, the outcome of the election would not have changed.[411] Although the proposed reform may initially benefit Democrats, the overall long-term political consequences would be uncertain.[412] At least, our political future would be more

410. *See supra* notes 96–102 and accompanying text.

411. Trump won 304 electoral votes compared with Clinton's 227, so six or eight more votes for Clinton would not have mattered. *See Presidential Election Results: Donald J. Trump Wins*, N.Y. TIMES (Aug. 9, 2017), https://www.nytimes.com/elections/2016/results/president [https://perma.cc/26H6-ZBUS].

412. *See supra* note 20 and accompanying text; *see also* Franco Mattei, *Senate Apportionment and Partisan Advantage: A Second Look*, 26 LEGIS. STUD. Q. 391, 406

fair and representative. One might observe, however, that under the Senate Reform Act a current majority of twenty-six states would lose a senator.[413] Why would any of them agree?

If U.S. senators and representatives voted only in the interest of their own states' relative power, then the reform would indeed fail. Representatives in the House would likely follow the interests of their states and vote in favor of the reform. Senators, though, would balk. Those in the twelve states gaining senators would vote yes. Those in another twelve states that keep two senators might say yes too. Those in the twenty-six states that lose a senator, though, would kill the bill.[414]

Sectional politics of this kind, however, no longer rules the day.[415] In the post-World War II period, presidential leadership and ideologically split parties matter more than sectional or geographical differences.[416] Since the 1970s, ideology has grown more important—with Democrats becoming more "liberal" and Republicans more "conservative."[417] Ideological polarization now trumps regional and geographical divisions.[418] Indicating

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(2001) (finding no long-term advantage for a political party from unequal apportionment in the Senate).

413. *See supra* Tables 1 & 8.

414. *See supra* text accompanying note 92 (summarizing allocation of senators).

415. *Compare* FREDERICK J. TURNER, THE SIGNIFICANCE OF SECTIONS IN AMERICAN HISTORY (1932) (expressing the old view), *with* Harvey L. Schantz, *The Erosion of Sectionalism in Presidential Elections*, 24 POLITY 355, 356–57, 364–65 (1992) (discussing evidence supporting the views of scholars such as V. O. Key and E. E. Schnattschneider that the influence of parties has eclipsed the importance of regional sectionalism in American presidential elections).

416. *See, e.g.*, Peter H. Odegard, *Presidential Leadership and Party Responsibility*, 307 ANNALS AM. ACAD. POL. & SOC. SCI. 66, 66 (1956).

417. These labels are, of course, rather imprecise and often misleading. "Conservatives," for example, are often not very "conservative" today regarding the use or preservation of the natural environment. *See, e.g.*, Peter J. Jacques et al., *The Organisation of Denial: Conservative Think Tanks and Environmental Scepticism*, 17 ENVT'L POL. 349 (2008) (documenting the strong influence of conservative non-governmental organizations promoting an anti-environmentalist agenda). *But see generally* ROGER SCRUTON, HOW TO THINK SERIOUSLY ABOUT THE PLANET: THE CASE FOR AN ENVIRONMENTAL CONSERVATISM (2012).

418. *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, *supra* note 96, 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

the depth of continuing racial division in the United States, scholars and journalists identify a key watershed in the ideological fervor of the civil rights reforms of the 1960s, including the Voting Rights Act of 1965.[419] The election of the first black president stoked implicit as well as explicit racist reactions.[420] In response, there is a growing social movement aiming at a Third Reconstruction.[421] In this context, a Senate Reform Act is politically feasible from an ideological point of view because it would improve voting equality and racial justice in America, and thus may find a place as part of an agenda for a Third Reconstruction.

Another objection to the reform is that urban states would gain and rural states would lose.[422] This prediction is broadly true. Census data shows that ten of the eleven states with forty percent or more of their population in rural areas would lose a senator under the reform.[423] However, other than

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some time to come"); *see also* Andre Prokop, *See Congress Polarize Over the Past 60 Years, in One Beautiful Chart*, VOX (Oct. 27, 2015), https://www.vox.com/2015/4/23/8485443 [https://perma.cc/A377-UNQ6] (providing a graphical representation of increasing polarization in Congress over the last several decades).

419. Hare & Poole, *supra* note 418, at 415–16; *see also* KORNACKI, *supra* note 408, at 23–26 (commenting on the importance of political shifts among Democrats and Republicans on racial issues).

420. *See, e.g.*, Dana Milbank, *Obama Was Right: He Came Too Early*, WASH. POST (June 1, 2018), https://www.washingtonpost.com/opinions/trump-brings-on-the-death-throes-of-white-hegemony/2018/06/01/0cf2d636-65c7-11e8-a69c-b944de66d9e7 [https://perma.cc/UVC2-6T6F] (arguing that "Trump cunningly exploited and stoked racial grievance with his subtle and overt nods to white nationalism"); 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"). For further discussion, see also *supra* note 266 and accompanying text.

421. *See supra* note 372 and accompanying text; *see also* Ed Kilgore, *Democrats' Voting-Rights Push Could Begin a Third Reconstruction*, INTELLIGENCER (Mar. 21, 2019), http://nymag.com/intelligencer/2019/03/voting-rights-push-could-begin-a-third-reconstruction.html [https://perma.cc/PAN6-ZFCL] (arguing that reversing voting suppression and emphasizing voting rights may serve as the focal point for a Third Reconstruction).

422. Randy Tobler made this argument in a discussion of an early working paper version of this Article on his radio show. *Randy Tobler Show: Eric Orts*, KFTK RADIO (Jan. 12, 2019), https://971talk.radio.com/media/audio-channel/eric-orts-1-12-19mp3 [https://perma.cc/85H7-BTP3]; *see also supra* text accompanying note 202.

423. STATE LIBRARY OF IOWA, STATE DATA CTR. PROGRAM, URBAN AND RURAL POPULATION FOR THE U.S. AND ALL STATES: 1900–2000, https://www.iowadatacenter.org/datatables/UnitedStates/urusstpop19002000.pdf. The ten rural states are Arkansas, Kentucky, Maine, Mississippi, Montana, New Hampshire, North Dakota,

an obvious self-interested claim by people living in rural areas, it is not clear what principle should grant them a special privilege, especially when the voting weight differentials are so large. Surely, the founders had no original intent to privilege rural areas given that ninety-five percent of the country was rural at the time of the first census in 1790.[424] They could not have foreseen the urban revolution. The better substantive argument is that rural states do not deserve better or more representation simply because they are rural. Given that rural populations now represent only one-fifth of the total population, this fact is not likely to be decisive politically either.[425] As indicated above too, rural citizens in very large states are also currently underrepresented by the one state, two senators rule, and the reform would likely increase their relative representation.[426]

A related practical political hurdle may arise from what is known as the endowment effect or status quo bias.[427] States that "lose" a senator may feel more strongly about the loss as opposed to "gains" for other states. One option to alleviate this concern is to double the number of senators allocated to all states, thus leaving two senators as a minimum for each state (eliminating any direct feeling of "loss" of an initial "endowment"), and following a Rule of Two Hundred to allocate other seats.[428] This would almost double the size of the reformed Senate to 216 senators rather than 110. See Table 9 on the next page.[429]

Following a Rule of Two Hundred would reduce the attractiveness of the proposal with respect to following tradition with respect to size. However, it

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South Dakota, Vermont, and West Virginia. Alabama is on the cusp of the cut-off and was rounded up to two senators. *See supra* Table 1.

424. U.S. CENSUS BUREAU, POPULATION: 1790 TO 1990, tbl.4, https://www.census.gov/population/censusdata/table-4.pdf.

425. *Id.*; *see also* Paul Krugman, *Real America Versus Senate America*, N.Y. TIMES, Nov. 9, 2018, at A31 (lamenting that the Senate "drastically overweights" rural areas and "underweights the places where most Americans live").

426. *See supra* notes 202–03 and accompanying text.

427. The endowment effect refers to an experimentally verified irrational tendency for people to value property that they already have (even if just given to them) more than traditional economic analysis suggests. Status quo bias is a similar "anomaly" to rational decision-making related to "loss aversion." *See* Daniel Kahneman et al., *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. ECON. PERSPECTIVES 193 (1991).

428. *See supra* Part II (explaining a Rule of One Hundred allocation); *supra* Table 1 (showing the allocation).

429. Table 9 uses the same census data as Table 1 but applies a unit of measure .05% of the total U.S. population.

would remove the potentially politically difficult prospect of proposing that states such as Iowa, Nevada, New Hampshire, and South Carolina, which are currently early primary venues for presidential candidates, would all "lose a senator" under the reform.[430]

Table 9: Proposed Allocation of Senators under a Rule of Two Hundred

State	2017 Population*	Share of One Percent of Total U.S. Population	Proposed Senators based on .05 units
United States	325,719,178		
Alabama	4,874,747	1.49	3
Alaska	739,795	.23	2
Arizona	7,016,270	2.15	4
Arkansas	3,004,279	.92	2
California	39,536,653	12.13	24
Colorado	5,607,154	1.72	3
Connecticut	3,588,184	1.10	2
Delaware	961,939	.30	2
Florida	20,984,400	6.44	13
Georgia	10,429,379	3.20	6
Hawaii	1,427,538	.44	2
Idaho	1,716,943	.53	2
Illinois	12,802,023	3.93	8
Indiana	6,666,818	2.05	4
Iowa	3,145,711	.97	2
Kansas	2,913,123	.89	2
Kentucky	4,454,189	1.37	3
Louisiana	4,684,333	1.44	3
Maine	1,335,907	.41	2
Maryland	6,052,177	1.86	4
Massachusetts	6,859,819	2.11	4
Michigan	9,962,311	3.06	6

430. *2020 Primary Schedule*, ELECTION CENT., https://www.uspresidentialelectionnews.com/2020-presidential-primary-schedule-calendar [https://perma.cc/GC54-TKWS].

Minnesota	5,576,606	1.71	3
Mississippi	2,984,100	.92	2
Missouri	6,113,532	1.88	4
Montana	1,050,493	.32	2
Nebraska	1,920,076	.59	2
Nevada	2,998,039	.92	2
New Hampshire	1,342,795	.41	2
New Jersey	9,005,644	2.76	6
New Mexico	2,088,070	.64	2
New York	19,849,399	6.09	12
North Carolina	10,273,419	3.15	6
North Dakota	755,393	.23	2
Ohio	11,658,609	3.58	7
Oklahoma	3,930,864	1.21	2
Oregon	4,142,776	1.27	2
Pennsylvania	12,805,537	3.93	8
Rhode Island	1,059,639	.33	2
South Carolina	5,024,369	1.54	3
South Dakota	869,666	.27	2
Tennessee	6,715,984	2.06	4
Texas	28,304,596	8.69	17
Utah	3,101,833	.95	2
Vermont	623,657	.19	2
Virginia	8,470,020	2.60	5
Washington	7,405,743	2.27	4
West Virginia	1,815,857	.56	2
Wisconsin	5,795,483	1.78	4
Wyoming	579,315	.18	2
Total Senators			216
District of Columbia	693,972	.21	(2)
Puerto Rico	3,337,177	1.02	(2)
Pacific Islands	375,165	.11	(2)
American Indians and Alaskan Natives	2,726,278	.73	(2)

* U.S. Census, 2017 estimate used for illustration purposes only.

Even though the Senate Reform Act is drawn in politically neutral terms, and even though the political future is highly uncertain and difficult to predict, it is nevertheless likely that most Republicans today would oppose the reform for two reasons. First, Republicans have tended in recent years to adopt a strong "states' rights" view of political and constitutional theory, and the proposal follows in a Madisonian nationalist strain.[431] Second, Republicans benefit from the current status quo bias in the Senate favoring white voters. In both the 2016 presidential election and the 2018 midterms, Republicans attracted more white voters (by 10 to 20% margins), while Democrats had an edge in nonwhite categories (including approximately 80% margins among black voters, 40 to 50% among Asian voters, and almost 40% among Hispanic voters).[432] For similar

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431. *See, e.g.*, Gary Miller & Norman Schofield, *The Transformation of the Republican and Democratic Party Coalitions in the U.S.*, 6 PERSP. ON POL. 433, 438 (2008) (noting the "transformation of the GOP from the nationalist party of Lincoln to the party of states' rights—a transformation that made possible a coalition of business interests, western sagebrush rebels, and southern populists"); *see also supra* notes 5 & 310 (citing sources on Madison's strong nationalist preferences for senate representation). For an argument that contemporary Republicans are following in the racially tinged tradition of "states' rights" advocated by the likes of John C. Calhoun, which is supported by an unrepresentative Senate, see NANCY MACLEAN, DEMOCRACY IN CHAINS: THE DEEP HISTORY OF THE RADICAL RIGHT'S STEALTH PLAN FOR AMERICA 1–11, 24–25, 224–26 (2017).

432. *See* Coates, *The First White President*, *supra* note 266 (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*, fig.2, BROOKINGS (Nov. 8, 2018) (compiling data from exit polls showing whites favoring Republicans but by lesser margins than in 2016), https://www.brookings.edu/blog/the-avenue/2018/11/08/2018-exit-polls-show-greater-white-support-for-democrats [https://perma.cc/3B83-LHLJ].

The unpleasant but plain truth is also that Republicans support voter suppression campaigns against minority voters. *See* Lopez, *supra* note 258. 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 263, at 44–45. Black voters began to prefer Democratic candidates during the New Deal, and Democrats began to lose a majority of white voters, driven mainly by a loss of white southern voters, after the landslide of Lyndon Johnson in 1964 and the turn of Nixon's southern strategy. Stephen Ansolabehere et al., *Race, Region, and Vote Choice in the 2008 Election: Implications for the Future of the Voting Rights Act*, 123 HARV. L. REV. 1385, 1400–01 (2010).

reasons of race and politics, Republicans are probably unlikely to support a reform that would make it easier to add the District of Columbia and Puerto Rico as new states.[433] Far-sighted Republicans, however, might consider whether they would prefer the proposed reform that would allow adding the District of Columbia and Puerto Rico as states with only one senator each to the alternative of adding both with two senators. One can also imagine a future in which Republicans abandoned a racially clouded political strategy.

Under at least some future circumstances, then, one can imagine a scenario in which a "blue wave" would continue to build,[434] and Democrats could win control of the Senate and the Presidency, as well as the House, in 2020, 2024, or 2028. Republicans in some large states might then also be persuaded to support Senate reform along the lines indicated here because it would improve their likely outcomes in future elections. For example, Republicans in large states such as California and New York, and perhaps Florida and Texas too, are currently underrepresented in the Senate.[435] If the proposed Senate Reform Act gathered support from both a Democratic president and a Democratic Congress, along with some Republican support in big states, then it is feasible that enough Democrats in small states and Republicans in large ones could support the change on grounds of fairness and national unity, as well as partisan politics. A Senate Reform Act would then pass into law.

CONCLUSION: MAKE THE SENATE A DEMOCRACY AGAIN

The unrepresentative structure of the Senate has been stitched into the constitutional fabric of the United States from the beginning. It is a fabric that has been stained by the inherited sin of African slavery and the long exclusion of indigenous people and women.

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433. *See, e.g.*, John Hawkins, *A Conservative Case Against Statehood for Puerto Rico*, NAT'L REV. (Mar. 28, 2019), https://www.nationalreview.com/2019/03/puerto-rico-statehood-conservative-case-against [https://perma.cc/T8DV-VWLC]. *But see* Kyle Sammin, *A Conservative Case for Puerto Rican Statehood*, NAT'L REV. (Mar. 26, 2019), https://www.nationalreview.com/2019/03/puerto-rico-statehood [https://perma.cc/A7F4-Y9ZT] (arguing in favor of admitting Puerto Rico as a state on grounds that it would strengthen federalism).

434. *See supra* note 18 and accompanying text.

435. *See supra* note 96 and accompanying text.

Over time, a civil war and other political battles have expanded the franchise beyond the property-owning, often slaveholding white men who wrote and ratified the original text of the Constitution. These victories overstitched permanent patches into our constitutional clothing. The Fourteenth, Fifteenth, Nineteenth, Twenty-Fourth, and Twentieth-Sixth Amendments enshrine a right to vote to all adults equally, without regard to race, ethnicity, color, national origin, sex, sexual orientation, wealth, and age. They explicitly delegate to Congress the power of enforcement.

It has been said "the arc of the moral universe is long, but it bends toward justice."[436] This has been true in the United States with respect to the evolution of constitutional protections of voting rights, though it has followed a spiraling or zig-zag pattern of historical progression.[437]

The U.S. Senate, as shown here, has become increasingly skewed in representation. It is an outlier among modern democracies in the severity of its unequal distribution of voting weight and power, disfavoring all citizens who live in large states. This unequal representation is also heavily biased in favor of white people, as well

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436. Martin Luther King, Jr., repeated the phrase memorably in his speeches. President Obama used the phrase as well, attributing it to King, and even had it inscribed on a rug in the Oval Office. The abolitionist Unitarian minister Theodore Parker, however, gets credit for the first use of the idea. In 1853, 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.

See Theodore Parker and the "Moral Universe," NAT'L PUB. RADIO (Sept. 2, 2010), https://www.npr.org/templates/story/story.php?storyId=129609461 [https://perma.cc/ND72-BZ9L] (recounting this history of the idea and its phrasings).

437. *Cf.* SMITH, *supra* note 182, at 19–20, 23–35 (describing "the spiral of politics" in defining "peoplehood" in the United States and elsewhere); *Transcript: President Obama's Remarks on Donald Trump's Election*, WASH. POST (Nov. 9, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/11/09/transcript-president-obamas-remarks-on-donald-trumps-election [https://perma.cc/87NY-MTWR] ("[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.").

as biased, though less strongly so, against women and other protected categories of citizens regarding age and sexual orientation.[438]

In these circumstances, Congress should exercise its power under the voting-rights amendments. It should correct this injustice that lies at the core of American democracy. It should act to place all U.S. citizens on a more equal footing in *their* Senate.

The Senate Reform Act recommended here provides a simple mathematical solution. It employs the Rule of One Hundred to adjust the allocation of senators to the states. Big states would add senators, mid-sized states would retain two senators, and small states would lose a senator. The overall number of senators would remain about the same, increasing from 100 to 110. If politically more feasible, a reform could follow instead of a Rule of Two Hundred in order to avoid the loss aversion that small states might otherwise feel too acutely. Other than total number and allocation of seats, all constitutional rules regarding the Senate would remain the same.

There are other structural advantages to the proposal. Because it is politically easier to add a new state with one senator rather than two, the reform would pave a path to potential statehood for the District of Columbia, Puerto Rico, and perhaps the Pacific Islands and indigenous peoples. The reform would automatically render the Electoral College more representative of the nation, relieving pressure for other potentially more disruptive changes, such as an interstate compact for a national popular vote. The reform would counter the tendency for senators in small states to siphon more than their fair share of government spending from the federal budget.

Despite these advantages, some may stubbornly contend that the one state, two senators rule can never change—because the original text of the Constitution says so! However, standard modes of constitutional interpretation give a different answer. The text of the later voting-rights amendments empowers Congress to override the original one state, two senators rule because the Senate, as presently constituted, abridges the equal voting rights of U.S. citizens. Textual analysis, as well as consideration of structure, history, morality, and legal authority, support interpreting the reform as constitutional.

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438. Distortions among the states with respect to other characteristics not reviewed here empirically, such as wealth, religion, and national origin, are also highly likely.

It is absurd to say a bad constitutional rule can never be changed, except by a revolution. We should not read the Constitution to put a straightjacket on the progression of representative government, binding us forever to the dead hand of an inflexible past. "The Earth belongs always to the living generation," said Thomas Jefferson, and "the dead have neither powers nor rights over it."[439]

Once before, the Seventeenth Amendment made the Senate more democratic, transferring the right to vote for U.S. senators from state legislators directly to the people. It is time now to resolve our national Lockean paradox of unequal representation. We should make the Senate a democracy, again.

439. TAYLOR, *supra* note 83, at 280 (quoting Jefferson).