

FIXING THE SENATE

Equitable and Full Representation for the 21st Century

REPORT BY **TODD N. TUCKER**
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Executive Summary

To many Americans in 2019, US politics seem fundamentally broken. The government gives tax cuts to millionaires but does not avoid disastrous shutdowns. Supreme Court justices are confirmed on party-line votes and make business-friendly rulings at odds with the interests of most working people. Politicians are bought and paid for by private companies through a culture of corruption. And the US Senate regularly fails to act on legislation approved by the House of Representatives. The Roosevelt Institute has released a number of publications that argue for interventions to change the structure of US politics so that both policies and the overall economy are more democratically responsive.

This latest paper looks at one facet of this problem: a US Senate that entrenches multiple types of inequality. First, the United States' second chamber¹ fails to represent the American people on a one-person, one-vote basis. Second, it gives outsized representation to rich and to white Americans while comprising senators who are disproportionately richer, whiter, and more male than the population as a whole. Third, the Senate completely fails to represent the nearly 5 million Americans who live in Washington DC and US territories. Fourth, the Senate's representational structure contributes to policy inaction on existential threats to American democracy and livelihoods, such as rising inequality and climate change.

One of the main findings in this paper is that the outsized representative weight of America's smallest, whitest states (which are least endangered by rising sea levels) is projected to more than double in the coming century, jumping from the internationally unprecedented 67-to-1 ratio at present to an even more startling 154-to-1 ratio in 2100. This representational inequality will be rising at precisely the time that America's leaders must take decisive action to address climate change and other existential threats to the majority of its population, yet the Senate's representational structure will insulate elected officials from having to respond to those most at risk.

The pressing challenges of our time—inequality and climate change—require bold proposals to set the country and world on a new trajectory. Recognizing that senatorial inequality is a problem that will be difficult to address in the immediate term but necessary to address in the medium to long term, this paper does not balk at blue-sky proposals. It reviews several options for structural reform that could better align our politics with our policy needs. These options include abolishing the Senate, reforming the filibuster, segmenting the most

¹ In the comparative politics literature, senates are often deemed “second chambers” or “upper houses.” To avoid the loaded nature of the latter term, this paper uses “second chambers” or “second houses.”



populous state (California) into multiple states, and granting statehood to DC and Puerto Rico. We add to these oft-discussed options a fifth original idea: expanding the types of units represented in the Senate to include more than just states, including the federal district, the United States' overseas territories, and Native American tribes. These units' and groups' lack of power in the Senate harms their interests; the woefully inadequate federal response to recent extreme hurricanes and typhoons is but one example. But these groups' absence from the Senate also tilts the priorities of the body in a way that harms *all Americans'* interests by foreclosing a channel whereby representatives of poorer and more climate-exposed areas could press for robust solutions to inequality and global warming. Moreover, full representation would better serve the Founding Fathers' goals of deepening federalism and inspiring trust in the US among the community of nations.

The paper proceeds as follows. Section 1 describes the Senate's unrepresentative structure. Section 2 examines the purported federalist rationale of this arrangement and how the modern Senate fails on its own terms. Section 3 scrutinizes some of the Senate's present and projected deleterious effects on democracy and sound public policy. Section 4 outlines five options for reforming the Senate. Section 5 concludes. (An Appendix examines in detail the particular constitutional challenges involved in overhauling the Senate's structure.)



SECTION ONE

Background: The Senate Entrenches an Unusual Inequality

Democracy combines the Greek words for “rule” (*kratos*) and “common people” (*demos*). Though scholars debate the precise complementary institutions needed to sustain thriving democracies, two core components are each person getting a vote that is equal to that cast by every other person and the majority of those votes dictating political decisions.

By that minimal definition, the American system of government is profoundly undemocratic. Consider the contrast between California (the nation’s most populous state, with nearly 40 million residents) and Wyoming (the nation’s least peopled, with just over half a million). Every 735,525 Californians must share a member of the House of Representatives, while in Wyoming, 583,200 people get one to themselves.² California gets 55 electoral college votes, while Wyoming gets three—which, on a per-person basis, means that an individual Wyomingite has four times the influence over who becomes president as does a Californian.

The Constitution’s apportionment of two senators for each state—regardless of population—is where the antidemocratic nature of government is most pronounced. There, Wyoming is 67 times as powerful as California on a per-person basis. A majority of the US population lives in just 10 states (California, Texas, Florida, New York, Illinois, Pennsylvania, Ohio, Georgia, and North Carolina). Yet combined, these 164 million people control only 10 percent of the Senate’s votes. This puts them on equal footing with the 7.9 million people that live in the 10 least populous states—giving the votes of the latter 20 times the weight of the popular majority. While we explore the federalist and other justifications for this form of representation below, suffice it to say here that the Senate cannot be understood (and was not intended) to be a small-d democratic institution.

This inequity has gotten worse since the Constitution’s ratification. In 1790, Delaware’s 59,096 residents had the same number of senators as the residents of Virginia (the most populous state, with 691,737 people)—giving Delawareans 11.7 times the Senate weight as Virginians. Then, as little as 30 percent of the population could elect a Senate majority. Today, that number is 18 percent. This means that a policy could be favored by the people of and senators representing 82 percent of the nation, but still not pass. For treaties and other

² For ease of presentation, and unless otherwise noted, this paper considers the relative power among the territorial units by total number of residents as counted in US Census numbers, rather than eligible or actual voters.



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The worst period for Senate inequities was the robber baron era. Until 1850, the senatorial advantage of the least populous over the most populous state (which this paper will call the “senatorial inequality ratio”) hovered between 12 and 36 percent, as shown in Figure 1. At that time, the income share of the richest 1 percent of Americans was about 10 percent. With the absorption of low-population states and the growth of powerful corporations after the Civil War, both senatorial and income inequality increased dramatically. In 1900, Nevada’s 42,335 residents had equal Senate representation to New York’s 7.3 million, making their vote matter 172 times as much. Likewise, income inequality grew to its highest level on record, with the top 1 percent of the richest Americans nearly doubling their income share relative to 50 years earlier. By 1928, on the eve of the Great Depression, inequality hit its US peak, with the richest 1 percent taking home 19.9 percent of national income, as shown in Figure 2. As the West became more settled, the senatorial inequality ratio stabilized to a modern low of 59 percent in 1980. However, as neoliberalism became the dominant governing philosophy in the Reagan era, inequality in Senate power began to rise once again to its current 67-to-1 ratio.



SENATORIAL INEQUALITY RATIO BETWEEN SMALLEST AND LARGEST STATE BY POPULATION, HISTORIC AND PROJECTED, 1790–2100

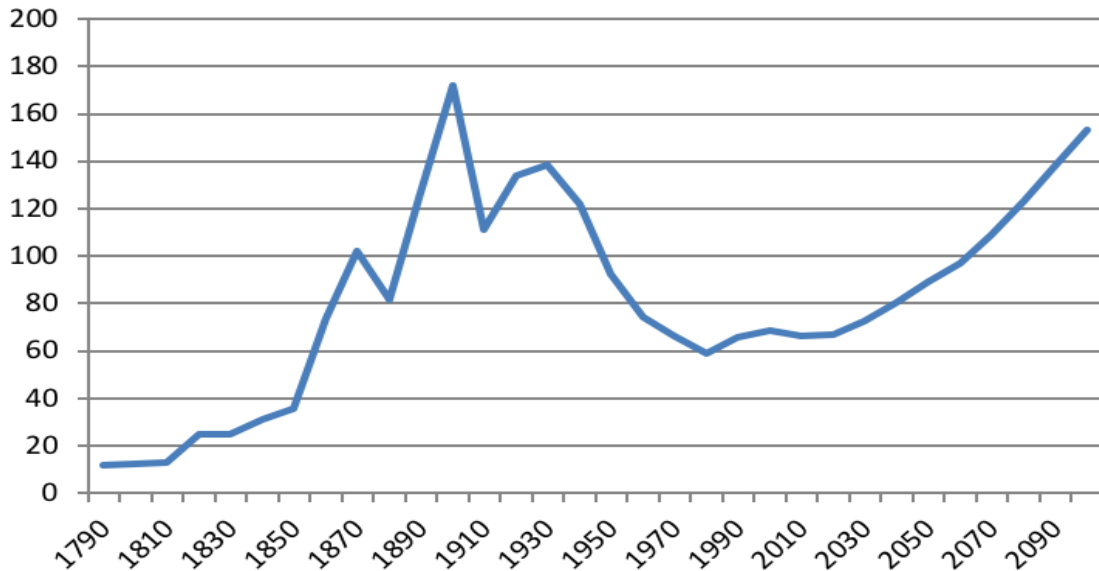


FIGURE 1 Source: Author’s calculations based on data from US Census Bureau; Hauer (2017).

Senatorial inequality will only grow in the future. According to projections from sociologist Mathew Hauer, the US population will increase nearly 40 percent by 2100, from 325 million people today to nearly 465 million (Hauer 2017).³ But this growth will not be spread evenly across states. Eight decades from now, a mere 431,112 people are projected to live in Vermont, which will make it the smallest state by population and even less populous than it or Wyoming today.⁴ Texas, in contrast, will be the most populous state, with 66 million people in 2100. This will give Vermont 154 times the senatorial power of Texas, returning the US to senatorial inequalities not seen since the robber baron era. Senators representing just 15.9 percent of the population will be able to elect a majority of the Senate, and states representing less than half that share will be able to block nominations and treaties supported by the remaining 93 percent.

³ These projections refer to Hauer’s “sustainability” scenario, a projection based on the most favorable outcomes for climate-related displacement. Other projections assume more catastrophic changes but do not imply major differences in senatorial inequality. This paper uses Hauer’s data for all projections.

⁴ Wyoming is projected to grow to one million residents by then, which will put it in 48th place, ahead of both Maine and Vermont.



INCOME SHARE OF THE TOP 1% IN US, 1860–PRESENT

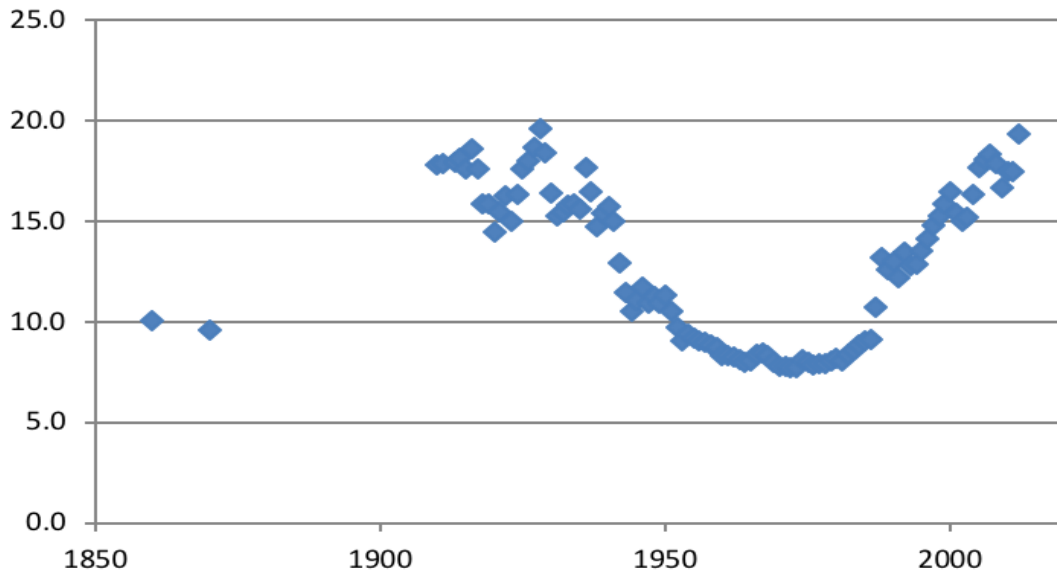


FIGURE 2 Source: Lindert and Williamson (2016); annual data for the late 19th century unavailable.

This inequality is unusual in international terms. The US stands out among the world’s democracies for having a second chamber that is one of the most powerful and, by far, the least democratic. Roughly half of the world’s countries, including highly economically successful nations, such as Denmark, Iceland, Israel, New Zealand, Norway, and Sweden, have only one chamber—elected generally on a one-person, one-vote basis.⁵ Others—including the UK, Canada, and Germany—have unelected second chambers that are much weaker than the US Senate and perform functions that in relative terms appear mostly advisory. Even those developed countries, such as Australia, that do have powerful second chambers are not marred by as much inequality. While the US senatorial inequality ratio is 67 to 1, the comparable inequality between the most overrepresented and underrepresented territorial units in Australia is only 13 to 1. This gap has been fairly consistent over time; at federation, in 1901, Australia’s senatorial inequality between its least and its most populous state was eight to one, and this inequality has increased only slightly in the years since. Indeed, one study identifies only the second chambers of Brazil, Argentina, and Russia as less evenly represented than the United States’ (Stepan 1999).

⁵ The US state legislature of Nebraska is also unicameral—alone among the 50 states.

SECTION TWO

The Rationale for the Senate’s Power and Evaluating Its Execution

The Senate is undemocratic, but the framers and others have sought to justify its existence on other grounds, including effectiveness, protection of minority rights, and federalism. This section explores how well the Senate has delivered on each of these justifications.⁶

Effectiveness

Consider the effectiveness rationale. The relatively long six-year terms (compared to the House’s two) were seen as a way to safeguard the nation’s reputation internationally, set long-term objectives, and—as James Madison puts it in Federalist no. 63—“be justly and effectually answerable for the attainment of those objects.” The Senate has three unique powers relative to the House: conducting impeachment trials, ratifying treaties, and confirming executive branch officials. These functions speak to the structural role that the founders intended the Senate to fill: to not just devise policy ideas but to also ensure that they are faithfully executed and internationally tolerable.

But institutional developments since the founding have considerably lessened the Senate’s efficacy.

Witness the rise of the filibuster. This procedural device allows a single senator to block legislation from moving forward (typically by monopolizing the Senate floor through making long speeches), even if the other 99 senators are in agreement. In other words, one half of the senatorial delegation of the smallest state comprising 0.18 percent of the population can hold back legislation supported by senators representing the other 99.88 percent of the population. A change in Senate rules in 1806 first allowed an individual senator to use this tactic, which was merely a theoretical possibility until it was first used in 1837, and it was used infrequently for decades after that. Beginning in 1917, a second procedural device called cloture was introduced, which allowed two-thirds of senators voting to vote to end a filibuster. In 1975, the threshold was lowered to three-fifths of not just those senators voting but total senators. In effect, this imposed a 60-senator requirement

⁶ There is reason to doubt the explanatory rationale of each of these functionalist explanations. The leading study on Senate apportionment argues that historical and conjunctural explanations, such as the convention’s voting rules, mattered more (Lee and Oppenheimer 1999).



on any attempt to move a bill through Congress, allowing senators representing 10 percent of the population to block legislation supported by the other 90 percent.

In a further twist, changes to Senate rules still require a two-thirds vote, allowing 34 senators representing 7 percent of the population to block changes to the filibuster supported by senators representing the remaining 93 percent of the population. In recent decades, filibusters went from rare occurrences to almost routine objections to opposed legislation. From a negligible rate before the 1970s, nearly one in five votes in today's Senate are cloture votes to end filibusters (Thurber and Yoshinaka 2015). Because funding for programs can be cut via a 50-vote threshold (through a process called budget reconciliation) but creating programs is subject to the filibuster (Klein 2017), the legislative process is biased toward economic austerity.

There are still other ways that Senate practices have made the body less efficacious. Rather than support presidents in constructing stable foreign-policy partnerships, the modern Senate creates chaos and unpredictability, as when Republican senators in 2015 sent a letter to Iran's leaders attempting to derail the Obama administration's nuclear deal (Diamond 2015). Senate inaction on treaties has led presidents to circumvent the Constitution's two-thirds treaty ratification requirement, binding the United States to highly consequential international governance arrangements by simple majority vote (Tucker and Wallach 2009). Senate opposition to bold action on climate change kept the US out of the Kyoto Protocol, kept from a vote on the American Clean Energy and Security Act (also known as the Waxman-Markey climate bill) passed by the House in 2009, and led to the Paris Agreement being voluntary, so as to avoid a negative treaty vote (Madden 2013) (Kolbert 2015). And instead of ensuring that the executive and judicial branches are well staffed, the Senate under Republican control blocked the Obama administration from filling routine vacancies. According to analysis by the Congressional Research Service, the Senate approved 80 percent of the Reagan administration's "uncontroversial" circuit court nominations in less than 100 days. This under-100-day approval rate has declined steadily over time, to 0 percent during the Obama administration. Indeed, the Senate took more than 200 days to approve more than 60 percent of Obama's "uncontroversial" nominees (McMillion 2012). These failures and inactions have tarnished the United States' credibility—contrary to the founders' rationale for the Senate.

Minority Rights

A second rationale for the Senate was to cool off the supposed democratic excesses of the House of Representatives, in particular for minority rights. There is evidence that the Senate performs this function, though primarily to the benefit of the elite rich minority,



rather than racial and other vulnerable minorities.

The framers were convinced of the needs for a strong central government but also concerned that a unicameral House would too quickly accommodate popular majorities. In the British context, the House of Lords was seen as a check on the interests of property owners against regulation or seizure by the Crown (Ryan 2018). In Federalist no. 62, Madison argued that a House alone would “yield to the impulse of sudden and violent passions, and to be seduced by factious leaders into intemperate and pernicious resolutions.” A Senate, in contrast, will serve as “a salutary check on the government.” In concrete terms, the founders wanted to avoid the types of interferences with property rights—renunciation of debts, inflationary paper money acts, abrogation of contracts—that had been common under the Articles of the Confederation (Lee and Oppenheimer 1999).

This rationale seems elitist on its face, but some have argued that counter-majoritarian structures can also protect the interest of non-elite minorities. This argument is perhaps more associated with the rationale for countermajoritarian courts, and indeed, courts have occasionally protected the rights of racial minorities and women. It is less clear that the Senate’s structure aids these groups as a general matter. There are, to be sure, occasional victories, such as when the Democratic minority led a filibuster in 2015 against the Republican majority’s effort to defund Planned Parenthood (Crockett 2015). But because of the structural disadvantages faced by minorities of color and those with lower means, as explored in Section 3, the protection of minority rights that the Senate has most ably defended have been that of Southern slave-owners, racists, and economic elites. As political scientist Robert Dahl wrote:

Between 1800 and 1860 eight antislavery measures passed the House, and all were killed in the Senate. Nor did the Southern veto end with the Civil War. After the Civil War, Senators from elsewhere were compelled to accommodate to the Southern veto in order to secure the adoption of their own policies. In this way the Southern veto not only helped to bring about the end of Reconstruction; for another century it prevented the country from enacting federal laws to protect the most basic human rights of African Americans. (2001)

In short, there is little systematic evidence that the Senate has helped protect vulnerable, non-elite minorities.

Federalism

A final reason for equal Senate apportionment is federalism. In this rationale, the Senate was never intended to be broadly representative of the American people. The Constitutional



drafters justified this through several principles, including giving states a *dedicated voice* in government, giving states an *equal voice* in government relative to one another, and ensuring *representational adequacy* when one senator is unable to be present. In Federalist no. 62, Madison justified the representational equality of states by arguing that the US was a “compound republic,” constituting both “one nation” and a league of “independent and sovereign States.” The House represented the proportional vote shares of the people in the nation as a whole, while the Senate represented the equal vote shares of the league.⁷ In *Reynolds v. Sims* (1964), the Supreme Court opined that the Senate represented a “compromise and concession indispensable to the establishment of our federal republic. Arising from unique historical circumstances, it is based on the consideration that, in establishing our type of federalism a group of formerly independent States bound themselves together under one national government . . . at the time of the inception of the system of representation in the Federal Congress, a 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.”

This third rationale has also not withstood the test of time. On the one hand, there is a logic to the notion (as Madison writes in Federalist no. 62) that the Senate gives the states “an agency in the formation of the federal government as must secure the authority of the former, and may form a convenient link between the two systems.” However, the persuasiveness of this reasoning was weakened substantially in 1911, when lawmakers amended the Constitution to take away the senatorial appointment power from state legislatures and give it to the public of the states through the direct election of senators. This change considerably weakened the “convenient link” between the two levels, while simultaneously failing to resolve the Senate’s countermajoritarian bias.

Moreover, unlike in 1789, modern federalism involves more than just states. Since 1790, it has involved territories on their way to statehood; since 1802, it has involved a federal district; since at least *Worcester v. Georgia* in 1832, it has involved legally cosovereign tribal nations; since 1898, it has involved far-flung overseas territories. Thus, federalism today is not about only the federal and state governments but also the district government, tribal governments, and territorial governments. From a nation of 13 states, America is now a nation of 50 states, 573 tribes, five territories, and a federal district.

⁷ Ironically, the main framers of the Constitution opposed equal representation for the states. In the constitutional debates, Alexander Hamilton stated that, “As states are a collection of individual men which ought we to respect most, the rights of the people composing them, or the artificial beings resulting from the composition. Nothing could be more preposterous or absurd than to sacrifice the former to the latter.” James Wilson took up the argument, arguing “Can we forget for whom we are forming a Government? Is it for men, or for the imaginary beings called States? Will our honest Constituents be satisfied with metaphysical distinctions?” (Madison 1789).



Yet through a series of court and other policy decisions, these newer units of federalism have been downgraded. Scholars have labeled this institutionalized discrimination between governmental units “asymmetrical federalism” (Tarr 2018). As noted below in Section 3, courts have frustrated the exercise of Native American voting rights. In *Adams v. Clinton* (2000), Judge Merrick Garland ruled that DC could not be treated like a state for voting rights purposes. He noted that plaintiffs argued that this would “deprive District residents of congressional representation—a result inconsistent with the one person, one vote principle—[and] that deprivation cannot continue in light of the expansive application of the principle in modern equal protection analysis.” As support for his dismissal of their pleas, he noted that the Constitution itself limits the application of one person, one vote—by the existence of the Senate. (The judge would go on to be President Obama’s Supreme Court pick, a move that frustrated many of the president’s supporters.)

The jurisprudence is equally grim for the overseas territories. In *Downes v. Bidwell* (1901)—one of the so-called Insular Cases—the Court wrote that the Constitution did not necessarily follow the flag: “[W]hile in an international sense Porto Rico was not a foreign country, since it was subject to the sovereignty of and was owned by the United States, it was foreign to the United States in a domestic sense,” meaning that US laws and constitutional protections did not automatically apply. The opinion went on: “If those possessions are inhabited by alien races, differing from us in religion, customs, laws, methods of taxation, and modes of thought, the administration of government and justice according to Anglo-Saxon principles may for a time be impossible.” Despite the racialized rhetoric in this and other Insular Cases, they still have not been overturned by an act of Congress or judicial decision (Leibowitz 1989) (Sparrow 2006). Indeed, even as modern courts criticize or overturn racist cases like *Plessy v. Ferguson*, *Dred Scott v. Sandford*, and *Korematsu v. United States*, the territories continue to be treated as the lowest rung in the federalist family, as separate but unequal (Torruella 2007). Liberals on the Roberts Court and in lower courts have joined conservatives to extend the Insular logic, in everything from denying Puerto Rico the bankruptcy relief enjoyed by states to denying basic citizenship rights to Samoans (Blocher and Gulati 2018).



SECTION THREE

The Consequences of Senatorial Inequality

What are the consequences of unequal apportionment of Senate seats? On the one hand, it could be possible to dismiss any concerns. As James Madison said, in arguing against equal senatorial representation for the states, policy preferences would not at first glance seem to be related to size. And indeed, this appears true in many respects. Vermont Democratic Socialist Bernie Sanders comes from a small state but votes a lot like big-state Democratic Senator Kirstin Gillibrand of New York. Senator Mike Rounds of South Dakota comes from a small state but has voting patterns similar to those of Senator John Cornyn of the big state of Texas. Yet social scientists have documented numerous subtler but significant negative consequences that stem from senatorial inequality. These include the entrenching of rich, white, male privilege, nonrepresentation or inadequate representation of the nearly five million Americans who do not live in states or who come from other disadvantaged groups, and the Senate's (partly resultant) inferior policy outputs. This section examines each in turn.

The Senate Entrenches Rich, White, Male Rule

The Senate's geographic inequalities compound the United States' legacy of regional, class, racial, and gender discrimination. First, the dominance of small states in the senatorial system translates to a bias in favor of rural areas. To make major changes to Senate rules requiring two-thirds support, the 34 senators from the least urbanized states (with an average urban population of 57.4 percent) can stall legislation supported by senators from the 25 most urban states (with an average urban population of 85.6 percent). In contrast, the most urban state in the union—California, with 95 percent of its population living in cities—has only two senators. Cities are also underrepresented by what now seems like arbitrary state lines that divide metropolitan regions (think St. Louis or New York metro areas) into multiple states (Thompson 2018). Finally, the most urban jurisdiction in the US—Washington, DC, with a 100 percent urban population—has no senators at all. These inequities will worsen with time. At present, DC's population is only larger than that of Wyoming and Vermont. But by 2100, the population of Washington, DC, is projected to be 1.8 million people—larger than that of nine states.⁸

⁸ If Puerto Rico were a state, it would be the fourth most urban, behind just California, New Jersey, and Nevada. Yet it has no senators.



Second, the Senate is not only excessively countermajoritarian and rural; it gives outsized representation to a few relatively rich, small states. Four states with populations of under a million have per capita income levels above the national average: Alaska, Connecticut, North Dakota, and Wyoming. This gives relatively richer citizens substantial leverage in national politics.

Yet it is perhaps on race where the Senate's entrenched inequities come most into focus. By 2050, according to Hauer's projections, most Americans will be nonwhite.⁹ But because of the uneven geographic distribution of nonwhites, a majority of states will still be majority white until 2090. So, on simple matters where a majority vote in the Senate is all that is needed, a white minority will be able to block the will of the nonwhite majority for 40 years. A decade after that, in 2100, Hauer projects that 32 states will have nonwhite majorities—which will still be two states shy of what would be needed to amend the Constitution, approve treaties, and make fundamental changes to Senate procedure.¹⁰

Senatorial inequality gives relatively richer citizens substantial leverage in national politics.

What to make of these biases? Scholars have long debated whether the Constitution is a fundamentally racist document. The clauses on fugitive slaves, the three-fifths “compromise,” and accommodation of the slave trade through 1808 were never formally stricken.¹¹ At stake in these debates is whether the promise of freedoms for all individuals were effectively denied to members of racial minorities (Muhammad 2018). Yet the Constitution is racist in another profound sense: Through the institution of the Senate, the foundational document of the United States entrenches white rule 240 years after the Emancipation Proclamation and decades after the US is projected to be majority nonwhite.

These class, gender, and racial inequities are reflected in the individuals who represent the US populace. The average Republican senator has a net worth of \$1.4 million, according to the latest available numbers, while the average Democratic senator has nearly a million dollars. These figures are (respectively) 14 and four times as much as the average American's net worth, and even 2.3 and 1.2 times more than senators' counterparts in the House.

⁹ “Whiteness” is a social and legal construction, and we do not know, for instance, whether many Latinx or biracial people will identify as such so far into the future. These projections extrapolate from the static designations in contemporary data. For more on these issues, see (I. H. Lopez 1997).

¹⁰ In 2100, the whitest state, West Virginia (with a 74 percent white population), will have the same senatorial representation as New Mexico (which will be more than 90 percent nonwhite).

¹¹ They are, however, now inoperative following ratification of the 13th through the 15th Amendments in 1865 to 1870.



Moreover, 3 percent of the Senate is worth more than \$43 million, putting them in the top 0.01 percent of the population (Hawkings 2018). Black Americans make up 13.4 percent of the population, yet only 3 percent of the Senate at present. In 229 years of the republic, there have been only 10 Black senators, which amounts to 0.5 percent of those officials that have served. Latinx Americans make up 18.1 percent of the population, but only 4 percent of the current Senate and 0.46 of all historic senators. Asian Americans comprise 5.8 percent of the population but 3 percent of current senators (including the biracial Kamala Harris and Tammy Duckworth) and 0.4 percent of all historic senators. Native Americans comprise 1.3 percent of the population but 0 percent of the Senate presently and only 0.15 percent historically.¹² Native Hawaiians and Pacific Islanders represent 0.2 percent of the population, but none have ever been elected senator. In contrast, white men are 30 percent of the population but 71 percent of the current Senate and 96 percent of all historic senators. The female majority has been poorly served by the Senate as well. Women make up 50.8 percent of the US population at present but only 25 percent of the Senate. Remarkably, this underrepresentation is the best it has ever been: No woman won a Senate race until 1932, and the share of female senators did not top 10 percent until the 2000s. Of 1,970 individuals who have served as senator since 1789, only 50 (or 2.54 percent) have been women (Manning and Brudnick 2018).

In sum, on some of the most salient class and identity distinctions in US society, the Senate privileges incumbent rich, white, male interests over America's rising diversity.

The Senate Does Not Represent the Full US Population

The Senate not only underrepresents many Americans, it also fails to represent some altogether. The 4,525,977 residents of American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, the US Virgin Islands, and Washington, DC, are at present totally unrepresented in the Senate and have only nonvoting delegates in the House of Representatives. The situation of these units varies from a “best case” scenario in DC to a “worst case” scenario in American Samoa. Though Alexander Hamilton proposed an amendment to the Constitution giving voting rights to the residents of the federal district after the population reached a certain threshold, this proposal did not garner consensus. Some 230 years later, district residents still lack a vote in Congress, though they have been able to vote for president since the 23rd Amendment was added to the Constitution in 1961. At the other end of the spectrum, and unlike the other territories, residents of American

¹² These senators were elected to represent their states of residence rather than their tribes, and included two Republicans in Kansas and Colorado, and a Democrat from Oklahoma. Information from: <https://www.senate.gov/senators/EthnicDiversityintheSenate.htm>



Samoa are not considered US citizens and are denied voting and other rights even if they move to a US state. In the “middle,” the other four territories get no vote for president or Congress but are granted basic citizenship rights—in addition to voting rights if they move to a state (Watson 2017).

The Senate’s racial inequities are made worse by the absence of the territories and federal district. Currently, only five states are majority nonwhite: California, Hawaii, New Mexico, Nevada, and Texas. They have control over only 10 percent of the Senate. In contrast, all six nonstates are majority nonwhite; were they represented in the Senate, they would more likely send nonwhite delegations. Depending on how their representation were structured, such a change in status would translate into 6 to 12 new senators of color. Thus, adding territorial representation would increase the leverage of majority-nonwhite states and units to 13 to 15 percent of the Senate. (The details of how this representation could be structured are explored more in Section 4.)

It is easier for the Senate to maintain its current inaction on climate change when these highly affected communities are left out of its halls.

The territories are also poorer and more climate-exposed than the states. The average per-person income on the islands is approximately \$28,520.¹³ In contrast, the average state per capita income is \$57,137—more than twice that of the island territories. Even Mississippi—the nation’s poorest state—is nearly 30 percent richer than the territorial average. Wyoming’s per capita income is 2.3 times that of the territories, yet the Equal Rights state gets two senators and the territories none. Moreover, DC and the territories are substantially more at risk from climate change and rising sea levels. Were it a state, DC would have the third-lowest average elevation, while Guam would have the sixth lowest. Wyoming, meanwhile, has the second-highest elevation (Census Bureau 2011). According to the latest government estimates, the territories’ freshwater access, crop production, and hurricane exposure will be “more sensitive to changes in temperature and precipitation than similar systems in the mainland United States” (USGCRP 2018). We need not wait to see these catastrophic impacts: In 2017 and 2018, Hurricane Maria, Hurricane Irma, Typhoon Mangkhut, and Super Typhoon Yutu devastated the Atlantic and Pacific territories

¹³ For a sense of the magnitude (though not an apples-to-apples comparison), this is a little below the poverty level for a family of five on the mainland. Medical care on the territories is far inferior to that available on the mainland, with significantly higher mortality rates in hospitals that perform the stateside average on the standard measures of performance (Nunez-Smith 2011).



(Wong and Cruz 2018). It is easier for the Senate to maintain its current inaction on climate change when these highly affected communities are left out of its halls.

The statistics for the territories track another underprivileged grouping in Congress: Native Americans. Their poverty rate (27 percent) is twice that of whites. At present, Native Americans can and often do vote for senators and representatives in the states in which they live. But this was not always so. For most of US history, both anti-Native racists and Native Americans themselves debated whether it was appropriate for members of tribes (themselves sovereign entities under US law) to vote in elections for the US government—a separate sovereign. Doing so, some argued, might be an implicit surrender of sovereignty. Nonetheless, many Native Americans desired to vote in federal elections that, whatever the formal legal relationship between the units of government, greatly affected them and their standard of living. In 1924, Congress passed the Indian Citizenship Act, as prior to that point Native Americans were not automatically citizens unless they were taxed off-reservation or had served in the military (Wilkinson 2006). Nonetheless, it took four more decades for all states to guarantee the voting rights of Native Americans (Little 2018). In practice, their participation is still hindered by restrictive voting rules, such as a North Dakota’s ID laws that were upheld by the Supreme Court in 2018—possibly flipping the result of that year’s US Senate election (Poggrund and Somnez 2018).

Because of these long-standing grievances, Native American activists have historically made and recently revived demands for some form of dedicated congressional representation. One approach would be to make the Navajo Nation the 51st state. The Navajos have the largest population of any tribe and live on the largest reservation—encompassing parts of New Mexico, Arizona, and Utah. They have three branches of government and already many of the capacities expected of states, making the idea viable (Wyckoff 1977). If enacted, there would be two Navajo senators and a representative. Another idea is to give them nonvoting delegates in the House of Representatives, which would allow them informal and committee influence over legislation. Early 19th century treaties with the Cherokee and Choctaw nations granted them rights to send nonvoting delegates to Congress, but the legislature never honored these agreements. Ironically, only the internationally unrecognized white ethnostate of the Confederate States of America made good on this treaty obligation, seating delegates from Cherokee, Choctaw, Creek, and Seminole tribes (Rosser 2005) (Ahtone 2017).¹⁴

The US is alone among advanced democracies for denying the vote to its federal district and offshore territories. First, all major democracies give legislative representation to their capital cities. In Austria and Germany, the federal districts are coequal (city) states. In

¹⁴ At the state legislature level, Maine allows for three Native American delegates.



Canada and Switzerland, voters in the federal city are located in a coequal state. Australia and Brazil have federal districts similar to the US but grant them dedicated seats in both the first and second chambers (Nagel 2013). France has 21 senate and 27 assembly seats for its 11 overseas departments, overseas collectivities, and special collectivities, ranging from four senate and seven assembly seats for Réunion, in the Indian Ocean, to one senate and one assembly seat for Wallis and Futuna, in the South Pacific. In Australia's second chamber, both a nonstate territory and the federal district get two senators apiece, alongside the 12 senators that come from each of Australia's six states. Moreover, Christmas and Cocos islanders are incorporated into Australia's Northern Territory for federal representation purposes, and Norfolk Island has a similar arrangement with the federal district. The Danish one-chamber parliament has two seats each for the Faroe Islands and Greenland. Finland reserves a seat in its unicameral parliament for a representative from the Åland Islands.

Even the relative laggards in equal representation do better than the US. New Zealand has three overseas territories that cannot vote in parliamentary elections on the main island, though two of these have populations of only around 1,000 people and the third—the Cook Islands—has roughly 20,000 people (far less than the United States' least populous territory). Nonetheless, New Zealand has had reserved seats for the Maori Indigenous population in its unicameral legislature since 1867 and was the first country to give women the vote, in 1891. To this day, any New Zealanders who declare themselves Maori and wish to be placed on a separate voting roll can elect representatives to seven Maori seats. Since 2011, residents of the three Dutch special municipalities in the Caribbean (Bonaire, Sint Eustatius, and Saba) can vote in elections for the Netherlands' lower house. In 2017, these rights were extended to votes for the Dutch senate. Under the Netherlands' party-list proportional representation system, legislative positions do not represent geographic areas, so the municipalities do not have a dedicated seat. At the same time, the Netherlands denies voting rights to its three overseas constituent countries (Aruba, Curaçao, and Sint Maarten). Nonetheless, this too may change; the European Court of Human Rights may soon hear a lawsuit on the constituent countries' enfranchisement (Daily Herald 2016) (Daily Herald 2017).

Even the second-worst developed democracy in enfranchisement terms is still better than the United States. While the United Kingdom does not grant parliamentary representation for its 14 overseas territories or crown dependencies, residents of the capital city of London have full legislative representation. Indeed, the current leader of the Labour Party, Jeremy Corbyn, is from the capital; in the US, he would not have a seat. Moreover, there is currently a push to give the UK territories seats in the House of Commons and to give them seats in the House of Lords immediately. The rationale is that unity and inclusion of all the



constituent parts of the UK will be especially valuable post-Brexit (Anson 2017).

In sum, on the existential issues of climate change, inequality, poverty and more, the US Senate is structured to exclude many interests on the frontlines.

Voting Rights for a Global Era

The US also has fallen behind the best democratic practices by denying any representation for noncitizens residing here and denying dedicated representation for expatriates living abroad. Nothing in the US Constitution requires that voting be restricted to citizens. Indeed, for most of US history, there was no automatic equation between being a US subject, US national, or US citizen and being an eligible voter. The gaps therein often worked to exclude people from voting—as was the case for women and people of color for much of US history. But it also occasionally worked to extend the franchise where it might not otherwise have gone.

The US is a nation of immigrants, and historically, nonnaturalized white men had some political rights. At least 22 US states and territories allowed nonnaturalized inhabitants to vote in elections and/or serve in legislatures—a practice never overturned and frequently upheld by courts. The conditions for doing so ranged from the relatively lax (Illinois’s 1812 state constitution granting voting rights to those who had resided in the state for six months) to the more onerous (the 1789 Northwest Territories’ rule restricting noncitizen voting and office-holding to those with a minimum amount of land) to the in-between (Wisconsin’s 1848 constitution restricting the franchise to those noncitizens who declared an intention to seek citizenship, though this was not enforced). So-called “alien suffrage” served the policy goals of encouraging settlement and integration and aligning political rights with those contributing to the local economy. However, it began to be rescinded as whites became more fearful of nonwhite and left-leaning immigrants. The most recent state to retract this franchise was Arkansas, in 1926. Today, only select localities allow nonnaturalized residents to vote—and then only in local elections (Raskin 1993).

Moreover, some modern democracies also give representation to citizens living abroad. Italy, France, and Portugal all have dedicated legislative representation for their overseas expatriates. In contrast, the US denies dedicated representation to the approximately six million US citizens abroad. Instead, these individuals and families are required to retain their home state registration if they want to participate in US elections—years or even decades after they have left home. These voters are likely to have their own unique issues, such as ease of postal voting or concern about so-called “double taxation.” At present, they



are dependent on stateside representatives to understand and advocate for their special plight.

Greater attention to the political rights of long-term nonnaturalized inhabitants and expatriates, perhaps through internal party primaries, should be a part of any comprehensive discussion of voting rights.

The Senate's Inequality Affects Policy Outputs

The representational imbalances of the US Senate have several implications for policy outputs and process, including with respect to the number of appropriations, the amount of face time and constituent attention voters receive, what types of class and identity groups can easily run for Senate, and what types of attention their issues receive.

First, let us examine the effects of apportionment. Not only does a Wyomingite's vote count for more than a Californian's, but research has documented subtler effects of the population and demographic discrepancies. Because Wyoming's senators have fewer residents to interact with, each individual resident has better one-on-one access even after election day is over. Moreover, because the Equality State's two senators have fewer constituents to service, they can spend more time than the Golden State's senators on legislating and building influence for themselves within the second chamber. These structural factors seem to influence questions of economic and power distribution: Wyomingites' share of federal expenditures is 50 percent higher than each Californian's, small-state residents contact their senators not only about broad issue positions but also to directly claim federal largesse, and all Senate majority leaders have come from small states since 1961 (Lee and Oppenheimer 1999).

Small states also help amplify corporate lobbyists' influence. Even though small- and large-state senators receive similar amounts of corporate campaign donations, the lower overall cost of small-state election campaigns means that the share of corporate donations is typically higher in small states—amplifying these donors' relative influence post-election. While corporations must compete with tens of millions of constituents to get scarce face time with California's senators, they have fewer difficulties meeting with Wyoming's representatives. Moreover, lobbyists encounter lower hurdles in building “grasstops” or “Astroturf” influence¹⁵ operations in small states. One or two phone calls could easily

¹⁵ These terms refer to the practice of running lobbying campaigns that pay or otherwise recruit a few “local faces” in order to give the appearance that an initiative has more grassroots and voter support than it actually does.



identify the Wyoming senators' personal friends or most influential donors, whereas populous states, such as California, are more diverse and contain many competing interests that their senators must consider (Lee and Oppenheimer 1999).

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Other effects stem from the mere fact of having a second chamber with veto power. By one count, when legislation passed by the Senate differs from that passed by the House, the Senate gets its way totally or partially 82 percent of the time (Lee and Oppenheimer 1999). But a more pervasive impact of Senate bias is in what political scientists call “agenda control”—the legislation that never comes up for a vote. Even when a political party accomplishes the difficult task of winning control of both chambers of government, the Senate often fails to take up hundreds of bills on matters large and small that the House approves (Rushing 2010). For example, when Democrats had 60 senators and the White House in 2009–2010, financial reform and health care efforts approved by the House had to be watered down to gain Senate approval. These complicated compromises made the policies less effective and more subject to court attack. Environmental policy, as noted in Section 2, has been a particular failure. The US is unusual among Organisation for Economic Co-operation and Development (OECD) states in that its Senate has been singularly unable to ratify major climate change legislation.

Still other consequences are partisan. During the early New Deal and in almost every cycle since the 1950s, Republicans have gotten more Senate seats than they would have under proportional representation (Lee and Oppenheimer 1999; Griffin 2006). Between 1914 and 2016, Republicans received a higher share of seats than votes in 60 percent of the election cycles. In 2016, Democrats received 54 percent of the votes cast for senator but only 34 percent of the seats—a 19 percent disadvantage. To the extent that the parties differ on policy questions such as distribution of economic gains—and political research has shown that this gap is pronounced and growing over time (Lee 2009)—this Republican structural advantage makes the US less egalitarian than it otherwise would be.



Finally, we know less about whether the Senate’s racial, gender, and class inequities have specific isolatable impacts on policy outputs. This is due in part to data scarcity; there have been few examples of nonwhite, nonmale senators. But a wealth of research on the House of Representatives, US state legislatures, and other countries has found that increased minority representation leads to more prominority legislation, implementation, agenda-shaping, party coalition–shaping, and voter turnout (Griffin 2014).¹⁶ Still here, the Senate apportionment leads to underrepresentation of minority candidates. Because minorities are clustered in certain states, there will be more inraelite competition for scarce Senate seats. This may explain why so few Black House members opt to run for the Senate (Johnson, Oppenheimer, and Selin 2012).¹⁷ There are also class impacts that mark not just the Senate but all of Congress. Research by political scientist Kristina Miler finds that the poor are essentially unrepresented in Congress, because poor people neither serve in office or have their interests effectively represented by others. As a consequence, the body spends only 1 to 2 percent of its time on poverty-related matters and has made historically underinformed and ineffective interventions on poverty-related issues (Miler 2018). Working-class people suffer from a similar lack of representation, and an almost complete lack of union-friendly legislation is the result (Carnes 2013). Ineffective Senate (and overall governmental) responses have failed to check rising income inequality, which in turn polarizes legislators and makes their work less effective (Bonica et al. 2013).

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In sum, the Senate’s internationally unique veto power—when coupled with the various specific inequities of who is represented and how—produce fundamental obstacles to needed structural change.

¹⁶ Research indicates that Democratic Party control and economic growth can help bridge the gap in racial responsiveness (Griffin et al. 2017).

¹⁷ An ample literature has examined why women historically have been less likely to run for public office than men. The research is ambiguous. For a recent exploration, see Bonneau and Kanthak (2018).



SECTION FOUR

Solutions to Fix the Senate

There is growing consensus that the Senate needs reform, but less clarity and much despair that needed changes will actually materialize. Nonetheless, the picture painted in the previous sections shows that the inequities in the Senate’s structure will only grow over the next century—at a time when demands on politics due to inequality and climate change will be greater than ever.

This section explores five options for Senate reform, including abolition of the Senate, reform of the filibuster, dividing the most populous state (California) into multiple states, granting statehood to DC and Puerto Rico, and expanding the types of units represented in the Senate to include more than just states (including the federal district, the United States’ overseas territories, and Native American tribes). The first three are relatively straightforward and are thus discussed only briefly; the latter two involve some novel issues and are dealt with in more depth.

Senate Abolition (or Fundamental Weakening)

The recently passed former Rep. John Dingell (D-MI)—the congressperson who held the longest tenure in history (59 years)—called the Senate “downright dangerous,” as “usually conservative [small] states can block legislation supported by the majority of the American people.” He proposed an ambitious fix: abolish the Senate and make America a unicameral legislative system with just a House of Representatives (Dingell 2018).

The proposal would require a top-to-bottom overhaul of the US Constitution and would eliminate a core feature of US federalism: the notion of the US as a union of coequal states. On the plus side, it would definitively resolve the countermajoritarian problem. In so doing, it would create a tighter nexus between election and policy outcomes, as the House of Representatives could pass laws on a simple majority vote. Yet it would trigger fierce opposition from small states, which would point to the Constitution’s so-called “unamendable core”: equal state suffrage in the Senate. (See the Appendix for more detail.)

These objections may be able to be accommodated by changing the proposal such that a Senate would continue to exist and states would continue to have equal weight in its deliberations. But instead of voting on legislation passed by the House as a coequal branch, the Senate could instead serve a more advisory role, much like the second chambers of other democracies. It could even continue to play its current role in appointments, treaty advice



and consent, and impeachment trials. Focusing on only those tasks would make the Senate more like the authors of the Federalist Papers at certain points envisioned it: as a copartner with the executive branch.

Filibuster Reform

The filibuster is the most countermajoritarian procedure in the world's most countermajoritarian second chamber. With it, a single senator can stall policies favored by a majority of his or her colleagues.

Filibuster frustration is on the rise, and substantial changes have already been enacted. In 2013, Senate Democrats used a loophole in Senate procedure that allowed the majority leader to circumvent the two-thirds rule and change Senate rules through a simple majority vote. To unclog a backlog of nominees held up by the Republican minority, Democrats eliminated the filibuster for executive branch and most non-Supreme Court judicial branch nominees. This had been dubbed the so-called “nuclear option,” and Republicans reciprocated in 2017 by extending majority votes to Supreme Court.

There are various ways in which the filibuster could be still further pared back. Senate parliamentary experts argue that it could be eliminated on the first day of a new session of Congress by a simple majority vote, because that is a unique constitutional moment when the Senate sets up its rules for the biennium to come (Oleszek 2016). Steven S. Smith of Washington University has argued for maintaining a form of filibuster but lowering the threshold needed to invoke cloture every day a debate drags on (Ellis and Nelson 2016).

Because of the relative ease of enacting filibuster reform, it can and should be a core part of any structural reform. However, this strategy only eliminates the most pronounced inequities, leaving untouched many of the problems addressed in this paper.

Split Up California

Political scientist David Faris recently proposed a novel solution to the Wyoming versus California discrepancy: divide California into seven new states. His argument is premised on an explicit desire to expand the ranks of the Senate to the benefit of the Democratic Party. The new states—Sacramento, San Diego, Anaheim, Los Angeles, Fresno, San Jose, and San Francisco— could be drawn in such a way that the new senate seats would vote Democratic (Faris 2018).



It is easy to see why Democrats might find the idea appealing. It is even possible to make a normative case for it, as Democrats consistently fail to control the Senate even when they win the so-called “Senate popular vote” (the number of votes cast for a Democratic versus a Republican senatorial candidate, from whatever state). As a legal matter, it would also be easier to accomplish than proposals including Senate abolition, requiring (only) a majority vote in a California referendum, the California legislature, and the US Congress. Finally, because California is fairly economically developed and has a competent state government, it would also be arguably administratively simple to make this transition.

However, there are also drawbacks to the plan. Its highly partisan nature would make it an easy target for Republicans, who would be able to argue that it violates constitutionally protected equal suffrage in the Senate (see Appendix). This move could then invite a spiral of tit-for-tat expansion of Republican-leaning states, such as Texas. The reform is also a rather ad hoc and roundabout way to address Senate countermajoritarianism; why not address all representational discrepancies, rather than just California’s? Indeed, the Senate could be completely remade such that Wyoming got one senator and all other states were assigned a number of senators based on how much more populous they are than Wyoming. In this world, the Senate would increase to 549 seats, with California getting 67 senators, Texas 47, Florida 35, and New York 34. Of course, this would eliminate the relative intimacy of the Senate and make it larger than even the House. Moreover, seats would need to be continually adjusted, like they are in the House, as populations change. At that point, Senate abolition starts to look like an even more direct way of solving the Senate’s inequities.

Establish Statehood for DC and Puerto Rico

Another Senate reform has gained traction in recent years: DC and Puerto Rico statehood. On January 3, 2019, Eleanor Holmes Norton, DC’s delegate to the US House of Representatives, introduced H.R. 51—a bill that would admit the nation’s capital as the 51st state in the union. Ironically, Norton won’t be able to vote for her own bill when it comes up for a vote. That’s because, as a nonstate, DC lacks full representation in both chambers of Congress. Norton is allowed to introduce bills and sit on congressional committees. But when it comes time to actually cast a floor vote on tax legislation, climate bills, war authorizations, and other matters of civic life and death, Washington’s 672,931 residents are left without a voice that counts.¹⁸ Puerto Rico is in a slightly different situation. The

¹⁸ Moreover, DC is subservient to Congress. National legislators can and have nullified local laws, including on abortion funding, needle exchange to combat HIV/AIDS, medical marijuana, recreational marijuana sales, and gun control (G. Lopez 2016). One option raised by reformers for rectifying this situation is to retrocede the current DC territory to Maryland, just as the Virginia portion of DC was retroceded in the 1840s. However, this option has little support in either DC or Maryland (Vyse 2018).



downsides to its lack of congressional representation are obvious, as the aftermath of Hurricane Maria shows. Yet, historically, opinion was divided on the island as to the relative merits of statehood, the status quo, or total independence from the US (Faris 2018).

There are numerous advantages to the statehood route. First, it is a perfectly constitutional process that has been used 37 times in the past. Second, DC and Puerto Rico each do well by various criteria Congress has used in the past to evaluate the merits of a statehood application. DC would be a rich state in per capita terms (indeed, the richest), so has and has already demonstrated fiscal viability as a new state. For Puerto Rico's part, it is well above the 60,000-person threshold (even lower in practice) that Congress has established as a condition of statehood.

Statehood would partly make up for an indefensible double standard. The normal process enjoyed by most of the 37 non-original states entailed a few phases. Once a territory had 5,000 people, it could establish local government and send a nonvoting delegate to Congress. At 60,000 people, it could request admission from Congress as a state "on an equal footing with the original States in all respects whatever," provided its proposed state constitution and government were republican in form. Finally, Congress envisioned that a territory could be admitted as a state even before the 60,000 population threshold, provided that it was deemed "consistent with the general interest of the confederacy." Indeed, three states were admitted with populations below the threshold: Illinois in 1818 with 55,211 people, Oregon in 1859 with 52,456 people, and Nevada in 1864 with a mere 28,841 people.¹⁹

There are also procedural advantages postaccession. Granting statehood to Puerto Rico would not require a constitutional amendment and would be achievable by a majority vote in both houses of Congress. Washington, DC, could also thusly become a state, though this would pose some unique challenges. The 23rd Amendment to the Constitution, ratified in 1961, gave DC three electoral college votes. Upon statehood, DC would get another three electoral college votes. To keep DC from having double the electoral college weight it would deserve by population alone, the Constitution would need to be amended to repeal the 23rd

¹⁹ The gap between initial US acquisition and the organization of a territorial government varied from one year in Louisiana's case (1803 to 1804) to 87 years in Oklahoma's (1803 to 1890), with an average of 28 years. The gap between territorial government and statehood ranged from two years in Kentucky's case (1802 to 1803) to 62 years in New Mexico's (1850 to 1912), with an average of 21 years. The total gap between acquisition and statehood ranged from two years in California's case (1848 to 1850, without a territorial phase) to 104 in Oklahoma's case, for an average of 47 years (Shearer 2004). The experience of DC and Puerto Rico stands in stark contrast. Each has long surpassed the Northwest Ordinance's population threshold, yet both have been held in limbo for longer than the 104-year record set by Oklahoma.

Amendment.²⁰

Nonetheless, there are some potential downsides to the strategy. First, it would not resolve the Senate’s countermajoritarian bias. Instead, it would give an additional outsized voice to a small new state—though DC’s population would still be larger than Wyoming and Vermont, currently the two smallest states. (Puerto Rico doesn’t pose the same problem, because it is already larger than half of the states in the union.) Second, like the splitting of California, the two-state strategy would have difficulty attracting bipartisan support, especially among those who believe that it would add four Democrats to the Senate. Indeed, Norton’s bill has zero Republican cosponsors. This may not be fatal to passage if Democrats have control of both houses of Congress. However, it may inspire punitive escalation when Republicans regain power. (But this belief may be misplaced, as shown in the next subsection.) In one respect, the lack of bipartisan appeal would ease resolution of the most difficult logistical issue: repeal of the 23rd Amendment. Republican legislators would have little problem voting for an amendment that denies DC double the number of electoral college votes. Finally, the two-state strategy still leaves four overseas territories (American Samoa, Guam, the Northern Marianas, and the US Virgin Islands) without congressional representation. As demonstrated in the next subsection, including them in a reform package would increase its bipartisan appeal, in addition to being normatively desirable from a full-representation standpoint.

Give Representation to the Nonstates

The federalist legitimacy and linkage functions articulated by Madison need to work across a different matrix than existed two centuries ago. A modern Senate should reflect a modern federalism encompassing not only states and the federal government but also the district, territories, and tribes. This could be accomplished by amending the US Constitution to allow for full congressional representation for all these units.

This paper builds on a proposal advanced by Equally American, an organization that works to advance equality and civil rights for Americans living in US territories. In its proposal, DC would be given a single senator, as would the territories as a whole (Weare 2016). This paper

²⁰ Norton’s bill deals with the other remaining constitutional difficulty in a straightforward manner. Article I, Section 8, Clause 17 grants Congress plenary power over a federal “District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States.” Translated to modern usage, this means that the district can be up to 100 square miles. Notably, there is no requirement that the district be 100 square miles, only that it be not more than 100 square miles. Indeed, it already is far below this, because, in 1846, Virginia requested and Congress approved a retrocession of its portion, leaving DC with a truncated 68.34 square miles of land. Thus, Norton would shrink the federal district to the key federal buildings in DC that have no permanent residents. This would allow Congress to maintain control over the government’s own facilities—the main reason for inclusion of the clause in the first place.

goes a step further and proposes allotting eight additional senators. This would include two for DC, two from the Atlantic territories, two from the Pacific territories, and two from the tribes as a whole. Each grouping would also get a voting representative in the House of Representatives, with the exception of the Atlantic territories, which, by their combined nearly 3.8 million residents, would be entitled to five members of Congress—one of whom would be reserved for the Virgin Islands and the balance for Puerto Rico.

Our proposed amendment draws on template text in the 1978 District of Columbia Voting Rights Amendment. Largely forgotten today, this amendment was the first serious proposal to provide nonstates with Senate representation. It attracted support from 70 percent of the House of Representatives and nearly as much support in the Senate—including from ardent defenders of white supremacy, such as Sen. Strom Thurmond (R-SC). Unfortunately, it was only ratified by 16 states and needed 38 to advance. Our proposed text reads:

Full Representation Amendment

Section 1. *For purposes of representation in the Congress, election of the President and Vice President, and Article V of the Constitution, the District constituting the seat of government of the United States, the Atlantic territories as a whole, the Pacific territories as a whole,²¹ and the Indian tribes²² as a whole shall each be treated as though they were each a State.*

Section 2. *The exercise of the rights and powers conferred under this article shall be by the people of each grouping and shall be provided by the Congress.*

Section 3. *The 23rd Amendment to the Constitution of the United States is hereby repealed.*

Section 4. *This article shall be inoperative, unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States, or if the resident population of any grouping falls below 50,000 persons, or if any territory within a grouping becomes a state (except that any territory still remaining within the groupings established by this article will continue to enjoy the rights and powers of the original grouping).*

There are several advantages to the Full Representation proposal. First, it gives representation to all of the United States' population—not just that portion that happens to live in states. Thus, it is the most inclusive of the proposals outlined above. Second, it

²¹ The territorial groupings could also be made more generic to include territories to the west and east of the American meridian—though this could be seen as an endorsement of further colonial adventures.

²² This term is not used in a racist sense but to match the existing constitutional references.



would likely bring eight new senators of color to the second chamber, helping lessen the extreme overrepresentation of whites and helping remedy the historic nonrepresentation of Asia Pacific Islanders. As shown in Figure 2, Full Representation could advance majority non-white states’ and territorial units’ control of the Senate by years or even decades. Thus, instead of having 50 percent of senators come from non-white states in 2090, Full Representation would move this up to 2070, if current projections hold. And by the end of the 21st century, two-thirds of senators would come from majority non-white states under Full Representation.

Third, this new representation would be anticipated to generate better policy outputs. In particular, it would provide more representation for lower-income people and those threatened by catastrophic climate change. According to the latest scientific projections, sea levels will rise three to four feet by 2100 absent dramatic government interventions. Indeed, under some calculations, these interventions will be necessary as soon as 2040 to avert irreversible damage from climate change (Eilperin, Dennis, and Mooney 2018). Having four additional island senators would help focus Senate attention on saving the planet.²³

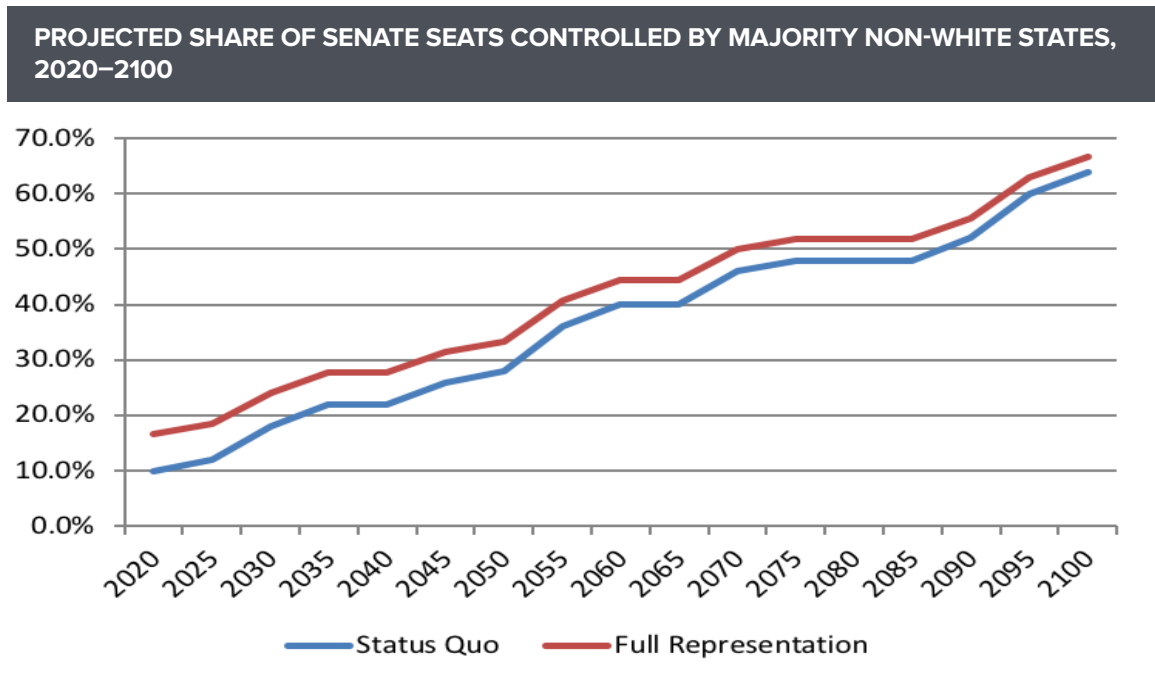


FIGURE 3 Source: Author’s calculations based on projections from Hauer (2017).

²³ The fact that some real numbers would be added to the Senate’s ranks—thus potentially shifting the chamber’s political dynamics—would also help give it a constituency beyond just the disenfranchised areas. For instance, a recent proposal by Neil Weare would require the difficult lift of a constitutional amendment but only add one senator from DC and one senator for the whole of the territories (Weare 2016). There are sound legal and moral arguments for Weare’s proposal, but this paper’s more expansive version would attract a wider set of interests, including environmentalists and Native American tribes. It could also draw more opposition—though, as argued in this section, there is not an obvious partisan or principled reason for this.



Fourth, incorporating *all* federal units into the Senate will deepen the chamber’s ability to serve as a connective network for all levels of government in the country, thereby deepening the legitimacy of each.

Fifth, the proposal has potential bipartisan appeal. Unlike the two-state solution explored in the previous section, the Full Representation proposal may garner GOP votes. That’s because the Pacific Islands and Native American tribes have more of a history of voting for Republicans for local office and nonvoting delegates to the House.²⁴ Indeed, of the eight new senators, only the two from DC (with its 75 percent Democratic registration) would be shoos for Democrats.

Sixth, it sidesteps some of the practical problems with full statehood for each of the territories. There may be legal and practical concerns about whether each entity can survive as a stand-alone state. For instance, some fear that communal land practices in the Pacific Islands might not pass constitutional muster if the islands were a state (Krannich 2018). Moreover, the threat of climate change and rising sea levels might lead to resettlement from the territories to the mainland. This is far from speculative; more than 135,000 Puerto Ricans relocated to the US mainland after Hurricane Maria (Sesin 2018). It would not make sense to have congressional representatives from uninhabited islands a century or two from now. That’s why the proposal allows for a snapback of representation if certain developments, such as this, occur. Instead of needing to establish all the administrative capacity necessary to be a full-fledged state, all that would be needed is a different set of polling questions administered by the territorial boards of election that already exist.²⁵

The Full Representation proposal would not preclude a transition to statehood by any or all of these areas. Indeed, the DC statehood initiative has gained traction and could be a reality in the coming decade. But this proposal leverages the fact that DC statehood will require a constitutional amendment anyway (to remove the district’s special electoral college votes provided for in the 23rd Amendment to the Constitution) to proceed and make a number of interrelated changes to the Constitution. Moreover, people’s rights to Senate representation

²⁴ The current delegate from American Samoa is Aumua Amata Coleman Radewagen—a Republican. Guamanians voted for Democrats in nonbinding straw polls in the last three presidential cycles, though Republicans occupied all the top local executive offices (governor, lieutenant governor, attorney general, and auditor) from 2011 to 2017. The Northern Mariana Islands government is divided between Republicans and Democrats; its congressional delegate, Gregorio Kilili Camacho Sablan, caucuses with the Democrats. Two of the three Native Americans elected to the Senate in the past were Republicans, and substantial minorities of Native Americans identify with the Republican Party (Herrick and Mendez 2018). In fact, despite their supposed partisan leaning toward Democrats, Puerto Ricans since 2016 have sent a Republican, Jenniffer González-Colón, as their delegate (officially called the resident commissioner). Even the US Virgin Islands, whose congressional delegate has caucused with the Democrats since 1981, had a governor and lieutenant governor from 2015 to 2018 who were registered Republicans (though elected as independents).

²⁵ The biggest change is that the Department of Interior’s Bureau of Indian Affairs may need to coordinate elections of the more than 500 tribes because the two Native American senators would not represent geographically bound units but a nationwide racial constituency.



should not be delayed by complicated sequencing or administrative questions.

Seventh, though it would entail a big change, the Full Representation proposal would not be the most radical change of the Senate in US history. The 17th Amendment passed Congress in 1911 and reversed 122 years of practice by allowing for the direct election by voters of senators. Prior to that, as enshrined in the Constitution, state legislatures selected senators. As noted above, this “convenient link” between the two levels of government was one of the central reasons the founders created a Senate. Because Congress was willing to renege on a central purpose of one of its chambers, a mere expansion of the Senate’s numbers for the purpose of representational equality is modest in comparison.

Finally, the Full Representation proposal is more aligned with emerging international practice. As discussed in Section 1, modern democracies have many means of ensuring legislative representation for different types territorial and nonterritorial units, including Indigenous communities, overseas territories, federal districts, expatriates, and even noncitizen immigrants. Moving closer to the developed-country modal practice will help the US regain its historic stature as the exemplary democratic nation.

Admittedly, this reform would present novel constitutional challenges and on its own would not resolve all of the problems highlighted in this paper. First, the final clause of Article V appears to put a limitation on amendments to the Constitution, namely “that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.” There are reasons to believe, however, that a Full Representation amendment could survive constitutional muster, as we explore in the Appendix. The short response is that the Senate has already approved adding nonstates, in 1978, when it approved the (unratified) DC voting rights amendment. Second, it would not resolve the countermajoritarianism that still gives less weight to populous states. Third, adding eight senators of color is also no guarantee that policy outputs will be better. Enacting a Full Representation amendment will be more likely to achieve progressive objectives if coupled with campaign finance reform and anticorruption measures. That said, the Full Representation amendment would help remedy the racism of the Insular Cases and lessen the outsized power of whites in the US Senate.



Conclusion

The pressing challenges of our time—inequality and climate change—require bold proposals to set the country and world on a new trajectory. Given the instrumental role that the US Senate does and could play in blocking structural change and how much more countermajoritarian it is than our trading partners’ second chambers, it would be irresponsible not to put all options on the table. Indeed, legal scholar Sanford Levinson has proposed putting the entire Constitution up to a popular vote. If a majority of voters reject it, a lottery would be held to fill a new Constitutional Convention (Kreitner 2017). Short of that, this paper outlined several reforms that would improve the situation, from filibuster reform to dividing current states, adding states to abolishing the senate. Each of these has pros and cons, and each is worthy of consideration. A fifth option—giving Senate representation to nonstate entities—strikes a balance between reducing objectionable elements of the Senate (its racial inequities, its incomplete representation of Americans, its resulting inferior policy outputs) and retaining more felicitous objectives (effectiveness, protection of minority rights, federalism). Indeed, with eight new senators representing the majority-nonwhite federal district, overseas territories, and Native American tribes, the objectives of racial inclusion and federalism will be better served than at present.

Fundamentally reforming the Senate is a way to realign the body with the functions it was meant to serve.

In the Federalist Papers, James Madison thought it unlikely that the Senate would “be able to transform itself, by gradual usurpations, into an independent and aristocratic body.” However, he was certain that “if such a revolution should ever happen from causes which the foresight of man cannot guard against, the House of Representatives, with the people on their side, will at all times be able to bring back the Constitution to its primitive form and principles. Against the force of the immediate representatives of the people, nothing will be able to maintain even the constitutional authority of the Senate, but such a display of enlightened policy, and attachment to the public good, as will divide with that branch of the legislature the affections and support of the entire body of the people themselves.” Fundamentally reforming the Senate is a way to realign the body with the functions it was meant to serve.



Appendix: Is It Constitutional to Change the Senate?

The Senate not only has power, but it has power over its own power. The body would have significant influence over any effort to curtail its power through constitutional amendment. Article V of the Constitution specifies four ways to amend the Constitution:

1. A proposal is made by two-thirds each of the Senate and House, followed by approval by three-fourths of the state legislatures (the method used for 32 proposed and 26 ratified amendments);
2. A proposal is made by two-thirds each of the Senate and House, followed by approval by three-fourths of special state conventions (the method used for the remaining single proposed and ratified amendment, repealing prohibition);
3. A proposal is made by a constitutional convention convened by Congress and called for by two-thirds of the state legislatures, followed by approval by three-fourths of the state legislatures (never used); or
4. A proposal is made by a constitutional convention convened by Congress and called for by two-thirds of the state legislatures, followed by approval by three-fourths of special state conventions (never used).

These high hurdles make the US Constitution extraordinarily difficult to amend. In the methods thus far actually employed, two-thirds of the Senate had to agree. At the Senate's current size, this translates to 67 senators—meaning that 34 senators could prevent a proposal from going forward. If the 34 senators from the smallest states voted as a block, this would mean that legislators representing only 7 percent of the population could block changes supported by legislators representing the remaining 93 percent of the population. And because three-fourths of the states must ratify any proposed amendment, the 13 smallest states accounting for just 4 percent of the US population could block amendments supported by the other 37 states representing 96 percent of the population. Political scientist Donald Lutz has concluded that the US Constitution is the most difficult to amend in the world. Using a quantitative index to account for procedural and other hurdles, he assigns the US a score of 5.1—nearly twice that of Denmark, three times that of Germany, and 10 times that of New Zealand. Moreover, the US has the third-lowest rate of actual amendment—behind Japan and Australia, whose constitutions are much younger (Lutz 1994). Though in practice a supermajority of the Senate has approved all proposed amendments, in theory the latter two options would allow change without the Senate's consent.



The hurdles do not end there. The final clause of Article V appears to make major changes to the Senate’s power nearly impossible. It reads: “[N]o State, without its Consent, shall be deprived of its equal Suffrage in the Senate.” This clause appears to enshrine the Senate’s powers in perpetuity, leading scholars to deem it a unanimity requirement or effectively unamendable, because “no state would freely consent to a diminution of its representation in the Senate” (Fidell 2017).

The novelty of this clause would almost certainly invite a legal challenge to a Full Representation amendment. Were the Court to have an option to interpret the Senate equal suffrage clause, it is unclear how it would rule. On the one hand, the Court has characterized it in passing as a “permanent and unalterable exception ... to the power of amendment” (*Dodge v. Woolsey* [1855]) or merely a “limitation upon the power of amendment” in *Barry v. US* (1929).²⁶ On the other, the Court has rejected all legal challenges to past constitutional amendments, including in a case brought by states over the 18th Amendment on prohibition (*Rhode Island v. Palmer* [1920]) and by Maryland men over the 19th Amendment on women’s suffrage (*Leser v. Garnett* [1922]).²⁷ Any legal challenge would thus involve novel questions. First, what does it mean for the states to have equal suffrage? Second, procedurally, what recourse would a hold-out state have if an amendment impairing equal suffrage manages to be ratified? Third, substantively, does the clause bar permissible amendments? Finally, if the clause does bar amendments, can the equal suffrage clause itself be amended?

Working backward, a few preliminary observations can be made. The constitutional text and context provide some clues that the Constitution can always be amended. Under America’s first constitution (the Articles of Confederation), any amendment required the unanimous consent of all states. The Constitutional Convention lowered that to the present supermajority requirement. The early drafts of what became Article V did not include the Senate equal suffrage language. However, a signer of both documents, Roger Sherman of Connecticut, proposed the following addition: “[N]o State shall without its consent be

²⁶ In the latter case, the Court determined that the clause did not bar the Senate from refusing to seat William Vare, who had won a US senate race in Pennsylvania but was accused of election improprieties.

²⁷ Rhode Island was one of two states that had rejected the prohibition amendment, and Maryland was one of eight states that rejected the women’s suffrage amendment (by 1984, all eventually reversed their rejection and ratified the amendment). As Justice Oliver Wendell Holmes wrote in the latter case, “The first contention is that the power of amendment conferred by the federal Constitution and sought to be exercise does not extend to this amendment because of its character. The argument is that so great an addition to the electorate, if made without the state’s consent, destroys its autonomy as a political body. This amendment is in character and phraseology precisely similar to the Fifteenth. For each the same method of adoption was pursued. One cannot be valid and the other invalid. That the Fifteenth is valid, although rejected by six states, including Maryland, has been recognized and acted on for half a century. . . . The suggestion that the was incorporated in the Constitution, not in accordance with law, but practically as a war measure which has been validated by acquiescence, cannot be entertained.” *Leser v. Garnett*, 258 US 130, 136, 42 S. Ct. 217, 217, 66 L. Ed. 505 (1922). In other words, states cannot defer their approval as a way of blocking highly consequential amendments—even when the contention is that it will destroy their character as a state. If equal Senate suffrage for states came before the Court, this is a theme to follow: Is states’ clout within the Senate a fundamental attribute of statehood?

affected in its internal police, or deprived of its equal suffrage in the Senate.” While the Convention rejected the proposal (as well as Sherman’s earlier proposal to have *only* a Senate), members eventually reinserted the equal suffrage clause into the final version of the Constitution as part of what is called the Connecticut Compromise. They also included a clause that would bar amendments to allow federal regulation of slavery until 1804. In 1861, Congress passed and three states ratified an amendment that would have blocked any amendments aimed at regulating or eliminating slavery (Dahl 2001). Taken together, the failed proposal (Sherman’s police clause), lapsed clause (slavery entrenched until 1804), and unratified amendment (from 1861) suggest that lawmakers know what language to use when they wish to outright prohibit amendments. The fact that they did not use such categorical language suggests that changes in Senate suffrage (and to the Senate suffrage clause) are possible.

However, just because an amendment is theoretically possible does not make it practically feasible. This takes us to our second question: What recourse would a state have if it did not believe that its consent had been given? The process for states giving their “consent” for structural changes in the Senate is not defined. Elsewhere, the Constitution defines exacting procedures and numerical thresholds for allowing change to happen—including three-quarters state support for constitutional amendments. Assuming that 38 states already supported the Full Representation constitutional amendment, could any one of the remaining 12 states veto the proposal? And would they have to do so through state legislatures and conventions, or could they do so through a lawsuit? Needless to say, there is little precedent and few guidelines in case law. If a state were to sue to block the creation of the new senators, existing precedent suggests that courts might deem this a nonjusticiable political question.²⁸

Moving to the first question, there is ambiguity in key terms in the clause, such as the notion of “equal suffrage.” Suffrage is clearly an ability to vote, but what does “equal” mean in this context? It cannot mean “no vote dilution,” because individual state’s voting power in the Senate has steadily contracted over time, as shown in Figure 4. There have been

²⁸ Perhaps the nearest analogy to the Full Representation dilemma is the creation of new states out of old ones. Article IV, Section 3, Clause 1 of the Constitution establishes that “no new State shall be formed or erected within the Jurisdiction of any other State . . . without the Consent of the Legislatures of the States concerned as well as of the Congress.” In April 1861, a Virginia convention voted to secede from the Union. In response, Unionist sympathizers in the Northwestern part of Virginia called their own series of conventions in Wheeling, where they claimed (and were federally recognized) to be the true government of Virginia. Meeting in that capacity, they sent a delegation to Congress to fill Virginia’s seats and approved West Virginia’s secession. Congress approved the creation of the Mountain State, which acceded to the Union in 1863 under the governorship of Arthur Boreman—one of the convention-goers. After the war, the Virginia legislature unanimously passed a resolution rescinding the Wheeling Conventioneers’ consent. Despite this, in *Virginia v. West Virginia* (1870), the Supreme Court refused to second-guess the propriety of a rump government both approving of and executing a splitting of the state (Shearer 2004). Perhaps the Court would take a similarly hands-off approach to whatever political settlement was needed to add nonstate representation.

37 statehood accessions since the Constitutional Convention. As a result, the number of senators has nearly quadrupled since the nation’s founding, from 26 in 1789 to 100 today. The original senators had an individual vote weight of 3.85 percent each, meaning that they controlled that share of the votes. But by the time the US acquired the bulk of its overseas territories in 1899’s Spanish American War, this vote weight had collapsed to 1.11 percent. The marginal vote dilution of adding the territories would be less than what states experienced since acquiring the territories—0.08 percent loss, as compared with 0.11 percent since 1899.

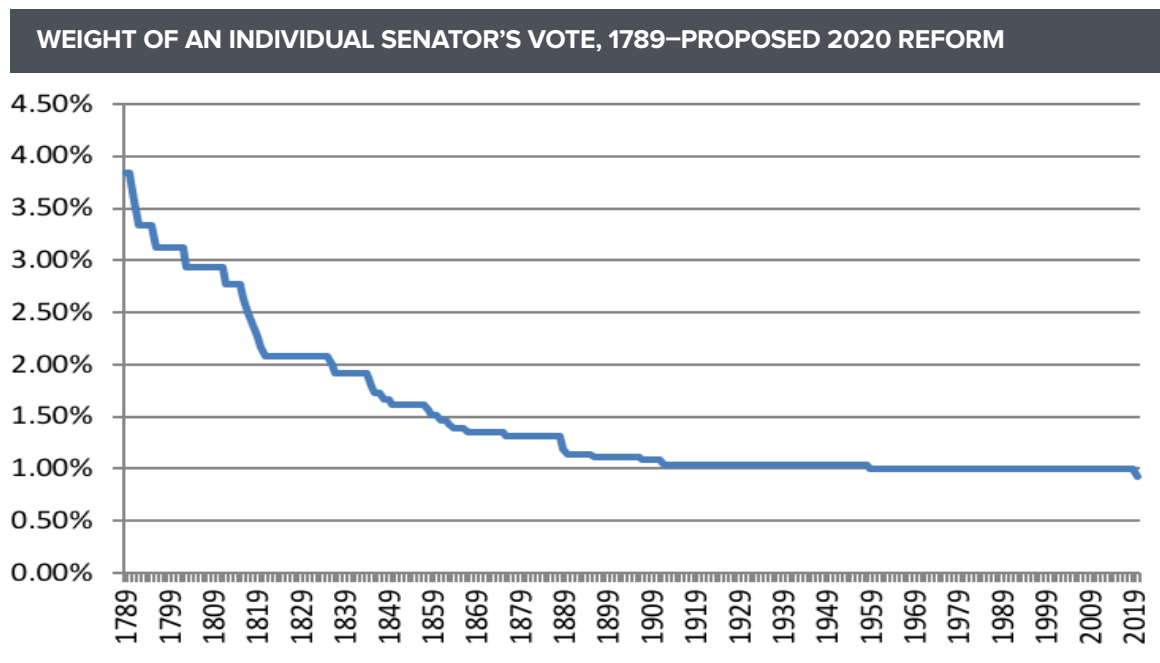


FIGURE 4 Source: Author’s calculations.

A sounder interpretation would be that no state can have more power than another state. California’s senatorial votes cannot suddenly count for more than Wyoming’s. But the text does not foreclose the representation of nonstates in the Senate. An argument could be made that, even if territories were to be given representation, each state would still have equal representation to all the other states—with each seeing its influence diluted equal amounts by the admission of nonstates. Indeed, this was the argument of Sen. Edward Kennedy (D-MA) in supporting the 1978 District of Columbia Voting Rights Amendment: “So long as the District of Columbia is represented in the Senate equally with every other State, representation for the District of Columbia will not offend the provisions of article V. Each State will still have two votes in the Senate, and each State will still have the same



proportionate vote as every other State.” In extensive House and Senate hearings, legal scholars and other witnesses backed this point of view—one of the strongest points in support of the Full Representation amendment’s constitutionality.²⁹ Moreover, even if the nonstates were to vote as a bloc, they would not be able to prevent a single bill, veto override, treaty, constitutional amendment, appointment, or impeachment otherwise supported by the states from going forward. States will still be the overwhelmingly dominant actors in the Senate.

There are reasons to test the flexibility of the Constitution. First, there is the possibility, however remote, that all states will go along with the idea. As this paper has laid out, there are solid normative reasons for seeking a more inclusive Senate. Pragmatically, it may also forestall more fundamental changes, such as abolition of the Senate or amending away the Article V provision altogether.

Finally, if the most restrictive understanding of Article V is true—that the current representational structure of the Senate is constitutionally unalterable—then that is all the more reason to resolve this constitutional dilemma directly. We are already beginning to see conservatives reference Article V to challenge progressive priorities, as when legislators cited it in their support for the supremacy of state gun laws (*State of Montana, Intervenor, v. Holder*). The US is not alone in the attempted use of the state to foreclose the space for democracy—a defining feature of neoliberalism (Grewal and Purdy 2015). According to legal scholar Yaniv Roznai, from the US Constitution’s signing thru 1944, no more than 20 percent of all new constitutions contained unamendable clauses. This increased to 25 percent by 1988 and up to 50 percent by 2013 (Roznai 2013), the neoliberal period. This trend must be challenged if meaningful democracy is to survive.

²⁹ See Representation for the District of Columbia: Hearing Before the H. Comm. on the Judiciary, 95th Cong. 105 (1978) (Statement of Senator Edward M. Kennedy), at 14.



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