
NOTE

PACK THE UNION: A PROPOSAL TO ADMIT NEW STATES FOR THE PURPOSE OF AMENDING THE CONSTITUTION TO ENSURE EQUAL REPRESENTATION

For most of the twenty-first century, the world’s oldest surviving democracy has been led by a chief executive who received fewer votes than his opponent in an election for the position.¹ The first of these executives started a war based on false pretenses that killed hundreds of thousands of civilians.² The second — a serial abuser of women³ who hired as his campaign manager a lobbyist for violent dictatorships⁴ — authorized an immigration policy that forcibly separated migrant children from their families and indefinitely detained them in facilities described as “concentration camps.”⁵

Democracy, as they say, is messy.⁶

But even when democracy is messy, a society’s commitment to the endeavor rests on the belief that giving power to the people is appropriate and fair.⁷ Recent events have highlighted some of the ways in which federal elections in the United States are profoundly undemocratic and, thus, profoundly unfair.⁸ The Electoral College — when it contravenes the popular vote — is an obvious example of this unfairness. But it is just one of the mathematically undemocratic features in the Constitution. Equal representation of states in the Senate, for example, gives citizens of low-population states undue influence in Congress. Conversely, American citizens residing in U.S. territories have no meaningful representation in Congress or the Electoral College.

¹ See DENNIS W. JOHNSON, CAMPAIGNS AND ELECTIONS 70 (2020).

² See Rebecca Adelman & Sherifa Zuhur, *Iraqi Freedom, Operation, Casualties Of*, in THE IRAQ WAR ENCYCLOPEDIA 199, 201 (Thomas R. Mockaitis ed., 2013); Gregory W. Morgan, *Iraq, History of, 1990 to Present*, in THE IRAQ WAR ENCYCLOPEDIA, *supra*, at 184, 188; Tim J. Watts & Paul G. Pierpaoli, Jr., *Bush, George Walker*, in THE IRAQ WAR ENCYCLOPEDIA, *supra*, at 72, 75.

³ See Michael Barbaro & Megan Twohey, *Crossing the Line: How Donald Trump Behaved with Women in Private*, N.Y. TIMES (May 14, 2016), <https://nyti.ms/24RqHYi> [<https://perma.cc/7AM8-V74F>].

⁴ See Franklin Foer, *Paul Manafort, American Hustler*, THE ATLANTIC (Mar. 2018), <https://www.theatlantic.com/magazine/archive/2018/03/paul-manafort-american-hustler/550925> [<https://perma.cc/2DA7-2Y7E>].

⁵ Isaac Chotiner, *Inside a Texas Building Where the Government Is Holding Immigrant Children*, NEW YORKER (June 22, 2019), <https://www.newyorker.com/news/q-and-a/inside-a-texas-building-where-the-government-is-holding-immigrant-children> [<https://perma.cc/4LT4-LGL7>].

⁶ Cf. 444 Parl Deb HC (5th ser.) (1947) col. 203 (UK) (statement of Rt. Hon. Churchill) (“No one pretends that democracy is perfect or all-wise. Indeed, it has been said that democracy is the worst form of Government except all those other forms that have been tried . . . ”).

⁷ Sidney Verba, *Fairness, Equality, and Democracy: Three Big Words*, 73 SOC. RES. 499, 503 (2006).

⁸ See generally Ezra Klein & Mallory Brangan, Vox, *The Roots of America’s Democracy Problem*, YOUTUBE (Nov. 20, 2018), <https://youtu.be/oySL8zWbcvU> [<https://perma.cc/9JWL-5R7W>].

If we truly hold to be self-evident that all are created equal,⁹ then it is time to amend the Constitution to ensure that all votes are treated equally. Just as it was unfair to exclude women and minorities from the franchise, so too is it unfair to weight votes differently. The 600,000 residents of Wyoming and the 40,000,000 residents of California¹⁰ should not be represented by the same number of senators. Nor should some citizens get to vote for President, while others do not. Any rationalization of the status quo must adopt the famous Orwellian farce: “All animals are equal but some animals are more equal than others.”¹¹

These observations are not new, and they were noted well before the Constitution was ratified. During the Constitutional Convention, delegates from small states refused to accept a system of representation by population.¹² Likewise today, the faction that benefits from the unfair allocation of power has no interest in changing it.¹³ Article V of the Constitution requires supermajorities to amend the Constitution, so pragmatists have been reduced to advocating meager solutions: perhaps Congress could admit Washington, D.C., as a state; maybe Puerto Rico too, if we’re really feeling ambitious.¹⁴

While a step in the right direction, these proposals are inadequate. To create a system where every vote counts equally, the Constitution must be amended. To do this, Congress should pass legislation reducing the size of Washington, D.C., to an area encompassing only a few core federal buildings and then admit the rest of the District’s 127 neighborhoods¹⁵ as states. These states — which could be added with a simple congressional majority — would add enough votes in Congress to ratify four amendments: (1) a transfer of the Senate’s power to a body that represents citizens equally; (2) an expansion of the House so that all citizens are represented in equal-sized districts; (3) a replacement of the Electoral College with a popular vote; and (4) a modification of the Constitution’s amendment process that would ensure future amendments are ratified by states representing most Americans.

Radical as this proposal may sound, it is no more radical than a nominally democratic system of government that gives citizens widely

⁹ See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

¹⁰ QuickFacts, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/CA,MT,WY/PST045218> [https://perma.cc/98R8-3JCA].

¹¹ GEORGE ORWELL, ANIMAL FARM 112 (1946).

¹² See MICHAEL J. KLARMAN, THE FRAMERS’ COUP: THE MAKING OF THE UNITED STATES CONSTITUTION 199–201 (2016).

¹³ See Erin Corbett, *Why Democrats Want to Abolish the Electoral College — and Republicans Want to Keep It*, FORTUNE (Apr. 2, 2019), <http://fortune.com/2019/04/02/abolish-the-electoral-college-votes/> [https://perma.cc/WU4H-LT8Z].

¹⁴ E.g., Ezra Klein, *Democrats Need to Get Serious on Statehood for DC and Puerto Rico*, VOX (Oct. 26, 2018, 10:10 AM), <https://www.vox.com/policy-and-politics/2018/10/26/18024542/dc-puerto-rico-statehood-senate-democracy> [https://perma.cc/9JMF-WS97].

¹⁵ See JENNIFER COMEY ET AL., URBAN INST., STATE OF WASHINGTON, D.C.’S NEIGHBORHOODS 3 (2010) (identifying 127 neighborhoods).

disproportionate voting power depending on where they live. The people should not tolerate a system that is manifestly unfair; they should instead fight fire with fire, and use the unfair provisions of the Constitution to create a better system.

This Note proceeds in three parts. Part I identifies the issue of unequal representation in the federal government. Part II explains the proposal to admit new states and pass new amendments. Part III addresses legal, historical, and political counterarguments.

I. THE PROBLEM OF UNEQUAL REPRESENTATION

The problem of unequal representation is rooted in provisions of the Constitution that treat citizens living in different places differently. These provisions date to the Constitutional Convention, but in many respects, the present state of affairs does not reflect the Framers' intentions. Developments since ratification call into question the inequality of the status quo, which has a substantial effect on public policy and is likely to get worse unless it is addressed.

A. History — How and Why the Problem Exists

i. The Senate. — In the Senate, each state is represented by two senators regardless of population.¹⁶ As a result, the Senate is arguably the least democratic legislative chamber in any developed nation.¹⁷ At the Constitutional Convention, the arguments in favor of representation by state were never particularly persuasive, but the voting structure of the Convention — where decisions had to be approved by a majority of states — ensured that small-state delegates got their way.¹⁸

Gunning Bedford, a delegate from Delaware, warned that if representation were based on population, large states might “crush the small ones” in Congress.¹⁹ But as James Madison noted, that risk is minimal, because large states do not inherently have anything in common that would bring them together for such purposes.²⁰ The only issue that would reliably divide small and large states is the very question of how to allocate power among them.²¹

Luther Martin, of Maryland, also argued that because the federal government was a confederation of equally “sovereign and free” states, each should be considered an equal contracting party.²² But again, this

¹⁶ U.S. CONST. art. I, § 3, cl. 1.

¹⁷ See Adam Liptak, *Smaller States Find Outsize Clout Growing in Senate*, N.Y. TIMES (Mar. 11, 2013), <https://nyti.ms/2kQU4hb> [<https://perma.cc/Q4NU-8GUF>].

¹⁸ See KLARMAN, *supra* note 11, at 201.

¹⁹ *Id.* at 190; see also FRED BARBASH, THE FOUNDING 69 (1987).

²⁰ See NOAH FELDMAN, THE THREE LIVES OF JAMES MADISON 137–38 (2017).

²¹ See *id.* at 141.

²² KLARMAN, *supra* note 12, at 188.

view is not especially compelling. As Pennsylvania delegate James Wilson wryly inquired: “Can we forget for whom we are forming a government? Is it for *men*, or for the imaginary beings called states?”²³ States do not have interests independent of the people who live in them, so equal numbers of people ought to be entitled to an equal number of representatives.

Moreover, while it was at least plausible at the time to argue that the federal government was a creature of sovereign states, today the federal government is intimately involved with individual lives in a way that would have been unimaginable to those in the Founding era.²⁴ If the federal government can levy personal income taxes, change the definition of marriage, and penalize the failure to purchase health insurance,²⁵ shouldn’t *the people* whose lives depend on those decisions be entitled to equal representation?

2. *The House.* — While more democratic than the Senate, the House of Representatives suffers from anti-democratic features as well. Most obviously, representatives are elected only by citizens of states, so the millions of American citizens living in the District of Columbia and U.S. territories are without meaningful representation in Congress.²⁶ And even among the states, House elections do not treat voters equally. Because each state is entitled to at least one representative, and because the size of the House is capped by statute at 435,²⁷ there are significant disparities between the powers of voters in each state.²⁸

Unlike the Senate, which has treated voters differently from the beginning, the House was supposed to continually grow so as to remain democratic and representative of the citizenry.²⁹ Both the seemingly permanent disenfranchisement of citizens in populous self-governing territories and the statutory cap on the size of the chamber are inconsistent with the Framers’ vision of a body reflecting the will of the people.³⁰

²³ *Id.* at 185; see also BARBASH, *supra* note 19, at 67 (“As [Madison] saw it, this was to be a government constituted by the people, not by states, and the people rather than the states should be represented.”).

²⁴ See generally I. BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 105 (1991) (describing the changes since the Founding that redefined the national government).

²⁵ U.S. CONST. amend. XVI; Obergefell v. Hodges, 135 S. Ct. 2584, 2607 (2015); Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519, 574 (2012).

²⁶ 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, 260 (2017).

²⁷ See Reapportionment Act of 1929, ch. 28, § 22, 46 Stat. 21, 26–27 (codified as amended at 2 U.S.C. § 2a (2018)).

²⁸ Wyoming’s single House district, for example, covers a population of less than 600,000, while Montana’s is home to more than 1,000,000. See QuickFacts, U.S. CENSUS BUREAU, *supra* note 10.

²⁹ See Christopher St. John Yates, *A House of Our Own or a House We’ve Outgrown? An Argument for Increasing the Size of the House of Representatives*, 25 COLUM. J.L. & SOC. PROBLEMS 157, 175–79 (1992).

³⁰ See THE FEDERALIST NO. 55, at 340–41 (James Madison) (Clinton Rossiter ed., 2003) (promising that the House would expand with the population); Weare, *supra* note 26, at 259, 262–63.

3. *The Electoral College.* — The Electoral College produces similarly undemocratic outcomes. More than ten percent of Presidents have been elected despite losing the popular vote,³¹ in large part because the system presently operates in a manner inconceivable to its creators.³²

Like the debate over apportionment of the national legislature, deliberations over the method of electing the Executive pitted small and large states against each other.³³ The resulting compromise promoted two values: First, the use of electors would dilute populist influence, while ensuring that the President would not be unduly dependent on Congress.³⁴ Second, each state would receive a number of electors equal to the sum of its representatives plus its senators so that large states would not have an unfair advantage.³⁵

Since ratification, the premises underlying these compromises have almost completely eroded.³⁶ The electors no longer play a serious role in “diluting” populist influence because states immediately realized that the best way to maximize their influence on the election was to direct all of their electors to vote for the candidate that won their state.³⁷ This winner-take-all approach also substantially undercuts the protection for small states.³⁸ Although there remains, at least in theory, a modest “boost” for small states, the practical effect of winner-take-all laws is to focus a wildly disproportionate share of campaign resources on large battleground states,³⁹ because minuscule changes in the result of one large state can have a determinative effect on the entire election.⁴⁰

³¹ See JOHNSON, *supra* note 1, at 70.

³² For starters, the Framers seemed to think the Electoral College would rarely produce a winner, and that the House would typically select the next President. See KLARMAN, *supra* note 12, at 232, 369, 629.

³³ See Note, *Rethinking the Electoral College Debate: The Framers, Federalism, and One Person, One Vote*, 114 HARV. L. REV. 2526, 2528–29 (2001).

³⁴ See JEFFREY ST. JOHN, CONSTITUTIONAL JOURNAL 197–99 (1987); see also KLARMAN, *supra* note 12, at 228 (discussing the manners in which the people would be ignorant and inept at selecting the “chief magistrate”).

³⁵ See KLARMAN, *supra* note 12, at 231; ST. JOHN, *supra* note 34, at 199.

³⁶ See Akhil Reed Amar with Vikram David Amar, *Electoral College History: Slavery, Sexism, and the South*, FINDLAW (Nov. 30, 2001), reprinted in AKHIL REED AMAR, THE CONSTITUTION TODAY 342, 346 (2016).

³⁷ See William Josephson & Beverly J. Ross, *Repairing the Electoral College*, 22 J. LEGIS. 145, 154 (1996).

³⁸ Note, *supra* note 33, at 2531 (“[T]he emergence of the . . . winner-take-all system for state selection of electors, which the Framers did not anticipate, has rendered the notion of any consistent small-state, regional, or federalist protection in the electoral college highly tenuous.” (footnotes omitted)).

³⁹ See David Strömberg, *How the Electoral College Influences Campaigns and Policy: The Probability of Being Florida*, 98 AM. ECON. REV. 769, 769 (2008).

⁴⁰ See, e.g., ARI BERMAN, GIVE US THE BALLOT 207–14 (2015) (recalling the decisive Florida recount in the 2000 presidential election).

B. Effects — Public Policy that Does Not Reflect the People

The public policy implications of unequal representation are substantial. Congress does not pass laws that people want, nor does it confirm the Supreme Court Justices people want.⁴¹ Americans without representation are neglected by “their” government. Presidents are elected in spite of their popular support, not because of it. This is not how democracy is supposed to work. There may be something to be said for putting a check on the impulses of an electorate, but there is no good justification for nominally allocating power to the people, but distributing it on unequal terms.

1. *Legislation.* — It is common knowledge that the U.S. Congress does not pass legislation favored by most Americans. Wide majorities favor universal background checks for gun purchases,⁴² more robust parental leave policies,⁴³ and raising taxes on the wealthy.⁴⁴ One common explanation for the disconnect between popular policy preferences and congressional inaction is the influence of money in politics. The wealthy have unrepresentative interests and disproportionate power.⁴⁵ Surely there is some truth to this explanation, but it does not tell the whole story. Another explanation is that the representatives themselves are not the representatives preferred by the public.⁴⁶

In the 2018 midterms, for example, Democratic congressional candidates won the House popular vote by the largest midterm margin of victory ever.⁴⁷ Republican candidates for Senate received a total of 38% of votes cast, while Democratic candidates received 58%.⁴⁸ And yet,

⁴¹ Compare Amber Phillips, *A Majority Say Merrick Garland Should Be Confirmed. But That Means Less than You Think*, WASH. POST (Mar. 21, 2016, 2:37 PM), <https://wapo.st/1UJtQp7> [https://perma.cc/5CUB-G7LT], with Ariel Edwards-Levy, *Brett Kavanaugh Is on Track to Be a Historically Unpopular Supreme Court Justice*, HUFFPOST (Oct. 5, 2018 7:13 PM), https://www.huffpost.com/entry/brett-kavanaugh-unpopular-supreme-court-justice_n_5bb7c331e4bo28e1fe3d9646 [https://perma.cc/MW64-XVAJ].

⁴² See ROBERT J. SPITZER, THE POLITICS OF GUN CONTROL 125 (6th ed. 2015).

⁴³ Claire Groden, *An Overwhelming Majority of Americans Support Paid Parental Leave*, FORTUNE (Apr. 15, 2016), <https://fortune.com/2016/04/15/an-overwhelming-majority-of-americans-support-paid-parental-leave> [https://perma.cc/F9SG-XGG5].

⁴⁴ SPENCER PISTON, CLASS ATTITUDES IN AMERICA 57 (2018).

⁴⁵ See *Americans’ Views on Money in Politics*, N.Y. TIMES (June 2, 2015), <https://nyti.ms/2mfQXtT> [https://perma.cc/X4KH-HUMW].

⁴⁶ See John D. Griffin, *Senate Apportionment as a Source of Political Inequality*, 31 LEG. STUD. QUART. 405, 406 (2006). There are of course other potentially relevant factors, such as the non-uniform distribution of people with certain preferences, the propensity of certain people to vote, and the relative importance of an issue to a voter choosing between a limited number of candidates.

⁴⁷ Jane C. Timm, *Democrats Smash Watergate Record for House Popular Vote in Midterms*, NBC NEWS (Nov. 26, 2018, 11:24 AM), <https://www.nbcnews.com/politics/elections/democrats-smash-watergate-record-house-popular-vote-midterms-n940116> [https://perma.cc/G7FJ-WDLY].

⁴⁸ See OFFICE OF THE CLERK, U.S. HOUSE OF REPRESENTATIVES, STATISTICS OF THE CONGRESSIONAL ELECTION FROM OFFICIAL SOURCES FOR THE ELECTION OF

Republicans not only retained a majority in the chamber, they actually increased it.⁴⁹ Given that only one-third of Senate seats are up in each election, it would make sense to see only modest changes in the overall composition of the body each cycle. But when the losing party in a wave election gains seats in the Senate, something is amiss.

2. *The Supreme Court.* — The problem of unequal representation affects more than legislation. For example, in February 2016, Justice Antonin Scalia died, leaving the Supreme Court divided between four Democratic appointees and four Republican appointees.⁵⁰ The Republican-controlled Senate refused to hold hearings for the Democratic President's nominee, and the Senate majority leader announced that control of the Court was to be decided by "the American people."⁵¹ In November 2016, the American people spoke definitively: Democratic Senate candidates received 10 million more votes than Republican candidates, and 11 percentage points more of the total vote.⁵² The Democratic presidential nominee similarly received nearly 3 million more votes than her opponent.⁵³ And yet, because of the unfair method of representation, Republicans retained control of the Senate and took over the White House.⁵⁴ In the ensuing Congress, two new conservative Justices were appointed to the Court despite the fact that senators representing a majority of Americans voted against both of them.⁵⁵

In fact, of the five sitting Justices appointed by Republican Presidents, all but one was appointed by a President who was elected despite losing the popular vote.⁵⁶ The policy consequences of these appointments —

NOVEMBER 6, 2018, at 57 (2019), <https://history.house.gov/Institution/Election-Statistics/2018election> [<https://perma.cc/TJ49-C7UG>].

⁴⁹ Maureen Groppe, *Republicans Make History by Growing Senate Majority While Losing House*, USA TODAY (Nov. 7, 2018, 3:51 PM), <https://www.usatoday.com/story/news/politics/elections/2018/11/06/election-day-2018-republicans-senate/1848366002> [<https://perma.cc/BE2P-44KX>].

⁵⁰ DAVID A. KAPLAN, *THE MOST DANGEROUS BRANCH* 10 (2018).

⁵¹ *Id.* at 66.

⁵² See OFFICE OF THE CLERK, U.S. HOUSE OF REPRESENTATIVES, STATISTICS OF THE PRESIDENTIAL AND CONGRESSIONAL ELECTION FROM OFFICIAL SOURCES FOR THE ELECTION OF NOVEMBER 8, 2016, at 83 (2017), <https://history.house.gov/Institution/Election-Statistics/2016election> [<https://perma.cc/N2MR-MHAK>].

⁵³ *Id.* at 82.

⁵⁴ Geoffrey Skelley, *Straight Tickets for Senate, Split Tickets for Governor: The 2016 Senate and Gubernatorial Elections*, in LARRY J. SABATO ET AL., *TRUMPED* 52, 56–57 (2017).

⁵⁵ See Michael Tomasky, Opinion, *The Supreme Court's Legitimacy Crisis*, N.Y. TIMES (Oct. 5, 2018), <https://nyti.ms/2y4oZH9> [<https://perma.cc/8TZK-8FGS>].

⁵⁶ See Greg Price, *Brett Kavanaugh Will Be Fourth Supreme Court Justice Nominated by President Who Didn't Win the Popular Vote*, NEWSWEEK (Oct. 6, 2018, 10:19 AM), <https://www.newsweek.com/supreme-court-justice-president-popular-vote-1156542> [<https://perma.cc/P3U2-CTTZ>]. President George W. Bush appointed both of his Justices during his second term — after the 2004 election where he won both the popular and electoral vote — but had the popular vote winner of the 2000 election assumed the office, it seems doubtful that President Bush would have even been President at all.

appointments that were only possible due to an unfair system of representation — are profound. Some of the biggest cases of the twenty-first century were decided by 5–4 votes split down party lines,⁵⁷ results that almost certainly would have been different if the United States had a fair method of representation.

None of this is to say the judiciary should be a rubber stamp on public opinion; perhaps its countermajoritarian function is essential.⁵⁸ But if the courts are to be subject to public control, their judges and Justices appointed and confirmed by representatives of the people, and their decisions binding on the entire nation, it makes little sense to give some citizens much more voting power than others.

3. U.S. Territories. — The problem of unequal representation is especially severe for citizens of U.S. territories. Such citizens pay payroll taxes but, with few exceptions, are not eligible for Supplemental Security Income.⁵⁹ Nor are the territories reimbursed for Medicaid at the same rate as states.⁶⁰ They also serve in the military at higher rates than the national average, and yet, per capita healthcare spending on veterans in the territories is much lower than the national average.⁶¹

It also seems likely that territorial disenfranchisement plays a significant, albeit intangible role in the national psyche. Compare, for example, the federal government's reactions to Hurricane Katrina and Hurricane Maria. When the former devastated New Orleans in 2005, there was substantial political fallout. Within weeks, the Republican-controlled House and Senate were holding hearings on the Bush Administration's response,⁶² which contributed to Democrats' historic success in the 2006 midterm elections.⁶³ But in 2017, when Hurricane Maria killed 3,000 people in Puerto Rico, the political fallout was minimal.⁶⁴ There were

⁵⁷ See, e.g., *Trump v. Hawaii*, 138 S. Ct. 2392, 2402, 2423 (2018) (upholding President Trump's travel ban); *Shelby County v. Holder*, 133 S. Ct. 2612, 2617, 2631 (2013) (striking down portions of the Voting Rights Act); *District of Columbia v. Heller*, 554 U.S. 570, 572, 636 (2008) (guaranteeing a personal right to own a firearm); *Gonzales v. Carhart*, 550 U.S. 124, 130, 166–67 (2007) (upholding federal abortion restrictions).

⁵⁸ See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

⁵⁹ See MEDICAID AND CHIP PAYMENT AND ACCESS COMMISSION, FACT SHEET: MEDICAID AND CHIP IN THE TERRITORIES 1 (2019), <https://www.macpac.gov/wp-content/uploads/2019/07/Medicaid-and-CHIP-in-the-Territories.pdf> [https://perma.cc/G8UW-VNGB].

⁶⁰ *Id.*

⁶¹ See, e.g., Josh Hicks, *Guam: A High Concentration of Veterans, but Rock-Bottom VA Funding*, WASH. POST (Oct. 29, 2014), <https://www.washingtonpost.com/news/federal-eye/wp/2014/10/29/guam-a-high-concentration-of-veterans-with-little-va-funding/> [https://perma.cc/P36M-G5S4].

⁶² Danny Vinik, *Trump Gets Pass from Congress on Puerto Rico Deaths*, POLITICO (Sept. 16, 2018), <https://www.politico.com/story/2018/09/16/maria-katrina-trump-bush-congress-hurricane-825870> [https://perma.cc/LWF3-CYJZ].

⁶³ See CLERK OF THE HOUSE OF REPRESENTATIVES, STATISTICS OF THE CONGRESSIONAL ELECTION OF NOVEMBER 7, 2006, at 83 (Sept. 21, 2007), http://clerk.house.gov/member_info/electionInfo/2006election.pdf [https://perma.cc/V8LQ-BG6G].

⁶⁴ See Vinik, *supra* note 62.

no congressional reports,⁶⁵ and the Trump Administration's response did not seem to weigh significantly in the next midterm election.⁶⁶ One obvious explanation is that Puerto Rico does not have representation in the federal government, while Louisiana does. There may be merit to a probationary period prior to statehood, but what justification could there be for indefinite second-class citizenship?

4. *The President.* — The practical effects of an Electoral College that contravenes the will of the people are perhaps self-evident but still worth mentioning. Whereas in the early republic, the President had more modest duties, the modern presidency has transformed into the most powerful office in the world.⁶⁷ In addition to signing or vetoing legislation and appointing key officers, the President has a powerful bully pulpit to influence world affairs, and a powerful pen for signing executive orders.⁶⁸ To the tune of trillions of dollars⁶⁹ and millions of lives,⁷⁰ Presidents have the power to shape history for better or worse. It makes little sense to allow an antiquated, unfair system of representation — a system that does not work as intended⁷¹ — to determine who becomes President.

C. The Problem Is Getting Worse

For two reasons, the problem of unequal representation is getting worse. First, increasing percentages of Americans reside in large states, which are disadvantaged in terms of federal representation. Second, political issues are pitting residents of small and large states against each other, such that the federal government is increasingly acting on behalf of a smaller percentage of citizens. These trends suggest that whatever window of opportunity to remedy the problem of unequal representation might exist, it is shrinking.

The American population is becoming increasingly centralized in a smaller number of states. In 1800, for example, the top 10% of states by population were home to approximately 27% of the population.⁷² By 1900, that number was up to 34%,⁷³ and by 2016, it was up to

⁶⁵ *Id.*

⁶⁶ See Frank Newport, *Top Issues for Voters: Healthcare, Economy, Immigration*, GALLUP (Nov. 2, 2018) (declining even to ask a hurricane-related question in the poll), <https://news.gallup.com/poll/244367/top-issues-voters-healthcare-economy-immigration.aspx> [https://perma.cc/88BW-CMXZ].

⁶⁷ See LEWIS L. GOULD, THE MODERN AMERICAN PRESIDENCY xiv (2d ed. 2009).

⁶⁸ BENJAMIN GINSBERG, PRESIDENTIAL GOVERNMENT 102, 326–27 (2016).

⁶⁹ Consequences of the Iraq War, in THE IRAQ WAR ENCYCLOPEDIA, *supra* note 2, at xxii, xxiv.

⁷⁰ See, e.g., WILLIAM BUNDY, A TANGLED WEB 497–500 (1998) (linking President Richard M. Nixon's foreign policy decisions to the Cambodian genocide).

⁷¹ Note, *supra* note 33, at 2531.

⁷² See DEPT. OF COMMERCE, U.S. BUREAU OF THE CENSUS, POPULATION OF STATES AND COUNTIES OF THE UNITED STATES: 1790–1990, at 4 (1996).

⁷³ See *id.* at 2.

37%.⁷⁴ By 2040, it is estimated that 40% of the American population will be concentrated in just five states.⁷⁵ Half of the population will be represented by just sixteen senators, the other half by eighty-four.⁷⁶

Of course, states have never been equal in size, and as James Madison noted, small and large states do not necessarily have anything substantive in common.⁷⁷ The concentration of people in large states is not enough to *necessarily* skew public policy significantly. Increasingly, however, small and large states are divided in a manner that is qualitatively different than the past.⁷⁸ Perhaps urbanization is pitting the interests of the rural against the urban,⁷⁹ or the clustering of certain minority populations is exposing different regions to different socioeconomic factors.⁸⁰ Or perhaps it is a random coincidence. In any case, the trend is causing the federal government to act on behalf of a smaller percentage of the public.

For most of American history, it was relatively rare for a bill to pass the Senate without support from senators representing the majority of Americans.⁸¹ Most votes passed with around two-thirds of the Senate in favor, with those senators representing two-thirds of the population.⁸² But in 2017, for the first time ever, *nearly half* of the bills and nominations passing the Senate were supported by senators representing less than half of the population.⁸³ While this extraordinary arrangement may not be permanent, with the Republican party relying on white,

⁷⁴ Philip Bump, *By 2040, Two-Thirds of Americans Will Be Represented by 30 Percent of the Senate*, WASH. POST (Nov. 28, 2017), <http://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/DC4E-5VMR].

⁷⁵ *Id.*

⁷⁶ See Jamelle Bouie, Opinion, *The Senate Is as Much of a Problem as Trump*, N.Y. TIMES (May 10, 2019), <https://nyti.ms/2VwdXva> [https://perma.cc/PT5N-E5GA].

⁷⁷ See FELDMAN, *supra* note 20, at 137–38.

⁷⁸ Ronald Brownstein, *Small States Are Getting a Much Bigger Say in Who Gets on Supreme Court*, CNN (July 10, 2018), <https://edition.cnn.com/2018/07/10/politics/small-states-supreme-court/index.html> [https://perma.cc/MS38-3MDE] (“[M]inority voters are more underrepresented in the Senate today than at any point since 1870.”).

⁷⁹ See *id.* (“Smaller states, with very few exceptions, tend to rank lower in the share of their jobs that require a high level of digital skill”).

⁸⁰ *Id.* (“The real rub could be the widening divergence between the large and small states, not only in their partisan leanings, but also in their exposure to the most powerful forces reshaping American life in the 21st century. Critically, the small states tend to be less touched than the large ones by the nation’s growing racial and religious diversity.”).

⁸¹ Joshua Tauberer, *The Senate Has Never Been as Un-democratic as It Was in 2017–2018, and Minority Rule Could Continue in 2019 for Nominations*, GOVTRACK (Dec. 30, 2018), <https://govtrackinsider.com/the-senate-has-never-been-as-un-democratic-as-it-was-in-2017-2018-and-minority-rule-could-801e1046af28> [https://perma.cc/M56C-C6UF].

⁸² *Id.*

⁸³ *Id.*

rural voters⁸⁴ — typical residents in many of the smallest-population states — it is likely to repeat with increasing frequency.

II. SOLUTION

For the same reason it is hard for a man to see where he placed his glasses, it is hard for a democracy to fix its political process. Problems embedded in the democratic process resist change because the problem itself is an obstacle to its solution. Washington, D.C., for example, wants statehood⁸⁵ but cannot vote on the matter because it isn't a state. These challenges are even greater when the problems are in the Constitution itself, which requires supermajorities to amend.

Article V provides two mechanisms for amending the Constitution. Congress may propose an amendment with a two-thirds majority in each chamber, or two-thirds of the states may call for a constitutional convention and propose new amendments there.⁸⁶ In either case, three-fourths of the states must subsequently ratify any new amendments before they take effect.⁸⁷ These thresholds make it highly unlikely that the problem of unequal representation will be fixed through the normal amendment process.

Given these challenges, some might say that the problem of unequal representation is simply an intractable part of the U.S. political system — something impossible to fix,⁸⁸ or something to try to work around.⁸⁹ But surely those same things were said about other daunting inequities in voting rights, like the disenfranchisement of women and racial minorities.⁹⁰ By recognizing the fundamental unfairness of the present arrangement, the nation might become motivated to fix it, and perhaps, motivated enough to think creatively about solutions.

An “easier” way to amend the Constitution would be for Congress to admit a large number of new states whose congressional representatives would reliably ally with the existing majority in sufficient numbers to

⁸⁴ Jacob S. Hacker & Paul Pierson, *The Republican Devolution: Partisanship and the Decline of American Governance*, 98 FOREIGN AFF., July–Aug. 2019, at 42, 42.

⁸⁵ See Washington D.C., *Statehood Referendum (November 2016)*, BALLOTPEDIA, [https://ballotpedia.org/Washington_D.C._Statehood_Referendum_\(November_2016\)](https://ballotpedia.org/Washington_D.C._Statehood_Referendum_(November_2016)) [https://perma.cc/2RMG-QCNE].

⁸⁶ U.S. CONST. art. V.

⁸⁷ *Id.*

⁸⁸ See, e.g., Noah Feldman, *Revamping the Senate Is a Fantasy*, BLOOMBERG (Oct. 10, 2018, 12:39 PM), <https://www.bloomberg.com/opinion/articles/2018-10-10/u-s-senate-is-undemocratic-but-there-s-no-way-to-change-it> [https://perma.cc/7RBU-THX5].

⁸⁹ See generally DAVID FARIS, IT'S TIME TO FIGHT DIRTY 16–17 (2018).

⁹⁰ See, e.g., SALLY MCMILLEN, SENECA FALLS AND THE ORIGINS OF THE WOMEN'S RIGHTS MOVEMENT 93 (2008) (“Henry, who had assisted Elizabeth [Stanton] with some of the legal issues, had expressed surprise at his wife's insistence that women should demand the right to vote. ‘You will turn the proceedings into a farce,’ he warned her.”).

propose and ratify new amendments fixing the problem of unequal representation. Because Congress can admit new states with a simple majority,⁹¹ this would provide a more attainable political threshold.

A. Shrink the Federal District and Admit New States

The first step in the process is the addition of new states. Although new states could theoretically come from anywhere, for a few reasons, the District of Columbia is an ideal location to enact this proposal. First, Washington, D.C., is not currently part of any state, so creation of new states there would not require action by or dismemberment of any presently existing state.⁹² Second, every measurable subdivision of D.C. voted overwhelmingly for the Democratic party in the 2016 election, so the Democratic caucus in Congress could be confident that new states created within the District would elect like-minded delegations to Congress.⁹³ Third, the neighborhoods of D.C. provide a reasonable starting point for the new state boundaries; they are numerous enough to provide the votes necessary, but not so great that they would allow the new delegations to pass amendments or legislation on their own.⁹⁴

The actual admission of the new states would be relatively simple. First, it would be necessary to shrink the federal district to a small area encompassing only the National Mall and the essential federal buildings. This has already been done once, when in 1846 Congress shrank the district and gave land west of the Potomac River back to Virginia.⁹⁵ Only this time, the land would not be ceded; it would remain federal territory outside the federal district. Congress could then admit any number of new states by delineating their borders and providing for elections for new congressional delegations.⁹⁶ Once the new states are admitted, it will be easier to pass new amendments.

B. Pass New Amendments

The new amendments would ensure that each vote cast in a federal election counts equally. To do this, three amendments would be necessary: (1) a transfer of the Senate's duties to a fairly apportioned

⁹¹ U.S. CONST. art. IV, § 3, cl. 1.

⁹² See *id.*

⁹³ Matthew Bloch et al., *An Extremely Detailed Map of the 2016 Election*, N.Y. TIMES (July 25, 2018), <https://www.nytimes.com/interactive/2018/upshot/election-2016-voting-precinct-maps.html> [<https://perma.cc/4JTW-5UNV>].

⁹⁴ The “right” number of states to add would depend on the size of the congressional majority willing to admit new states. Using figures from the last time Democrats had unified control of the federal government, and assuming a party-line vote, the minimum number of new states would be ninety-six.

⁹⁵ Act of July 9, 1846, 9 Stat. 35.

⁹⁶ The Washington, D.C. Admission Act, H.R. Res. 1291, 115th Cong. (2017), a proposed D.C. statehood bill, is an excellent model for the logistics.

body; (2) an expansion of the House to ensure that all citizens are represented equally; and (3) a presidential election system by popular vote. A fourth amendment would modify Article V to ensure that this scheme could not be repeated.

1. *Transfer the Senate's Power.* — An amendment to change the Senate would be the most complicated because of Article V's Entrenchment Clause, which provides "that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate."⁹⁷ But there is a straightforward solution.

The Senate's duties could be changed without modifying its composition.⁹⁸ Imagine, for example, a system where the Senate resembles the House of Lords, the largely ceremonial upper chamber in the United Kingdom. The Senate could review legislation passed by the House but not prevent it from becoming law. Its formal powers would be transferred either to the House or to a new, equitably apportioned body.⁹⁹

The power to pass legislation, confirm appointments, ratify treaties, and try impeachments should belong to a body that represents citizens equally. The Senate might maintain oversight responsibilities and be a place where the unique concerns of state governments are communicated to Washington, but it should no longer play a determinative role in the federal government.

2. *Expand the House to Include Territories and Replace the Cap of 435 Members with an Amendment Ensuring a Minimum Size.* — An amendment to fix the House of Representatives would do two things. First, it would ensure that the body represents all Americans, not simply those who live in states. This could be done by treating each territory "as a state" for purposes of congressional representation and presidential elections.¹⁰⁰

Second, it would constitutionalize a minimum size for the House of Representatives, such that the representative-to-population ratio for House districts would be determined by the population of the smallest-

⁹⁷ U.S. CONST. art. V.

⁹⁸ See Douglas Linder, *What in the Constitution Cannot Be Amended?*, 23 ARIZ. L. REV. 717, 727 (1981) (arguing that "constitutional amendments reducing the powers of the Senate under article one (e.g., removing the Senate's power to approve treaties) should be upheld," but also arguing that such amendments should not be upheld if intended to reduce the influence of small states).

⁹⁹ As a practical matter, since gutting the Senate essentially asks senators to vote themselves out of a job, it might be more palatable for them if a new legislative body were created contemporaneously. A second legislative chamber, at least in theory, also provides the benefits of bicameralism. See THE FEDERALIST NO. 62, at 374–78 (James Madison) (Clinton Rossiter ed., 2003) (describing potential benefits of the Senate, including protection from potential corruption in the House, helpful insulation from short-term political winds, and the development of experienced statesmen).

¹⁰⁰ Cf. H.R.J. Res. 554, 95th Cong. (1978) (proposing, in an unratified constitutional amendment, congressional representation for D.C. without making it a state).

population state. This “Wyoming Rule”¹⁰¹ would ensure that small states do not receive undue influence in Congress by virtue of the Constitution’s guarantee of at least one representative per state.¹⁰²

3. *Abolish the Electoral College in Favor of a Popular Vote.* — A third amendment would abolish the Electoral College and create a system where the President and Vice President are elected by a pure popular vote. In the event that states are unable to conclusively certify election results, or the results of the election are otherwise disputed, the House of Representatives, voting as individuals, could determine the next President and Vice President.

4. *Remove the Influence of States in the Amendment Process.* — A fourth and final amendment would ensure that these changes could not be undone by an opposition Congress following the same playbook. The language in Article V that allows for two-thirds of the states to call a constitutional convention and that requires three-fourths of the states to ratify new amendments should be changed to ensure that those states actually represent a majority (or supermajority) of the total population. In other words, once a fair system of representation is established, the possibility that a small fraction of the population would once again control the federal government should be removed.¹⁰³

III. OBJECTIONS

Objections to this proposal can be sorted into two buckets: those about the legality of the proposal, and those about its desirability even if it were possible. Both are addressed below. In terms of legality, objections about changes to both the District of Columbia and the Senate can be addressed and situated in American history. In terms of desirability, it can be shown that a system of fair and equal representation is compatible with the hallmarks of the American political system and that these values do not require treating some as second-class citizens.

A. Legal

1. *District of Columbia.* — Some have suggested that Washington, D.C., could not be admitted as a state without a constitutional

¹⁰¹ Steven L. Taylor, *Representation in the House: The Wyoming Rule*, OUTSIDE THE BELTWAY (Dec. 14, 2010), <https://www.outsidethebeltway.com/representation-in-the-house-the-wyoming-rule/> [<https://perma.cc/A2AQ-KH2H>].

¹⁰² *Id.* If territories had congressional representation, fairness would dictate basing the ratio off of the lowest-population state *or territory*, though this would dramatically increase the size of the House.

¹⁰³ After amending the Constitution to ensure the principle of equal representation, the new states would presumably be reconsolidated back into one. However, in the new federal government — one based on representation of people, not states — this would concern the rest of the country only to the extent it determined the size of the House.

amendment.¹⁰⁴ They suggest that Article I, Section 8's exclusive grant of authority to Congress over the federal district precludes the creation of a new state there.¹⁰⁵ But this stretches the text of the Constitution considerably. Article I, Section 8 allows for the existence of a federal district *up to* "ten miles square," but it does not *require* those specifications.¹⁰⁶ Indeed, Congress has already shrunk the size of the district once, ceding land back to Virginia in 1846.¹⁰⁷

Another argument is that because Maryland only ceded land to Congress for the purpose of creating a seat of government, the state would retain veto power over establishing any new state there, pursuant to Article IV, Section 3, which prevents new states from being made from parts of existing ones without the existing state's consent.¹⁰⁸ Putting aside the fact that Maryland might give its blessing, the plain language and purpose of the original cession made clear that Maryland would have no future interest in the land it ceded to the federal government.¹⁰⁹ By shrinking — not removing — the federal district, Congress could create an area of federal territory outside the federal district, but not belonging to any state. Nothing would stop it from creating new states there.

2. *Entrenchment Clause.* — The more serious obstacle is the Entrenchment Clause in Article V, which prevents any state from being denied "equal Suffrage" in the Senate.¹¹⁰ The outlined proposal offers a way around the Entrenchment Clause by retaining equal suffrage of states, but stripping the Senate of its power. It is admittedly a hyper-formalistic dodge. Should it be allowed?

If it is not, the provision is essentially unamendable. And that ought to be a concern. As Americans across the ages and across the political spectrum have long recognized, the promise of democracy is its ability to evolve.¹¹¹ To believe in unamendable or virtually unamendable provisions is to abandon the democratic experiment and submit to the tyranny of the dead hand.

¹⁰⁴ R. Hewitt Pate, *D.C. Statehood: Not Without a Constitutional Amendment*, 461 HERITAGE LECTURES 1, 1 (1993).

¹⁰⁵ *Id.* at 3–4.

¹⁰⁶ U.S. CONST. art. I, § 8, cl. 17.

¹⁰⁷ Peter Raven-Hansen, *The Constitutionality of D.C. Statehood*, 60 GEO. WASH. L. REV. 160, 169–70 (1991).

¹⁰⁸ See Pate, *supra* note 104, at 5.

¹⁰⁹ Raven-Hansen, *supra* note 107, at 180.

¹¹⁰ U.S. CONST. art. V.

¹¹¹ E.g., NEIL GORSUCH WITH JANE NITZE & DAVID FEDER, *A REPUBLIC, IF YOU CAN KEEP IT* 28 (2019) ("In a government by the people, it is *our* responsibility as a people to ensure that our representatives enact wise laws. When we lose sight of that, we weaken the habit of self-government."); Barack Obama, *A More Perfect Union* (Mar. 18, 2008) ("[A]merica can change. That is the true genius of this nation."); George Washington, *Farewell Address* (Sept. 17, 1796), in 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1907, at 213, 217

An illustrative example from the lead-up to the Civil War demonstrates the folly of unamendable amendments. In 1861, a bipartisan group of congressmen sought to avert hostilities by proposing a constitutional amendment to *permanently* protect the institution of slavery from federal interference.¹¹² The so-called Corwin Amendment — which purported to be unamendable — passed both chambers of Congress with the requisite supermajority, though it was never ratified by enough states to become law.¹¹³

Are we to believe that had the Corwin Amendment been ratified, slavery would still be permissible under federal law today? Surely the answer must be no. Either courts would have permitted the amendment itself to be changed, or we as a society would have tacitly acknowledged that sometimes the Constitution does not mean what it says.¹¹⁴ By virtue of its odious subject matter, the Corwin Amendment makes clear what ought to be obvious: unamendable amendments are fundamentally incompatible with democracy.¹¹⁵ Whether it is the institution of slavery, or the framework for the government, nothing in the Constitution should be unamendable.

B. Historical

Even beyond hypotheticals like the Corwin Amendment, American history is full of examples where the Constitution was dramatically changed via methods more legally dubious than those proposed here. The ratification of the Constitution itself was of doubtful legality, as was the ratification of its most important amendments. And statehood — which this Note proposes using as an overtly political tool — has often been used as such. Viewed in historical context, the proposed solution to the problem of unequal representation is much less radical than it seems¹¹⁶ and, in reality, is in keeping with the nation's history of constitutional evolution.

(James D. Richardson ed., 1908) (“The basis of our political systems is the right of the people to make and to alter their constitutions of government.”).

¹¹² See Philip L. Martin, *Illinois' Ratification of the Corwin Amendment*, 15 J. PUB. L. 187, 187 (1966).

¹¹³ *Id.* at 187, 190.

¹¹⁴ See generally David A. Strauss, *The Supreme Court, 2014 Term — Foreword: Does the Constitution Mean What It Says?*, 129 HARV. L. REV. 1, 3 (2015) (answering the titular question in the negative).

¹¹⁵ See Linder, *supra* note 98, at 731.

¹¹⁶ Compare, for example, proposals of varying degrees of seriousness that could cement Democratic control without addressing the underlying unfairness of a system that treats citizens in different locations differently. E.g., FARIS, *supra* note 89, at 68–73 (breaking California into seven Democratic states); @Jmeiseles, TWITTER (Aug. 11, 2019, 4:37 AM), <https://twitter.com/Jmeiseles/status/1160470317170647040> [https://perma.cc/4G62-KE43] (“I can’t wait for the Judiciary Act of 2021 to strip jurisdiction from any judge appointed by a president who lost the popular vote.[.]”); @nycsouthpaw, TWITTER (Sept. 14, 2018, 9:21 PM), <https://twitter.com/nycsouthpaw/status/>

1. *The Constitution.* — Importantly, the Constitution itself was of dubious legality. Throughout the ratification process, Antifederalists raised persuasive arguments against the legitimacy of the Constitutional Convention.¹¹⁷ For one, Congress had no authority under the Articles of Confederation to authorize the Convention, and once it started, the delegates immediately exceeded their mandate to amend them.¹¹⁸ And while the Articles required unanimous assent for changes, the new Constitution allowed for adoption after ratification by only nine states.¹¹⁹

At the Convention, the Framers immediately decided that even with extensive amendment, the Articles would be insufficient to constitute the United States, so they started from scratch, even though the Articles likely prohibited that course.¹²⁰ This is not to say the Constitution is illegitimate. On the contrary, it simply demonstrates that extraordinary exercises of political power are part of the bedrock of the nation's history.

2. *Reconstruction Amendments.* — Similarly, the Reconstruction Amendments, adopted in the aftermath of the Civil War, were so controversial that public officials and academics continued to contest their legitimacy for decades.¹²¹ In truth, the foundational amendments for much of modern civil rights law were passed under dubious circumstances. Southern states were denied representation in Congress when the Fourteenth Amendment was sent to the states, even though the Civil War had been over for years.¹²² And the southern state ratifications needed to procure the Amendment's passage were produced under significant federal coercion.¹²³

Congressional Republicans understood that left to their own devices, southern states would not ratify the Reconstruction Amendments, nor would they permit African Americans to exercise political equality.¹²⁴ So rather than admit defeat, Republicans created new Reconstruction state governments, concocted theories as to why southern states did not count toward the three-fourths requirement in Article V, and coerced southern legislatures into ratifying the amendments as a precondition to

¹⁰⁴⁰⁸¹⁷⁸⁶¹⁰⁹⁷⁴¹⁴⁶⁵⁷ [<https://perma.cc/AJJ6-J2DA>] (“Dems should retake Congress and make 7 new states from the territories primarily to put a stamp on that Obama 57 states comment and also to, you know, reform the Senate.”).

¹¹⁷ KLARMAN, *supra* note 12, at 9.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ See, e.g., John Harrison, *The Lawfulness of the Reconstruction Amendments*, 68 U. CHI. L. REV. 375, 379 (2001).

¹²² *Id.* at 376–77.

¹²³ Thomas B. Colby, *Originalism and the Ratification of the Fourteenth Amendment*, 107 NW. U. L. REV. 1627, 1652–56 (2013).

¹²⁴ *Id.* at 1644–52.

reentry.¹²⁵ In a sense, these were amendments passed by gimmick, important and worthwhile nonetheless.

3. *Statehood*. — It is also worth noting that the admittance of new states has often been overtly political, and at times legally dubious. West Virginia, for example, in “one of the great constitutional legal fictions of all time,”¹²⁶ was “allowed” to become a new state in 1861 by the Reformed Government of Virginia, a ragtag pro-Union faction of Virginia that scarcely had control of half of what is now West Virginia, let alone the entire state of Virginia.¹²⁷ President Lincoln acknowledged the dubious legality of West Virginia’s admittance in his signing statement, but made the political case for statehood as a war measure.¹²⁸

Just a few years later, days before the election of 1864, Republicans in Congress were worried about Lincoln’s reelection chances and short the votes necessary to pass the Thirteenth Amendment.¹²⁹ So notwithstanding the traditional population requirements for statehood,¹³⁰ they turned the territory of Nevada — population 6,857¹³¹ — into a state, adding Republican votes to Congress and the Electoral College. For reference, the Columbia Heights neighborhood in Washington, D.C., currently has a population exceeding 30,000.¹³²

At the time they were admitted, these territories were not political entities on par with existing states; they were given that status by a Congress trying to accomplish unrelated political goals. And while the examples of West Virginia and Nevada are uniquely illustrative, they are not outliers: the history of American statehood is the history of political factions selectively admitting new states for political ends.¹³³

A proposal to admit a bevy of new states to amend the Constitution may sound radical, but in the context of American history, it would simply be a new chapter of a familiar story. On multiple occasions, the nation’s constitutional order has changed radically, through aggressive

¹²⁵ Harrison, *supra* note 121, at 379–80.

¹²⁶ Vasan Kesavan & Michael Stokes Paulsen, *Is West Virginia Unconstitutional?*, 90 CALIF. L. REV. 291, 294 (2002).

¹²⁷ RICHARD ORR CURRY, A HOUSE DIVIDED 8 (1964).

¹²⁸ Abraham Lincoln, Opinion on Admission of West Virginia into the Union, in ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1859–1865, at 421, 421–23 (Don E. Fehrenbacher ed., 1989).

¹²⁹ F. Lauriston Bullard, *Abraham Lincoln and the Statehood of Nevada*, 26 A.B.A. J. 313, 313 (1940).

¹³⁰ An Act to Provide for the Government of the Territory North-West of the River Ohio, art. 5, ch. 8, 1 Stat. 50, 51 n.a (1789).

¹³¹ See BUREAU OF THE CENSUS LIBRARY, POPULATION OF THE UNITED STATES IN 1860, at iv (1864).

¹³² Population of Columbia Heights, Washington, District of Columbia (Neighborhood), STATISTICAL ATLAS, <https://statisticalatlas.com/neighbohood/District-of-Columbia/Washington/Columbia-Heights/Population> [https://perma.cc/3SUR-QLYR].

¹³³ See, e.g., Ian Millhiser, *The Forgotten History of How Abraham Lincoln Helped Rig the Senate for Republicans*, THINKPROGRESS (May 5, 2019, 8:00 AM), <https://thinkprogress.org/how-abraham-lincoln-rigged-the-senate-for-republicans/> [https://perma.cc/Y2ZR-7Z5B].

political action, in ways that find legitimacy not in clear-cut legality, but in a generation asserting the importance of a change and ratifying it through subsequent elections.¹³⁴ If Congress were determined enough to change the Constitution through the addition of new states, it would not be deterred by courts subject to congressional control.¹³⁵

C. Political

Questions of constitutionality aside, there are also arguments that the status quo is preferable to alternative arrangements as a matter of policy. The Senate, it is said, protects states and provides a necessary countermajoritarian check. And the Electoral College ensures that presidential candidates have to appeal to all regions of the nation. The Framers had a vision that has endured for centuries, and it would be foolish to abandon it now. These arguments, addressed below, fail to persuasively make the case for a system of unequal representation. To the extent there are beneficial aspects of the status quo, they can be maintained in a fair system without perverting the idea of majority rule.

1. *Senate.* — The traditional argument for the Senate is that equal representation of states is necessary as a check on unfettered majority rule. Without the Senate, large states might gang up on smaller states, and the rights of a minority contingent would be trampled.¹³⁶

While there are compelling arguments for a majoritarian check, to the extent the Senate serves that function, it comes at too high a cost.¹³⁷ There are two fundamental tenets to a just democracy: (1) majority rule, and (2) protection of minority rights.¹³⁸ Defenses of the Senate appeal to the latter principle, but they pervert the former. It is one thing to require a supermajority for certain actions that would impose majority preferences on the minority — it is quite another to allow the opposite, that is, for a minority to actively impose new preferences on a majority.¹³⁹ But that is precisely what the Senate does, because in some

¹³⁴ See ACKERMAN, *supra* note 24, at 41–44 (1991).

¹³⁵ See Mark C. Miller, *When Congress Attacks the Federal Courts*, 56 CASE W. RES. L. REV. 1015, 1016–30 (2006) (highlighting ways a determined Congress can control — and at times has controlled — the courts).

¹³⁶ Jeff Greenfield, *Why Liberals Should Stop Whining About the Senate*, POLITICO, (July 24, 2018), <https://www.politico.com/magazine/story/2018/07/24/democrats-senate-constitution-219033> [<https://perma.cc/5CZL-BD3U>].

¹³⁷ Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1071 n.98 (1988) (“The malapportionment of the United States Senate is hardly trivial or outcome neutral”).

¹³⁸ Barbara Thomas-Woolley & Edmond J. Keller, *Majority Rule and Minority Rights: American Federalism and African Experience*, 32 J. MOD. AFR. STUD. 411, 411 (1994).

¹³⁹ Admittedly, the distinction is not always clear. The ability of a minority to prevent majority action could always be described as an imposition. But surely there is a meaningful distinction between allowing a minority to block some majority action, and allowing a minority to actively impose something new on an unwilling majority, which the present system regularly allows.

contexts, like confirmations or treaty approvals, the majority may not get a chance to check back.¹⁴⁰

It is also said that the Senate safeguards the nation's federal structure by giving states a voice in the federal government. But it is hard to see how giving citizens of some states more voting power relative to citizens in other states protects the idea of state sovereignty in the abstract.¹⁴¹ If anything, the extra power afforded to small states would seem to incentivize their support for expansive federal expenditures.¹⁴² Moreover, in choosing to adopt the Seventeenth Amendment,¹⁴³ the American people made clear that they want senators to represent people, not the institutional prerogatives of state governments.¹⁴⁴

If there is a compelling justification for giving citizens of small states extra power, it must be that they are systematically disadvantaged in some way and therefore entitled to it. Perhaps coastal cities have unfair economic advantages that allow them to increase in size and clout.¹⁴⁵ Or perhaps the universities and media outlets that cluster in urban areas are an unfair political advantage.¹⁴⁶ While it seems plausible that features of large population centers are advantageous, it does not follow that the structure of the federal government must combat them. If large states have more people, they should have more political power; surely equality of people is more important than equality of land.

2. *Electoral College.* — Defenses of the Electoral College are also unpersuasive. To its proponents, the system ensures that a President must appeal to many regions of the country.¹⁴⁷ For two reasons, this is a weak argument. First, why should appeal across *regions* be more important than appeal across *people*? Regions, or states, do not have interests independent of the people who live there. As was said long ago, it is a government of people, not a government of states.¹⁴⁸

¹⁴⁰ E.g., Vik D. Amar, Note, *The Senate and the Constitution*, 97 YALE L.J. 1111, 1112–13 (1988).

¹⁴¹ See Amar, *supra* note 137, at 1071 n.98 (“True federalism is not served by equal representation — this simply favors some states at the expense of *other states* . . .”); see also Richard Primus, *Federalism and the Senate*, TAKE CARE (Nov. 15, 2018), <https://takecareblog.com/blog/federalism-and-the-senate> [https://perma.cc/N5XH-KH2D].

¹⁴² See Liptak, *supra* note 17.

¹⁴³ U.S. CONST. amend. XVII (providing for direct election of senators).

¹⁴⁴ Ralph A. Rossum, *The Irony of Constitutional Democracy: Federalism, the Supreme Court, and the Seventeenth Amendment*, 36 SAN DIEGO L. REV. 671, 672 (1999).

¹⁴⁵ See Kasparas Adomaitis, *World’s Major Port Cities Are Growing Faster than Inland Cities*, EUROMONITOR INT’L (May 31, 2014), <https://blog.euromonitor.com/worlds-major-port-cities-are-growing-faster-than-inland-cities> [https://perma.cc/TVM5-35VU].

¹⁴⁶ Liptak, *supra* note 17.

¹⁴⁷ See Ronald D. Rotunda, *How the Electoral College Works — And Why It Works Well*, CATO INST. (Nov. 13, 2000), <https://www.cato.org/publications/commentary/how-electoral-college-works-why-it-works-well> [https://perma.cc/VDK9-CD7G].

¹⁴⁸ KLARMAN, *supra* note 12, at 185; see also Abraham Lincoln, Address at Gettysburg, Pennsylvania (Nov. 19, 1863), in ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1859–1865, *supra* note 128, at 536, 536 (reminding the nation that ours is a “government of the people, by the people, for the people”).

Second, the claim that the Electoral College demands cross-national appeal is simply not true as an empirical matter. During the last presidential election, many states did not receive a single postconvention visit from a candidate.¹⁴⁹ If every vote mattered, it would make sense to travel to many parts of the country, because there are votes to win everywhere. Texas, for example, has the largest population of rural voters in the nation,¹⁵⁰ but under the status quo, these voters are often neglected because the fate of Texas's electoral votes has not been in question. Rather than forcing candidates to appeal broadly, the Electoral College focuses attention on a small number of battleground states, which inevitably tip the election one way or another.

Similarly, it is also said that the Electoral College prevents large cities and states from dominating the election.¹⁵¹ This too is unconvincing. Although it was designed to give a small boost to small states, in practice, the winner-take-all system forces a disproportionate amount of attention on large battleground states. In fact, just a few decades ago, it was small states that petitioned the Supreme Court to strike down winner-take-all laws because they unfairly favor large states.¹⁵² In the context of a national election, whether a candidate wins Miami by a 2:1 margin or a 2.1:1 margin should not be that important. But it is, as are margins in Philadelphia, Detroit, and other "big cities," which have the highest concentration of voters in large battleground states.¹⁵³ In a fair electoral system, every vote would matter equally.

3. *Framers' Vision.* — Considered in isolation, unequal methods of representation may not seem like a problem. The Senate alone has very little authority. It cannot pass legislation without the House, and it cannot confirm appointments unless the President has made one. A somewhat unfair element of government seems tolerable when it is just one

¹⁴⁹ Two-Thirds of Presidential Campaign Is in Just 6 States, NAT'L POPULAR VOTE, <https://www.nationalpopularvote.com/campaign-events-2016> [https://perma.cc/RF7S-JE8B].

¹⁵⁰ DAVID K. HAMILTON, GOVERNING METROPOLITAN AREAS 3 (2d ed. 2014).

¹⁵¹ Allen Guelzo & James Hulme, *In Defense of the Electoral College*, WASH. POST (Nov. 15, 2016), <https://www.washingtonpost.com/posteverything/wp/2016/11/15/in-defense-of-the-electoral-college> [https://perma.cc/F44Y-84WP] (suggesting that the Electoral College "prevent[s] big-city populations from dominating the election of a president"); see also Patrick Ruffini, @PatrickRuffini, TWITTER (Oct. 21, 2018, 7:29 AM), <https://twitter.com/PatrickRuffini/status/1054016910441021441> [https://perma.cc/3XAS-49RT] ("Someone winning the Presidency with supermajorities in large states like California and New York is exactly the scenario the Founding Fathers were looking to prevent when they instituted the Electoral College.").

¹⁵² Order No. 28, *Delaware v. New York*, 385 U.S. 895 (1966); see also Ann Althouse, *Electoral College Reform: Déjà Vu*, 95 NW. U. L. REV. 993, 1000 (2001) (book review) ("As the small states recognized, it was the [winner-take-all] rule that enabled the large states to draw all the attention of the presidential candidates. One might think it would take some nerve to cite [the 'one person, one vote' principle] on behalf of the small states, upon which the Constitution bestows votes beyond proportion to their population; but this is exactly what Delaware and other states sought . . .").

¹⁵³ Nick Corasaniti, *Why Is Cory Booker Spending So Much Time in These 3 Cities?*, N.Y. TIMES (Aug. 13, 2019), <https://nyti.ms/2OUWwlF> [https://perma.cc/3876-XT66].

part of a grand scheme. But as shown previously, the problem of unequal representation is embedded in each part of the government. Neither the House, the Senate, the presidency, nor the Supreme Court is accountable to the citizenry on a one-person, one-vote basis.

An appeal to the Framers' vision glosses over the fact that most of these institutions are operating in a manner that the Framers never would have imagined. It also glosses over the reality that for all their political wisdom, the Framers — many of whom held human beings as slaves¹⁵⁴ — had views about voting rights that are fundamentally incompatible with modern democracy.¹⁵⁵ Just because something is in the Constitution doesn't mean it can't, or shouldn't, be reevaluated.

And yet, despite the flaws of its drafters and the passage of centuries, the Constitution remains a document with brilliant features, among them separation of powers, checks and balances, and federalism. This proposal retains all of them; it simply asks that we reconsider some of the provisions that no longer serve our time. Just as it was unfair to deny representation based on race, sex, and wealth, it remains unfair to discriminate based on place of residence.

CONCLUSION

The best counterargument is simply that this proposal is a fraud — a contrived, pie-in-the-sky gimmick to make an end run around the Constitution — as foolish as it is unrealistic. How could we let a bunch of new, low-population states control the government?

But this is precisely what we allow today.

The current system of representation allows for a minority population to impose its will on a majority in a way that is deeply undemocratic. It permits the disenfranchisement of some citizens and the overrepresentation of others, and it allows a party receiving fewer votes than its opposition to control each branch of the government. It does not have to be this way.

If it was acceptable to remedy some of the Constitution's original injustices by excluding states from the amendment process, perhaps it is worthwhile to address those remaining by creating new ones. Perhaps it is also worthwhile to dream big about what kind of change is possible. It should not be a radical proposition for the Constitution to treat citizens' votes equally — the United States was founded on the proposition that all are created equal.¹⁵⁶ Those who still believe that should do what generations of great Americans have always done and take up the hard work of realizing that promise.

¹⁵⁴ Annette Gordon-Reed, *Engaging Jefferson: Blacks and the Founding Father*, 57 WM. & MARY Q. 171, 171–82 (2000).

¹⁵⁵ See ALBERT EDWARD MCKINLEY, THE SUFFRAGE FRANCHISE IN THE THIRTEEN ENGLISH COLONIES IN AMERICA 487 (1905) (estimating that, at most, only one-sixth of the population was eligible to vote at the Founding).

¹⁵⁶ Cf. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).