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REDISCOVERING THE SOVEREIGNTY OF THE PEOPLE: THE CASE FOR SENATE DISTRICTS

TERRY SMITH*

The creation and drawing of district voting lines in order to benefit racial minorities has spurred several recent Supreme Court decisions and generated mountains of commentary. This attention, however, has been directed at the drawing of district lines for the House of Representatives. In this unique and intriguing Article Professor Smith posits a different form of districting—United States Senate districting. Drawing from the history and text of the Seventeenth Amendment and the Elections Clause of Article I, Professor Smith argues that the creation of Senate districts is a permissible, though not required, activity. As Professor Smith points out, such a proposal would have benefits for both racial minorities and campaign finance reform. Anticipating objections to his proposal on Equal Protection grounds, Professor Smith concludes with a discussion of recent Supreme Court rulings and defends his proposal within this framework. For states such as California and New York, with divergent racial makeups and political ideologies rooted in geography, the implications of Professor Smith's Article are widespread and significant.

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This Article is dedicated to my friend and mentor, Lincoln Pettaway.

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The Constitution does not mention legislative electoral districts. Federal law, however, requires members of the House of Representatives to be elected by district,¹ a procedure that was indisputably contemplated by the Framers.² In contrast, all fifty states currently elect their United States Senators in at-large, statewide elections.³ At-

1. See 2 U.S.C. § 2c (1994).

2. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 240-41 (Max Farrand ed., 1966) [hereinafter RECORDS OF THE CONVENTION]; see also *Oregon v. Mitchell*, 400 U.S. 112, 122 (1970) ("Surely no voter qualification was more important to the Framers than the geographical qualification embodied in the concept of congressional districts.").

3. The eleven state statutes which expressly provide for "at-large" or "statewide"

large Senate elections exacerbate some of the most significant problems in American politics. Illustratively, such at-large arrangements contribute to the underrepresentation of minorities in the Senate.⁴ Indeed, the United States Senate has been derided as a "white male club."⁵ Does the Constitution require that the election procedures for the Senate be different from the House? If not, state legislatures, Con-

election of United States Senators are: ALA. CODE § 17-2-2 (1995); CONN. GEN. STAT. ANN. § 9-178 (West 1996); GA. CODE ANN. § 21-2-542 (1995); IOWA CODE ANN. § 39.10 (West 1996); MD. CODE ANN., ELEC. § 21-1 (1994); MICH. COMP. LAWS ANN. § 168.92 (West 1995); MISS. CODE ANN. § 23-15-855 (1995); N.H. REV. STAT. ANN. § 653:3 (1995); N.Y. ELEC. LAW § 12-200 (McKinney 1996); N.D. CENT. CODE § 16.1-13-08 (1995); WASH. REV. CODE ANN. § 29.80.010 (West 1996).

Thirty-six state statutes provide for election of United States Senators without reference to an "at-large" or "statewide" election: ALASKA STAT. § 15.30.110 (Michie 1995); ARIZ. REV. STAT. ANN. § 16-213 (West 1995); ARK. CODE ANN. § 7-5-102 (Michie 1995); CAL. ELEC. CODE § 10720 (West 1996); COLO. REV. STAT. § 1-4-202 (Supp. 1995); DEL. CODE ANN. tit. 15, § 4307 (1994); FLA. STAT. ANN. § 99.081 (West 1995); HAW. REV. STAT. § 17-1 (1994); IDAHO CODE § 59-910 (1996); ILL. COMP. STAT. ANN. 46/2-3 (West 1996); IND. CODE ANN. § 3-10-8-7 (Michie 1996); KAN. STAT. ANN. § 25-101 (1995); KY. REV. STAT. ANN. § 118.465 (Michie 1994); LA. REV. STAT. ANN. § 1278 (West 1996); ME. REV. STAT. ANN. tit. 21-A, § 391 (West 1995); MINN. STAT. ANN. § 204B.08 (West 1996); MONT. CODE ANN. § 13-25-201 (1995); NEV. REV. STAT. § 304.010 (1993); N.J. STAT. ANN. § 19:3-26 (West 1995); N.M. STAT. ANN. § 1-15-12 (Michie 1995); N.C. GEN. STAT. § 163-12 (1995); OHIO REV. CODE ANN. § 3501.02 (Anderson 1996); OKLA. STAT. ANN. tit. 26, § 12-101 (West 1996); OR. REV. STAT. § 188.120 (1995); PA. STAT. ANN. tit. 25, § 2751 (West 1996); R.I. GEN. LAWS § 17-4-9 (1995); S.C. CODE ANN. § 7-19-10 (Law. Co-op. 1995); S.D. CODIFIED LAWS § 12-11-1 (Michie 1995); TENN. CODE ANN. § 2-16-101 (1995); UTAH CODE ANN. § 20A-13-201 (1995); VT. STAT. ANN. tit. 17, § 2621 (1994); VA. CODE ANN. § 24.2-206 (Michie 1995); W. VA. CODE § 3-1-15 (1996); WIS. STAT. ANN. § 8.25(2) (West Supp. 1995); WYO. STAT. ANN. § 22-2-105 (Michie 1996).

In none of the aforementioned states are Senators currently elected by districts.

Finally, Massachusetts, Missouri, and Texas appear to have no specific provision for the election of United States Senators but do not currently elect Senators by districts.

4. Racial minorities currently constitute only four percent of the Senate's membership. See Donna Cassata, *Freshman Class Boasts Resumes to Back Up 'Outsider' Image*, 52 CONG. Q. WKLY. REP. 9, 10 (Supp. 1994). This is the largest number of minorities to hold Senate seats in the past twenty years. See 3 THE ENCYCLOPEDIA OF THE U.S. CONGRESS 1371-72 (Donald C. Bacon et al. eds., 1995) [hereinafter ENCYCLOPEDIA OF THE CONGRESS]; Cassata, *supra*, at 10; John R. Cranford, *The New Class: More Diverse, Less Lawyerly, Younger*, 50 CONG. Q. WKLY. REP. 7, 8 (Supp. 1992). There is little question that this underrepresentation is the result of at-large elections, for such elections have long been found to lead to the underrepresentation of minorities. See, e.g., *Thornburg v. Gingles*, 478 U.S. 30, 33 (1986) ("This Court has long recognized that multimember districts and at-large voting schemes may 'operate to minimize or cancel out the voting strength of racial [minorities in] the voting population.' " (citations omitted)); *City of Mobile v. Bolden*, 446 U.S. 55, 92-93 (1980) (Stevens, J., concurring) ("[A]t-large systems characteristically place one or more minority groups at a significant disadvantage in the struggle for political power . . .").

5. Richard S. Dunham, *Congress' Rookies Will Be Ready To Rock*, BUS. WK., Sept. 14, 1992, at 56, 57 (discussing the common perception of the United States Senate as a "white-male club" and noting that the presence of only two female Senators—a number which has since increased—was mere tokenage).

gress and the judiciary are all free to adopt districting, a change that may enhance the opportunity for minority representation.

Senate districts may also help to solve another conundrum in American politics: the undue influence of money in political campaigns. In the absence of campaign finance reform imposing spending limits on Senate candidates, cutting the costs of running for the Senate by cutting the territory in which candidates must campaign may be an effective means of checking the influence of monied interests on the upper house.⁶ With decreased costs, there would likely be a corresponding increase in the range of candidates able to run and the spectrum of interests able to be heard in Senate races.⁷ Determining the constitutionality of Senate districts is fundamental to addressing these and other current concerns of democratic representation.⁸

Commentators assume without analysis that United States Senators cannot be elected by districts. In his recent book on the direct election of Senators, C.H. Hoebeke takes for granted that Senators must be elected from a statewide constituency.⁹ Oddly, the author proceeds on this assumption even though he acknowledges that at-large Senate elections actually *defeat* one of the central purposes of allowing the people to directly elect their Senators: to rid campaigns of the influence of corporate money previously associated with the legislative appointment of Senators.¹⁰

Judge Frank Easterbrook further typifies the reflexive nature of the statewide assumption in arguing that the at-large election of Senators was integral to a constitutional scheme whose success depended largely on fragmentation: "Fragmentation [was] to be pursued in a

6. The average cost of a successful Senate race in 1994 was \$4.4 million. See William Douglas, *The Pendulum Swings/Democrats Eye The Majority*, *NEWSDAY*, Apr. 28, 1996, at A04. The comparable figure for House races was \$535,000. See *id.*

7. Nothing more readily confirms this hypothesis than the major parties' candidate recruitment for 1996 Senate races. Democrats, not known as the party of the rich, have made a concerted effort to recruit wealthy entrepreneurs as candidates because such candidates are willing to finance a substantial part of their own campaigns. See Robert M. Wells & Jonathan D. Salant, *Wealthy Democrats are Tapped to Challenge GOP Senators*, 54 *CONG. Q. WKLY. REP.* 443, 443-44 (1996).

8. The examples of increased representation for racial minorities and the advancement of campaign finance reform are, again, merely illustrative of the salutary effects of Senate districts. However, because each of these issues is currently salient in the public's eye and, moreover, is uniquely relevant to the principal constitutional provision explored in this Article, the Seventeenth Amendment, they are highlighted. See *infra* notes 281-334 and accompanying text.

9. See C.H. HOEBEKE, *THE ROAD TO MASS DEMOCRACY: ORIGINAL INTENT AND THE SEVENTEENTH AMENDMENT* 2, 16-17, 88, 90, 176, 194 (1995).

10. See *id.* at 98-99, 102-06.

thoroughgoing manner: different state qualifications for voting; different districts for officials to represent . . . portions of states for members of the House, *whole states for senators* . . ."¹¹ So commonplace is the statewide assumption that Easterbrook offered no citations to support it. He has been joined by other notable commentators in this practice.¹²

The Supreme Court has been no less casual in its statements about the electoral basis of the Senate. Again without citation, the Court has stated that "[m]embers of the Federal Senate are of course elected from a *State at large*, and represent the *entire State*."¹³ Moreover, the Court has in the recent past stated that the Senate's function is to represent states as such.¹⁴ The inference drawn is that if it is *the state* which is represented, elections for the Senate must be on a statewide basis.¹⁵ On first impression, the inference appears to draw textual support from Article V of the Constitution, which entrenches the equal representation of the states in the Senate.¹⁶ In the Supreme Court's words, "The significance attached to the States' equal representation in the Senate is underscored by [Article V's] prohibition of any constitutional amendment divesting a State of equal representation without the State's consent."¹⁷

The vestiges of the original Constitution's provision for the legislative appointment of Senators¹⁸ reinforce the Court's view and the

11. Frank H. Easterbrook, *The State of Madison's Vision of the State: A Public Choice Perspective*, 107 HARV. L. REV. 1328, 1332 (1994) (footnote omitted) (emphasis added).

12. See, e.g., Daniel A. Farber, *The Outmoded Debate Over Affirmative Action*, 82 CAL. L. REV. 893, 924-25 (1994) (observing that while the creation of minority districts has increased minority representation in the House of Representatives, the Senate is "beyond the reach of creative redistricting"); Bruce E. Fein, *A Constitutional Bicentennial Celebration: Original Intent and the Constitution*, 47 MD. L. REV. 196, 205 (1987) ("[E]ach state is entitled to two Senators, who are elected from *statewide constituencies* for six-year terms.") (emphasis added); Saul Levmore, *Bicameralism: When Are Two Decisions Better than One?*, INT'L REV. L. & ECON. 145, 154 (1992) (noting that election of Senators by district would prevent the same coalition of voters in a state from electing both Senators, but suggesting that this system is not possible because the Constitution does not "require" Senate districts).

13. *Roman v. Sincok*, 377 U.S. 695, 709 n.19 (1964) (emphasis added).

14. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 551 (1985).

15. See, e.g., Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 HARV. C.R.-C.L. L. REV. 173, 178 n.19 (1989) ("[S]enators are elected by states, precisely because states, as geographic entities, were given a role in the federal government as part of the constitutional compromise.").

16. See U.S. CONST. art. V ("[N]o State . . . shall be deprived of its equal Suffrage in the Senate.").

17. *Garcia*, 469 U.S. at 551.

18. See U.S. CONST. art. I, § 3, cl. 1, *amended by* U.S. CONST. amend. XVII, cl. 1.

statewide assumption. Senators were appointed by state legislatures under Article I, Section 4, Clause 1 as a bulwark against democratic excesses by the people and, at least in the view of some Framers, in order to represent the states in their sovereign capacities.¹⁹ House members, on the other hand, were directly elected by the people in order to represent popular interests.²⁰ By continuing to impute these differences in mission to the House and Senate,²¹ the statewide assumption has been elevated to *a priori* status.

If the statewide assumption ever truly had a constitutional basis, that basis has long since dissipated after the ratification of the Seventeenth Amendment in 1913. The Amendment provides, in relevant part: "The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years . . ."²² The Amendment is modeled on Article I, Section 2, Clause 1 of the Constitution, under which House members are elected by districts: "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . ." After passage of the Seventeenth Amendment, the "Federal Government [is] directly responsible to the people, . . . and chosen directly, not by States, but by the people."²³ Thus, whatever the initial concerns that prompted the Framers to insulate Senators from popular elections, Senators now share the same constituency as House members—the people—and thus should be able to be elected in the same manner.

This Article's purpose is to demonstrate that Senate districts are permitted, but not compelled under the Constitution, especially after ratification of the Seventeenth Amendment providing for the direct election of Senators.²⁴ Although other modes of analysis are feasible, this Article presents the textual and historical case for the constitution-

19. See *infra* notes 95-151 and accompanying text.

20. See U.S. CONST. art. I, § 2, cl. 1; see also *infra* notes 107-11 and accompanying text (discussing Framers' decisions regarding election of House members).

21. See *Garcia*, 469 U.S. at 551 ("[The States] were given . . . direct influence in the Senate, where each State received equal representation and each Senator was to be selected by the legislature of his State.") (citing, *inter alia*, JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 176 (1980) ("[T]he Senate . . . could be depended upon to protect States' rights . . .")).

22. U.S. CONST. amend. XVII.

23. U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842, 1863 (1995).

24. Clause 1 of the Seventeenth Amendment provides in full that:

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

U.S. CONST. amend. XVII, cl. 1.

ality of Senate districts.²⁵ The Article draws on the "translation" model of fidelity, examining not merely the original understanding of the relevant text at the time of enactment, but also the changed circumstances to which the original understanding must be applied. The Article then reinterprets the text in light of the changed factual setting, seeking a modern analogue to the original understanding.²⁶

Part I of this Article is an evaluation of the relevant text of the Constitution. Part II examines the pre-Seventeenth Amendment Senate. Part III examines the legislative history of the Seventeenth Amendment. It concludes with a discussion of the implications of the Amendment's ratification. Here, the Article translates original intent by identifying three contemporary circumstances to which the broad purposes of the Seventeenth Amendment can be applied to justify Senate districts: the political participation of minorities, the excessive influence of money in political campaigns and the emergence of uniformity in the representational capacities and institutional characters of the House and Senate. Anticipating equal protection concerns with any Senate district drawn with the first circumstance in mind, this discussion demonstrates that such districts can be drawn to comport with Fourteenth Amendment requirements.

I. THE TEXTUAL ARGUMENTS FOR FEDERAL SENATE DISTRICTS

The most compelling arguments in support of federal Senate districts are based on the text of the Constitution. Viewing the Constitution holistically, four textual arguments emerge. The first is based on the Elections Clause of Article I, Section 4, which grants states the authority to determine the time, place and manner of Senate and House elections, subject to the federal government's prerogative to override state regulation.²⁷ Since this provision permits states or the federal government to create congressional districts, it should likewise permit them to draw federal Senate districts.

The second textual basis for federal Senate districts is the Qualifications Clause of the Seventeenth Amendment, which establishes the same qualifications for voting in Senate elections as those for partici-

25. One could, alternatively, render a present-oriented interpretation of the relevant text. Such an analysis would not seek to uncover the original intent of the drafters, but would instead endeavor to construe the Constitution in light of contemporary needs and values. See Steven D. Smith, *Law Without Mind*, 88 MICH. L. REV. 104, 107 (1989).

26. See Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1263 (1993); William M. Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 857 (1995).

27. See U.S. CONST. art. I, § 4, cl. 1.

pating in elections for the most numerous branch of a state legislature. Since this provision allows states to impose district residency requirements on voters in congressional races and in state legislative races, a state should similarly be free to adopt district residency requirements as a prerequisite to voting in Senate elections.

Third, the Tenth Amendment's reservation of undelegated power to the states and the people may permit the creation of federal Senate districts. Although in its most recent pronouncement on the Tenth Amendment in *U.S. Term Limits, Inc. v. Thornton*²⁸ the Supreme Court was sharply divided over the Amendment's substantive contours, federal Senate districts comport with the divergent interpretations offered in *Thornton*. Finally, there are potential negative inferences that may be drawn from the Constitution's text, namely Article V's guarantee of equal representation in the Senate and the Constitution's bicameral structure. However, as will be shown, Article V by its own terms does not control the question of Senate districts, and districting would not defeat the Founders' purposes in creating a bicameral national legislature.

A. *The Elections Clause of Article I*

Under the original Constitution, the legislature of each state appointed two United States Senators.²⁹ The Constitution gave broad discretion to the state legislatures to determine the manner in which they elected federal Senators:

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators.³⁰

Thus, subject only to Congress's supervisory authority, the Elections Clause of Article I left to the states decisions regarding the procedures for electing Senators.³¹

As a "manner" of electing Senators, legislatures could have, either

28. 115 S. Ct. 1842 (1995).

29. See U.S. CONST. art. I, § 3, cl. 1 ("The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.").

30. U.S. CONST. art. I, § 4, cl. 1.

31. For instance, the Elections Clause left to the states' discretion the coordination of votes between the upper and lower houses of state legislatures. See JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 256 (Carolina Academic Press 1987) (1833).

formally or informally, adopted a system that required that one Senator come from the northern portion of the state, while the other hail from the southern.³² Nothing in the plain language of the Elections Clause prohibits such districting; to the contrary, the very breadth of the term "manner" implicitly countenances this and many other practices, as long as such procedures do not run afoul of the Constitution.³³

Contemporaneous interpretations of the Elections Clause by the leading commentators of the period support the view that "manner" means all procedures that are not otherwise prohibited by the Constitution. Justice Joseph Story wrote that "[i]t was obviously impracticable to frame, and insert in the constitution an election law, which would be applicable to all possible changes in the situation of the country and convenient for all the states."³⁴ Accordingly, "[t]he regulation of elections is submitted, in the first instance, to the local governments, which, in ordinary cases, and when no improper views prevail, may both conveniently and satisfactorily be by them exercised."³⁵

In *McPherson v. Blacker*,³⁶ the Supreme Court compared the Elections Clause of Article I to the provision in Article II, Section 1, Clause 3 for the selection of members to the state electoral college for purposes of electing the President.³⁷ Article II provides in relevant part: "Each state shall appoint, *in such manner as the legislature thereof may direct*, a number of electors, equal to the whole number of senators and representatives to which the state may be entitled . . ."³⁸ In upholding a Michigan law mandating the selection of presidential electors by districts, the Court noted that districting for the House of Representatives had been permitted under the Elections Clause of Article I and found this a convincing parallel. The Court concluded that

[t]he constitution does not provide that the appointment of

32. See *infra* notes 196-97 and accompanying text.

33. See STORY, *supra* note 31 at 292; see also *Roudebush v. Hartke*, 405 U.S. 15, 24 (1972) ("Unless Congress acts, Art. I, § 4, empowers the states to regulate the conduct of senatorial elections."); *Oregon v. Mitchell*, 400 U.S. 112, 122 (1970) ("It cannot be doubted that these comprehensive words [contained in the Elections Clause] embrace authority to provide a complete code for congressional elections . . ."); *Smiley v. Holm*, 285 U.S. 355, 367 (1932) (noting the broad congressional authority conferred by Article I, § 4, cl. 2); *Wilson v. United States*, 878 F. Supp. 1324, 1327 (N.D. Cal. 1995) (upholding the recent motor-voter registration law under the "broad power" granted Congress by Article I, § 4).

34. STORY, *supra* note 31, at 292.

35. *Id.*

36. 146 U.S. 1 (1892).

37. See *id.* at 26.

38. U.S. CONST. art. II, § 1, cl. 3 (emphasis added).

electors shall be by popular vote, nor that the majority of those who exercise the elective franchise can alone choose the electors. It recognizes that the people act through their representatives in the legislature, and leaves it to the legislature exclusively to define the method of effecting the object.³⁹

At the very least, *McPherson* confirms that three of four federal elective officers—House members, the President and the Vice-President—may be elected directly or indirectly under a districting scheme. Fairly read, *McPherson* also supports a broad reading of the Constitution's delegation to the states of the authority to prescribe methods for conducting all federal elections. As a textual matter, the Elections Clause of Article I appears to have always permitted the election of Senators by districts.

The passage of the Seventeenth Amendment in 1913 fortifies the argument that such districts are permissible today. The Seventeenth Amendment provides that:

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years, and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.⁴⁰

The language of the Seventeenth Amendment closely resembles Article I, Section 2, Clause 1 of the Constitution:

The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.⁴¹

Indeed, the Supreme Court has recognized these directives as "parallel provision[s]."⁴² Most recently, the Court has recognized the

39. *McPherson*, 146 U.S. at 27.

40. U.S. CONST. amend. XVII, cl. 1.

41. U.S. CONST. art. I, § 2, cl. 1.

42. *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 227 (1986). In *Tashjian*, the Court analyzed the Qualifications Clauses of Article I and the Seventeenth Amendment to determine whether there could be any variation between the qualifications for voting in congressional elections and elections for the most numerous house of a state legislature. *See id.* at 225-26. Although the Court discussed Article I, Section 2, Clause 1 and the Seventeenth Amendment in this context, its reference to their parallelism was not limited to these provisions' Qualifications Clauses, but rather referred to the central purpose of both provisions—that each congressional body is to be elected by the people. *See id.* at 227.

Seventeenth Amendment as an extension of the ideal embodied in Article I, Section 2, Clause 1—that the “Federal Government [is] directly responsible to the people, . . . and chosen directly, not by States, but by the people.”⁴³

The symmetry of structure and purpose between the Seventeenth Amendment and Article I, Section 2, Clause 1, warrants an analogous interpretation of each.⁴⁴ Given this parallelism, the text of the Seven-

43. *U.S. Term Limits, Inc. v. Thornton*, 115 S. Ct. 1842, 1863 (1995). No decision of the Supreme Court has differentiated the language of Article I, Section 2 from that of the Seventeenth Amendment.

Some cases mention Article I, Section 2, Clause 1 and the Seventeenth Amendment without commenting on differences or similarities. See, e.g., *MacDougall v. Green*, 335 U.S. 281, 288 (1948), *overruled by Moore v. Ogilvie*, 394 U.S. 814, 819 (1969); *Smith v. Allwright*, 321 U.S. 649, 651, 657 (1944); *Smiley v. Holm*, 285 U.S. 355, 365, 374 (1932); *Newberry v. United States*, 256 U.S. 232, 250-57, 260-64, 269 (1921).

The bulk of the cases, however, emphasize the parallel nature of Article I, Section 2 and the Seventeenth Amendment. These cases note that under both provisions, Representatives and Senators alike are to be elected by the people. See, e.g., *Term Limits*, 115 S. Ct. at 1863; *Tashjian*, 479 U.S. at 227; *Lubin v. Panish*, 415 U.S. 709, 722 n.1 (1974) (Douglas, J., concurring); *Oregon v. Mitchell*, 400 U.S. 112, 148-49 (1970); *Lassiter v. Northampton Election Bd.*, 360 U.S. 45, 51 (1959); *United Pub. Workers v. Mitchell*, 330 U.S. 75, 111 (1947); *United States v. Classic*, 313 U.S. 299, 318 (1941). Justice Douglas has suggested that both provisions should be construed to apply to primaries. See *Stassen for President Citizens Comm. v. Jordan*, 377 U.S. 914, 927 (1964) (Douglas, J., dissenting) (denial of certiorari); *South v. Peters*, 339 U.S. 276, 279 (1950) (per curiam) (Douglas, J., dissenting).

Another similarity is that both Article I, Section 2 and the Seventeenth Amendment reserve to the states the right to set voter qualifications. See *Baker v. Carr*, 369 U.S. 186, 243-44 (1962). Under both provisions, the states' right to set voter qualifications is limited by the requirement that the qualifications for voting in federal legislative races be the same as the qualifications for voting for the most numerous branch of the state legislature. See *Hawke v. Smith*, 253 U.S. 221, 227 (1920).

44. See *Phillips v. Rockefeller*, 435 F.2d 976, 979-81 (2d Cir. 1971). In *Phillips*, the Second Circuit was presented with the question of whether election by the people under the Seventeenth Amendment meant election by a majority of the electorate. See *id.* at 976. Analogizing to Article I, Section 2, the court concluded that “the deliberate choice of the drafters of the Seventeenth Amendment to use the words of the section providing for elections to the House . . . demonstrates that they intended the same result—that is, that elections to the Senate need not be by a majority of the votes cast.” *Id.* at 980; see also *Tashjian*, 479 U.S. at 227 (“The fundamental purpose underlying Article I, § 2, cl. 1, . . . like the parallel provision of the Seventeenth Amendment, applies to the entire process by which federal legislators are chosen.”); cf. *Leser v. Garnett*, 258 U.S. 130, 136 (1922) (noting that the Fifteenth Amendment, prohibiting deprivation of franchise on grounds of race “is in character and phraseology” similar to the Nineteenth Amendment, prohibiting deprivation of franchise based on gender and declaring that “[o]ne cannot be valid and the other invalid”).

Although “[t]he use in the Federal Constitution of the same term in different relations does not always imply the performance of the same function,” *Smiley*, 285 U.S. at 365, it is presumed that identical terms used in different provisions of the Constitution are intended to have the same meaning. See *Atlantic Cleaners & Dyers v. United States*, 286 U.S. 427, 433-34 (1932). If the drafters of the Seventeenth Amendment intended the term

teenth Amendment is properly construed in light of how the Elections Clause has been applied to House elections. That districts are a permissible means of electing United States Representatives is beyond serious dispute.

Although the Elections Clause makes no reference to districts, James Madison and other Framers assumed that states would adopt a districting system.⁴⁵ Speaking at the Constitutional Convention in 1787, Madison acknowledged that the term "Times, Places and Manner" in Article I's Elections Clause was one of "great latitude" but went on to illustrate the kinds of measures the clause was intended to comprehend:

Whether the electors should vote by ballot or viva voce, should assemble at this place or that place; should be divided into districts or all meet at one place; should all vote for all the representatives; or all in a district vote for a number allotted to the district; these and many other points would depend on the Legislatures.⁴⁶

By 1842, all but seven states elected Representatives by district.⁴⁷ Congress eventually imposed a districting system on all states pursuant to the Elections Clause.⁴⁸ Districting is a constitutional, well-institutionalized application of the Elections Clause to House elections. Whatever may have been the arguments against its application to Senate elections when Senators were legislatively appointed, such

"the people" to mean something other than what it meant in 1787, it would have made little sense to model the Amendment so closely on Article I, Section 2. Since all the people of a state need not vote on all members of Congress representing the citizens of that state, all the people of a state need not be permitted to vote for both Senators.

45. See *Wesberry v. Sanders*, 376 U.S. 1, 15 (1964).

46. 2 RECORDS OF THE CONVENTION, *supra* note 2, at 240-41. The debate on the Elections Clause primarily concerned the national government's authority to override state election regulations. Proponents of federal authority urged that ultimate federal control was necessary for the national government's self-preservation. "[E]very government," wrote Alexander Hamilton, "ought to contain in itself the means of its own preservation." THE FEDERALIST NO. 59, at 398 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (emphasis omitted). Thus, federal supremacy was necessary to protect against the possibility of states refusing to elect representatives to the national legislature. See *id.* at 399; 3 RECORDS OF THE CONVENTION, *supra* note 2, at 345. Six states which ratified the Constitution adopted a resolution disapproving of the proviso in the Elections Clause giving Congress override authority, but this section was retained. See *Mitchell*, 400 U.S. at 119 n.2.

47. See *Wesberry*, 376 U.S. at 9 n.11. The seven states which did not adopt a districting system elected Representatives on an at-large, statewide basis, which had been the common practice in the first fifty years of the nation's history. See *id.* at 8. That most states elected House members in the same manner that Senators are currently elected—on a statewide basis—suggests that the Constitution does not restrict either house of Congress to a statewide or a district-based electoral system.

48. See 2 U.S.C. § 2c (1994); *Colegrove v. Green*, 328 U.S. 549, 555 (1946).

objections lack force now that Representatives and Senators alike are "directly responsible to the people, . . . and chosen directly, not by States, but by the people."⁴⁹

B. The Qualifications Clause of the Seventeenth Amendment

The Qualifications Clause of the Seventeenth Amendment provides that "[t]he electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures."⁵⁰ The Qualifications Clause of Article I, Section 2 regarding House elections is nearly identical: "[T]he Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."⁵¹ Subject only to the foregoing restrictions and the Constitution's anti-discrimination prohibitions, states determine the qualifications for participation in congressional elections.⁵²

States may impose district residency requirements in state legislative elections.⁵³ These same states therefore may constitutionally impose district residency requirements on voters in congressional elections.⁵⁴ For example, a voter residing in Congressional District 1 may be restricted to voting for candidates on the ballot in that district.⁵⁵ Similarly, a state's "broad powers to determine the conditions under which the right of suffrage may be exercised"⁵⁶ would allow it to restrict voter participation in United States Senate elections to geographic subdivisions.

Although federal Senate districts would be larger in both size and population than state legislative districts (because there could be only two Senate districts per state), these districts would not violate the condition that federal and state voter qualifications be the same. The

49. *U.S. Term Limits, Inc. v. Thornton*, 115 S. Ct. 1842, 1863 (1995).

50. U.S. CONST. amend. XVII, cl 1.

51. U.S. CONST. art. I, § 2, cl. 1.

52. *See Gray v. Sanders*, 372 U.S. 368, 379 (1963).

53. *See Dunn v. Blumstein*, 405 U.S. 330, 343 (1972) ("[T]he States have the power to require that voters be bona fide residents of the relevant political subdivision."); *see also Kramer v. Union Sch. Dist.*, 395 U.S. 621, 625 (1969) (noting that states have the power to impose reasonable residency requirements, including district residency requirements).

54. *See Dunn*, 405 U.S. at 343.

55. *See, e.g.,* COLO. CONST. art. VII, § 1(a) (prescribing durational requirements for the precinct in which the citizen offers to vote); MISS. CONST. art. XII, § 241 (same); GA. CODE ANN. § 21-2-451(c) (1994) ("[N]o person shall vote at any primary or election at any polling place outside the precinct in which such person resides . . ."); *Christenson v. Felton*, 295 S.W.2d 361, 362 (Ark. 1956) (recognizing that as a general rule, "a voter must vote in the ward or precinct in which he resides") (citations omitted).

56. *Carrington v. Rash*, 380 U.S. 89, 91 (1965) (citations omitted).

Seventeenth Amendment makes the qualifications for state and federal legislative elections similar but not identical. The qualifications need only be substantially the same.⁵⁷ Indeed, a requirement of identicalness would invalidate all district residency requirements for House elections, since House districts, too, do not mirror state legislative districts in their contours and sizes. Thus, as long as a state chooses to impose district residency requirements for elections to the largest chamber of the state legislature, it should also be permitted to impose comparable qualifications in federal Senate elections.

C. *The Tenth Amendment*

The Tenth Amendment reserves to the states a residuum of law-making authority and provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."⁵⁸

In *U.S. Term Limits, Inc. v. Thornton*,⁵⁹ the Supreme Court held that the Tenth Amendment does not accord states the power to impose term limits on federal legislators.⁶⁰ Justice Stevens, writing for a majority of five, based the Court's holding on two alternate grounds. First, the Court concluded that the Amendment can only reserve to a state a power which it possessed before the ratification of the Constitution.⁶¹ Since the power to establish the credentials for federal legislators could not possibly have pre-dated the establishment of the federal government itself, there was no power which the states could reserve.⁶² Second, and more relevant to the question of Senate districts, the Court reasoned that even if the states originally possessed power to establish qualifications for federal legislators, that power was divested by the qualifications expressly set forth in Article I, Section 2, Clause 2 of the Constitution.⁶³

57. See *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 229 (1986).

58. U.S. CONST. amend. X.

59. 115 S. Ct. 1842 (1995).

60. See *id.* at 1856.

61. See *id.* at 1854.

62. See *id.* at 1854-55.

63. See *id.* at 1856. The Qualifications Clause of Article I, Section 2, provides:

No Person shall be a Representative who shall not have attained to the Age of twenty-five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

U.S. CONST. art. I, § 2, cl. 2. The qualifications for Senators are set forth in Article I, Section 3:

No Person shall be a Senator who shall not have attained the Age of thirty

In a dissent joined by three other Justices, Justice Thomas disputed the Court's notion of reserved powers with a simple default rule: "[W]here the Constitution is silent about the exercise of a particular power—that is, where the Constitution does not speak either expressly or by necessary implication—the Federal Government lacks that power and the States enjoy it."⁶⁴ Because Article I sets forth only minimum qualifications which the states may not abolish, he reasoned, the Tenth Amendment reserves to the states the power to impose term limits.⁶⁵

However irreconcilable these positions may be in the context of term limitations, they do not lead to divergent outcomes when applied to federal Senate districts. Under the majority's view, since the power to determine the "manner" of Senate elections is expressly committed to the states in the first instance,⁶⁶ Senate districts would be permissible if states adopted them and the federal government did not object. The case for such districts is even plainer under the dissenters' view. Since Article I's time, place and manner provisions "do[] not speak either expressly or by necessary implication" to the question of Senate districts, the Tenth Amendment reserves this power to the states.⁶⁷

D. Negative Inferences from the Text

A holistic interpretation of text must, of course, reconcile the Elections Clause, the Seventeenth Amendment, and the Tenth Amendment with provisions of the Constitution that might appear to negate the permissibility of federal Senate districts. Article V's guarantee of equal suffrage to the states in the Senate is one such provision. Article V ensures that "no State, without its Consent, shall be deprived of its equal Suffrage in the Senate."⁶⁸ By contrast, Article I, Section 2, Clause 3 apportions Representatives among the states according to population: "Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers"⁶⁹ Because Article V speaks of the "State" being deprived of representation in the Senate, the guar-

Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

U.S. CONST. art. I, § 3, cl. 3.

64. *Term Limits*, 115 S. Ct. at 1876 (Thomas, J., dissenting).

65. *See id.* at 1885 (Thomas, J., dissenting).

66. *See* U.S. CONST. art. I, § 4, cl. 1.

67. *See Term Limits*, 115 S. Ct. at 1876 (Thomas, J., dissenting).

68. U.S. CONST. art. V.

69. U.S. CONST. art. I, § 2, cl. 3, *amended by* U.S. CONST. amend. XIV, § 2 *and* U.S. CONST. amend. XVI.

antee of equal suffrage in the Senate might seem to mean that the Framers intended Senators to have a statewide constituency. Article I, Section 2, Clause 3, in contrast, defines representation in the House in terms of "numbers" of inhabitants. The implication is that states, as such, are represented in the Senate while the people are represented in the House.

Despite this inferential argument, Article V's guarantee of equal suffrage does not foreclose the creation of federal Senate districts. Article V's equal suffrage guarantee speaks only to the number of Senators to come from each state; it does not address how each state may elect its Senators. The manner of election is expressly addressed in Article I, Section 4, Clause 1.⁷⁰

Assuming for argument's sake that Article V's equal suffrage guarantee means that states, rather than individual citizens, are represented in the Senate, this assumption still would not dictate statewide elections under the Elections Clause. Each Senator from each state votes individually.⁷¹ The state is not represented as a delegation that must cast its vote as a bloc, which was the arrangement under the Articles of Confederation.⁷² Because a state, by definition, may speak with more than one voice in the United States Senate, it should be free to apportion its Senate seats to reflect this fact.⁷³

If the assumption that the Senate represents states as states compels statewide elections for Senators, a corollary mandate would seem to follow from the assumption that House members represent the peo-

70. Generally, where the subject matter is explicitly committed to a specific provision of the Constitution, that provision governs all questions within its purview. *See* *Albright v. Oliver*, 510 U.S. 266, 273 (1994) ("Where a particular amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of 'substantive due process' must be the guide for analyzing these claims.'" (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989))); *cf.* *Fourco Glass Co. v. Transmirra Prod. Corp.*, 353 U.S. 222, 228 (1957) ("However inclusive may be the general language of a statute, 'it will not be held to apply to a matter specifically dealt with in another part of the same enactment.'" (quoting *Ginsberg & Sons v. Popkin*, 285 U.S. 204, 208 (1932))).

71. *See* U.S. CONST. amend. XVII; U.S. CONST. art. I, § 3, cl. 1, *amended by* U.S. CONST. amend. XVII, cl. 1.

72. *See* U.S. ARTICLES OF CONFEDERATION art. V ("[E]ach State shall have one vote." (emphasis added)).

73. *See infra* note 198 and accompanying text (arguing no inconsistency between districting and the representation of sovereign interests). Moreover, neither Article V nor any other provision gives a state the ability to recall a Senator or to issue a binding instruction on how to vote. The absence of such restrictions belie the suggestion that the Framers intended that a Senator represent a state's sovereign interests rather than the popular interests represented by House members. *See infra* notes 147-49 and accompanying text.

ple: House members must be elected by districts. Yet for the first fifty years of the Republic's history, House members were elected on a statewide, at-large basis.⁷⁴ Moreover, the Elections Clause commits to the states' and federal government's discretion the manner in which House elections will be held.⁷⁵

One might observe that it is possible to ensure the representation of the people either through statewide, at-large elections or through elections by district; hence, the lack of a House corollary to Article V's arguable command that Senators be elected statewide. But this incongruity seems implausible in light of the Framers' pattern of expressly noting the distinctions between the House and the Senate. For instance, the original Constitution explicitly distinguished the electors for the Senate (state legislatures) from the electors for the House (the people). In addition, the Senate is expressly given powers that the House is not, and vice-versa. The Senate possesses the sole power to try impeachments.⁷⁶ Treaties,⁷⁷ judicial appointments,⁷⁸ ambassadors⁷⁹ and heads of federal departments and agencies⁸⁰ are likewise subject to the approval of the Senate rather than the House. On the other hand, all revenue bills must originate in the House.⁸¹ Where the Framers chose not to specify a distinction, they left the matter to the states, as in the case of the Elections Clause, or to the Senate and House themselves, as with the authority of each body to determine its own rules and judge the qualifications of its own members.⁸² Against this pattern of explicit distinctions between the House and Senate, it is highly unlikely that the Framers left for surmise the important requirement that Senators be elected on a statewide basis.

Notwithstanding Article V, one may assert the broader argument that it makes no sense for the Framers to have established a bicameral national legislature if both houses would be elected in the same fashion. This argument, however, misapprehends Senate districts. Although similar to House districts, United States Senate districts would not be composed of the same constituencies as House districts. They would in most cases be larger and composed of broader constitu-

74. See *Wesberry v. Sanders*, 376 U.S. 1, 8 (1964).

75. See U.S. CONST. art. I, § 4, cl. 1.

76. See U.S. CONST. art. I, § 3, cl. 6.

77. See U.S. CONST. art. II, § 2, cl. 2.

78. See *id.*

79. See *id.*

80. See *id.*

81. See U.S. CONST. art. I, § 7, cl. 1.

82. See U.S. CONST. art. I, § 5, cl. 1, 2.

encies.⁸³

More importantly, the argument misapprehends the effect of the Seventeenth Amendment on the Constitution's prescribed bicameralism. The institutional safeguards of bicameralism need not derive from a difference in the manner in which the two bodies are elected.⁸⁴ To the extent that the bicameralism of the national legislature originally rested on such a distinction, the Seventeenth Amendment removes it. Yet a host of other dissimilarities, such as the longer term for Senators, remain to ensure the "differences in the composition and complexion of the two bodies" that bicameralism requires.⁸⁵

83. Only those states currently represented by less than three House members would have Senate districts of equal or smaller constituencies than House members. In such instances, Senate districts may not be appropriate. Nothing in the Elections Clause, however, requires that each state's Senate elections be held in the same manner. See Joel F. Paschal, *The House of Representatives: "Grand Depository of the Democratic Principle"?* 17 LAW & CONTEMP. PROBS. 276, 285-86 (1952) (noting that Congress may exercise its power under the Elections Clause with respect to a single state).

84. See Max Farrand, *Popular Election of Senators*, 2 YALE REV. (n.s.) 234, 241 (1913) [hereinafter Farrand, *Popular Election*]. Farrand writes:

It was the evident intention of the Federal Convention to establish in the Senate a body of a distinctly different character from that of the House of Representatives. The manner of election was only one method of differentiating the two. Differences in number, in term of office, in age, and, at one stage of the proceedings, in other qualifications as well, were all important distinctions. In the judgment of the writer there is nothing inherently contrary to the purposes of the founders of our government in permitting the Senators of the United States to be chosen by the people instead of by the legislatures of the individual States. It would seem to be a question of policy and expediency rather than of principle.

Id.; accord *Reynolds v. Sims*, 377 U.S. 533, 576-77 (1964). In *Reynolds*, the State argued that applying the one man, one vote criterion to both the state house of representatives and the senate would defeat the essential purposes of bicameralism by treating the two bodies the same. See *id.* at 576. The Court clearly distinguished the concept of bicameralism from the procedures employed to elect a legislative body:

A prime reason for bicameralism, modernly considered, is to insure mature and deliberate consideration of, and to prevent precipitate action on, proposed legislative measures. Simply because the controlling criterion for apportioning representation is required to be the same in both houses does not mean that there will be no differences in the composition and complexion of the two bodies.

Id.

85. *Reynolds*, 377 U.S. at 576. If requiring the same apportionment criteria for an upper house and a lower house in *Reynolds* does not eviscerate the institutional safeguards of bicameralism, then permitting Senators to be elected by districts would leave bicameralism intact as well. The bicameralism prescribed by the Constitution would be undisturbed by Senate districts because the specific and distinct powers given to each body would remain unchanged, and each body would retain the right to determine its own procedural rules. These remaining distinctions, in conjunction with the fact that Senate districts would in most cases be larger than House districts, ensure that there will be the "differences in the composition and complexion of the two bodies" that bicameralism contemplates. *Id.*

In sum, neither Article V nor the Constitution's provision for a bicameral national legislature contradicts the support for federal Senate districts found in the Elections Clause of Article I, Section 4; the Qualifications Clause of the Seventeenth Amendment; and the Tenth Amendment. All of these provisions can be harmonized in a manner that makes sense of the entirety of the Constitution and permits Senate districts.

II. THE PRE-SEVENTEENTH AMENDMENT SENATE

In order to comprehend the changes wrought by the Seventeenth Amendment and interpret how those changes support the creation of federal Senate districts, one must first understand why the original Constitution prescribed the legislative appointment of Senators. The *raison d'être* of the Senate was anything but clear to the Framers. After setting forth the concerns that weighed on the Framers as they gathered in Philadelphia in 1787, Part II presents the cacophonous rationales that were offered for creating the upper house of the national legislature. The most widely known theory of the Senate—the notion that it was to represent states in their political capacity—was not a universal belief at the time of the Constitutional Convention, and in fact, was flatly contradicted during the ratification struggle. Although some of the Founders did indeed intend that the Senate represent states' sovereign interests, at the time of the Constitution's ratification, the Senate was understood mainly as a popular representative body whose function was to act as a check on the House.

Part II concludes by describing two post-ratification practices which support the permissibility of Senate districts under the original Constitution. First, some state legislatures did in fact elect Senators by district. Thus, whether or not the Senate represented states' sovereign interests, Senate districts were viewed as permissible. Second, many states effectively disregarded the Constitution's requirement that their legislatures appoint Senators. Instead, popular primaries and other mechanisms were used to ascertain the public's choice for the office, and state legislatures often deferred to these polls. For all the near-folkloric distinctions between the representative capacities of the Senate and the House, these practices suggest that the two bodies shared a popular democratic genesis.

A. *Concerns of the Framers*

As a nascent republic newly freed from the shackles of an unrepresentative British government, post-Revolutionary America's understanding of democracy was rich and fast-evolving. A central

animating principle of the Revolution had been elegantly simple: government's legitimacy must be based on the consent of the governed.⁸⁶ This manifesto, however, was more easily conceptualized in revolt than implemented in practice. As the premise of the Revolution, democracy was understood as a bulwark against a tyrannical British King and Parliament.⁸⁷ Only after the Revolution, during the Critical Period of the 1780's, would the nation come to fully understand that tyranny could also be practiced by democratically elected assemblies.⁸⁸

There was every indication in the early 1780's that the revolutionaries had underestimated the indiscriminate nature of power: "The people, it seemed, were as capable of despotism as any prince; public liberty was no guarantee after all of private liberty."⁸⁹ The state legislatures created by the revolutionary state constitutions were microcosmic vehicles for the peoples' excesses. As the grist mills for democratic tyranny, these bodies confiscated private property, aided paper money schemes, and enacted debtor relief legislation and ex post facto laws that penalized commercial interests.⁹⁰ "The economic and social instability engendered by the Revolution was finding political expression in the state legislatures at the very time they were larger, more representative, and more powerful than ever before in American history."⁹¹

There was growing sentiment in the mid-1780's that unwieldy state legislatures posed a greater threat to America's republican experiment than the acknowledged inadequacies of the Articles of Confederation.⁹² Thus, by 1786, reform efforts had shifted from the states to the central government.⁹³ "The calling of the Philadelphia Convention in 1787," writes Gordon Wood, "was the climax of the process of rethinking that had begun with the reformation of the state constitutions in the late seventies and early eighties, a final step taken from the fullest conviction that there was not a better, perhaps no other, which could be adopted in this crisis of our public affairs."⁹⁴

86. See GORDON WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 441 (1969).

87. See *id.* at 409.

88. See *id.* at 409-10.

89. *Id.* at 410.

90. See *id.* at 404-06.

91. *Id.* at 405.

92. See *id.* at 466-67.

93. See *id.* at 466.

94. *Id.* at 467 (internal quotation omitted).

B. *The Uncertain Function of the Senate*

The Great Compromise is the watershed moment when the small states prevailed upon the Constitutional Convention to permit equal representation of the states in the Senate, as had been the method of apportionment in the Continental Congress.⁹⁵ Born of the small states' fear of proportional representation,⁹⁶ the Compromise has often been misunderstood as being a debate not only about how representation among the states would be apportioned in the Senate but also about how Senators were to be selected.⁹⁷ Yet the concerns that culminated in the Great Compromise were a far cry from those that led to the legislative appointment of Senators.⁹⁸ And if the Great Compromise saved the Convention from the brink of disintegration,⁹⁹ the issue of how Senators were to be elected was, by comparison, a relatively uncontroversial topic.¹⁰⁰ Far from being a conscious undertaking, then, the intersection of the Compromise with the method of electing Senators was a collision of two trains that the delegates to the Convention had initially intended to run on separate tracks.¹⁰¹

The Framers convened in Philadelphia on May 25, 1787.¹⁰² The question of how Senators would be selected was discussed principally on three days—May 31, June 7, and June 12—and was finally settled on June 25.¹⁰³ By contrast, the equal representation of the states in the Senate, the core of the Great Compromise, was not decided until July 16.¹⁰⁴ Yet the subtext for all the discussions concerning the Senate was

95. 1 GEORGE H. HAYNES, *THE SENATE OF THE UNITED STATES* 4-10 (1960) [hereinafter *SENATE OF THE UNITED STATES*].

96. See Jack Rakove, *The Great Compromise: Ideas, Interests, and the Politics of Constitution Making*, 44 WM. & MARY Q. 424, 434 (1987) ("[The small states'] professed fear was that the relative reduction of their representation would expose them to the rapacious impulses of a putative coalition of the large states.").

97. See MAX FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES* 112 (1913) [hereinafter *FRAMING OF THE CONSTITUTION*] ("[W]hatever opinions were expressed in debate, and whatever arguments were advanced for or against the election of the members of the upper house by the state legislatures . . . they should be interpreted with reference to the one question at issue, that of proportional representation.").

98. See 1 *SENATE OF THE UNITED STATES*, *supra* note 95, at 13.

99. See 1 *id.* at 6-9.

100. See 1 *id.* at 10.

101. See, e.g., Rakove, *supra* note 96, at 456 (discussing James Madison's failed attempt to disentangle the question of the legislative appointment of Senators from the issue of apportionment).

102. See 1 *RECORDS OF THE CONVENTION*, *supra* note 2, at 2.

103. See 1 *SENATE OF THE UNITED STATES*, *supra* note 95, at 10.

104. See *FRAMING OF THE CONSTITUTION*, *supra* note 97, at 104; WILLIAM M. MEIGS, *THE GROWTH OF THE CONSTITUTION IN THE FEDERAL CONVENTION OF 1787*, at 57

the issue of apportionment of representation.¹⁰⁵

In discussing the composition of the national legislature, it was understood by almost everyone that the legislature would be bicameral, and a resolution to this effect was adopted.¹⁰⁶ The overriding question with respect to the method of election was what role the people would assume in selecting members to the national legislature. A common mistrust of democracy engendered by populist excesses put in question whether the people were to be involved at all.

The Framers first discussed the manner in which House members should be selected.¹⁰⁷ There was sentiment that the House of Representatives should be appointed by state legislatures, for, as Roger Sherman of Connecticut argued, "[t]he people . . . should have as little to do as may be about the Government. They want information and are constantly liable to be misled."¹⁰⁸ But the proposal for popular election of House members prevailed, with most delegates appearing to side with James Madison's argument that too many "successive filtrations," limiting the direct participation of the people, could be taken to an extreme; "the people would be lost sight of altogether; and the necessary sympathy between them and their rulers and officers, too little felt."¹⁰⁹ Although he did not express it at the time, Madison also believed that the popular election of the House was necessary to secure the superiority of the national government above the states.¹¹⁰ In order to successfully subordinate the states, the national government would have to be an ostensibly representative government.¹¹¹

The Framers' decision to popularly elect House members foreshadowed their rejection of the popular election of Senators. Having ceded to the people the lower house, the Framers were ever cognizant that "the general object was to provide a cure for the evils under which the U.S. laboured . . . and that a good Senate seemed most likely to answer the purpose."¹¹² Hence, when James Wilson of Pennsylvania proposed that Senators be elected directly by the people, no state dele-

(1987); 2 RECORDS OF THE CONVENTION, *supra* note 2, at 15-16.

105. See FRAMING OF THE CONSTITUTION, *supra* note 97, at 111.

106. Most of the states had bicameral legislatures, and this was the British experience as well. See GEORGE H. HAYNES, THE ELECTION OF SENATORS 2 n.1 (Ralph C. Ringwalt ed., 1906) [hereinafter ELECTION OF SENATORS]. Hence, only Pennsylvania voted against bicameralism. See 1 RECORDS OF THE CONVENTION, *supra* note 2, at 47.

107. See 1 RECORDS OF THE CONVENTION, *supra* note 2, at 48.

108. 1 *id.*

109. 1 *id.* at 49-50.

110. See EDMUND S. MORGAN, INVENTING THE PEOPLE 271 (1988).

111. See *id.*

112. 1 RECORDS OF THE CONVENTION, *supra* note 2, at 51.

gation except his own favored the proposal.¹¹³ The conventioners were not persuaded by Wilson's view that "[i]f one branch of [the national legislature] . . . be chosen by the [state] Legislatures, and the other by the people, the two branches will rest on different foundations, and dissensions will naturally arise between them."¹¹⁴

Dissension between the House and the Senate was exactly what the Framers desired. The Senate would serve as a check in favor of the commercial and monied interests, whose lot had not fared well in the hands of state legislatures beholden to the democratic impulses of the people.¹¹⁵ The protection of these "minority" interests and the question of the mode of election were inextricably linked. James Madison reminded the delegates that "[d]ebtors have defrauded their creditors. The landed interest has borne hard on the mercantile interest. The Holders of one species of property have thrown disproportion of taxes on the holders of another species."¹¹⁶ It was incumbent on the delegates, Madison concluded, "to frame a republican system on such a scale & in such a form as will controul all the evils which have been experienced."¹¹⁷ The Senate, according to Madison, could fulfill that function.¹¹⁸

In the eyes of some delegates, the Senate's pedigree was to differ from the House's and this distinction would affect its operation. It would function "with more coolness, with more system, and with more wisdom, than the popular branch,"¹¹⁹ for its members would be drawn from an elite cadre of men.¹²⁰ Since state legislatures were composed of "select bodies of men," they would appoint Senators reflecting the same qualities.¹²¹ John Dickinson of Delaware believed that the Senate should emulate the House of Lords.¹²² Alexander Hamilton of New York proposed a "senate for life."¹²³

Finally, and most important to an understanding of the relation-

113. See 1 *id.* at 151-55. Wilson's plan called for the popular election of Senators through large districts that would have apparently clustered states into regions for this purpose. See 1 *id.*

114. 1 *id.* at 151.

115. See 1 *id.* at 152, 154.

116. 1 *id.* at 135-36.

117. 1 *id.* at 136.

118. See 1 *id.* at 422-23.

119. WOOD, *supra* note 86, at 553.

120. See *id.*

121. THE FEDERALIST NO. 27, at 172 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

122. See 1 RECORDS OF THE CONVENTION, *supra* note 2, at 150.

123. WOOD, *supra* note 86, at 554.

ship between the Great Compromise and the legislative appointment of Senators, the Senate would secure for the states a defense against the national government.¹²⁴ Although the democratic excesses of the states had convinced virtually all of the Convention delegates that some steps must be taken to strengthen the Articles of Confederation, there were vastly different views over the extent of any modifications. Nationalists such as Madison came to the Convention of 1787 with the expectation of substantially subordinating the state governments.¹²⁵ The nationalists originally sought a largely consolidated central government in which the notion of state sovereignty had little role.¹²⁶ Federalism, the notion of shared sovereignty, evolved from the Convention only as a compromise.¹²⁷

Precisely how state sovereignty emerged as a rationale for the legislative appointment of Senators, and, more to the point, how the legislative appointment of Senators came to intersect with the crux of the Great Compromise, is a complex history. The notion of two methods of representation—the House representing the people and the Senate the states—was alluded to on the very first day that the delegates took up the subject of representation, well in advance of the Great Compromise.¹²⁸ During the discussions concerning the method of electing Senators, delegates from both large and small states invoked state sovereignty as a justification for the legislative appointment of Senators. John Dickinson of Delaware supported the legislative appointment of Senators because

the sense of the States would be better collected through their Governments The preservation of the States in a certain degree of agency is indispensable. It will produce that collision between the different authorities which should be wished for in order to check each other. To attempt to abolish the States altogether, would degrade the Councils of our Country, would be impracticable, would be ruinous.¹²⁹

On this score, Dickinson's view was buttressed by Charles Pinckney of South Carolina, who conceded that "it will be right to shew the sovereignty of the State in one branch of the Legislature, and that should be in the Senate."¹³⁰

124. See 1 RECORDS OF THE CONVENTION, *supra* note 2, at 59, 155.

125. See WOOD, *supra* note 86, at 525.

126. See *id.*

127. See *id.* at 525-26.

128. See FRAMING OF THE CONSTITUTION, *supra* note 97, at 107.

129. 1 RECORDS OF THE CONVENTION, *supra* note 2, at 150-53.

130. 1 *id.* at 59.

Madison would later write:

It must be kept in view that the largest States particularly Pennsylvania & Virginia always considered the choice of the 2d Branch by the State Legislatures as opposed to a proportional Representation to which they were attached as a fundamental principle of just Government. The smaller States who had opposite views, were reinforced by the members from the large States most anxious to secure the importance of the State Government.¹³¹

Thus, at least by Madison's account, the large states had lost the battle over proportional representation in the Senate well before the Great Compromise; that question had been decided by the Convention's earlier decision giving state legislatures authority to appoint federal Senators.¹³²

But why did Madison believe that "an election by the State Legislatures involved a surrender of the principle insisted on by the large States and dreaded by the small ones, namely that of a proportional representation in the Senate?"¹³³ Although he cautioned the delegates of this consequence during the discussions of the method of appointing Senators, he did not offer any explanation.¹³⁴ Likewise, when Rufus King of Massachusetts issued this same admonition to the delegates, he did not explain why the legislative appointment of Senators necessarily subverted proportional representation, nor did his observation prompt inquiry.¹³⁵ On the face of it, there seems no logical or practical impediment to both legislatively electing Senators and apportioning representation among the several states. Yet the dilemma that Madison foresaw lay not in logic or practical concerns, but in the eighteenth century dichotomy of states' sovereign rights versus the rights of the people.¹³⁶ Federalists such as Madison and Wilson believed that complete proportional representation in the national legislature would

131. 1 *id.* at 408.

132. See Rakove, *supra* note 96, at 456. According to Jack Rakove:

[T]he vote [of June 7] revealed that legislative election of senators, for all its faults, was preferred by a decisive majority of the convention. From that point on, Madison found himself having to hope either that the damage could be limited without jeopardizing the cause of proportional representation or that an eventual victory on apportionment could be used to reverse the decision on election. But once the specter of sectional conflict legitimated the small states' appeal to security, that opportunity was lost.

Id.

133. FRAMING OF THE CONSTITUTION, *supra* note 97, at 111.

134. See 1 RECORDS OF THE CONVENTION, *supra* note 2, at 151.

135. See 1 *id.* at 51.

136. See *infra* notes 137-38, 141-51 and accompanying text.

obliterate any notion of state sovereignty in the Constitution.¹³⁷ However, once states' rights were recognized in the Constitution in any form, one state could not have greater rights than another by virtue of its population, for the very idea of state sovereignty existed independently of a state's relative size.¹³⁸

C. *Fictions Laid Bare*

However intelligibly one may chronicle the story of the Senate's creation during the Convention, the conception of that body was anything but coherent in the Framers' minds by the end of the Philadelphia meeting. For each rationale that underpinned the Senate and its legislative election, an opposing view laid bare a fiction.

Although many delegates looked to the legislative appointment of Senators to curtail the democratic excesses that had brought the Confederation to the brink of extinction, the assumption that this could be achieved by conferring appointment powers on state legislatures faced serious doubt. Wilson, the main proponent of the popular election of Senators, considered how it was possible that

the landed interest wd. be rendered less predominant in the Senate, by an election through the medium of the Legislatures than by the people themselves. If the Legislatures, as was now complained, sacrificed the commercial to the landed interest, what reason was there to expect such a choice from them as would defeat their own views[?]¹³⁹

Madison, whose notion of "successive filtrations" to restrain democracy was seemingly consonant with the idea of legislative appointment, also questioned the efficacy of this device:

The great evils complained of were that the State Legislatures run into schemes of paper money &c, whenever solicited by the people, & sometimes without even the sanction of the people. Their influence then, instead of checking a like propensity in the National Legislature, may be expected to promote it. Nothing can be more contradictory than to say that the Natl. Legislature with[out] a proper check will follow the example of the State legislatures, & in the same breath, that the State Legislatures are the only proper check.¹⁴⁰

Thus, the use of democratic state assemblies to check the very excesses

137. See WOOD, *supra* note 86, at 525-26.

138. See *infra* notes 141-51 and accompanying text.

139. 1 RECORDS OF THE CONVENTION, *supra* note 2, at 154.

140. 1 *id.*

that they had helped to create reeked of fiction.

But the delegates were most disunited when it came to the idea of the Senate representing states as such in the national government. To the nationalists, the notion of state sovereignty elevated form over substance. Wilson remarked, "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? . . . We talk of States, till we forget what they are composed of."¹⁴¹ Alexander Hamilton, too, thought the distinction between the people's power and the rights of the states was disingenuous. He inveighed, "[A]s States are a collection of individual men which ought we to respect most, the rights of the people composing them, or of the artificial beings resulting from the composition[?] Nothing could be more preposterous or absurd than to sacrifice the former to the latter."¹⁴² Madison and Gerry premised their arguments against state sovereignty on history, contending that the states had never possessed the essential characteristics of sovereignty; these rights instead had been vested in the Continental Congress.¹⁴³

Although the Great Compromise was a recognition of a residual aspect of state sovereignty that the nationalists had fought against,¹⁴⁴ that recognition itself was inconsistent with basic features of the Senate. For one thing, the Convention had decided that Senators should vote per capita rather than by state. This method of voting differed from the Continental Congress in which the delegates did not vote individually (or per capita) but rather as a state.¹⁴⁵ Voicing a concern shared by other delegates of small states, Luther Martin of Maryland objected that the decision to permit each Senator one vote undermined state sovereignty; this feature remained nevertheless.¹⁴⁶ Moreover, al-

141. 1 *id.* at 483.

142. 1 *id.* at 466.

143. See 1 *id.* at 467, 471.

144. See THE FEDERALIST NO. 39, at 255 (James Madison) (Jacob E. Cooke ed., 1961) ("The Senate . . . will derive its powers from the States, as political and co-equal societies . . ."); *id.* NO. 43, at 296 ("[T]he equality of suffrage in the Senate was probably meant as a palladium to the residuary sovereignty of the States, implied and secured by . . . one branch of the Legislature . . ."); *id.* NO. 62, at 417 ("[T]he equal vote allowed to each state, is at once a constitutional recognition of the portion of sovereignty remaining in the individual states, and an instrument for preserving that residuary sovereignty.").

145. See U.S. ARTICLES OF CONFEDERATION art. V ("[E]ach *State* shall have one vote."). Even at the Philadelphia Convention votes were cast as states rather than as individual delegates. See FRAMING OF THE CONSTITUTION, *supra* note 97, at 57.

146. See 2 RECORDS OF THE CONVENTION, *supra* note 2, at 94-95; Farrand, *Popular Election*, *supra* note 84, at 238-39 ("When the great compromise was adopted, many . . . thought that voting in the upper house would be by States; but having won their main

though state legislatures had the authority to appoint Senators to represent the states' corporate interests, there was no provision in the new Constitution for the recall of Senators should they fail to satisfy their electors. A right of recall had existed under the Articles of Confederation.¹⁴⁷

Nor was there any provision to enable the state legislatures to instruct Senators how to vote.¹⁴⁸ While state legislatures might attempt to instruct Senators, exacting compliance was another matter altogether. A state legislature could refuse to re-elect an errant Senator, but the Senator's lengthy term of office—six years—rendered this punishment ineffective.¹⁴⁹

Max Farrand, the editor of the modern chronicles of the Constitutional Convention, helped to explain the foregoing inconsistencies when he observed:

There was undoubtedly a feeling in the Convention that the Senate was representative of the States, as contrasted with the House as representative of the people. This was often expressed in the form that the lower house represented the people of the States in their individual capacity, while the Senate represented the States in their political capacity. *But these should not be regarded as expressions of purposes to be fulfilled in the composition of the two houses[;] they are almost always after-explanations of an accomplished fact.*¹⁵⁰

Confronted with a confluence of diametrically opposed views and transparently weak theories, the Convention was never certain of what the Senate's function would be. This uncertainty would manifest itself later during the ratification debates.¹⁵¹

contention of equality of representation, there was little objection to allowing Senators to vote individually, and a provision to that effect was adopted.”).

The delegates apparently determined that the inconveniences and delays incident to voting as states under the Articles of Confederation outweighed any inconsistency between state sovereignty and individual voting. See Farrand, *Popular Election*, *supra* note 84, at 238-39.

147. See U.S. ARTICLES OF CONFEDERATION art. V (“[A] power [is] reserved to each State, to recall its delegates . . .”).

148. In contrast, because the Articles of Confederation contained a provision for recall, state legislatures by implication had the authority to instruct their representatives how to vote. See *id.*

149. See Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1508 (1994). The practice of instructing Senators was never terribly successful and by 1860 had little significance. See *id.* By then members of both the House and the Senate appeared to adhere to the view that they possessed something of a property right in their seats. See 2 SENATE OF THE UNITED STATES, *supra* note 95, at 1029.

150. Farrand, *Popular Election*, *supra* note 84, at 239 (emphasis added).

151. See WOOD, *supra* note 86, at 557.

D. The Ratification Debates: The Selling of the Senate

The provision for the legislative appointment of Senators provoked little controversy during the Constitution's ratification process.¹⁵² What is more, the state ratifying conventions largely relented without protest to the equal representation of the states in the Senate.¹⁵³ Yet, just as the function of the Senate had not been clear to the delegates in Philadelphia, so too was its role muddled during the ratification debates. This ambiguity ultimately worked to the benefit of the Federalists, who artfully exploited the nebulous image of the upper house to defuse some of the broader criticisms of the proposed Constitution.¹⁵⁴ However, the costs of the Federalists' manipulation was a lingering indeterminacy about the nature of the Senate.

In order to rebut the Anti-Federalists' charge that they sought a consolidation of the states, the Federalists actively co-opted the premise of the Great Compromise that the Senate should represent states as such.¹⁵⁵ With the states represented in their political capacities, the national government could not possibly extinguish them.¹⁵⁶ On the other hand, in order to meet the Anti-Federalists' objection that two law-making authorities could not coexist within the same state without imploding the idea of sovereignty, the Federalists were forced to argue that all branches of the national government, including the Senate, represented the people.¹⁵⁷ To understand the dichotomous, contradictory nature of these arguments, it is necessary to probe the concept of sovereignty.

The references to state sovereignty during the Philadelphia Convention and the ratification debates must be placed in accurate historical context. Sovereignty was the animating principle of the American Revolution.¹⁵⁸ It held that "in all civil states it is necessary, there should somewhere be lodged a supreme power over the whole."¹⁵⁹ Sovereign power was, by its very nature, indivisible, "for otherwise, there could be no supremacy, or subordination, that is no

152. See 1 SENATE OF THE UNITED STATES, *supra* note 95, at 31.

153. See 1 *id.* at 30.

154. See *infra* notes 155-57 and accompanying text.

155. See WOOD, *supra* note 86, at 558.

156. See *id.*; THE FEDERALIST NO. 9, at 55 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) ("The proposed Constitution, so far from implying an abolition of the State Governments, makes them constituent parts of the national sovereignty by allowing them a direct representation in the Senate . . .").

157. See WOOD, *supra* note 86, at 530.

158. See *id.* at 345.

159. *Id.* (quotations omitted).

government at all.”¹⁶⁰ In Great Britain, sovereignty resided in the Parliament, the whole of the nation nominally being represented there.¹⁶¹ The British Empire had initially attempted to justify its exercise of sovereign power over the colonies by claiming that colonists were “virtually represented” in Parliament. That is to say, though the colonists could not vote for members to Parliament, the commonality of interests between the colonists, the voting segment of British society, and the members of Parliament ensured that the colonists were adequately represented.¹⁶² The colonists, however, easily showed that virtual representation had no application to them.¹⁶³ Thus, the British were forced to rely on sovereignty and its indivisible nature to defend their rule over the colonies.¹⁶⁴

Try as they may, the colonists could not divide sovereignty; they could not be subject to the control of the British Parliament for some purposes but not for others. “‘There is no alternative,’” wrote one Revolutionary, “‘either the Colonies are part of the community of Great Britain or they are in a state of nature with respect to her, and in no case can be subject to the jurisdiction of that legislative power which represents her community, which is the British Parliament.’”¹⁶⁵ Thus, rather than persist in arguments about dividing sovereignty, the Revolutionaries conceded that two supreme authorities could not exist in the same state and concluded that sovereignty resided, at least transitionally, in their provincial legislatures rather than Parliament.¹⁶⁶

In actuality, the transfer of sovereignty from Great Britain to its former colonies was not as simple as moving law-making authority from the British Parliament to the provincial legislatures. The fault lines were numerous.¹⁶⁷ Massachusetts’ and New Hampshire’s attempts to establish post-colonial legislatures were met with armed resistance and declarations that Great Britain’s dissolution of power over the colonies had placed the citizens thereof in a state of nature.¹⁶⁸ This was an extension of the Lockean principle that a sovereign’s

160. *Id.* (quotations omitted).

161. *See id.* at 347.

162. *See id.* at 174-75.

163. *See id.* at 177-78.

164. *See id.* at 348-49.

165. *Id.* at 350 (citation omitted).

166. *See id.* at 351-52.

167. *But see* FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 147 (1985) (indicating that for the citizens of Rhode Island and Connecticut, the transfer of sovereignty was indeed a successful transfer of power to the state legislatures; their governments continued to function without interruption).

168. *See id.* at 148.

(Great Britain's) betrayal of its people places its citizens at war with their ruler and casts them into a "state of nature," in which all previous laws are nullified.¹⁶⁹ Given the prevailing ideology, Massachusetts was forced to call a popularly elected convention in order to draft a constitution, which it ratified belatedly in town meetings in 1780.¹⁷⁰ New Hampshire followed the same procedure and did not ratify its constitution until 1784.¹⁷¹

Nationalists believed that sovereignty had been relocated in the Continental Congress.¹⁷² Still others believed sovereignty lay with the individual states.¹⁷³ Under this conception, states continued to exist as political societies but were in a state of nature with respect to each other.¹⁷⁴

In sum, the location of sovereignty was not definitively established in the years immediately following the Revolution, but Americans understood what was thought to be sovereignty's essential characteristic—its indivisibility.¹⁷⁵

Despite the original contributions to political thought in the 1760's made by the Americans and despite their long experience with different spheres of authority, there was in 1776 little theoretical comprehension among most Whig leaders of any possibility of a divided sovereignty, of any possibility, in other words, of two legislatures' existing in the same state.¹⁷⁶

Americans' acceptance of the notion of indivisible sovereignty would later pose a barrier to the creation of a national government. If sovereignty were indivisible, how could a national and state government exercise concurrent powers of taxation? Was it not the design of the Framers to abolish states altogether, asked the Anti-Federalists? Gordon Wood writes:

The same logic that the English had used against the Americans in the late sixties and that most Americans had finally accepted in 1774-75 was now relentlessly thrown back at the Federalists by the opponents of the Constitution. There could be but one supreme legislative power in every state,

169. *Id.* at 59, 144.

170. *See id.* at 149.

171. *See id.*

172. *See id.*

173. *See id.* at 150.

174. *See id.*

175. *See* WOOD, *supra* note 86, at 353.

176. *Id.*

the Antifederalists said over and over, and any proposition to the contrary was inconsistent with the best political science of the day.¹⁷⁷

The Federalists ultimately answered their opponents not by dividing sovereignty, but by redefining it.¹⁷⁸ Wilson, who had mocked the notion of state sovereignty at the Philadelphia Convention as obscuring the interests it protected, became the architect of the redefinition of sovereignty. Wilson did not contest the proposition that there must be an absolute and supreme authority in all governments, the very essence of the concept of sovereignty. Noting that some Americans believed that this supreme authority rested in their state governments, Wilson maintained that this was a misplacement of sovereignty.¹⁷⁹ "[I]n truth," Wilson contended, "[sovereignty] remains and flourishes with the people . . . It *resides* in the PEOPLE, as the fountain of government."¹⁸⁰ Under this conception of sovereignty, the people were free to divide and distribute their sovereign powers as they saw fit, apportioning some to the national government and others to the states.¹⁸¹ A state legislature could not claim to lose its sovereignty; it never possessed it.¹⁸²

The popular sovereignty advanced by Wilson and other Federalists was in many respects as fictional as the notion of a state possessing rights. At its core, sovereign power was the power to legislate.¹⁸³ In the daily operations of a state, the people could not exercise sovereign power, though they might do so in "rare moments of revolution."¹⁸⁴ The experience of the Confederation immediately following the Revolution amply demonstrated the incompatibility of literal popular sovereignty with the practicalities of government. The lack of representation in the British Parliament and Crown that had aroused Americans to arms in 1776 had also created a lasting suspicion about representative government in general.¹⁸⁵ In many communities throughout America, conventions of the people at-large, and even mobs, endeavored to do the work of state legislatures.¹⁸⁶ Even where

177. *Id.* at 527.

178. *See id.* at 530.

179. *See id.*

180. *Id.*

181. *See id.*

182. *See id.* at 531.

183. *See id.* at 346.

184. *Id.*

185. *See id.* at 363.

186. *See id.* at 368.

the legislatures took action, "[n]ot only were the people ignoring and disobeying the laws . . . but the lawmakers in the legislatures were being bandied about and intimidated by electoral combinations and instructions in their local districts."¹⁸⁷ The popular sovereignty that gave birth to the American Revolution was being turned on its head, for "[t]he dissolution of the ordinary legislatures and the continued appeals to alternative bodies and to the nebulous will of the people in a state of nature rendered all institutions set above the people precarious and made representation itself suspect."¹⁸⁸

Wilson's appeals to the sovereignty of the people during the ratification struggle clearly were not a call to return to the "state of nature." Rather, from the premise that "the supreme or sovereign power of the society resides in the citizens at large,"¹⁸⁹ Wilson concluded that the people could create a government in which they could dispense as much or as little of their collective sovereignty as they pleased, on whatever conditions they pleased, and for whatever duration they pleased.¹⁹⁰ The argument possessed the dual attributes of making sense of federalism at a time when sovereignty was thought to be indivisible while affirming a basic tenet of the Revolution.¹⁹¹

The Federalists' relocation of sovereignty effectively negated the recognition of states in the national government through the legislative appointment of Senators. The legislative appointment of federal Senators was not a mechanism for representing state legislatures in the Senate, for these entities did not in reality possess sovereign powers—only the people did. Wood concludes that "[m]ost Federalists . . . stressed that the Senate was as 'nearly a popular representative' of the people as the lower house, an argument that was comprehensible only because of the Federalists' equating of all popularly delegated power."¹⁹² Once all sovereignty was relocated in the people, they could, in the absence of a proscription in the text of the Constitution, determine how they would be represented in the Senate, whether at-large or by districts.

But if the Senate would be, in effect, a glorified House of Representatives, what was the rationale for its existence? On this point the Federalists did not obfuscate: "Bicameralism was . . . defended as sim-

187. *Id.* at 369.

188. *Id.* at 365.

189. 1 THE WORKS OF JAMES WILSON 14 (James D. Andrews ed., Chicago, Callaghan 1896).

190. *See* 1 *id.* at 167-70.

191. *See* MORGAN, *supra* note 110, at 58-59, 256.

192. WOOD, *supra* note 86, at 560.

ply another means of restraining and separating political power."¹⁹³ Just as the legislative branch acted as a check on the executive, the two bodies of the national legislature would act as a check on each other.¹⁹⁴

E. Post-Ratification Practices: Districting and Limited Popular Control

Two post-ratification practices support the permissibility of Senate districts under the original Constitution.¹⁹⁵ The most direct evidence of their permissibility is states' actual use of such districts. In the initial decades of the national legislature's existence and as late as 1912, districting was not limited to the election of House members. State legislatures, either by custom or by statute, elected Senators by district.

193. *Id.* at 559.

194. Madison amplified this point in Federalist No. 62:

It is a misfortune incident to republican government, though in a less degree than to other governments, that those who administer it, may forget their obligations to their constituents, and prove unfaithful to their important trust. In this point of view, a senate, as a second branch of the legislative assembly, distinct from, and dividing the power with, a first, must be in all cases a salutary check on the government. It doubles the security to the people, by requiring the concurrence of two distinct bodies in schemes of usurpation or perfidy, where the ambition or corruption of one, would otherwise be sufficient. This is a precaution founded on such clear principles, and now so well understood in the United States, that it would be more than superfluous to enlarge on it. I will barely remark that as the improbability of sinister combinations will be in proportion to the dissimilarity in the genius of the two bodies; it must be politic to distinguish them from each other by every circumstance which will consist with a due harmony in all proper measures, and with the genuine principles of republican government.

THE FEDERALIST NO. 62, at 418 (James Madison) (Jacob E. Cooke ed., 1961).

As Federalist No. 62 makes clear, the benefits of bicameralism were to be attained not merely by creating a second legislative body but by creating meaningful distinctions between the two houses. Because the Seventeenth Amendment removed the difference in constituencies between the House and the Senate, Federalist No. 62 is at odds with the intent of the Seventeenth Amendment, and thus, one must synthesize the Amendment's legislative history and the original Framers' notion of bicameralism. See *infra* notes 335-64 and accompanying text. "Synthesis . . . describes how later texts come to affect the meaning of earlier texts. Within a tradition of written constitutions, a question of synthesis gets raised with every amendment." Lawrence Lessig, *Understanding Changed Reading: Fidelity and Theory*, 47 STAN. L. REV. 395, 408 (1995) (footnote omitted).

195. Ordinarily, post-ratification history is the least probative source of original intent. See Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 553 (1994). As it is used in this section, however, the post-ratification history of the original Constitution constitutes the pre-enactment understanding of those responsible for passage of the Seventeenth Amendment. Such history is therefore an appropriate analytic focus of an original intent inquiry. Cf. *id.* at 599 ("[W]hen assembling the legislative history of a statute, one normally begins by analyzing the interval before the statute's enactment, rather than the period after. This principle has even more force where the statute amends, or supersedes, a prior statute.").

The State of Maryland, for instance, enacted a law requiring that its state legislature elect Senators from different parts of the state: "[O]ne of the senators shall be always an inhabitant of the eastern and the other of the western shore."¹⁹⁶

George Haynes, who in the early part of the twentieth century was the nation's principal authority on the history of the Senate, described the practices in several states:

[I]n every one of the older States . . . there has grown up a custom of the Constitution, even if it has not found embodiment in positive law. There are understandings which are always observed, precedents which are always followed. For example, there is a feeling in most States that the two senators ought to be residents of different sections of the State, in order that they may represent it most effectively. Occasionally this is disregarded—indeed, in recent Congresses the senators from Indiana have been both residents of the same city; but this is a rare exception. In Vermont, unvarying precedent requires that one senator shall have resided on the east side of the Green Mountains and the other on the west side. In all her history as a State it is said that this custom has never once been violated. Maryland did not trust her restraints to custom, but, for many years, attempted to bind her legislatures in the choice of senator by the provisions of statute law. As early as 1809 it was enacted: "One of the senators shall always be an inhabitant of the eastern shore and the other of the western shore."¹⁹⁷

196. 1809 Md. Laws, ch. 22, § 2. That the Maryland statute required the entire legislature to vote on Senate nominees does not mean that the state did not employ a districting scheme. The participation of the full legislature was viewed as a constitutional requirement. See STORY, *supra* note 31, at 256. This view, however, did not mean that districts could not be created; it meant only that the full legislature must concur on the representative for a given district. There was nothing extraordinary about such a requirement. Since 1788 some states had used a similar system for electing its members to Congress—electors voted statewide but the members came from particular districts. See Jack N. Rakove, *The Structure of Politics at the Accession of George Washington*, in BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY 269-70 (Richard Beeman et al. eds., 1987).

197. ELECTION OF SENATORS, *supra* note 106, at 31. The informal practice of electing Senators from different regions of a state continues to the present day. Consider, for example, the 1996 United States Senate contests in Kansas. Kansas has traditionally elected one Senator from the eastern part of the state and one from the western region. See Deborah Kalb, *Frahm Named Interim Successor to Resigning Sen. Dole*, CONG. Q. WKLY. REP. 1478, 1479 (May 25, 1996). However, majority leader Robert Dole, who comes from western Kansas, resigned from the Senate in May to run full-time for the presidency, and Senator Nancy Kassebaum, who comes from the eastern region of the state, is retiring from the Senate in 1996. Based on the candidate field for Senators Dole and Kassebaum's replacements, some Kansas Republicans expressed concern that both of

Whatever the ambiguity created by the Federalists, states' use of Senate districts even before the adoption of the Seventeenth Amendment demonstrates that there is no inconsistency between the Senate representing states' sovereign interests and Senators being elected by districts.¹⁹⁸ Moreover, it would be an absurd consequence of the popular election of Senators if districting, which was practiced before the Seventeenth Amendment, was disallowed after the Amendment's ratification, precisely when the Senate's electoral base became identical to that of the House of Representatives.

A second post-ratification practice supports the view that the House and Senate were both conceived primarily as popular representative bodies, thus making use of districts proper for each. Notwithstanding the constitutionally prescribed role of state legislatures, the public had a substantial, often decisive, say in the selection of United States Senators even before ratification of the Seventeenth Amendment. Although not always successful, as early as 1858, political parties were endorsing Senate candidates at party conventions as a means of exerting public influence over the selection of Senators.¹⁹⁹ By 1890, several states employed direct primaries to express senatorial

their candidates would come from the western part of the state. *See id.*

198. *McPherson v. Blacker*, 146 U.S. 1 (1892), forecloses any argument that districting is inconsistent with the representation of a state as a sovereign whole. Plaintiffs in *McPherson* sought to void a Michigan statute providing for the election of the state's presidential electors by districts. Plaintiffs argued that such a districting scheme was inconsistent with the command of Article II, Section 1, Clause 2 that "[e]ach State . . . appoint a Number of Electors . . ." *Id.* at 24 (citing U.S. CONST. art. II, § 1, cl. 2). They maintained that "the appointment of electors by districts is not an appointment by the State, because all its citizens otherwise qualified are not permitted to vote for all the presidential electors." *Id.* at 24-25.

Comparing Article II, Section 1, Clause 2 to the method of electing Representatives, the Court noted that most states opted to elect members of the House of Representatives by district in the early part of the Republic and had been required by federal statute to do so in 1842. *See id.* at 26 (citing Act of June 25, 1842, ch. 47, 5 Stat. 491 (apportioning Representatives among the several states according to the Sixth Census)). The Court found that although the Constitution required that House members be elected "by the people of the several States," *id.* at 26, districting was not at variance with the notion of the state being represented in its sovereign capacity. The Court stated: "It has never been doubted that representatives in Congress thus chosen represented the entire people of the state acting in their sovereign capacity." *Id.* Even though all of the people of the state are not permitted to vote on each presidential elector or congressman, the Court reasoned that, "the combined result is the expression of the voice of the state, a result reached by direction of the legislature, to whom the whole subject is committed." *Id.*

The argument is underscored by the Constitution's provision for per capita voting in the Senate. Because the Constitution affords states two separate and independent votes in the Senate, each with the potential to nullify the other, Senate districts simply reflect the reality of *how* states are represented in the Senate, if they were ever intended to be represented at all. *See supra* notes 71-73 and accompanying text.

199. *See* ELECTION OF SENATORS, *supra* note 106, at 133-34.

preferences to their state legislatures. In de facto single-party states such as those in the South, the results of the popular primary effectively bound the state legislature.²⁰⁰ Even in jurisdictions not dominated by single parties, the results of the popular primary were given coercive effect by various means. For instance, in Oregon, candidates for the state legislature were asked to sign a pledge obligating themselves to vote for the Senate candidate who received the highest number of votes in the popular primary.²⁰¹ Although state legislators were not originally required to sign the pledge, in 1908 Oregon passed an initiative making signing compulsory.²⁰² In the elections of 1910, most of the legislators failing to sign the pledge were defeated.²⁰³

Although the states' attempts to turn the selection of Senators over to the people achieved mixed results,²⁰⁴ the attempt itself suggests a fundamental similarity between the House and the Senate. Inasmuch as the legislative appointment of Senators has been thought to denote a special role for the states in Congress, the state legislatures' delegation of their duty to the people suggested that Senators and Representatives both represent the people. If both bodies were, in effect, elected to represent the people, then both could be elected by district.

There were, of course, appreciable differences in character between the House and Senate, and some of those differences may have been attributable to the Constitution's provision for the legislative appointment of Senators.²⁰⁵ Indeed, but for the *perception* that the legislative appointment of Senators insulated them from the popular will, there would have been scant reason for the passage of the Seven-

200. See *id.* at 137-40. Indeed, in South Carolina, state legislatures were required to take an oath promising to abide by the results of the popular primary. See *id.* at 148.

201. See ALLEN H. EATON, *THE OREGON SYSTEM* 92-98 (1912).

202. See *id.* at 96.

203. See *id.* at 97.

204. See ELECTION OF SENATORS, *supra* note 106, at 152 (noting that the efforts at non-constitutional reform were most successful "in States where one party [was] firmly entrenched in power, [and] popular control [could] be asserted in the way of anticipating what would have been the probable action of the legislature").

205. See, e.g., Donald J. Boudreaux & A.C. Pritchard, *Rewriting the Constitution: An Economic Analysis of the Constitutional Amendment Process*, 62 *FORDHAM L. REV.* 111, 146 (1993) (noting that state legislatures' power to appoint Senators "made the Senate a bastion of states-rights supporters and a substantial obstacle to the expansion of the federal government into the realm of traditional state powers"). The authors, whose assertion is unsupported by specific examples, probably overstate their case. The Senate had been intended to be a more conservative, deliberative body, and the legislative appointment of Senators was but one vehicle for ensuring this. See Farrand, *Popular Election*, *supra* note 84, at 241. Thus, differences between the House and Senate that may seem attributable to the legislative appointment of the latter are equally attributable to other characteristics of the Senate, such as the longer term of office.

teenth Amendment.²⁰⁶ However, the states' similar treatment of House and Senate elections by seeking to make their selections based on popular preference cast considerable doubt on the assumption that the original intent of the Senate was to represent the sovereign interests of the states. This conception of the Senate, tenuous to begin with, was rendered wholly without basis by the ratification of the Seventeenth Amendment.

III. THE PASSAGE OF THE SEVENTEENTH AMENDMENT

Although the text of the Seventeenth Amendment makes no reference to race, the provision's legislative history confirms W.E.B. DuBois's 1908 prophecy: "The problem of the Twentieth Century is the problem of the color-line."²⁰⁷ In this section, the Article first examines the legislative history of the Seventeenth Amendment. Two facets of this history are remarkable. First, and most astonishing, race (or, perhaps more accurately, racism) nearly deprived the nation of the opportunity to directly elect Senators. Second, and relatedly, the nation's racial dilemma forced the Amendment's enactors to recognize the central ramification of the direct election of Senators for state sovereignty—namely, that with direct elections the Senate could no longer, if it ever truly did, function as a repository of states' sovereign interests. Rather, both the House and Senate would represent the sovereignty of the people of the United States. If the people could, as in the case of the House, allocate their sovereign power among several districts, they could logically do the same with the Senate.

206. Writing in 1912, before the passage of the Seventeenth Amendment, George Haynes stated:

Gradually . . . the feeling has become widespread that many of the men who, in recent years, have found their way to the Senate, are little disposed to hold themselves responsible to the people, or to heed the broader interests of the country. Rightly or wrongly, this imperfect sense of responsibility shown by the senators is being attributed in increasing measure to the process and organ of their election; and the same distrust of state legislatures which has led to the stripping away of many of their powers, through amendments to state constitutions and other forms of direct legislation, now gives rise to the demand that the choice of senators shall no longer be left to the caprice of these legislatures, but that it shall either be taken away from them entirely, or, at any rate, be subjected to effective popular control.

ELECTION OF SENATORS, *supra* note 106, at 131. The traditional view that the direct election movement resulted from an unrepresentative, corrupt Senate has been challenged in more modern accounts of the Seventeenth Amendment's ratification. See, e.g., HOEBEKE, *supra* note 9, at 135, 151; Todd J. Zywicki, *Senators and Special Interests: A Public Choice Analysis of the Seventeenth Amendment*, 73 OR. L. REV. 1007, 1019-20 (1994).

207. W.E.B. DUBOIS, *THE SOULS OF BLACK FOLK*, at v (1903).

Section B of Part III translates the original intent of the Seventeenth Amendment by identifying three modern political circumstances which justify Senate districts: (1) the participation of racial minorities in the political process, (2) the ever-increasing role of money in political campaigns and its corresponding marginalization of the average citizen in the political process, and (3) the modern-day uniformity in the representational capacities and institutional pressures of the House and Senate.

A. Eschewing the Merits: Race, State Sovereignty and the Seventeenth Amendment

"Constitutional professionals"—judges, lawyers and legal academicians—often misstate constitutional history.²⁰⁸ It will come as no surprise, then, that politicians are prone to do the same when they engage in the process of amending the Constitution. The Seventeenth Amendment is one of several democratic innovations in government achieved by the Progressive Movement. Like the advent of the referendum, the initiative, and the recall election, the movement for the direct election of Senators was predicated, at least ostensibly, on the view that large concentrations of business, capital and labor had marginalized the voice of the individual citizen in the political process.²⁰⁹ The movement was nearly a century old by the time House Joint Resolution 39 was introduced in the Sixty-second Congress.²¹⁰ The Resolution's core provision stated: "The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years . . ."²¹¹ To many members of the Sixty-second Congress, extended debate over the merits of direct election was obviated by the proposal's long history.²¹² But in an effort to soft-pedal the magnitude of their proposed change, supporters of the Resolution mischaracterized the history of the Senate in a way that obscured the Amendment's potential ramifications for the representation of states in the national government.

The authors of the House Report on the Amendment believed

208. See Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 524 (1995).

209. See HOEBEKE, *supra* note 9, at 18.

210. See *id.* at 162.

211. 47 CONG. REC. 203 (1911) (reading of resolution by the clerk).

212. See, e.g., *id.* at 1764 (statement of Sen. Works) (declining to discuss the merits of direct elections because "[t]he record of this question was made up, and well made up, at the last session of Congress"); *id.* at 206 (statement of Rep. Young) (declining to discuss the merits of direct elections because "the sentiment upon that question is overwhelmingly in favor of the proposition on both sides of the Chamber").

that "[t]he Senators of a State would be just as thoroughly representative of the State if elected by the people as they are when elected by the legislature."²¹³ Would the Anti-Federalists who had insisted on the legislative appointment of Senators as a means of protecting states agree? Moreover, how was it possible that the House and Senate, each now to be popularly elected, could nevertheless represent different interests? The legislative appointment of Senators had been the primary protection of states in the original Constitution.²¹⁴ The authors of the House Report could not have it both ways: they could not provide for the direct election of Senators and simultaneously claim that the Senate would continue to represent states in their political capacity.

The report further stated that after passage of the Amendment, "It will still be the duty and the pride of the Senator to see that the Commonwealth which he represents in its entirety has that full representation to which it is entitled under the fundamental law."²¹⁵ The report ignored the practices of those states which, either by custom or by statute, used a districting scheme to apportion their representation in the Senate.²¹⁶ The authors of the House Report seemed to be re-writing the very history they purported to preserve.²¹⁷

In part because the issue was well-worn, but also because understatement (and misstatement) of the Amendment's consequences was to their advantage, supporters of direct elections in the Sixty-second Congress largely eschewed the proposed Amendment's ramifications for state sovereignty. It is thus ironic that another issue that many viewed as diversionary would ultimately bring state sovereignty to the fore.

213. H.R. REP. NO. 62-2, pt. 6, at 3 (1911).

214. See Kramer, *supra* note 149, at 1508.

215. H.R. REP. NO. 62-2, pt. 6, at 3.

216. For examples of these customs and statutes, see ELECTION OF SENATORS, *supra* note 106, at 31. In any event, there is no inconsistency between Senate districts and the expectation that a Senator will represent his entire state. See *supra* note 198. A Senator elected from Ohio is as much a representative of the entire nation as she is a representative of Ohio. See *infra* notes 264-68 and accompanying text. *A fortiori*, since a Senator represents both her state and the nation, a Senator from the southern portion of Ohio is both a representative of her district and the whole state.

217. A final miscue illustrates the premium that the Amendment's supporters placed on expediency. Although unrelated to the question of Senate districts, to allay fears that the change in the method of election raised the specter of proportional representation in the Senate, the report said of the Great Compromise: "Had the fathers seen fit to say that the Senators should be elected by popular vote the compromise between the large and the small States would have been precisely the same." H.R. REP. NO. 62-2, pt. 5, at 3 (1911). Madison's view, however, casts doubt on this confident assertion: popular elections would have allowed for proportional representation in the Senate, a result sought by the Federalists. See *supra* notes 132-38 and accompanying text.

1. The "Race Rider"

After years of laying dormant in various Senate committees, a Resolution for the direct election of Senators reached the floor of the Senate in 1911 during the Sixty-first Congress.²¹⁸ But the resolution went beyond merely providing for the direct election of Senators. It also contained an amendment to the Elections Clause of Article I of the Constitution. The Elections Clause gave Congress the power to modify state regulations regarding the time, place and manner of holding House elections. It gave Congress the same power with respect to the time and manner, but not the place, of holding Senate elections.²¹⁹ The resolution, however, proposed removing all of the federal government's oversight authority in Senate elections.²²⁰ It provided that "[t]he times, places, and manner of holding elections for Senators shall be as prescribed in each State by the legislature thereof."²²¹

Engineered by Southern Democrats who feared Reconstruction-style federal intervention in Senate elections,²²² and later demonized as a "race rider" by its opponents,²²³ the proposed amendment to the Elections Clause provoked a hostile showdown.²²⁴ Senator George Sutherland of Utah offered an amendment to rid the direct election proposal of the so-called race rider and restore the original language of the Elections Clause.²²⁵ For this, strangely, he was accused of attempting to defeat the direct election proposal by injecting the issue of race.²²⁶ Senator William Borah of Idaho, a vigorous advocate of direct elections who supported the amendment to the Elections Clause as the price of securing them, could see no other point to the Sutherland Amendment.²²⁷ Congress, he argued, had no intention of employing

218. See 1 ROBERT C. BYRD, *THE SENATE 1789-1989: ADDRESSES ON THE HISTORY OF THE UNITED STATES SENATE* 398-402 (Mary S. Hall ed., 1988).

219. See U.S. CONST. art. I, § 4, cl. 1.

220. See 1 BYRD, *supra* note 218, at 400.

221. 46 CONG. REC. 847 (1911).

222. See 1 BYRD, *supra* note 218, at 400.

223. References to this specific characterization are from the 62nd Congress's debate when an identical amendment to the Elections Clause was proposed in conjunction with House Joint Resolution 39. However, the reaction of Republican members of the 61st Congress was of a similar vein. See, e.g., 46 CONG. REC. 2765-66 (1911) (statement of Sen. Carter) (arguing that without federal supervision of Senate elections under the Elections Clause, blacks may be deprived of voting rights).

224. See 1 BYRD, *supra* note 218, at 400.

225. See 1 *id.*

226. See 1 *id.*

227. See 1 *id.*

the Elections Clause to benefit the former slaves, so it was folly to object to relinquishing federal control of Senate elections. "Let me say to the Negro," Borah admonished from the Senate floor, "do not permit the anxious and restless and hopeful spirit to call you from the path you are pursuing of working out your own salvation."²²⁸

The debate over the Sutherland Amendment, which lasted six weeks during the Sixty-first Congress, engendered considerably more controversy than the core proposal for the direct election of Senators.²²⁹ This was to the delight of the opponents of direct elections. "Their strategy was to pass [the Sutherland Amendment], so obnoxious to many southern senators who otherwise favored direct election, so that those members would vote against the resolution itself."²³⁰ The opponents of direct elections succeeded.²³¹

The political climate had changed by the Sixty-second Congress. Although Republicans controlled the Senate by a slim margin, the Democrats were solidly in control of the House.²³² Thus, when the Democratic House reported out House Joint Resolution 39, it contained the distinctive imprimatur of Southern Democrats in the form of an amendment to the Elections Clause. It provided: "The times, places, and manner of holding elections for Senators shall be as prescribed in each State by the legislature thereof."²³³ This time it was

228. 1 *Id.*

229. See 1 *id.*

230. 1 *Id.* at 400-01.

231. See 1 *id.* at 401.

232. See 3 *ENCYCLOPEDIA OF THE CONGRESS*, *supra* note 4, at 1557. In the 61st Congress, Republicans outnumbered Democrats by 219 to 172 in the House and 61 to 32 in the Senate. See *id.* In the 62nd Congress, Republicans still held a majority in the Senate by a 51 to 41 margin; however, the Democrats gained control of the House by a 228 to 161 margin. See *id.*

233. 47 *CONG. REC.* 203 (1911) (reading of H.R.J. Res. 39 by the clerk). The Republicans did not hesitate to attribute the worst of motives to Southern Democrats' insistence that the Elections Clause be amended. They repeatedly referred to the proposal as a "race rider" because the reason the South wanted to banish federal supervision of Senate elections was to ensure that the national government would not interfere with its disenfranchisement of Blacks. See *id.* at 1483, 1889, 1899 (statements of Sen. Smith). But how amending the Elections Clause would accomplish disenfranchisement was not at all clear. Some Republicans foresaw no practical impairment of the federal government's ability to intervene in Senate elections even if the Elections Clause was amended; they simply preferred that the proposal for direct elections not be encumbered by tangential matters. See *id.* at 1909 (statement of Sen. Bristow).

Others, however, could sense a Machiavellian plot. They suspected that Southern Democrats were attempting to impliedly repeal the Fifteenth Amendment's prohibition against racial discrimination at the polls. One Republican purported to pierce the South's race-neutral facade:

You southern Democrats believe that if you can insert in the Constitution, as

Senator Joseph Bristow of Kansas who sponsored an amendment ("the Bristow Amendment") to rid the resolution of the so-called race rider and to maintain the original language of the Elections Clause.²³⁴

Because Democrats sought to justify their proposal on grounds of

you are now proposing, the following provision, "the times, places, and manner of holding elections for Senators shall be as prescribed in each State by the legislature thereof," that this may be construed as a partial repeal of the fifteenth amendment, and whether it so operates as a matter of theoretical law, you know that you intend that it shall operate so in fact.

Id. at 2430 (statement of Rep. Mann).

To other Republicans, the proposed amendment to the Elections Clause was evocative of the Civil War:

The reasons for this [amendment to the Elections Clause] are not difficult to discover. One section of this country is still arrayed against the other politically. In the great civil conflict of 50 years ago they were defeated. They are now in power in this House. This demand comes chiefly from that section. It is seeking the same power now that was denied it then—the power of the State to control the Nation for its own end untrammelled by Federal supervision.

Id. at 2418 (statement of Rep. Moon).

For their part, the Democrats responded to these charges in part by acknowledging them (whether consciously or unconsciously), and in part by charging the Republicans with subterfuge. The Reconstruction era, when Republicans forcibly intervened in the South's elections in order to secure the participation of former slaves, was almost certainly on the minds of Southern Democrats who supported amending the Elections Clause. One Democrat recalled the period as one during which "[f]ederal bayonets fasten[ed] the heel of the negro upon the neck of the white man." *Id.* at 2414 (statement of Rep. Witherspoon). The Democrats contended that the objective of the Bristow Amendment, which sought to restore the original language of the Elections Clause, *see infra* note 234, was "to overthrow white supremacy and to reinstate negro domination in the Southern States." 47 CONG. REC. 2415 (1911) (statement of Rep. Witherspoon).

Given these self-incriminating responses to the Republicans' charges, it was understandable that the Republicans could not accept the otherwise reasonable argument that the Constitution's anti-discrimination provisions would ensure continued federal supervision of Southern elections even if the Elections Clause were repealed. *See, e.g., id.* at 1764-65 (statement of Sen. Works) (arguing that Fourteenth and Fifteenth Amendments would continue to protect Blacks even after the repeal of the Elections Clause).

However, the Democrats did not completely play into the Republicans' hands. They charged that Republicans were engaging in subterfuge, emphasizing the Elections Clause proposal only because they opposed the principle of direct elections. *See, e.g., id.* at 2420 (statement of Rep. Sherley).

In sum, there was no shortage of the impugning of motives during the debates on the Seventeenth Amendment. However, in order to understand why the defeat of the proposal to amend the Elections Clause fundamentally undermined the idea of the Senate as a guardian of state sovereignty, one must go beyond motives and critique the rationales that Democrats offered in support of their proposal.

234. An identical amendment was offered in the House by Representative Young of Michigan. *See* 47 CONG. REC. 207. Young's amendment was defeated in the House. *See id.* at 241-42. However, because the Senate adopted the Bristow Amendment and sent the amended House Joint Resolution 39 back to the House for its concurrence, the Bristow Amendment was debated in the House as well as the Senate. *See id.* at 2404. Thus, for simplicity's sake, both the Young and Bristow proposals are referred to throughout as "the Bristow Amendment."

state sovereignty, the defeat of the proposed amendment to the Elections Clause confirms this Article's core thesis that the Senate no longer represents states' sovereign interests.

2. State Sovereignty in a State of Confusion

Although Byzantine, the Democrats' arguments on behalf of the proposed amendment to the Elections Clause had an unmistakable thrust: states' rights.²³⁵ The Senate, they claimed repeatedly, represented states in their sovereign capacity.²³⁶ Thus, states, not the federal government, should have ultimate authority to determine the time, place and manner of electing Senators.²³⁷ Although with the passage of the Seventeenth Amendment both the House and the Senate would be elected by the people, an asymmetry in the Elections Clause allowing federal supervision over the former, but exempting the latter, would be justified by the unique role of Senators as "ambassadors" of their states.²³⁸

Significantly, the state sovereignty whose virtues the Democrats extolled was different from the state sovereignty that the Anti-Federalists sought to protect in 1787. The Democrats used the term to refer to the popular will of the citizens of a particular state.²³⁹ By con-

235. The terms "states rights" and "state sovereignty" are often used interchangeably. Terrence M. Messonnier, *A Neo-Federalist Interpretation of the Tenth Amendment*, 25 AKRON L. REV. 213, 224 n.65 (1991). However, "[s]tate sovereignty, in its narrowest sense, is the concept that the states are the source of sovereignty." *Id.* This was the position of the Southern secessionists during the Civil War. See Michael W. McConnell, *The Fourteenth Amendment: A Second American Revolution or the Logical Culmination of the Tradition?*, 25 LOY. L.A. L. REV. 1159, 1167 (1992). The state sovereignty doctrine repudiated the notion of a divisible sovereign and advocated a return to the eighteenth century conception that sovereignty resides in the state governments. See Arthur Bestor, *State Sovereignty and Slavery: A Reinterpretation of Proslavery Constitutional Doctrine, 1846-1860*, 54 J. ILL. ST. HIST. SOC'Y 117, 146 (1961). Secession was the most extreme expression of the doctrine of state sovereignty. See *id.* at 119. States rights, on the other hand, is a rhetorical expression of the desire for more limited federal powers. See *id.* at 144-46.

Although the Democratic supporters of the so-called race rider invoked state sovereignty as a justification for their amendment, for the most part, they probably did not intend to convey its strictest meaning. With this caveat in mind, the Article uses the terms interchangeably throughout.

236. See, e.g., 48 CONG. REC. 6352 (1912) (statement of Rep. Sisson); 47 CONG. REC. 1488 (1911) (colloquy between Sens. Sutherland and Williams); *id.* at 2411 (statement of Rep. Dickinson); *id.* at 2419 (statement of Rep. Sherley); *id.* at 2428 (statement of Rep. Richardson); H.R. REP. NO. 62-2, pt. 6, at 3 (1911).

237. See 47 CONG. REC. 1488 (colloquy between Sens. Sutherland and Williams).

238. See *id.* at 1886 (statement of Sen. Borah).

239. As Senator Raynor of Maryland put it:

Who do I represent here; my State in its sovereign capacity? Yes. But what is

trast, the Anti-Federalists had insisted on the legislative appointment of Senators precisely because they distinguished between representation of the people (for which the lower house existed) and representation of the state as a corporate body (for which the Senate supposedly existed).²⁴⁰ The modern Democrats' redefinition of state sovereignty not only allowed them to assert that the shift from legislative to direct elections would not change the nature of the Senate, but also provided another central tenet for amending the Elections Clause. The Democrats inveighed:

Reduced to plain language, [the Bristow Amendment's] declaration is: "Yes, you are a sovereign people, . . . a people that we trust; therefore we will give you the right to vote for United States Senators . . . but you neither possess the honesty nor the intelligence to conduct such an election. We will therefore not give you the right to select your Senators clean-cut and clear; we will have Congress put hobbles upon this right"²⁴¹

The Democrats insisted that the power to elect necessarily included the power to decide the time, place and manner of election.²⁴²

Rather than recognizing the Senate's role as the guardian of state interests, the Democrats argued, the Bristow Amendment actually enlarged federal power, even as it purported to leave the Elections Clause unchanged.²⁴³ The objective of the Bristow Amendment, Democrats argued, was to "deprive the State of the power to determine who shall represent it in the Senate, and to give to Congress the power to determine and select Senators of the Southern States."²⁴⁴ This result, they claimed, obtained because the federal government could somehow interfere with a state's choice of Senators in a popular election in a way that it could not if Senators were appointed by state legislatures. Since state legislators elected Senators, and the federal government could not interfere with the election of state legislators, the federal government effectively had no authority in the legislative

my State except the people who compose it. Are the people of the State one thing and the State another? Then who is the State? . . . Is that which has been rightfully denominated the despotism of the Republic the prevailing sentiment of this body? Fellow Senators, are we imbued with fear of the people of our States?

Id. at 1736.

240. See *supra* notes 124-38, 155 and accompanying text.

241. 47 CONG. REC. 1913 (statement of Sen. Reed).

242. See *id.* at 1886 (statement of Sen. Borah); *id.* at 1912-13 (statement of Sen. Reed).

243. See *id.* at 2406 (statement of Rep. Sherley).

244. *Id.* at 2415 (statement of Rep. Witherspoon).

appointment of Senators.²⁴⁵ Once the power to elect was taken from state legislatures, however, "the power of the Government to invade the ballot box of the citizen and to interfere with the vote of the citizen becomes absolute and complete."²⁴⁶

In effect, then, the Democrats offered two arguments against the Bristow Amendment. First, the Amendment enlarged federal power. Second, and more importantly, any such enlargement of federal power would be contradictory to the Senate's role as guardian of states' rights. Neither argument, however, proved sufficient to carry the debate. As to the first objection, the Democrats never put forth a concrete explanation of how the failure to amend the Elections Clause would enlarge federal power. The underlying assumption that the federal government could not interfere in state legislative elections, and therefore could not determine the electors for the Senate, was irrelevant to the Elections Clause. By its express terms, Article I made the qualifications for voting in federal legislative elections the same as those for voting in state elections, which qualifications the state itself determined.²⁴⁷ House Joint Resolution 39 continued this practice with respect to Senate elections.²⁴⁸ True, the federal government could intervene in Senate elections to prevent illegal discrimination, but (save for the implied repeal that the Republicans suspected²⁴⁹) an amendment to the Elections Clause would not nullify the Fourteenth and Fifteenth Amendments. It is no wonder, then, that the Republicans answered the argument about an enlargement of federal power by inviting the Democrats to prove their assertions.

The Democrats' core argument—that the election of a body devoted to the protection of state sovereignty should be controlled by the states—could not be as easily dismissed. It forced an answer to the paramount question that the Federalists had caused to linger: Did the Senate represent the states as such, or the people? Moreover, because the Democrats equated state sovereignty with the sovereignty of the people of the several states, yet another question begged: If the Senate represented the people, which people did it represent? The people of the United States or the people of the several states?

The Republicans' rejoinder to the Democrats was unequivocal.

245. See *id.* at 1912 (statement of Sen. Reed).

246. *Id.* (statement of Sen. Reed).

247. See U.S. CONST. art. 1, § 4, cl. 1.

248. See 47 CONG. REC. 203 (reading of House Joint Resolution 39 by the clerk) ("The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.").

249. See *supra* note 233.

They repeatedly emphasized that amending the Elections Clause to exclude federal supervision of Senate elections would create an incongruity; elections for the House would be subject to federal supervision, but not elections for the Senate.²⁵⁰ The Republicans noted that this lack of uniformity was particularly absurd in light of direct elections, for "[t]he fact that Senators are now to be elected in the same manner as Representatives affords all the more reason why the same power should continue to exist in Congress in the one case as in the other."²⁵¹

The Democrats' contention that the incongruity was justifiable because the Senate represented states' sovereign interests held little sway. Some Republicans believed that there had never been a difference between the representative capacities of the Senate and House,²⁵² but to the extent that there had been, "the only purpose of the amendment as to the [direct] election of Senators is to do away with what little difference exists in this respect and make the Senators more directly representative of the people."²⁵³

The Republicans clearly intended that the Seventeenth Amendment eliminate distinctions—real or fictional—in the representative capacities of the Senate and the House. No difference in the federal government's oversight powers could be justified because

[t]hese two bodies are coordinate bodies; they have the same powers; they exercise the same authority. The Members are all Members of the Congress; they are all Federal officers; why should not the Federal Government have power to regulate, when it may be necessary to regulate, the election of its own officers?²⁵⁴

Recognizing the Republicans' intent, the Democrats sought to illustrate the implications of treating the Senate and House alike. This is

250. See 47 CONG. REC. 2406 (statement of Rep. Hardy); *id.* at 2407 (statement of Rep. Olmsted); *id.* at 2421 (statement of Rep. Cannon).

251. *Id.* at 2406 (statement of Rep. Olmsted).

252. See *id.* at 1486 (statement of Sen. Sutherland) ("A United States Senator is a representative officer precisely the same as a Member of the House of Representatives . . ."); *id.* at 2417 (statement of Rep. Moon) (noting that House members have not historically perceived themselves differently from Senators).

253. *Id.* at 2409 (statement of Rep. Young).

254. *Id.* at 2407 (statement of Rep. Olmsted); see also *id.* at 2417 (statement of Rep. Moon). Representative Moon stated:

Bear in mind . . . that the two branches of the legislative department, the House and the Senate, are one. They are not two coordinate powers, they are two parts of one coordinate power, differing somewhat in their minor functions, but in all constitutional powers, in all constitutional matters, one before the law of the land.

Id.

the only point of debate at which sustained attention was devoted to Senate districts:

Mr. HARDY. Mr. Speaker, in my interruption of the gentleman from Pennsylvania [Mr. OLMSTED] I asked him but one question, and that was in what way Federal authority over the election of Members of Congress had been exercised, and his answer was to require that election to be by districts. I want to say that that very answer discloses one essential objection that we have to Federal authority controlling the manner and time of election of Senators. To say that Senators should be elected from the east and west half of a State, or from this or that district of a State, might be the action taken by the Federal Government under the Bristow amendment, and that would be to destroy the very purpose of the organization of the Senate of the United States, which purpose was to have a body composed of representatives of the States to sit as ambassadors of whole and undivided States.²⁵⁵

If the Bristow Amendment gave the federal government authority to create Senate districts, it necessarily gave states this same power, since the Amendment delegated regulatory power to the states in the first instance.²⁵⁶ This was the response of the Republicans by former House Speaker Cannon, who believed that without the Bristow Amendment states would be free to create such districts and the federal government would be powerless to either forbid or regulate them:

The gentleman from Pennsylvania [MR. OLMSTEAD] asked a question as to whether it would be in the power of a State—in effect, by throwing the State into districts—to elect Senators by a minority vote in the event the House joint resolution was enacted into law without the Senate amendment. Undoubtedly that might be done. Undoubtedly the respective State legislatures would have this power. And yet gentlemen on that side—Democrats, glorying in “the rule of the people”—propose to place it in the power of a

255. *Id.* at 2410 (statement of Rep. Hardy). Significantly, Representative Hardy appeared to speak in blissful ignorance of the fact that states had previously elected Senators by district. See ELECTION OF SENATORS, *supra* note 106, at 31. In any event, there is simply nothing inconsistent between Senators being elected from districts and simultaneously representing entire states. See *supra* note 198. If a Senator from Ohio is a representative of the whole nation, then a Senator from the northern district of Ohio is also the representative of his entire state. See *supra* note 216.

256. See 47 CONG. REC. 1484 (1911) (“The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof, but the Congress may at any time by law make or alter such regulations, except as to the places of [choosing] Senators.”).

State legislature, by this joint resolution, to enact laws under which practically a minority can choose Senators; and the Congress of the United States would be powerless in the premises²⁵⁷

Responding to Representative Cannon's equating of districts with plurality votes, the Democratic floor manager of House Joint Resolution 39, Representative Rucker of Missouri, stated, "I confess I would prefer to have a Senator elected by even a minority of honest, loyal voters rather than to have that high office bought in and controlled by special interests."²⁵⁸ Others were similarly expectant of (or resigned to) the prospect of plurality votes, if not Senate districts themselves.²⁵⁹

Thus, the Sixty-second Congress did not decide the constitutionality of Senate districts; it neither rejected nor accepted them.²⁶⁰ Instead, as former Speaker Cannon's remarks reveal, supporters of the Bristow Amendment sought to preserve the authority Congress had been granted by the original Constitution to mandate or forbid election practices of whatever form, including Senate districts.²⁶¹

257. *Id.* at 2420 (statement of Rep. Cannon) (emphasis added). Although Representative Cannon's statement makes reference to a question posed by Representative Olmsted, it is unclear what the exact question was. Shortly before Cannon's remarks, Olmsted cited an 1842 act in which Congress required states to draw districts for House races as an example of Congress's authority under the Elections Clause. The statement was made in response to insinuations by the Democrats that the Elections Clause be repealed as to both the House and the Senate because it had been so little used. *See id.* Representative Bartlett, a Georgia Democrat, shortly thereafter asked, "Does the gentleman think the power exists in the Congress now with reference to the election of Senators to prescribe any regulations for electing Senators?" *Id.* (statement of Rep. Bartlett). Olmsted responded, "It has whatever power the Constitution now gives to Congress." *Id.* (statement of Rep. Olmsted).

258. *Id.* at 2430 (statement of Rep. Rucker); *see id.* at 1485 (statement of Sen. Root).

259. *See id.* at 1485 (statement of Sen. Root) (noting that the election of Senators by a plurality would be an inevitable consequence of direct elections); *id.* at 1741 (statement of Sen. Borah) (suggesting that Senators elected from districts would nevertheless be representative of the entire state). As is evident from former Speaker Cannon's statements, "plurality" was at times used interchangeably with "districts" during the floor debates, though some members may have used the former without intending to connote the latter. *See id.* at 1881 (statement of Sen. McCumber) (assuming that direct elections would mean statewide elections, but also noting that such elections would substitute plurality coalitions for majorities).

260. If Representative Hardy's parade of horrors highlighting Senate districts had any effect on the Republicans, it was to solidify their resolve that the House and the Senate should be treated the same with respect to federal supervision of elections. As former Speaker Cannon stated shortly after Hardy's statement, "I would not, to secure this joint resolution, make legislation that would apply to this body in the election of its Members and would not apply to the Senate in the election of its Members." *Id.* at 2421 (statement of Rep. Cannon).

261. Like the 62nd Congress, previous Congresses had been aware that a shift to popular elections might invite Senate districts. In 1899, during the 55th Congress, Senate Resolution

Placed in the broader context of the debate over the representational capacity of the Senate, the Republicans' rejoinder on districts was consistent with their overall theme of uniformity in the treatment of the House and the Senate. To the question "whom does the Senate represent, states or the people?" Republicans answered that the Senate's representative capacity was the same as the House's—both bodies represented the people. As such, federal supervision over both bodies was appropriate. A parallel in constituencies, however, was insufficient to overcome the Democrats' sovereignty arguments, for the Democrats had placed sovereignty in the people of the several states rather than the people of the United States. Given this premise, to say that the Senate represented the people begged the question, "which people?" This dilemma was as old as the Republic itself.²⁶²

In tones evocative of the nationalizing experience of Reconstruction,²⁶³ the Republicans responded that sovereignty belonged not to the people of a particular state but to the citizens of the United States. A Senator, the Republicans repeated often, is not merely a representative of his state but also a representative of the United States.²⁶⁴ Indeed, a

243 expressly provided that Senators be elected "at large by a direct vote of the people." 32 CONG. REC. 1678 (1899) (reading of resolution by Sen. Allen). This limitation is not mere surplusage, for the popular movement for direct elections had produced proposals which varied significantly in their specifics. Consider, for example, the Farmers' Alliance Party Platform of 1900. In contrast to Senate Resolution 243, it specifically called for the division of each state into two districts with one Senator to be elected from each district. Wallace Worthy Hall, *The History and Effect of the Seventeenth Amendment* 496, App. D (1936) (unpublished Ph.D. dissertation, University of California) (on file with author).

The 62nd Congress's exchange regarding Senate districts must be understood against this backdrop of competing conceptions of direct elections. Had the 62nd Congress wanted to mandate statewide elections, prior congressional resolutions provided precedent for doing so. At the same time, had it wanted to expressly provide for Senate districts, it had ample points of reference from both the public debate regarding direct elections and from the practices of some states prior to the adoption of the Seventeenth Amendment. The 62nd Congress, however, chose neither option. In so doing, it abdicated the question of Senate districts to the broad authority of the states and Congress under the Elections Clause of the Constitution.

262. See MORGAN, *supra* note 110, at 262. Morgan writes:

Although independence had determined that Americans were not part of the people of Great Britain, it had not determined whether they were one people or many, or whether the sovereignty of the people, say, of Virginia was exhausted in the creation of an independent government for Virginia. If Americans were in any sense one people, did that people enjoy a sovereignty too? And if so, who were their representatives?

Id.

263. See generally Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863, 884-99, 910-17 (1986) (discussing Northern Republicans' successful efforts to impose upon the nation their view of national supremacy).

264. See 47 CONG. REC. 1487-88 (statement of Sen. Sutherland); *id.* at 230 (statement

Senator was more a national representative than a House member:

[A] Senator of the United States, while he may be . . . a representative of the State, is more a representative of the United States than is a Member of the House. The Representative, the Member of the House of Representatives, has nothing to do with the question of treaties. He has nothing to do with the confirmation of appointees to Federal positions and ambassadors to foreign governments. The Senator of the United States passes upon treaties with foreign governments. A Senator of the United States advises and consents to the appointment of the judges, ambassadors, and all the other officers of the United States. In that condition, can it be said that the Government of the United States should absolutely yield to the States its control over the election of such an officer, who discharges these important functions of the National Government?²⁶⁵

The proponents of the proposed amendment to the Elections Clause could not dispute the validity of these arguments. They were forced to acknowledge that a Senator represents the people of the nation as well as his state.²⁶⁶ Thus conceded, it was difficult, if not impossible, to maintain that the federal government had no interest in controlling the manner of electing Senators. The Democrats were reduced to sophistry. "I do not regard the election of a United States Senator as a local affair," confessed Senator Borah of Idaho, "but I regard the manner of holding the election where he is elected as purely a local affair. I contend that there can be no such thing as a national interest in the manner of holding a popular election in a State."²⁶⁷

The placement of sovereignty with the people of the United States removed state sovereignty as a potential barrier to Senate districts. The Democrats' concession that Senators were national representatives to the same extent as House members meant that there was no distinction between the representative capacities of the two—both represented the people of the nation.²⁶⁸ To the extent the debates

of Rep. Dyer); *see id.* at 1542 (statement of Sen. Heyburn). Heyburn did not support the direct election of Senators but did oppose modifying the Elections Clause. *See id.* at 1543.

265. *See id.* at 1488 (statement of Sen. Sutherland).

266. *See, e.g., id.* at 1910 (statement of Sen. Bacon).

267. *Id.* at 1889 (statement of Sen. Borah).

268. One might observe that acceptance of the Republicans' view of the Senator as the more national representative between Senators and House members cuts against districts. If Senators are to have a broader perspective than House members, should they not be elected by a broader constituency? They should, and, in most instances, Senate districts would encompass a vastly broader constituency than House districts. In the nation-sized state of California, for example, each Senator would be elected in districts of approximately 15 million persons. In smaller states, where drawing districts would leave a state's

recognized a residual state sovereignty function in a Senator's representation, they also established that such a function would not be inconsistent with districts. A Senator's dual function as a representative of both her state and nation only confirms that it is possible for a Senator to serve a broader constituency than the one which elects her. If a Senator elected from New York represents the nation and her state, then a Senator elected from the "city" district of New York would represent the whole state as well as her district.

Significantly, although the Republicans correctly located sovereignty in the people of the United States, an opposite view would not have meant that Senate districts were unconstitutional. If, as the Democrats maintained, the people of a given state possessed sovereignty, then that state's citizens possessed the power to divide sovereignty as they saw fit, allocating some representational power to one Senator and the remainder to the other. Senate districts are permissible because sovereignty is divisible. Its divisible nature does not depend on which people possess it.

The Bristow Amendment cleared the Senate on a dramatic tie-breaking vote by the Vice President James S. Sherman.²⁶⁹ House Joint Resolution 39 was then remanded to the House for its concurrence, but the House declined to adopt the Bristow Amendment.²⁷⁰ The stalemate was broken when, in the face of an immovable Senate, the House adopted the resolution as modified by the Bristow Amendment.²⁷¹ The Seventeenth Amendment was ratified by the states within a year's time.²⁷²

Senators representing the same number or fewer constituents than House members, Senate districting might be inappropriate.

269. See 47 CONG. REC. 1923.

270. See *id.* at 2548, 4905.

271. See *id.* at 5172, 6367.

272. See 1 BYRD, *supra* note 218, at 403. The available state ratification records shed almost no light on the question of Senate districts. State libraries, archives and legislatures were contacted to determine whether individual states kept legislative histories or debates regarding the adoption of the Seventeenth Amendment. The overwhelming majority of states kept no transcribed records of legislative debates, but only roll call votes and procedural histories. In addition to reviewing available journal records, the author sought, and in most instances obtained, confirmation from the states that no transcribed records of ratification debates exist. The following is an accounting of the responses received, including letters indicating that verbatim debates were not maintained:

ARIZONA—Senate journals do not reflect the substance of the debates on the Seventeenth Amendment, but no confirmation letter regarding debates obtained.

ARKANSAS—Letter from John L. Ferguson, State Historian, Arkansas History Commission, to Terry Smith, Associate Professor of Law, Fordham University School of Law (July 31, 1995) (on file with author).

CALIFORNIA—Letter from John F. Burns, Director, and Sydney Bailey, Archives Assistant, California State Archives, to Terry Smith, Associate Professor of Law, Fordham

University School of Law (July 7, 1995) (on file with author).

COLORADO—Letter from Terry Ketelsen, State Archivist, State of Colorado Division of Archives and Public Records, to Terry Smith, Associate Professor of Law, Fordham University School of Law (June 20, 1995) (on file with author).

CONNECTICUT—LAWRENCE G. CHEESEMAM & ARLENE C. BIELEFIELD, *THE CONNECTICUT LEGAL RESEARCH HANDBOOK* 40 (1992) (indicating that transcribed proceedings of house and senate floor debates are partially available only from 1945 to 1953 and are complete beginning in 1953).

DELAWARE—Letter from Randy L. Goss, Archivist Supervisor, Delaware State Archives, to Terry Smith, Associate Professor of Law, Fordham University School of Law (June 19, 1995) (on file with author).

FLORIDA—Letter from David J. Coles, Florida State Archives, to Terry Smith, Associate Professor of Law, Fordham University School of Law (Aug. 23, 1995) (on file with author).

IDAHO—Letter from Steve Averett, Idaho State Law Library, to Terry Smith, Associate Professor of Law, Fordham University School of Law (Aug. 23, 1995) (on file with author).

ILLINOIS—Legislative History—a guide to compiling a legislative history (on file with author).

INDIANA—Letter from Martha E. Wright, Reference Librarian, Indiana Division, Indiana State Library, to Terry Smith, Associate Professor of Law, Fordham University School of Law (June 14, 1995) (on file with author).

IOWA—Letter from Linda Robertson, Law Librarian, Iowa State Law Library, to Terry Smith, Associate Professor of Law, Fordham University School of Law (Aug. 24, 1995) (on file with author).

KANSAS—Senate journals do not reflect the substance of the debates on the Seventeenth Amendment, but no confirmation regarding debates obtained.

LOUISIANA—Letter from Virginia R. Smith, Head, Louisiana Section, State Library of Louisiana, to Terry Smith, Associate Professor of Law, Fordham University School of Law (Aug. 25, 1995) (on file with author).

MAINE—Letter from Lynn E. Randall, State Law Librarian, State of Maine Law and Legislative Reference Library, to Terry Smith, Associate Professor of Law, Fordham University School of Law (Aug. 7, 1995) (on file with author).

MICHIGAN—Letter from Nancy B. Whitmer, Reference Librarian, Library of Michigan State Law Library, to Terry Smith, Associate Professor of Law, Fordham University School of Law (Sept. 5, 1995) (on file with author).

MINNESOTA—Letter from Brigid Shields, Reference Librarian, Minnesota Historical Society, to Terry Smith, Associate Professor of Law, Fordham University School of Law (Aug. 23, 1995) (on file with author).

MISSOURI—Letter from Christyn Elley, Missouri State Archives, Office of the Secretary of State, State of Missouri, to Terry Smith, Associate Professor of Law, Fordham University School of Law (June 29, 1995) (on file with author).

MONTANA—Letter from the State of Montana State Law Library, to Terry Smith, Associate Professor of Law, Fordham University School of Law (June 1995) (on file with author).

NEBRASKA—Journal records obtained from state do not reflect the substance of the debates on the Seventeenth Amendment, but no confirmation regarding debates obtained.

NEVADA—Letter from Patricia Deadder, Reference Department, Nevada State Library and Archives, to Terry Smith, Associate Professor of Law, Fordham University School of Law (Aug. 28, 1995) (on file with author).

NEW HAMPSHIRE—Letter from Frank Mevers, Director and State Archivist, New Hampshire State Archives, to Terry Smith, Associate Professor of Law, Fordham University

School of Law (Aug. 29, 1995) (on file with author).

NEW JERSEY—Letter from Robert E. Lupp, Supervising Librarian, New Jersey Publications, State of New Jersey Department of Education, to Terry Smith, Associate Professor of Law, Fordham University School of Law (July 26, 1995) (on file with author).

NEW MEXICO—Letter from Kevin M. Lancaster, Associate Librarian, New Mexico Supreme Court Law Library, to Terry Smith, Associate Professor of Law, Fordham University School of Law (June 14, 1995) (on file with author); Letter from Al Regensberg, Senior Archivist, New Mexico Commission of Public Records, State Records Center and Archives, to Terry Smith, Associate Professor of Law, Fordham University School of Law (June 14, 1995) (on file with author).

NEW YORK—Transcripts of debates do not exist before 1960 in the senate and 1973 in the house. See ROBERT ALLAN CARTER, *LEGISLATIVE INTENT IN NEW YORK STATE* 20 (1981) (on file with author).

NORTH CAROLINA—Louise Stafford, *North Carolina Legislative History*, N.C. ST. B.Q., Winter 1991, at 23-24; Letter from Janet Justis, Government Documents Specialist, North Carolina Department of Cultural Resources Division of State Library, to Terry Smith, Associate Professor of Law, Fordham University School of Law (June 16, 1995) (on file with author).

NORTH DAKOTA—Letter from Marcella Kramer, Assistant Law Librarian, State of North Dakota, Supreme Court Law Library, to Terry Smith, Associate Professor of Law, Fordham University School of Law (Aug. 23, 1995) (on file with author).

OHIO—Letter from Clyde Hordusky, Head, Research Services, The State Library of Ohio, to Terry Smith, Associate Professor of Law, Fordham University School of Law (June 27, 1995) (on file with author).

OKLAHOMA—See OKLAHOMA DEPARTMENT OF LIBRARIES, *SOURCES OF INFORMATION ON OKLAHOMA BILLS* (on file with author).

OREGON—Letter from Julie Ann Bouché, Library Assistant, Oregon Supreme Court Law Library, to Terry Smith, Associate Professor of Law, Fordham University School of Law (June 12, 1995) (on file with author).

RHODE ISLAND—Letter from Thomas R. Evans, State Librarian, State of Rhode Island and Providence Plantations, to Terry Smith, Associate Professor of Law, Fordham University School of Law (July 24, 1995) (on file with author).

SOUTH DAKOTA—Letter from Clare Cholik, Legislative Librarian, South Dakota Legislative Research Council, to Terry Smith, Associate Professor of Law, Fordham University School of Law (June 12, 1995) (on file with author).

TENNESSEE—Letter from Kassie Hassler, Librarian, Tennessee State Library & Archives, to Terry Smith, Associate Professor of Law, Fordham University School of Law (Aug. 28, 1995) (on file with author).

TEXAS—See TEXAS STATE ARCHIVES, *RESOURCES FOR LEGISLATIVE RESEARCH* (on file with author).

UTAH—Letter from State of Utah Law Library, to Terry Smith, Associate Professor of Law, Fordham University School of Law (June 13, 1995) (on file with author).

VERMONT—Letter from Paul Donovan, Senior Reference Librarian, State of Vermont Department of Libraries, to Terry Smith, Associate Professor of Law, Fordham University School of Law (Aug. 23, 1995) (on file with author).

VIRGINIA—Letter from Sarah Huggins, Reference Librarian, The Library of Virginia, to Terry Smith, Associate Professor of Law, Fordham University School of Law (Sept. 15, 1995) (on file with author).

WASHINGTON—Letter from David W. Hastings, Chief of Archives, Washington State Archives Service, to Terry Smith, Associate Professor of Law, Fordham University School of Law (June 13, 1995) (on file with author).

WEST VIRGINIA—Letter from Debra Basham, Archivist, West Virginia Division of Cul-

B. The Implications of the Ratification of the Seventeenth Amendment for Senate Districts

The ratification of the Seventeenth Amendment raises an interpretive ambiguity regarding the question of Senate districts. The language of the Amendment itself is silent. The congressional debates suggest that this silence should be interpreted to mean that the issue was left unresolved. The available state ratification records provide little assistance.²⁷³

The traditional originalist, one who limits her inquiry to what the drafters of a text intended at the time of enactment,²⁷⁴ will likely have one of two reactions. The first and more formalistic is that since the historical evidence is inconclusive, districts are impermissible.²⁷⁵ The second, and arguably more intuitive reaction, is that in the absence of conclusive evidence prohibiting the practice, the broad language of the Elections Clause of Article I should be applied to the Seventeenth Amendment as it is applied to its similarly-worded analogue, Section 2 of Article I, under which House districts are permitted.²⁷⁶

ture and History, to Terry Smith, Associate Professor of Law, Fordham University School of Law (June 30, 1995) (on file with author).

WISCONSIN—A. PETER CANNON, LEGISLATIVE REFERENCE BUREAU, AN INTRODUCTION TO LEGISLATIVE HISTORY RESEARCH IN WISCONSIN 5 (1990) (on file with author).

WYOMING—Letter from Kathy Carlson, Wyoming State Law Librarian, Wyoming State Law Library, to Terry Smith, Associate Professor of Law, Fordham University School of Law (June 16, 1995) (on file with author).

Of the records the author was able to obtain, only Pennsylvania kept records of legislative debates regarding the ratification of the Seventeenth Amendment which implied an understanding of the Amendment to include state at-large elections. See Pennsylvania State House of Representatives Legislative Journal (daily ed. Feb. 3, 1913).

The author was unable to obtain information from Kentucky and Massachusetts.

273. See *supra* note 272.

274. See Lessig, *supra* note 26, at 1182-83 ("Fidelity, [the traditional originalist believes], means applying the original text *now* the same as it would have been applied then.").

275. See *id.*

276. The originalist on either side of this question may observe that this Article has not discussed the post-enactment history of the Seventeenth Amendment. This omission is intentional. First, questions of post-enactment practice are sufficiently complex to warrant separate extended treatment elsewhere. For originalists, moreover, post-ratification history is "the least reliable source for recovering the original meaning of the law . . ." Calabresi & Prakash, *supra* note 195, at 553. As Jack Rakove explains:

The Constitution derives its supremacy . . . from a direct expression of popular sovereignty, superior in authority to all subsequent legal acts resting only on the weaker foundations of representation. If this becomes the premise of interpretation, it follows that the understanding of the ratifiers is the preeminent and arguably sole source for reconstructing original meaning.

JACK RAKOVE, ORIGINAL MEANINGS 9 (1996).

Whatever the interpretive ambiguity created by application of traditional originalism, however, the permissibility of Senate districts is clear when translation originalism is applied. Like traditional originalism, translation originalism seeks to comprehend the meaning of a text as that text was understood by its enactors.²⁷⁷ Translation originalism, however, departs from the traditional school by seeking to preserve original meaning across different factual contexts, locating in each new context the analogue of the original intent of the drafters.²⁷⁸ The difference in approach can fairly be described as a difference in the level of generality at which one construes original intent.²⁷⁹ Thus, under translation originalism, the fact that Senate districts are not mentioned in the text of the Seventeenth Amendment, and were not conclusively debated during the Sixty-second Congress or by the states, does not resolve the question of their permissibility. Rather than a static interpretation of text based upon its original understanding, the translator looks to the underlying values that the drafters embraced and the ends that they sought to achieve. She then interprets a constitutional provision in a manner that best advances those values in a modern setting.²⁸⁰

1. Translating Intent: The Political Participation of Racial Minorities

Some of the values the Seventeenth Amendment sought to advance can be gleaned by looking beyond the debates of the Sixty-second Congress to the broader movement for the direct election of Senators. Advocates of direct elections, for instance, sought to make the Senate more "responsive" to the popular will.²⁸¹ A modern translation of Progressives' concern with responsiveness requires recognition that today's electorate is far more heterogeneous than in 1913, when racial minorities were substantially precluded from participating in the

277. See Lessig, *supra* note 26, at 1183.

278. See *id.* at 1184, 1211-13.

279. See Treanor, *supra* note 26, at 859 (arguing that in order to understand the proper modern scope of the Takings Clause one must look beyond concrete formulations and more broadly to the Framers' motivations). The merit of such an approach is that it recognizes that neither the original Framers nor the drafters of the Seventeenth Amendment could have anticipated the myriad circumstances in which the relevant text would be applied. According to Professor Treanor, the approach is also faithful to a mode of constitutional interpretation that the Framers themselves apparently intended to be used, one of interpretive flexibility. See *id.* at 858.

280. See *id.* at 857.

281. See HOEBEKE, *supra* note 9, at 83, 128-29, 131, 193. As Hoebeke notes, there is considerable question whether the Senate was in fact as unresponsive as the Progressives portrayed, and, in any event, the popular will was not so easily ascertained. See *id.* at 83, 128-29, 131.

political process.²⁸² Senate districts would ensure greater responsiveness to groups whose interests were not considered at the time of the Amendment's passage.²⁸³

The creation of districts to enhance the protection of racial minorities' interests is especially appropriate in the case of the United States Senate because the Senate is an inherently anti-majoritarian institution. Article V's guarantee of equal representation in the Senate already affords special protection to geographic minorities;²⁸⁴ a minority of the population may block legislation supported by a majority.²⁸⁵ Senate districts would simply update the anti-majoritarian premise of the Senate by recognizing that statehood may now be less meaningful than other forms of political identity, such as race.²⁸⁶

282. Although the Civil War amendments conferred upon former slaves the constitutional right to vote, in many parts of the country, particularly the South, those amendments were not honored until the second half of the twentieth century. See generally Benno C. Schmidt, Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era*, 82 COLUM. L. REV. 835 (1982) (analyzing the Supreme Court's handling of black disenfranchisement during the Progressive Era). Indeed, the racialized tone of the debates on the Seventeenth Amendment attest to the then extant disenfranchisement of Black Southerners. See *supra* note 233.

283. As Hoebeker notes: "Direct democracy simply multiplied the voices which called upon government for aid and protection, so that none but the largest or loudest interests could be heard." HOEBEKE, *supra* note 9, at 128. For an extensive discussion of racial minorities' continued marginalization in the American political process, see generally LANI GUINIER, *THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY* (1994).

284. See U.S. CONST. art. V (providing for equal representation of a state in the Senate regardless of its population).

285. See William N. Eskridge, Jr., *The One Senator, One Vote Clause*, 12 CONST. COMMENTARY 159, 159-60 (1995). Professor Eskridge provides the following examples of this anomaly:

[I]f Senate votes were weighted according to the states' representation in the House (each Senator receiving half of the state's House allotment), the Senate would have voted 295-140 to override President Bush's veto of the 1990 civil rights bill, would have rejected the nomination of Judge Clarence Thomas for the Supreme Court in 1991 (albeit in a close vote, 224-211), and would have overwhelmingly (238-165) voted to remove the ban on entry into the United States of people who are infected with the HIV virus (a move that was defeated by 52-46 when proposed in 1993).

Id. at 160.

286. See Eli Zaretsky, *Identity Theory, Identity Politics: Psychoanalysis, Marxism, Post-Structuralism*, in *SOCIAL THEORY AND THE POLITICS OF IDENTITY* 198 *passim* (Craig Calhoun ed., 1994). Zaretsky writes:

Beginning in the late 1960s a new form of political life emerged, especially in the US, which more recently has been termed "identity politics." It had two main characteristics: first, an emphasis on difference rather than commonality; second, the local or particular community of identity—such as lesbianism or the African-American community—was intended as the central point of identification for the self.

Moreover, apart from notions of political identity, the reality is that state lines are far less relevant to the modern Senate²⁸⁷ and thus cannot justify the status quo of at-large elections. A number of factors explain this transformation. American society has become more nationalized through transportation and telecommunications advances, and there is an increased "standard of living and level of education, and a more urban and mobile populace."²⁸⁸ These changes, aided by the growth in the national government, the corresponding growth in the work of the Senate, and the burgeoning of national advocacy groups and issues, have in turn nationalized the Senate.²⁸⁹ Characteristic of this change is the conduct of Senate elections. Most money raised in Senate races comes from outside the states in which the candidates run.²⁹⁰ Moreover, Senators now identify themselves with particular national issues and constituencies to the point where, in the words of political scientist Nelson Polsby, "[t]he more common pattern today is for senators to seek to become national politicians, something the mass media have made increasingly possible."²⁹¹

The prospect of Senate districts must be evaluated in light of mod-

Id. at 198; see also Alexandra Natapoff, *Madisonian Multiculturalism*, 45 AM. U. L. REV. 751, 752 (1996) ("[R]ace today is an important political determinant that inspires significant factional interest-group jockeying, not only between whites and minorities, but between different groups of color."); Mark S. Nagel, Note, *Constitutional Limits on Racial Redistricting: Miller v. Johnson*, HARV. J.L. & PUB. POL'Y 188, 198 (1995) ("[R]ace remains one of the most important factors in American politics."); Kimberle Williams Crenshaw, Transcript, *Panel Presentation on Cultural Battery*, 25 U. TOL. L. REV. 891, 891 (1995) (discussing the domestic violence movement as a successful example of women's identity politics and defining the term to mean "resistance politics, organized and mobilized around the concept of identity as a woman").

In her dissent in *Miller v. Johnson*, 115 S. Ct. 2475 (1995), Justice Ginsburg recognized the potential for race and ethnicity to be overriding determinants of political identity:

[E]thnicity itself can tie people together, as volumes of social science literature have documented—even people with divergent economic interests. For this reason, ethnicity is a significant force in political life. . . . To accommodate the reality of ethnic bonds, legislatures have long drawn voting districts along ethnic lines. Our Nation's cities are full of districts identified by their ethnic character—Chinese, Irish, Italian, Jewish, Polish, Russian, for example.

Id. at 2504-05 (Ginsburg, J., dissenting) (citations omitted).

287. See generally FRED R. HARRIS, *DEADLOCK OR DECISION: THE U.S. SENATE AND THE RISE OF NATIONAL POLITICS* 91-158 (1993) (discussing how the nationalization of American society and the advocacy explosion of the 1950's produced a national and individualistic Senate).

288. *Id.* at 94.

289. *See id.* at 94-95.

290. *See id.* at 72.

291. *Id.* at 95 (internal quotations omitted); see also *id.* at 69-70 (maintaining that national issues and interest groups provide Senators with greater opportunities to gain political power and national prominence).

ern notions of political identity and an increasingly nationalized society and Senate. Statewide Senate elections elevate geographic lines above more substantive political divisions such as race and gender. They ignore the effect of technology and transportation on the notions of statehood, particularly as that construct relates to the Senate and its elections. As a consequence of adhering to statewide elections merely for their own sake, the goal of a more responsive Senate is thwarted and the voices of racial minorities are submerged in a fashion that is typical of such at-large arrangements.

One might observe, however, that defining responsiveness in racial terms may run counter to current notions of equal protection. Thus, the argument goes, race-motivated districting is not a permissible means of making the Senate more responsive to minority concerns.²⁹² An examination of the Supreme Court's recent redistricting decisions belies this argument, however. In *Shaw v. Reno*,²⁹³ white voters challenged two congressional districts in which Blacks constituted a majority of the population. By several accounts, both districts were oddly shaped.²⁹⁴ Moreover, there was evidence that the districts' shapes were the result of unconventional districting practices, such as dividing counties and towns and allocating them among multiple districts.²⁹⁵ The plaintiffs charged that the districts' distorted contours were the result of the North Carolina legislature's efforts to create the two majority-Black districts at issue.²⁹⁶ Reversing a lower court's dismissal for failure to state a claim, the Supreme Court announced that it would strictly scrutinize majority-minority congressional districts which, due to their disregard of traditional districting criteria, "can be understood only as an effort to segregate voters into separate voting districts because of their race . . ."²⁹⁷ Finding that plaintiffs need not suffer a dilution of their proportionate voting strength in order to state an equal protection violation,²⁹⁸ the *Shaw* Court announced an

292. See, e.g., *Holder v. Hall*, 114 S. Ct. 2581, 2598 (1994) (Thomas, J., concurring) (describing the creation of majority-minority districts as "an enterprise of segregating the races into political homelands that amounts . . . to nothing short of a system of 'political apartheid' ") (citations omitted).

293. 509 U.S. 630 (1993).

294. See *id.* at 635-36.

295. See *id.* at 636-37.

296. See *id.* at 637.

297. *Id.* at 657-58.

298. Whites in the two majority-Black districts in *Shaw* did not suffer a dilution of their proportional voting strength because whites still occupied 10 of the 12 North Carolina congressional seats, even after the creation of the Black districts. See *id.* at 634. Whites constituted 78% of North Carolina's voting age population. See *id.*

"analytically distinct" claim that required no tangible injury.²⁹⁹ Whether or not White voters were underrepresented by a districting plan, they were harmed if the plan relied on racial stereotyping that suggested "members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls."³⁰⁰

In *Miller v. Johnson*,³⁰¹ the Court attempted to clarify and expand upon the reasoning in *Shaw*. As in *Shaw*, *Miller* involved an equal protection challenge to two new majority-minority congressional districts. And, like *Shaw*, there was evidence that the new majority-Black districts had been achieved by disregarding traditional districting practices.³⁰² Writing for a five-Justice majority, Justice Kennedy described the evidentiary burden that plaintiffs must meet in order to trigger strict scrutiny of a redistricting plan:

The plaintiff's burden is to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district. To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations. Where these or other race-neutral considerations are the basis for redistricting legislation, and are not subordinated to race, a state can "defeat a claim that a district has been gerrymandered on racial lines."³⁰³

Whatever may be the effects of *Shaw* and its progeny on majority-

299. *Id.* at 652.

300. *Id.* at 647.

301. 115 S. Ct. 2475 (1995).

302. *See id.* at 2483-84.

303. *Id.* at 2488 (citations omitted). The Court found that plaintiffs had satisfied their burden and applied strict scrutiny to Georgia's districting plan. *See id.* at 2489-90. Georgia offered as a compelling state interest its need to comply with Section 5 of the Voting Rights Act of 1965. While acknowledging that compliance with the Voting Rights Act might constitute a compelling state interest, the Court held that the Justice Department's interpretation of Section 5 incorrectly required the state of Georgia to maximize the number of Black congressional districts to reflect as closely as possible the percentage of the state's Black population. *See id.* at 2490-91. "[C]ompliance with federal antidiscrimination laws cannot justify race-based districting where the challenged district was not reasonably necessary under a constitutional reading and application of those laws." *Id.* at 2491 (citations omitted).

minority House districts, these precedents do not preclude the creation of majority-minority or minority-enhanced Senate districts, for such districts can be drawn in accordance with traditional districting criteria. Suppose, for example, that New York were divided into two districts for purposes of electing its two federal Senators. The state might adopt a districting system for a number of reasons, including its potential to enhance the representation of minority interests. Nothing in *Shaw* or *Miller* suggests that the adoption of such a system constitutes a suspect classification merely because it is enacted with an intent to enhance the representation of minority interests.³⁰⁴ Instead, under these precedents, whether strict scrutiny is applied will turn on the manner in which the districting is carried out.

Suppose further that in drawing its Senate districts, New York's legislature included the whole of the City of New York in one district and most of upstate New York in another. This is a realistic assumption since the geopolitics of the state are basically two-dimensional—New York City versus the rest of the state.³⁰⁵ The result of such a districting scheme is an outcome that comports with traditional districting principles by maintaining political subdivisions and geographic communities of interest and ensuring compactness and contiguity.

The result is also a district with substantially more minorities than the statewide population.³⁰⁶ Racial minorities comprise approximately

304. Indeed, *Shaw* expressly declined to answer the question "whether 'the intentional creation of majority-minority districts, without more', always gives rise to an equal protection claim." *Shaw*, 509 U.S. at 649 (quoting *id.* at 668 (White, J., dissenting)). *United Jewish Organization of Williamsburgh, Inc. v. Carey*, however, appears to answer this question in the negative. There the Court upheld New York's creation of majority-minority districts against equal protection objections, finding that the deliberate use of race in a redistricting plan, without more, does not render it constitutionally infirm. See *United Jewish Organization*, 430 U.S. at 165. The opinion nowhere purports to apply strict scrutiny. Analogously, New York's shift from at-large Senate elections to districts for purposes of enhancing minority representation should not by itself invoke heightened review.

305. See 20 THE ENCYCLOPEDIA AMERICANA 228h (1989) ("New York City is often pitted against the rest of the state."); Alan Finder, *The Governor's Race: What's in It for Us*, N.Y. TIMES, Nov. 6, 1994, § 13, at 1 ("The regional distinctions that have defined New York's statewide campaigns for decades have loomed large in this year's [1994] gubernatorial race.").

306. The Supreme Court has not decided whether "influence" districts, those in which minorities constitute a substantial number but not a majority, are cognizable as a remedy in voting rights litigation. See *Voinovich v. Quilter*, 507 U.S. 146, 154 (1993). However, the Court recently intimated its approval of such districts by vacating the judgment in *Rural W. Tenn. African-American Affairs Council, Inc. v. McWherter*, 836 F. Supp. 453 (W.D. Tenn. 1993), and remanding the case for reconsideration in light of *Johnson v. DeGrandy*, 114 S. Ct. 2647 (1994). See *Johnson*, 114 S. Ct. at 2775. On remand, the three-judge panel approved the creation of an influence district in lieu of maximizing the number of majority-minority districts. See *Rural W. Tenn. African-American Affairs*

30.7% of the State of New York's population.³⁰⁷ However, they constitute 56.8% of New York City's population.³⁰⁸ Because Senate districts would likely be held to the population equality requirements of *Reynolds v. Sims*,³⁰⁹ counties surrounding New York City would have to be included in the "city" district to prevent malapportionment. By including in the city Senate district all counties comprising the New York Primary Metropolitan Statistical Area,³¹⁰ rough population equality is achieved.³¹¹

Thus configured, racial minorities would constitute 43.5% of the city Senate district, an increase of nearly 13% over their statewide proportion.³¹² If minorities in the city Senate district vote as a cohesive group, the increase in their voting strength would substantially increase the odds of electing a minority-preferred candidate.³¹³ A similar result may obtain in other states whose geopolitical and residential patterns track New York's.³¹⁴

Council, Inc. v. McWherter, 877 F. Supp. 1096, 1098 (W.D. Tenn. 1995), *aff'd sub nom.* Rural W. Tenn. African-American Affairs Council, Inc. v. Sundquist, 116 S. Ct. 42 (1995).

307. See THE NELSON A. ROCKEFELLER INST. OF GOV'T, NEW YORK STATE STATISTICAL YEARBOOK 9 (1994) [hereinafter STATISTICAL YEARBOOK].

308. See *id.*

309. 377 U.S. 533, 577 (1964) ("[A] State [must] make an honest and good faith effort to construct districts . . . as nearly of equal population as is practicable.").

310. A "Primary Metropolitan Statistical Area" is defined as a large urbanized county or a group of counties possessing strong economic and social ties. The urban center or group of counties must also have close ties to portions of their surrounding areas. See STATISTICAL YEARBOOK, *supra* note 307, at 7.

311. The New York Primary Metropolitan Statistical Area constitutes 47.5% of New York State's total population. See *id.* at 12. This population deviation may be justified "on the basis of some legitimate, consistently applied policy," such as preserving the voting strength of minority groups. *Karcher v. Daggett*, 462 U.S. 725, 741 (1983); but see *id.* at 741-44 (rejecting the latter justification as unproven by the State of New Jersey).

312. See *supra* text accompanying note 307-08.

313. The author does not mean to suggest by using an influence district example that influence districts are preferable to majority-minority districts. Instead, the above illustration is used only as the most straight-forward instance in which Senate districts would satisfy equal protection claims.

314. States with urban centers which might form the core of a majority-minority or minority-enhanced Senate district include: California (Los Angeles, 47.2% minority); Illinois (Chicago, 54.6% minority); Michigan (Detroit, 78.4% minority); and Pennsylvania (Philadelphia, 46.5% minority). See U.S. DEP'T OF COMMERCE, COUNTY AND CITY DATA BOOK 674, 722, 758, 806 (1994).

States with dispersed minority populations—such as North Carolina in *Shaw* and Georgia in *Miller*—do not necessarily make the creation of Senate districts to benefit minorities more constitutionally risky. Any definition of compactness in the Senate district context must take account of the fact that each Senate district will encompass half of the state's population. Therefore, the norm for compactness—or for that matter, for any other traditional districting criteria—will necessarily be different than for House districts. See *infra* notes 324-26 and accompanying text.

Even if strict scrutiny were applied to the New York districts, either because they were adopted with the intent of aiding minorities or because traditional districting principles were subordinated to race, the districts may still survive if New York can show that it acted to remedy the effects of past discrimination or to avoid liability for vote dilution under the Voting Rights Act of 1965. Last term, in *Bush v. Vera*³¹⁵ and *Shaw v. Hunt (Shaw II)*,³¹⁶ the Supreme Court recognized both these defenses as potentially compelling.³¹⁷

The Court's discussion of vote dilution claims under the Voting Rights Act in *Vera* and *Shaw II* is especially relevant to the possibility of creating Senate districts in states whose minority populations are dispersed. With respect to the states' interest in avoiding liability for vote dilution under the Voting Rights Act, the Court has assumed that such an interest would be compelling.³¹⁸ The Court's opinions in both *Vera* and *Shaw II* set forth the requirements for a finding of vote dilution under Section 2 of the Act: (1) the minority group must be sufficiently large and geographically compact to constitute a majority in a single-member district; (2) the minority must vote cohesively; (3) the White majority must vote as a bloc so as to usually defeat the minority-preferred candidate.³¹⁹ Although the Court did not require a preponderance of proof that a Section 2 violation existed, it held in each case that the states had not narrowly tailored their redistricting to avoid Section 2 liability because the minority populations encompassed by the new districts lacked the requisite compactness.³²⁰ According to the Court, the contorted shapes of the districts and the evident disregard of traditional districting criteria "defeat[ed] any claim that the districts are narrowly tailored to serve the State's interest in avoiding liability under § 2, because § 2 does not require a State to create, on predominantly racial lines, a district that is not reasonably compact."³²¹

Finally, the possibilities for majority-minority and minority-enhanced districts are augmented by the fact that by the middle of the twenty-first century, minorities will comprise nearly one-half of the nation. See William O'Hare, *Diversity Trend: More Minorities Looking Less Alike*, POPULATION TODAY, Apr. 1993, at 1.

315. 116 S. Ct. 1941 (1996).

316. 116 S. Ct. 1894 (1996).

317. See *Vera*, 116 S. Ct. at 1960-63; *Shaw II*, 116 S. Ct. at 1902-05.

318. See *Vera*, 116 S. Ct. at 1960; *Shaw II*, 116 S. Ct. at 1905.

319. See *Vera*, 116 S. Ct. at 1961; *Shaw II*, 116 S. Ct. at 1905.

320. See *Vera*, 116 S. Ct. at 1960-61.

321. *Id.* at 1961 (internal quotation omitted); see also *Shaw II*, 116 S. Ct. at 1906 ("No one looking at District 12 could reasonably suggest that the district contains a 'geographically compact' population of any race. Therefore where that district sits, 'there neither has been a wrong nor can be a remedy.'") (citations omitted). The Court's definition of geographic compactness in *Vera* and *Shaw II* is substantially more stringent than

The Court's geographic-compactness limitation on states' use of the Voting Rights Act as a justification for creating majority-minority districts would be inapplicable to Senate districts. To prove a violation of Section 2 of the Voting Rights Act in statewide elections for United States Senators, plaintiffs must show statewide vote dilution.³²² In assessing whether plaintiffs are sufficiently geographically compact in the context of a challenge to this office, a court cannot logically apply the same compactness requirements as it applies to an office with a smaller constituency.³²³ Because the Constitution would restrict the number of Senate districts per state to two, into which equal populations must be placed, the benchmark for compactness must be the geographic contours, demographics and population dispersion of the entire state; smaller electoral units are simply inapposite.³²⁴

Thus, the Seventeenth Amendment's broad purpose of effectuat-

lower courts' application of this criterion. "[L]ower courts have, almost without exception, interpreted [the compactness requirement] of the first prong to mean only contiguity. Thus, the courts have tended not to separate the question of geographic compactness from the question of whether the minority group is numerous enough to constitute a majority." BERNARD GROFMAN ET AL., *MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY* 64 (1992); see also BERNARD GROFMAN, *Expert Witness Testimony and the Evolution of Voting Rights Case Law*, in *CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE* 218-19 (Bernard Grofman et al. eds., 1992) (stating that lower courts had generally interpreted the compactness requirement loosely to mean only that the minority population must be "sufficiently geographically concentrated so that a district could be created in which the minority is a majority").

322. See *Johnson v. De Grandy*, 114 S. Ct. 2647, 2662 (1994) (limiting a § 2 inquiry to the area for which vote dilution was alleged); *Shaw II*, 116 S. Ct. at 1906 ("If a § 2 violation is proven for a particular area, it flows from the fact that individuals in this area have less opportunity . . . to participate in the political process and to elect representatives of their choice." (internal quotations omitted)).

323. Cf. *De Grandy*, 114 S. Ct. at 2662 (distinguishing claims of statewide vote dilution from dilution in a smaller geographic area).

324. See Paul L. McKaskle, *The Voting Rights Act and the "Conscientious Redistricter,"* 30 U.S.F. L. REV. 1, 64 (1995). Professor McKaskle writes:

There are many circumstances which justify, quite legitimately, departure from districts that approach a square in shape. These circumstances include topography (mountain ranges, rivers, bays), lines of communications and transportation, local government boundaries (which themselves are often quite irregular), and the like. *Notions of compactness must also be considered in view of the fact that while the entire area of any jurisdiction must be assigned to a district in the redistricting process, the districts must also be equal in population.* However, the population density may vary enormously, hence some districts may be very small but others will have to cover large areas to obtain the requisite population. . . . Perhaps the most extreme example of this is the division of Nevada into the two congressional districts allotted to it. One district is very compact, constituting the central urban core of metropolitan Las Vegas The other district encompasses the rest of the state, some 109 thousand square miles, yet over half of its population is clustered in a small area around Reno.

Id. at 64 & n.301 (emphasis added).

ing a more responsive Senate is not in conflict with the Court's current conceptions of equal protection, as pronounced by *Shaw* and its progeny. On the contrary, to the extent that equal protection endorses the goals of remedying past discrimination and preventing vote dilution, the Fourteenth Amendment reinforces a modern translation of the Progressives' aim of creating a more responsive Senate.

2. Translating Intent: The Influence of Money in Political Campaigns

Obscured by the current debate over campaign finance reform and its First Amendment implications is a significant fact: like today's advocates of reform, the Progressives who fought for passage of the Seventeenth Amendment were deeply concerned about the role of money in politics. Direct election advocates believed that monied interests such as large corporations exerted a disproportionate influence on state legislatures' appointment of Senators.³²⁵ Their cure for this evil was to turn over the election of Senators to the people.³²⁶ However, because the people constituted a far larger electorate than did members of state legislatures, the introduction of popular elections actually increased the influence of money.³²⁷ As C.H. Hoebeke observes in his recent work on the direct election of Senators, direct election advocates failed to realize that "the more the democratization of the electoral process, the more attention—in the form of organization and money—would have to be devoted. The range of interests in any one state were usually too broad to make direct appeals without a well financed structure of coordination."³²⁸

To a degree that Progressives could not possibly have imagined, money now dominates Senate races.³²⁹ Because attempts at directly curtailing spending invariably implicate the First Amendment and

325. See HOEBEKE, *supra* note 9, at 98-106.

326. See *id.*

327. See *id.* at 105-06.

328. See *id.* Hoebeke's account suggests a practical explanation for the post-ratification practice of at-large elections that is divorced from issues of original intent: power. The promoters of the Amendment within the states—party bosses and organizations, large corporations and United States Senators themselves—tended to be entities with statewide power and resources sufficient to mobilize statewide campaigns. See *id.* at 24, 105-06, 151-54. Who were the countervailing voices and how, in any event, could they be heard? Certainly not minorities, who were precluded from voting in numerous states. See *supra* note 282. Thus, the failure of states to adopt or maintain a districting system can be explained as a function of which interests were the most powerful at the time of the Seventeenth Amendment's adoption rather than a product of constitutional deliberation.

329. See HOEBEKE, *supra* note 9, at 189-95.

therefore must often withstand the most demanding constitutional scrutiny,³³⁰ measures which make money less necessary in the first place are the next best remedy. Senate districts would fulfill the aspirations of direct election advocates without First Amendment complications by reducing the need for money. House races on average cost less than Senate races because House candidates must campaign among a smaller constituency in a more limited geographic area than Senate candidates.³³¹ Applying this experience to Senate districts, it will generally cost less to run in one half of a state than the entire state.³³²

The salutary effects of reducing the costs of Senate races would not merely be to reduce the role of money in Senate campaigns; it would also facilitate greater responsiveness on the part of the Senate by diversifying its ranks. Non-traditional candidates such as minorities and women, who have a far more difficult time raising money for all types of political offices than their White male counterparts,³³³ would be major beneficiaries. Senate seats would become more accessible to them and other historically underrepresented interests because running for the Senate would be less expensive.³³⁴

The effect of failing to translate into modern terms the Progressives' concerns with the influence of money in Senate campaigns is that the Seventeenth Amendment must be interpreted in a manner that exacerbates a principal evil it sought to address. No form of originalism should require such a perverse result.

3. Translating Intent: Uniformity between the Senate and House

A final translation argument is based on the debates among the

330. See, e.g., *Colorado Republican Fed. Campaign Comm. v. Federal Election Comm'n*, 116 S. Ct. 2309, 2338 (1996) (Thomas, J., concurring) (noting that the Court has traditionally applied strict scrutiny to "broad prophylactic caps on both spending and giving in the political process").

331. See HARRIS, *supra* note 287, at 71.

332. Reducing the *amount* of money involved in Senate elections is no guarantee that the *influence* of such money will be reduced. This shortcoming, however, is no different from that of spending caps generally, which likewise reduce only the amounts of money involved in political campaigns.

333. See Doug Brown, *Women in Politics: Candidates Face Money Problems*, L.A. TIMES, June 27, 1986, at V1 (detailing fundraising difficulties of female candidates); Jerry Knight, *As the SEC Fights 'Pay-to-Play,' Minority Players Cry Foul*, WASH. POST, July 16, 1994, at F1 (discussing recent SEC regulations which minority politicians believe will exacerbate their fundraising difficulties).

334. See Karlan, *supra* note 15, at 190 n.71 (noting that Black voters stand a better chance of electing a minority-preferred candidate in a single-member district because the cost of running is less and White voters in a smaller electorate may be more likely to know, and therefore, more likely to support, the minority-preferred candidate).

Seventeenth Amendment's drafters. The Sixty-second Congress's debate over the Seventeenth Amendment was not about the merits of directly electing Senators. Rather, it was a dispute over the degree of uniformity that should exist between two coordinate bodies directly elected by the people. The decision to apply the Elections Clause uniformly to the House and Senate can be interpreted narrowly: Congress merely wished that there be federal oversight over both Senate and House elections. This interpretation, however, ignores the dominant rationale for Congress's decision: elections for both houses should be subject to federal supervision because both houses possess the same representative capacity. The modern role of the Senate supports extending the drafters' principle of uniformity to the manner by which both houses are elected.

Whatever may have been the Framers' intentions for the Senate, the Seventeenth Amendment has virtually abolished any notion of that body representing states as states.³³⁵ As a consequence, states' power in the national legislature has been greatly reduced.³³⁶ Rather than

335. See Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1488 (1987) (book review) ("[T]he principal structural protection for federalism, the direct representation of state legislatures in the Senate, was eliminated by the seventeenth amendment."); see also Deborah J. Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 16 (1988) ("The only constitutional provision that might have ensured some congressional representation for [state] institutional interests—the selection of Senators by state legislatures—was repealed in 1913.").

336. See McConnell, *supra* note 335, at 1488; see also George Anastaplo, *Amendments to the Constitution of the United States: A Commentary*, 23 LOY. U. CHI. L.J. 631, 809 (1992) (noting that the Seventeenth Amendment reduces the role of states in our constitutional system); Boudreaux & Pritchard, *supra* note 205, at 145-46 (noting that after the passage of the Seventeenth Amendment federal power increased because congressional politicians began responding to national interest groups instead of state legislatures); Jeffrey C. Clark, *The United States Proposal for a General Agreement on Trade in Services and its Preemption of Inconsistent State Law*, 15 B.C. INT'L & COMP. L. REV. 75, 104 n.213 (1992) (noting the shift in the balance of powers between the federal and state governments effected by the Seventeenth Amendment); Jerry Frug, *Decentering Decentralization*, 60 U. CHI. L. REV. 253, 338 & n.199 (1993) (noting that the passage of the Seventeenth Amendment raises considerable doubt whether Congress represents the interests of states qua states); Douglas Laycock, *Notes on the Role of Judicial Review, the Expansion of Federal Power, and the Structure of Constitutional Rights*, 99 YALE L.J. 1711, 1737-38 (1990) (book review) (explaining the direct election of Senators as an accretion of federal power at the expense of the states); Merritt, *supra* note 335, at 15-16 & n.90 (questioning whether Senators ever actually represented the sovereign interests of the states and finding that any such representation has been vanquished by the Seventeenth Amendment); Victoria L. Calkins, Note, *State Sovereign Immunity After Pennsylvania v. Union Gas Co.: The Demise of the Eleventh Amendment*, 32 WM. & MARY L. REV. 439, 469 (1991) (arguing that the passage of the Seventeenth Amendment has led to a shift of attention away from state and local concerns towards national interest groups); John E. DuMont, Note, *State Immunity from Federal Regulation—Before and*

representing the sovereign interests of states, Senators now represent a variety of national interest groups—a role identical to that of House members.³³⁷

In *Garcia v. San Antonio Metropolitan Transit Authority*,³³⁸ the Supreme Court recognized, but did not find dispositive, the Senate's diminished role as a repository of states' rights. *Garcia* involved the application of the wage requirements of the Fair Labor Standards Act to municipal employees in San Antonio.³³⁹ Claiming that the Department of Labor lacked authority under the Commerce Clause to impose federal wage standards on municipal employees, the city of San Antonio sued the federal government for declaratory relief.³⁴⁰ In answering the city's objections, the Supreme Court departed from precedent requiring a determination of whether the federal law invaded a "traditional" local governmental function.³⁴¹ Instead, the Court professed its inability to identify "principled constitutional limitations on the scope of Congress' Commerce Clause powers over the States merely by relying on *a priori* definitions of state sovereignty."³⁴² It held that states must look to the legislative process to prevent overreaching by the federal government.³⁴³ This approach made sense, according to the Court, because "the composition of the Federal Government was

After *Garcia*, 31 DUQ. L. REV. 391, 400 (1993) (arguing that "[s]ince the power to elect is the power to control," the Seventeenth Amendment has decreased the influence of states in the national government); Fernando R. Laguarda, Note, *Federalism Myth: States as Laboratories of Health Care Reform*, 82 GEO. L.J. 159, 164 (1993) (arguing that the Seventeenth Amendment is partially responsible for states, as such, having little influence over Congress). But see BRUCE ACKERMAN, *WE THE PEOPLE* 259 (1991) ("Surely Senators continue to serve as the distinctive voice of the states that elect them.").

337. See Calkins, *supra* note 336, at 469 ("Representatives of both Houses of Congress have developed independent constituencies among groups that support national initiatives, such as farmers, environmentalists, and the poor."); Albert P. Melone, *The Senate's Confirmation Role in Supreme Court Nominations and the Politics of Ideology Versus Impartiality*, 75 JUDICATURE 68, 73 (1991) (arguing that the Seventeenth Amendment may have made Senators more responsive to interest group and grassroots awareness of judicial policy making). Indeed, the Senators have a greater necessity to cultivate national interest group constituencies since nationally mobilized interests are more likely to target Senators than members of the House. See RICHARD F. FENNO, JR., *THE UNITED STATES SENATE: A BICAMERAL PERSPECTIVE* 17 (1982).

The concern over the role of national interest groups continues to mount. A coalition of Democrats and Republicans in the House of Representatives have proposed campaign reform legislation that would limit congressional and senatorial candidates' out-of-state campaign contributions. See H.R. REP. 104-2148 (1995).

338. 469 U.S. 528 (1985).

339. See *id.* at 533.

340. See *id.* at 534.

341. See *id.* at 545.

342. *Id.* at 548.

343. See *id.* at 550.

designed in large part to protect the States from overreaching by Congress.”³⁴⁴

More specifically, the Court recognized that the original Constitution gave states direct representation in the Senate through the legislative appointment of federal Senators.³⁴⁵ Thus, the *Garcia* Court seemed to give credence to the traditional notion of the Senate as a guardian of state interests. However, in virtually the same breath, the Court was forced to recognize the impact of the Seventeenth Amendment on the state-centered conception of the Senate:

We realize that changes in the structure of the Federal Government have taken place since 1789, not the least of which has been the substitution of popular election of Senators by the adoption of the Seventeenth Amendment in 1913, and that these changes may work to alter the influence of the States in the federal political process.³⁴⁶

Justice Powell, dissenting with three other Justices, found the majority's concession regarding the reduced role of states in the national government to be dispositive:

At one time in our history, the view that the structure of the Federal Government sufficed to protect the States might have had a somewhat more practical, although not a more logical, basis. . . . [B]ut a variety of structural and political changes occurring in this century have combined to make Congress particularly insensitive to state and local values. *The adoption of the Seventeenth Amendment . . . the weakening of political parties on the local level, and the rise of national media, among other things, have made Congress increasingly less representative of state and local interests, and more likely to be responsive to the demands of various national constituencies.*³⁴⁷

Thus, although *Garcia* provides some support for a state-centered conception of the Senate, it supports the proposition that the Senate and House possess the same representative capacities. To the extent that *Garcia* manifests a tension between the theory of the Senate and its actual operation today, subsequent decisions of the Court have resolved the conflict in favor of the Senate's modern role. Hence, in *U.S. Term Limits, Inc. v. Thornton*,³⁴⁸ the Court recognized the Seventeenth

344. *Id.* at 550-51.

345. *See id.* at 551.

346. *Id.* at 554.

347. *Id.* at 565 n.9 (Powell, J., dissenting) (emphasis added).

348. 115 S. Ct. 1842 (1995).

Amendment as an extension of the ideal embodied in Article I, Section 2, Clause 1—that the “Federal Government [is] directly responsible to the people, . . . and chosen directly, not by States, but by the people.”³⁴⁹

Beyond the uniformity in their representative capacities, the House and Senate have become institutionally similar in other important respects, some of which are directly attributable to popular elections. For instance, both Senators and Representatives now campaign and raise funds throughout their terms even though Senators have a tenure that is three times longer than House members.³⁵⁰ The House and Senate have become so similar as institutions that congressional scholars have theorized about a convergence of the roles of Senators and House members.³⁵¹ Even those who disagree with “convergence theory” conclude that the most significant difference between the Senate and House is not that Senators are currently elected on a statewide basis while House members are elected by districts, but rather that the House is four times larger than the Senate.³⁵² In this context, electing Senators by district would not change the institutional distinctions that remain between the House and Senate.³⁵³

349. *Id.* at 1863.

350. See ROSS K. BAKER, HOUSE AND SENATE 184 (1995).

351. See *id.* While ultimately disagreeing with convergence theorists, Baker sets forth the most commonly cited evidence of institutional convergence between the House and the Senate:

1. The House has suffered a decline in the efficiency of its legislative process and has become a more unpredictable body in the manner of the Senate.
2. A heavier senate workload and an increase in the numbers and the attendant rise of influence of staff have caused a deterioration in the interpersonal comity and accommodation that has long defined the Senate. This is associated with a decline of institutional loyalty, disillusionment, and a more rapid turnover of members and seems to point to more chances for stardom in the House.
3. Senators are beginning to experience greater electoral insecurity and to act more like House members by campaigning almost constantly for six years, as the House members do for the two years of their incumbency.
4. Senators are actually becoming more engrossed in the minutiae of legislation and House members are acting like generalists—an apparently dramatic role reversal.
5. The value of leadership positions in the House—both party and committee—has diminished, and the hierarchy of the House has become more flattened to resemble that of the Senate where power is more evenly distributed.

Id. As is evident from the above enumeration, convergence theory does not focus on the similarities in the representative capacities of the two houses, but instead is concerned with other institutional overlap. Convergence theory is nevertheless relevant to a discussion of Senate districts, for the fewer differences there are between the two houses, whether related to their representative capacities or not, the less objection there can be to electing both houses by districts.

352. See *id.* at 54-56.

353. See *supra* notes 76-82 and accompanying text.

Fidelity to the intent of the enactors of the Seventeenth Amendment requires recognition of a modern reality that the Amendment's drafters foreshadowed: the symmetry in the representative capacities and institutional characters of the House and Senate. But these similarities, in turn, raise questions about what differences are constitutionally required. Does an intent to ensure that both houses possess the same representative capacity mean that House members and Senators can both be elected by districts? In other words, where does the principle of uniformity end?

Whatever lingering confusion about the Senate remained after the ratification of the Constitution, it was clear that the Senate was intended to be a counterweight to the House in much the same way the legislative branch would act as a check on the presidency.³⁵⁴ The uniformity principle ends where its pursuit would defeat the Founders' purposes in creating a bicameral national legislature. Senate districts in no way thwart this bicameralism. Such districts are thus within the interpretive ambit of the uniformity principle established by the Sixty-second Congress.

Direct elections naturally limit the mechanisms available for achieving the counterbalance contemplated by the original Framers. A difference in constituency—election by state legislatures rather than the people—is no longer a feature of bicameralism. But the aim of bicameralism is achieved through a host of other distinctions that remain, distinctions James Madison specifically identified in *Federalist* No. 62: the different qualifications for Senators, their longer terms, and their distinct powers under the Constitution.³⁵⁵ Senate districts obviously do not affect such idiosyncrasies.

There is, however, one bicameral distinction that the Founders arguably contemplated which Senate districts would affect—the size of the electorate. In *Federalist* No. 10, Madison advanced the view that large electorates were most likely to guard against “unworthy candidates [who] practise with success the vicious arts, by which elections are too often carried.”³⁵⁶ In other words, a larger electorate would

354. See *supra* notes 193-94 and accompanying text; see also *THE FEDERALIST* NO. 62, at 415 (James Madison) (Jacob E. Cooke ed., 1961) (discussing the distinct characteristics of the Senate).

355. See *THE FEDERALIST* NO. 62, at 415 (James Madison) (Jacob E. Cooke ed., 1961); see also *id.* NO. 63, at 422 (discussing the longer duration of Senators' terms).

356. *Id.* NO. 10, at 63. Madison reasoned that:

The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within

most likely ensure the election of men who would advocate the public good rather than the interests of factions. In Federalist No. 63, Madison returned to his arguments in support of an extensive republic, or large electorate, in explaining the protections afforded by the Senate. He admonished that in assessing the advantage of a Senate, "we must be careful not to separate it from the other advantage, of an extensive territory."³⁵⁷ Thus, it is clear that Madison viewed bicameralism, and more specifically the role of the Senate, as an "auxiliary precaution[]" to the protections already afforded by a large electorate.³⁵⁸

The import of Madison's insights for Senate districts is unclear. The Framers decided against the direct election of Senators; hence, Federalists Nos. 10 and 63 do not speak directly to the modern reality of direct elections. Yet, it is reasonable to infer that the Framers would have sought a large electorate for the Senate.³⁵⁹ Senate districts fulfill this intent. The Framers likely did not anticipate the existence of nation-sized states like California and Texas, to name a few.³⁶⁰ In all but a handful of states, Senate districts would not only be larger than House districts,³⁶¹ but would contain millions of inhabitants per district, numbers more than sufficient to fulfill the goal of Federalist No. 10 to control the destabilizing factions which might otherwise prosper in a small electorate.³⁶²

which they are placed, the more easily will they concert and execute their plans of oppression. Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other.

Id. at 63-64.

357. *Id.* NO. 63, at 428.

358. *Id.* at 425.

359. In addition to Federalist No. 10, James Wilson's proposal for large interstate Senate districts also support this conclusion. See *supra* note 113. Finally, a preference for a large United States Senate electorate might be inferred from Madison's critique of Thomas Jefferson's draft of the Virginia Constitution, in which Madison expressed a preference for statewide voting for state Senators, who would in turn represent distinct districts. See Madison to Jefferson, Oct. 15, 1788, in *THE PAPERS OF JAMES MADISON* (Robert A. Rutland et al. eds., University Press of Virginia 1977), XI, 286; Rakove, *supra* note 96, at 429 n.11.

360. The current population of California is 31,431,000; the current population of Texas is 18,378,000. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 26 (1994). By contrast, at the time of the nation's first census in 1790, the entire population of the country was only four million. U.S. BUREAU OF THE CENSUS, STATISTICAL HISTORY OF THE UNITED STATES FROM COLONIAL TIMES TO THE PRESENT 7 (1965).

361. See *supra* note 268 and accompanying text.

362. Indeed, the current size of the electorate in Senate campaigns appears to have perverted the salutary effects that the Framers associated with large electorates. Hoebke elaborates on this unintended consequence of direct elections:

Moreover, the Framers did not live in a society in which technological and transportation advances and national interest groups had effectively nationalized politics, particularly Senate elections.³⁶³ Concerns with small electorates, already inapposite due to population growth since the founding, hold even less sway in light of these modern realities. These nationalizing forces would effectively "extend the sphere"³⁶⁴ of each district's Senate contests, ensuring the benefits of a large electorate even in a smaller unit.

Thus, Senate districts are permissible if they meet the concerns of Federalist No. 10 and do not otherwise undermine bicameralism. In the absence of evidence that either of these aspirations would be harmed, and in light of the modern uniformity between the House and Senate, Senate districts are consonant with the broad aims of the drafters of the Seventeenth Amendment.

CONCLUSION

The Constitution contains no express—or for that matter, necessarily implied—prohibition against Senate districts. To the contrary, the Constitution's text, the Founders' original conception of the Senate and the congressional debates on the Seventeenth Amendment all support the permissibility of Senate districts. Moreover, the broad purposes of the Seventeenth Amendment leave little doubt that districts are consonant with its modern application.

The parallel language of the Seventeenth Amendment and Article I, Section 2, Clause 1; the broad command of the Elections Clause of Article I; the Qualifications Clause of the Seventeenth Amendment; and the Tenth Amendment all support the permissibility of Senate districts as a textual matter. Indeed, in every other instance in which the Constitution has given states authority to prescribe the manner of electing a federal official (i.e., Representatives, the President and the Vice-President), its text has been read to allow districting, directly or

What James Madison observed a century previously with regard to the size of an assembly . . . proved equally true for the size of a constituency. The larger the electorate, "the fewer, and often the more secret, will be the springs by which its motions are directed." In form, "the government may become more democratic, but the soul that animates it will be more oligarchic." In short, the historical trend toward greater popularization of senate elections . . . had given rise to the very conditions which reformers hoped to end with even more popularization. Inevitably, big spending, the pressure of organized interests, and backstage maneuvering would continue to characterize the campaigns of senators long after the nostrum of direct elections had been administered.

HOEBEKE, *supra* note 9, at 105-06 (citations omitted).

363. See *supra* notes 287-91 and accompanying text.

364. THE FEDERALIST NO. 10, at 63-64 (James Madison) (Jacob E. Cooke ed., 1961).

indirectly. Thus, it would be anomalous, to say the least, to imply a senatorial exemption from districting into the Constitution.

The pre-Seventeenth Amendment history of the Senate likewise supports the permissibility of creating districts. Though long overlooked, the Federalists, whose constitutional scheme prevailed in 1789, harbored a populist (albeit inconsistent) conception of the Senate. Yet, even if the Founders could not quite make up their minds about the nature of the upper house they were creating, the Sixty-second Congress resolved the matter by passing the Seventeenth Amendment on the theory that both houses represent the people rather than the states.

The totality of the historical evidence supports the permissibility of districts, but this conclusion is bolstered by a broader view of the Amendment's original intent through the application of translation originalism. The ends sought to be achieved by the enactors of the Amendment—greater responsiveness to the electorate, a reduction in the influence of money in politics and uniformity in the representative capacities of the House and Senate—would all be facilitated by Senate districts.

Thus, the power to create Senate districts appears to have been willed to the people. They have only to rediscover their sovereignty and employ it in order to improve our democracy.