

PRIMARIES FOR PLAIN FOLKS: A REALISTIC PROPOSAL FOR SENATORIAL REFORM

Note

INTRODUCTION	958
I. SENATOR SELECTION: THE PROBLEM WITH PRIMARIES	959
A. <i>Legislative Appointment & the Seventeenth Amendment</i>	959
B. <i>Evolution of Direct Primaries in Senate Races</i>	961
II. POPULATION INEQUITIES	965
A. <i>Purposeful Origins</i>	965
B. <i>Modern Disparities</i>	966
III. DOOMED PROPOSALS: WHAT NOT TO DO	967
A. <i>“Reapportion” the Senate</i>	967
B. <i>“Abolish” the Senate</i>	969
IV. SENATOR SELECTION MECHANISMS: RETHINKING PRIMARIES.....	969
A. <i>Alaska’s New Idea: Top-Four Ranked-Choice Voting</i>	970
B. <i>The Peer Review</i>	971
C. <i>A Daring Proposal—Ranked Choice and Cross-Party Voting</i>	973
CONCLUSION	974
APPENDIX A – AN ILLUSTRATION OF CROSS-PARTY RANKED-CHOICE VOTING	975

PRIMARIES FOR PLAIN FOLKS: A REALISTIC PROPOSAL FOR SENATORIAL REFORM

Note

INTRODUCTION

On November 6, 2018, states held a total of thirty-five elections for the office of United States Senator.¹ This midterm election saw relatively high turnout, with an estimated 50% of eligible voters casting a ballot.² While the general election may decide the ultimate winner of a contest, the primary determines who appears on the ballot. And primaries are decided by a much smaller³ and, arguably, a more ideologically extreme group of voters.⁴ When those closer to the political edges play such an outsized role in selecting senators, can anyone be surprised when the nation's upper house remains in a state of gridlock, inviting strong feelings of illegitimacy? Does anyone speak for the "plain folks" who occupy the political center? The cause for this crisis is twofold. First, the method for senator selection, especially direct primaries, empowers those closer to the political extremes. This results in less compromise, and in turn, more gridlock. Second, population discrepancies among the states have ignited calls for reform, and even abolition, of the Senate.

In Part I of this Note, I argue that direct partisan primaries are partially responsible for the decay of the Senate as an institution. I will examine how the mechanisms of senatorial selection have led to a legitimacy crisis. While the Founders and the Constitution envisioned that state legislatures would appoint senators to their positions, the people of each state have selected senators at the ballot box since the ratification of the Seventeenth Amendment in 1913.⁵ Direct elections led to direct primaries within parties, which in turn led to more ideologically extreme officials. In Part II, I will address a popular critique of

1. United States Senate Elections, 2018, BALLOTPEDIA, https://ballotpedia.org/United_States_Senate_elections,_2018 (last visited Apr. 4, 2021).

2. See 2018 November General Election Turnout Rates, U.S. ELECTIONS PROJECT, <http://www.electproject.org/2018g> (last updated Dec. 14, 2018).

3. See Drew DeSilver, *Turnout in this Year's U.S. House Primaries Rose Sharply, Especially on the Democratic Side*, PEW RSCH. CTR. (Oct. 3, 2018), <https://www.pewresearch.org/fact-tank/2018/10/03/turnout-in-this-years-u-s-house-primaries-rose-sharply-especially-on-the-democratic-side/>.

4. See Danielle M. Thomsen, *Do Primary Voters Want Partisan Polarization?*, SOC. SCI. RSCH. COUNCIL (Oct. 15, 2019), <https://items.ssrc.org/democracy-papers/do-primary-voters-want-partisan-polarization/> (finding that "primary voters tend to prefer politically extreme over centrist candidates" and "despite Americans' frustration with gridlock and hyperpartisanship in Washington, primary voters are unlikely to vote for candidates who champion bipartisanship").

5. Senators Elected by State Legislatures, U.S. SENATE, https://www.senate.gov/artandhistory/history/common/generic/Feature_Homepage_ElectedStateLegislatures.htm (last visited Mar. 22, 2022).

those who seek reform: that the Senate is perpetually imbalanced due to population differences among the states. Because the people of each state now elect their senators, the disproportionate size of large states compared to small states causes some to question if this body of equal representation is legitimate. While I agree that certain population-based critiques of the Senate are worthy of consideration, this is an area where reform appears unlikely.

In Part III, I explain why certain proposals, such as Senate reapportionment or abolition, are doomed to fail. Those in search of a working Senate should turn their eyes toward the method of selection instead of the makeup of the body. In Part IV, I propose that states adopt an alternative system for Senate primaries that would encourage compromise among candidates. I provide three reforms that could benefit moderate candidates and lessen Senate gridlock: (1) Alaska's Top-Four Ranked-Choice Voting, (2) Peer Review, and (3) Cross-Party Ranked-Choice Voting.

I. SENATOR SELECTION: THE PROBLEM WITH PRIMARIES

A. *Legislative Appointment & the Seventeenth Amendment*

To adequately describe the pitfalls of modern mechanisms of senator selection, it is necessary to return to the Founding Era and the original method of senator selection for over a century. In the Founders' blueprint for the Senate, the legislatures of each state would appoint two senators.⁶ For “[i]t is recommended by the double advantage of [favoring] a select appointment, and of giving to the state governments such an agency in the formation of the federal government[] as must secure the authority of the former, and may form a convenient link between the two systems.”⁷ The Founders explicitly considered and rejected the idea of a popular election as a means of selecting senators. Direct election exposed senatorial selection to “the activity of party zeal, taking [the] advantage of the supineness, the ignorance, [and] the hopes and fears of the unwary and interested, often plac[ing] men in office by the votes of a small proportion of the electors.”⁸ James Madison directly contrasted the election of House representatives with the appointment of senators, writing,

The house of representatives will derive its powers from the people of America, and the people will be represented in the same proportion, and on the same principle, as they are in the legislature of a particular state. So far the government is national, not federal. The senate, on the other hand, will derive its powers from the states, as political and co-equal societies; and these will be

6. THE FEDERALIST NO. 62, at 319 (James Madison) (George W. Carey & James McClellan eds., Gideon ed., 2001).

7. *Id.* at 320.

8. THE FEDERALIST NO. 64, at 333 (John Jay) (George W. Carey & James McClellan eds., Gideon ed., 2001).

represented on the principle of equality in the senate, as they now are in the existing congress. So far the government is federal, not national.⁹

But in 1913, small states “dealt away their most potent tool” when Congress ratified the Seventeenth Amendment.¹⁰ Official proposals for the direct election of senators occurred as early as 1826.¹¹ By the 1890s, many states held popular votes for senators that “advised” legislatures.¹² “The Populist movement of the 1890s and the Progressive movement of the early 1900s brought powerful support for what would become the Seventeenth Amendment.”¹³ Support grew out of the corruption and bribery of state legislatures,¹⁴ and at least some state senators evidently “sold their votes.”¹⁵ Machine politics and corporations bore part of the blame as well.¹⁶ For instance, Progressive-era politician “William Jennings Bryan argued that ‘great corporations . . . are able to compass the election for their tools and their agents through the instrumentality of Legislatures, as they could not if Senators were elected directly by the people.’”¹⁷ Compounding these issues was rampant deadlock;¹⁸ when state legislatures could not agree on a senatorial appointment, seats would remain vacant, sometimes for years.¹⁹

As the need for reform became apparent, the question turned to “when,” rather than “if,” the people of each state would directly elect their senators.

Between 1890 and 1905, thirty-one state legislatures passed resolutions either calling on Congress to pass an amendment providing for the direct election of senators, to hold a conference with other states to work on such an amendment, or to have a constitutional convention such that the direct elections for Senator could be included in a newly drawn Constitution.²⁰

House Joint Resolution 39 soon passed both houses of Congress and became the text of the Seventeenth Amendment.²¹ From 1913 to the present day, the Senate consists of “two Senators from each State, elected by the people

9. THE FEDERALIST NO. 39, at 197 (James Madison) (George W. Carey & James McClellan eds., Gideon ed., 2001) (emphasis omitted).

10. Jay S. Bybee, *Ulysses at the Mast: Democracy, Federalism, and the Sirens' Song of the Seventeenth Amendment*, 91 NW. U. L. REV. 500, 504 (1997).

11. *Id.* at 536.

12. *Id.* at 537.

13. *Id.* at 538.

14. *See id.* at 539.

15. *Id.*

16. *See id.* at 539–40.

17. *Id.* at 540.

18. *See id.* at 541.

19. *See id.* at 541–42.

20. David N. Schleicher & Todd J. Zywicki, *Common Interpretation: The Seventeenth Amendment*, CONST. CTR., <https://constitutioncenter.org/interactive-constitution/interpretation/amendment-xvii/interprets/147> (last visited Mar. 11, 2021).

21. H.R.J. Res. 39, 62d Cong., <https://www.archives.gov/legislative/features/17th-amendment/hjres39.html> (as passed by House, Apr. 13, 1911).

thereof . . .”²² Today, the status of the Seventeenth Amendment remains entirely secure, despite calls for reform from some conservatives.²³

B. Evolution of Direct Primaries in Senate Races

One consequence of the direct election of senators is that primary elections—those that determine who will represent the party in the general election—have taken on both a vital and divisive role. To be sure, primaries are nothing new; states began holding primary elections for senators during the mid-1870s.²⁴ Although state legislatures were still appointing senators at this time, primaries became a necessary obstacle for candidates to navigate.²⁵ For the most part, primaries were “political beauty contests, which the parties’ grandees could choose to ignore.”²⁶ But from 1896 to 1915, “all but a handful of states adopted the primary as the chief method of nominating candidates for federal, state, and local offices.”²⁷ Progressives were optimistic about the direct primary, believing that it would reduce corruption, increase voter participation, and weaken the control of party machine politics.²⁸

But these noble goals brought along unintended consequences. If primaries were ever irrelevant in the past, they certainly have the attention of elected officials now. The United States now stands alone as the only democracy that uses primary elections to nominate candidates at all levels of government.²⁹ While these primaries may have strengthened voters’ voices, they have undoubtedly weakened the gatekeepers of the political realm—the parties themselves. “[B]y weakening party leaders’ capacity to control nominating processes, primary elections undermine the organizational coherence of established parties.”³⁰ More simply, primaries are responsible for a “breakdown

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

23. See, e.g., Ben Sasse, *Make the Senate Great Again*, WALL ST. J. (Sept. 8, 2020, 2:19 PM), <https://www.wsj.com/articles/make-the-senate-great-again-11599589142> (arguing for a repeal of the Seventeenth Amendment); David Schleicher, *The Seventeenth Amendment and Federalism in an Age of National Political Parties*, 65 HASTINGS L.J. 1043, 1045 (2014) (describing how prominent conservatives such as Justice Antonin Scalia, Texas Governor Rick Perry, and columnist George Will have all argued in favor of repealing the Seventeenth Amendment).

24. Schleicher, *supra* note 23, at 1055.

25. Schleicher & Zywicki, *supra* note 20.

26. Jonathan Rauch & Ray La Raja, *Too Much Democracy Is Bad for Democracy*, ATLANTIC (Dec. 15, 2019), <https://www.theatlantic.com/magazine/archive/2019/12/too-much-democracy-is-bad-for-democracy/600766/>.

27. Stephen Ansolabehere et al., *What Did the Direct Primary Do to Party Loyalty in Congress, in 2 PARTY, PROCESS, AND POLITICAL CHANGE IN CONGRESS* 21, 21 (David W. Brady & Mathew D. McCubbins eds., 2007).

28. See *id.* at 21–22.

29. See *id.* at 21.

30. *Id.* at 23 (citing Peter F. Galderisi & Benjamin Ginsberg, *Primary Elections and the Emanescence of Third Party Activity in the United States*, in *DO ELECTIONS MATTER* 116 (1986)).

on discipline.”³¹ “Since the candidate is simply a self-assertive individual who steps out of the ranks and gathers around him a following which is one of the several factions and often merely a minority of the party membership, his control is ephemeral and decentralizing and encourages insubordination.”³²

Examples of this phenomenon are readily available from previous national elections. The most illustrative example likely comes from the 2016 presidential primaries. Then-candidate Donald Trump was no establishment Republican. He had changed his party affiliation five times since 1987.³³ Notably, he was a registered Democrat from August 2001 until September 2009.³⁴ Trump also had no loyalty toward the Republican Party. In March 2016, he reneged on his pledge to support the GOP primary victor.³⁵ Similarly, outsiders have infiltrated the ranks of the Democratic Party. Independent Senator Bernie Sanders nearly captured the 2016 Democratic nomination³⁶ and was a competitive candidate during the 2020 primaries.³⁷ Although Sanders campaigned for Democratic presidential candidate Walter Mondale in 1984, he clarified that “I am not now, nor have I ever been, a liberal Democrat . . .”³⁸ But while Sanders has not moved into the Democratic Party, one can see how the party has moved closer to him.³⁹ The fifteen-dollar minimum wage, Green New Deal, free college, and the abolition of ICE have all become accepted, if not orthodox, ideas within the Democratic Party.⁴⁰ Senator Sanders acknowledged the movement of the Democratic Party, saying, “It was not long ago that people considered these ideas radical and fringe. Today these are mainstream ideas and many of them

31. *Id.*

32. *Id.* (citing ARTHUR C. MILLSPAUGH, PARTY ORGANIZATION AND MACHINERY IN MICHIGAN SINCE 1980, at 173–74 (1917)).

33. Joshua Gillin, *Bush Says Trump Was a Democrat Longer Than A Republican ‘in the Last Decade’*, POLITICOFACT (Aug. 24, 2015), <https://www.politifact.com/factchecks/2015/aug/24/jeb-bush/bush-says-trump-was-democrat-longer-republican-las/>.

34. *Id.*

35. Mark Katkov, *Trump Abandons Pledge To Support Republican Nominee*, NPR (Mar. 30, 2016, 4:49 AM), <https://www.npr.org/sections/thetwo-way/2016/03/30/472363315/trump-abandons-pledge-to-support-republican-nominee>.

36. See Wilson Andrews et al., *2016 Delegate Count and Primary Results*, N.Y. TIMES, <https://nytimes.com/interactive/2016/us/elections/primary-calendar-and-results.html> (last updated July 5, 2016).

37. See Josh Holder et al., *National Primary Results Map: Where Biden and Sanders Have Won*, N.Y. TIMES (Mar. 10, 2020), <https://www.nytimes.com/interactive/2020/us/elections/democratic-primary-map-results.html>.

38. Louis Jacobson, *How Bernie Sanders Runs in the Democratic Primary When He’s an Independent in the Senate*, POLITICOFACT (Mar. 2, 2020), <https://www.politifact.com/article/2020/mar/02/how-can-bernie-sanders-run-democratic-primary-when/>.

39. See Steve Friess, *How the Bernie Sanders Movement Reshaped the Democratic Party Forever*, NEWSWEEK (Apr. 9, 2020, 9:22 AM), <https://www.newsweek.com/how-bernie-sanders-movement-reshaped-democratic-party-forever-1497065>.

40. *See id.*

have already been [sic] implemented in cities and states across the country . . .”⁴¹

With an absence of institutional gatekeepers and the continuing erosion of norms, it comes as no surprise that outsiders, intruders, and individuals closer to the political extremes have come to dominate our national political institutions. And there is no reason to think that the results look any different on a smaller scale in congressional races. Primary challenges appear most effective in states that are “safely Republican” or “safely Democratic.” While “primary elections have probably helped to erode two-party competition . . .,”⁴² they have been quite effective in moving each party away from the ideological center. Groups have formed political action committees (PACs) to go after members who act insufficiently partisan.⁴³ For example, the Working for Us PAC announced, “[W]e will encourage Democrats to act like Democrats – and if they don’t – they better get out of the way for Democrats who will.”⁴⁴ On the other side, the Club for Growth seeks to fund primary challengers against “Republicans in Name Only” (RINOs).⁴⁵

The polarizing effects of direct primaries are most pronounced in states with a “[s]tate government trifecta,” meaning that one political party controls both houses, as well as the governor’s mansion.⁴⁶ Currently, thirty-eight states have trifectas—fifteen are Democratic, and twenty-three are Republican.⁴⁷ A primary election might be the only real contest that a candidate faces in these states while the general election is merely a formality.⁴⁸ Generally, primaries in safely Republican or safely Democratic districts are breeding grounds for the extreme. For instance, then-candidate Lauren Boebert defeated incumbent Congressman Scott Tipton in the 2020 Colorado Republican primary.⁴⁹ On the

41. *Id.*

42. Ansolabehere et al., *supra* note 27, at 23.

43. See Robert G. Boatright, Getting Primaried: The Growth and Consequences of Ideological Primaries 1 (Oct. 14–16, 2009) (unpublished manuscript), https://www2.clarku.edu/departments/politicalscience/pdfs/boatright_sotp09.pdf.

44. *Id.*

45. *Id.* at 1–2.

46. See *State Government Trifectas*, BALLOTPEDIA, https://ballotpedia.org/State_government_trifectas (last visited Mar. 13, 2021).

47. *Id.*

48. See, e.g., *United States Senate Election in Arkansas, 2020*, BALLOTPEDIA, https://ballotpedia.org/United_States_Senate_election_in_Arkansas,_2020 (last visited Mar. 13, 2021). Arkansas is a Republican trifecta state. See *State Government Trifectas*, *supra* note 46. Tom Cotton, the Republican incumbent, beat a Libertarian Party challenger by thirty-three percentage points. *United States Senate Election in Arkansas, 2020*, *supra*. There was no Democratic challenger because no candidate filed to run against Cotton. *United States Senate Election in Arkansas, 2020 (March 3 Democratic Primary)*, BALLOTPEDIA, [https://ballotpedia.org/United_States_Senate_election_in_Arkansas,_2020_\(March_3_Democratic_primary\)](https://ballotpedia.org/United_States_Senate_election_in_Arkansas,_2020_(March_3_Democratic_primary)) (last visited Mar. 13, 2021).

49. Nathaniel Rakich, *Ed Markey Won, but it’s Still Been a Rough Year for Incumbents*, FIVETHIRTYEIGHT (Sept. 2, 2020, 9:50 AM), <https://fivethirtyeight.com/features/ed-markey-won-but-its-still-been-a-rough-year-for-incumbents/>. Boebert, famous for owning a “gun-themed restaurant,” argued that Tipton “wasn’t conservative enough.” *Id.* Boebert also claimed that she hoped “Q,” the anonymous leader of the “QAnon”

other side, then-candidate Cori Bush defeated incumbent Congressman Lacy Clay in a 2020 Missouri Democratic primary.⁵⁰ Both of these individuals campaigned from their respective parties' extremist edges and cruised to a victory in the general election.⁵¹

With this sort of partisan hijacking in presidential and House elections, it comes as no surprise that institutions such as the Senate are facing a legitimacy crisis. After all, primaries are “low-turnout affairs dominated by highly ideological voters.”⁵² Only 19.9% of eligible voters participated in the 2018 primary contests.⁵³ And these highly ideological voters tend to favor candidates who are further away from the mainstream.⁵⁴ When partisanship becomes paramount, how can we expect legislators to compromise? When the need to stay loyal to one’s ideological “team” is combined with devices like the filibuster, it is no wonder that gridlock is the norm for the Senate. Over time, this broken body will continue to lose respect, and possibly even obedience, from the other branches.⁵⁵

conspiracy group, was “real.” Jack Brewster, *Congress Will Get Its Second QAnon Supporter, As Boebert Wins Colorado House Seat*, FORBES (Nov. 4, 2020, 11:53 AM), <https://www.forbes.com/sites/jackbrewster/2020/11/04/congress-will-get-its-second-qanon-supporter-as-boebert-wins-colorado-house-seat/?sh=13d27c61568f>.

50. Rakich, *supra* note 49. Bush received endorsements from the Democratic Socialists of America, DUH! Demand Universal Healthcare, Our Revolution, and the Sunrise Movement. *Missouri’s 1st Congressional District Election, 2020* (August 4 Democratic Primary), BALLOTPEDIA, [https://ballotpedia.org/Missouri%27s_1st_Congressional_District_election,_2020_\(August_4_Democratic_primary\)](https://ballotpedia.org/Missouri%27s_1st_Congressional_District_election,_2020_(August_4_Democratic_primary)) (last visited Mar. 13, 2021). In contrast, the *St. Louis Post-Dispatch* Editorial Board described Clay as “a steady, predictable representative and a reliable vote for mainstream Democratic priorities” Editorial Board, Editorial, *We Recommend Rep. Lacy Clay in the U.S. House District 1 Democratic Primary*, ST. LOUIS POST-DISPATCH (July 24, 2020), https://www.stltoday.com/opinion/editorial/editorial-we-recommend-rep-lacy-clay-in-the-u-s-house-district-1-democratic-primary/article_96660ef9-0c6a-5165-9173-a4e227dcaa03.html?fbclid=IwAR367nzbBjJswEHPphIu3gIC4to3JutilfdA1Sj41qcUo6I8SnonlcMqIg.

51. See *Missouri Election Results: First Congressional District*, N.Y. TIMES, <https://www.nytimes.com/interactive/2020/11/03/us/elections/results-missouri-house-district-1.html> (last updated Dec. 10, 2020) (displaying Bush’s fifty-nine point victory over her Republican challenger); see also *Colorado Election Results: Third Congressional District*, N.Y. TIMES, <https://www.nytimes.com/interactive/2020/11/03/us/elections/results-colorado-house-district-3.html> (last updated Jan. 26, 2021) (showing Boebert’s six-point victory over her Democratic opponent).

52. Katherine M. Gehl, *It’s Time to Get Rid of Party Primaries*, CNN, <https://www.cnn.com/2021/03/12/opinions/reform-american-political-primaries gehl/index.html> (last updated Mar. 12, 2021, 10:41 AM).

53. John C. Fortier et al., *2018 Primary Election Turnout and Reforms*, BIPARTISAN POL’Y CTR. 1, 5 (2018), <https://bipartisanpolicy.org/wp-content/uploads/2019/03/2018-Primary-Election-Turnout-and-Reforms.pdf>.

54. See David W. Brady et al., *Primary Elections and Candidate Ideology: Out of Step with the Primary Electorate?*, 32 LEGIS. STUD. Q. 79, 80–81 (2007) (“[I]deologically moderate candidates should be more likely to attract primary opposition.”).

55. See generally Tara Leigh Grove, *The Supreme Court’s Legitimacy Dilemma*, 132 HARV. L. REV. 2240, 2240 (2019) (reviewing RICHARD H. FALLON, JR., *LAW AND LEGITIMACY IN THE SUPREME COURT* (2018)) (“[I]llegitimate means something more than erroneous or incorrect. The term signifies something absolutely without foundation and perhaps ultra vires.”).

II. POPULATION INEQUITIES

A. Purposeful Origins

Population inequality between the states of the Union also causes some to question the legitimacy of the Senate.⁵⁶ Equal representation in the Senate is no accident—it was a “sticking point of the [constitutional] convention.”⁵⁷ Precedent existed for the concept of equal representation for unequal populations. In the First Continental Congress of 1774, each colony received one vote.⁵⁸ The largest state in 1790 was Virginia, which had a population of 747,550.⁵⁹ The smallest state, Delaware, had a population of 59,096.⁶⁰ The Founders were thus evidently comfortable with at least *some* level of disparity as part of the Connecticut Compromise.

The equality of representation in the Senate was a recognition of the sovereignty of states while still unifying the country under a national government. According to Madison, “independent and sovereign states bound together by a simple league, the parties, however unequal in size, ought to have an *equal* share in the common councils.”⁶¹ In this way, the “compound republic” may cater to national interests in the House of Representatives and federal interests in the Senate.⁶² Madison viewed the equality of representation as a “constitutional recognition of the portion of sovereignty remaining in the individual states.”⁶³ Without this recognition, the nation could become “an improper consolidation of the states into one simple republic.”⁶⁴

Madison offers another feature of equal representation—protection against the so-called tyranny of the majority.⁶⁵ The Senate acts as an “additional impediment” against “improper acts of legislation.”⁶⁶ “No law or resolution can now be passed without the concurrence, first, of a majority of the people, and then, of a majority of the states.”⁶⁷ While Madison concedes that this system

56. See, e.g., Ian Millhiser, *America’s Anti-democratic Senate, by the Numbers*, VOX (Nov. 6, 2020, 8:00 AM), <https://www.vox.com/2020/11/6/21550979/senate-malapportionment-20-million-democrats-republicans-supreme-court>.

57. Jack N. Rakove, *The Great Compromise: Ideas, Interests, and the Politics of Constitution Making*, 44 WM. & MARY Q. 424, 427 (1987).

58. *Id.*

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

60. *Id.*

61. THE FEDERALIST NO. 62, at 320 (James Madison) (George W. Carey & James McClellan eds., Gideon ed., 2001).

62. *See id.*

63. *Id.*

64. *Id.* at 320–21.

65. *See id.*

66. *Id.* at 321.

67. *Id.*

may sometimes yield negative results, it seems that the failure to pass a law was a preferable outcome compared to excessive law-making.⁶⁸

B. Modern Disparities

Today, plenty of critics believe that Madison and the rest of the Founders were wrong in their theory of equal representation. These critics charge that the population disparities between the states are exponentially more significant than the inequalities present at the Founding. In terms of raw numbers, there is little to dispute. In 1790, Virginia was more than twelve times the size of Delaware.⁶⁹ Today, the largest state, California, contains more than sixty-eight times the population of the smallest state, Wyoming.⁷⁰ And although the Senate is “split 50-50 . . . the Democratic half . . . represent[s] 41,549,808 more people than the Republican half.”⁷¹

As of late, this critique has been somewhat partisan, as Democrats are more likely to voice calls for reform of the Senate.⁷² While it is common to see comparisons between the population disparity between reliably Democratic California and reliably Republican Wyoming, it is rare to see articles discussing the same issue when comparing Texas and Vermont.⁷³ And to talk about Republican “malapportionment” of the Senate misses the point.⁷⁴ First, the Framers *explicitly* and *intentionally* designed the Senate to favor small states to offset the population-based House of Representatives.⁷⁵ Second, there was certainly no Republican conspiracy theory to rig the Senate in the party’s favor at the Constitutional Convention, seeing that the Republican Party did not exist until 1854.⁷⁶

68. See *id.*

69. See Bowman, *supra* note 59.

70. Millhiser, *supra* note 56.

71. *Id.*

72. See, e.g., Matthew Yglesias, *American Democracy’s Senate Problem, Explained*, VOX (Dec. 17, 2019, 11:40 AM), <https://www.vox.com/policy-and-politics/2019/12/17/21011079/senate-bias-2020-data-for-progress> (arguing that the Senate will always advantage Republicans); Jon Narciss, *When It Comes to Fair Votes, the US Senate Is Ripe for Reform*, ELECTORAL REFORM SOCIETY (Nov. 2, 2020), <https://www.electoral-reform.org.uk/when-it-comes-to-fair-votes-the-us-senate-is-ripe-for-reform/> (“The Senate system gives disproportionate power to smaller, rural (and largely Republican) states.”).

73. See *State Population Totals: 2010–2020, Annual Estimates of the Resident Population for the Nation and States*, UNITED STATES CENSUS BUREAU, <https://www.census.gov/programs-surveys/popest/technical-documentation/research/evaluation-estimates/2020-evaluation-estimates/2010s-state-total.html> (last updated Oct. 8, 2021). The Census Bureau estimates that Texas is the nation’s second-largest state with approximately 29,360,759 people. *Id.* Vermont is the second-smallest state, with a population of 623,347. *Id.* Thus, Texas’s two senators represent more than forty-seven times the population that Vermont’s two senators represent.

74. See Millhiser, *supra* note 56.

75. THE FEDERALIST NO. 62, at 321 (James Madison) (George W. Carey & James McClellan eds., Gideon ed., 2001).

76. *On this Day, the Republican Party Names its First Candidates*, CONST. CTR. (July 6, 2021), <https://constitutioncenter.org/blog/on-this-day-the-republican-party-names-its-first-candidates>.

Yet, the critique that the Senate is too antidemocratic is a fair one. As it stands today, California has two seats in the Senate. Meanwhile, the twenty-one smallest states—which, when combined, have about 2,400,000 fewer people than California—hold forty-two seats in the Senate.⁷⁷ Los Angeles County alone contains more people than forty-one of the states contain.⁷⁸ When one-eighth of the population receives only one-fiftieth of the representation, it is fair to question if this is an absurdity of magnitudes not imagined by the Founders. Some on the left have even called for a “Blue-State Secession” due to the disproportionate power that the Senate grants to “red” states.⁷⁹ But this country was neither founded under a despotic executive nor a direct democracy but instead, “a republic, if you can keep it.”⁸⁰

III. DOOMED PROPOSALS: WHAT NOT TO DO

A. “Reapportion” the Senate

I would first like to address a couple of proposals that plainly will not work. The first of these proposals is the idea to reapportion the Senate based on population.⁸¹ Eric Orts proposes that we allocate one senator to each state to start.⁸² Then, he asserts that the remaining senators should be apportioned based on the population of the states.⁸³ Under Orts’s proposal, California would have twelve senators, Texas would have nine, and Florida and New York would each have six.⁸⁴ Meanwhile, twenty-six states would only receive one senator because those states contain 1% or less of the nation’s population.⁸⁵ Orts’s plan adds ten senators to the body, resulting in a grand total of 110 senators.⁸⁶

But this scheme contradicts the plain text of the Constitution. Article V provides that “no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.”⁸⁷ The apportionment of representation in the Senate

77. See *State Population Totals: 2010–2020, Annual Estimates of the Resident Population for the Nation and States*, *supra* note 73.

78. See *Los Angeles County Population vs. State Populations*, L.A. ALMANAC, <http://www.laalmanac.com/population/po04a.php> (last visited Mar. 13, 2021).

79. See Nathan Newman, *The Case for Blue-State Secession*, NATION (Feb. 10, 2021), <https://www.thenation.com/article/politics/secession-constitution-elections-senate/>.

80. Adam J. White, *A Republic, if We Can Keep it*, ATLANTIC (Feb. 4, 2020), <https://www.theatlantic.com/ideas/archive/2020/02/a-republic-if-we-can-keep-it/605887/> (quoting the line famously attributed to Benjamin Franklin).

81. See, e.g., Eric W. Orts, *The Path to Give California 12 Senators, and Vermont Just One*, ATLANTIC (Jan. 2, 2019), <https://www.theatlantic.com/ideas/archive/2019/01/heres-how-fix-senate/579172/>.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. U.S. CONST. art. V.

“cannot be amended pursuant to the general procedures set out in Article V.”⁸⁸ Orts’s plan, or any other reapportionment scheme, could only come to fruition if every single state consented to unequal representation. Saying that unanimous and full consent is unlikely to occur is quite an understatement. It is next to impossible to imagine. Of course, someone with the same goal could attempt to pass two constitutional amendments: one that repeals the relevant section of Article V, and another that outlines an alternate method of Senate reapportionment. But in the 233 years since the Constitution was ratified, there have only been twenty-seven amendments.⁸⁹ The arduous process requires a two-thirds vote in both the House and the Senate, or a two-thirds vote of a convention of states.⁹⁰ Then, three-fourths of the states must ratify the amendment.⁹¹ While this route does not require the consent of every state as required in Article V, it is unthinkable that thirty-eight states would agree to give up their power in the Senate.

Orts acknowledges Article V’s limitations and offers a patchwork counterargument unable to withstand minimal scrutiny. After first comparing the constitutional text of Article V to the Affordable Care Act,⁹² Orts claims that Congress could pass the Senate reapportionment measure as a statute, meaning that Article V “would—arguably—not apply.”⁹³ But Congress cannot pass laws that purport to override the Constitution.⁹⁴ Orts then argues that the states have already consented to unequal representation in the Senate by adopting the Fourteenth, Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments as they relate to voting rights.⁹⁵ It is admittedly challenging to follow Orts’s logic here because none of these amendments relate to Senate apportionment or purport to override Article V. Orts then turns to the Founders themselves, arguing that “the Founders could never have imagined the immense expansion of the United States in terms of territory, population, and diversity of its citizens.”⁹⁶ And, “[w]e should keep in mind that the original one-state, two-senators rule was written and ratified by property-owning white men, almost half of whom owned slaves . . .”⁹⁷ The Founders were undoubtedly not omniscient, and they did codify the horrendous practice of

88. Lynn A. Baker & Samuel H. Dinkin, *The Senate: An Institution Whose Time Has Gone?*, 13 J. L. & POL. 21, 21 (1997).

89. *Measures Proposed to Amend the Constitution*, U.S. SENATE, <https://www.senate.gov/legislature/MeasuresProposedToAmendTheConstitution.htm> (last visited Mar. 22, 2022).

90. U.S. CONST. art. V.

91. *Id.*

92. See Orts, *supra* note 81.

93. *Id.*

94. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 138 (1803).

95. See Orts, *supra* note 81.

96. *Id.*

97. *Id.*

chattel slavery into the same Article V that pertains to Senate apportionment.⁹⁸ But, while America must continue to wrestle with her original sin of chattel slavery, we must consider the provision of providing disproportionate representation to smaller states on its own merits, regardless of the Constitution's former support of slavery since amended out of the law.⁹⁹

B. “Abolish” the Senate

While impractical and impossible to achieve, the idea of reapportioning the Senate at least appears to be a reasonable one on its face. But some go even further now and call for the abolition of the Senate as an institution.¹⁰⁰ Again, the basis for this proposal stems from the frustration of “minority rule” of the legislative branch.¹⁰¹ Dingell writes, “[S]parsely populated, usually conservative states can block legislation supported by a majority of the American people. That’s just plain crazy.”¹⁰² Some claim that “[t]he US Senate is by now the most unrepresentative major legislature in the ‘democratic world.’”¹⁰³

But those who wish to abolish the Senate will face the same obstacles as those who merely want to reapportion the membership. Again, Article V prevents any state from being denied equal suffrage in the Senate without its consent.¹⁰⁴ As mentioned above, this sort of idea would require the passage of two constitutional amendments: one repealing the relevant section of Article V, and another “abolishing” the Senate as a legislative body. Critics will have to find another way. Fortunately, there are constitutional remedies that can alleviate some of the Senate’s maladies.

IV. SENATOR SELECTION MECHANISMS: RETHINKING PRIMARIES

Reform must address the mechanisms by which a state’s population selects its senators. And it is only worth discussing those reforms that are practical. For better or for worse, “smoke-filled rooms” are not making a comeback. On the other hand, it appears that primaries are here to stay in some form or fashion. Therefore, to keep this discussion realistic, I will focus on reforms that states

98. See U.S. CONST. art. V (“[N]o Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article . . .”). Article I, Section 9, Clause 4 of the Constitution directly pertained to the importation of slaves.

99. See generally U.S. CONST. amend. XIII.

100. John D. Dingell, *I Served in Congress Longer than Anyone. Here’s How to Fix it.*, ATLANTIC (Dec. 4, 2018), <https://www.theatlantic.com/ideas/archive/2018/12/john-dingell-how-restore-faith-government/577222/>.

101. *Id.*

102. *Id.*

103. Daniel Lazare, *Abolish the Senate*, JACOBIN (Dec. 2, 2014), <https://www.jacobinmag.com/2014/12/abolish-the-senate>.

104. U.S. CONST. art. V.

could actually implement with the consent of the voters. In addition, unlike the proposals mentioned above, these reforms do not require the consent of all states or a constitutional amendment. States could experiment with different methods as “laboratories of democracy.”¹⁰⁵ The first of these proposed primary selection methods, Alaska’s Top-Four Ranked-Choice Voting initiative, is a real-world measure approved by voters. The second method, the Peer Review, has been used by at least one state-level political party. The third proposal, Cross-Party Ranked-Choice Voting, is untested. These proposals are not necessarily mutually exclusive, as states could combine aspects of these proposals.

A. Alaska’s New Idea: Top-Four Ranked-Choice Voting

In 2020, Alaska residents voted to replace partisan primaries in state executive, state legislative, and congressional offices with ranked-choice, top-four primaries.¹⁰⁶ Under this system, all candidates compete against one another in an open primary.¹⁰⁷ Voters used ranked-choice voting (RCV) to make their selections.¹⁰⁸ After votes are counted, the four candidates who receive the most votes advance to the general election.¹⁰⁹ Alaska became the first state to implement this system,¹¹⁰ although California and Washington have both implemented top-two primaries, albeit without RCV.¹¹¹ Alaska became the second state to use RCV, which Maine approved in 2016.¹¹²

The combination of RCV and a nonpartisan primary encourages candidates to reach out beyond their primary constituency. RCV means that voters will rank their preferences at the ballot box instead of voting for only one candidate. Therefore, this system incentivizes candidates to avoid the type of negative campaigning that has become the norm. In addition, nonpartisan primaries alleviate the worst impulses of extremism. A Republican’s biggest challenge will likely not be an extremist from the far-right, but instead, a moderate Democrat. Likewise, Democrats will likely be more interested in reaching across the aisle for conservative voters, rather than fending off a far-left challenger. The

105. See generally *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

106. *Alaska Ballot Measure 2, Top-Four Ranked-Choice Voting and Campaign Finance Laws Initiative* (2020), BALLOTPEDIA, [https://ballotpedia.org/Alaska_Ballot_Measure_2,_Top-Four_Ranked-Choice_Voting_and_Campaign_Finance_Laws_Initiative_\(2020\)](https://ballotpedia.org/Alaska_Ballot_Measure_2,_Top-Four_Ranked-Choice_Voting_and_Campaign_Finance_Laws_Initiative_(2020)) (last visited Mar. 14, 2021).

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*; see also *Timeline of Ranked Choice Voting in Maine*, FAIRVOTE, https://fairvote.org/maine_ballot_initiative (last visited Mar. 14, 2021).

formula is simple, and more moderate representatives means more compromise.

The people of Alaska specifically passed this measure in the hopes of combatting “divisive, partisan gridlock.”¹¹³ The open primary aspect allows multiple viewpoints to emerge from a single political party. And RCV allows those who favor a third party to support their candidate of choice without “throwing their vote away.” “Ranked-choice voting is a commonsense reform that saves money, makes elections more inclusive, and discourages negative campaigning.”¹¹⁴ Opponents claimed that the measure weakened the ability of the parties to elect their own legislators,¹¹⁵ and that this complicated and unfamiliar method of voting would confuse voters.¹¹⁶ Only time will tell if this sort of measure is successful. But, whatever the result, it is promising to see this sort of experimentation in elections with an express goal of reducing hyper-partisanship and gridlock.

B. *The Peer Review*

The next proposal attempts to counteract the worst impulses of populism and inexperienced candidates. I argue that the parties should subject their candidates to a peer review by officials holding the office that the candidate is seeking.¹¹⁷ The process is simple. Peers should receive a questionnaire containing all candidates who wish to run in the primaries. The question is also simple: Is this candidate, considering his or her experience and character, worthy of the office of United States Senator? For each candidate, peers would check a box for either “yes” or “no.” And I would recommend that the bar be set low for this screening process; I agree with Elaine Kamarck’s recommendation that the approval necessary be 15%.¹¹⁸ Candidates who cannot garner 15% approval should not appear on the ballot as a representative of the party.

113. See *Alaska Ballot Measure 2, Top-Four Ranked-Choice Voting and Campaign Finance Laws Initiative* (2020), *supra* note 106 (quoting Bonnie L. Jack, Jason Grenn & Bruce Botelho, *Ballot Measure No. 2, Statement in Support*, in OFFICIAL ELECTION PAMPHLET, STATE OF ALASKA 105, 105 (2020)).

114. *Id.* (quoting Jason Grenn, Bonnie Jack & Bruce Botelho, Opinion, *Better Governance Starts with Better Elections*, ANCHORAGE DAILY NEWS (Nov. 2, 2019), <https://www.adn.com/opinions/2019/11/02/better-governance-starts-with-better-elections/>).

115. *Id.* (citing Andrew Kitchenman et al., *Sponsors of Complex ‘Alaska’s Better Elections Initiative’ Say its Benefits Are Clear*, ALASKA PUB. MEDIA (Nov. 25, 2019), <https://www.alaskapublic.org/2019/11/25/sponsors-of-complex-alaskas-better-elections-initiative-say-its-benefits-are-clear/> (statement of Glenn Clary, chairperson of the Alaska Republican Party)).

116. *Id.* (citing Mark Begich & Sean Parnell, *Ballot Measure No. 2, Statement in Opposition*, in OFFICIAL ELECTION PAMPHLET, STATE OF ALASKA 106, 106 (2020)).

117. See The Remnant with Jonah Goldberg, *Primaries: What Are They Good for?*, THE DISPATCH, at 38:25 (Mar. 5, 2021) (downloaded using Spotify). Elaine Kamarck should receive credit for the peer review idea.

118. Elaine C. Kamarck, *Returning Peer Review to the American Presidential Nomination Process*, 93 N.Y.U. L. REV. 709, 726 (2018).

Therefore, this review process may serve as a screening device to filter out those unfit to serve. Movie stars, talk show hosts, and persons with a demonstrated lack of morals should not represent states in the upper house. This system provides a mechanism for the parties to regain some of their power as our institutions' gatekeepers. Who are the peers? One possible solution is to make current U.S. senators the peer group. It is true that this system gives senators from other states a certain degree of control over other states' elections. But this system still empowers in-state voters and allows the democratic process to take place; a candidate who fails to clear the 15% threshold could still run as a write-in or independent candidate. Alternatively—to accommodate federalism concerns—state legislators, instead of U.S. senators, could vote on a senatorial candidate's worthiness. This process could help state officials keep the most troublesome and polarizing candidates from waving the party banner.

What potential roadblocks exist in implementing this system? First, the Peer Review method is somewhat ill-suited for our desire for short-term results. The Peer Review will not root out any *current* demagogues and the most pernicious of politicians. Those folks have already built up a steady-enough base to garner the 15% necessary for approval. But the Peer Review will prevent *future* unqualified individuals from having a high chance of holding elected office. Also, implementation of the Peer Review would probably need to come from the parties instead of through the law. State legislation that attempted to impose ballot limitations could prove to be problematic in light of the Supreme Court's interpretation of Article I's Elections Clause.¹¹⁹

Despite these possible challenges, a version of the Peer Review occurs in at least one jurisdiction.¹²⁰ In election years, Massachusetts Democrats endorse candidates for statewide office at a party convention.¹²¹ A candidate must receive at least 15% of first-ballot convention votes to appear on the primary ballot.¹²² Furthermore, the candidate who receives the most votes at this convention is the “endorsed” candidate.¹²³ That candidate appears first on the primary ballot and is labeled as the “endorsed candidate of the Massachusetts Democratic Party.”¹²⁴ Parties should have a say in which particular candidates best represent the party. The Peer Review allows for the input of party elites without tossing the primary election system.

119. U.S. CONST. art. I, § 4; *see, e.g.*, Cook v. Gralike, 531 U.S. 510, 526 (2001) (ruling that a state could not place a disclaimer on the ballot relating to a House candidate's support of term limits); U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (holding that states cannot “craft their own qualifications for Congress”).

120. Kamarck, *supra* note 118, at 725–26.

121. *Id.* at 726.

122. *Id.*

123. *Id.*

124. *Id.* (quoting MASS. DEMOCRATIC PARTY, 2018 CONVENTION RULES 3–4 (2018), <https://massdems.org/wp-content/uploads/2018/01/2018-Convention-Rules-APPROVED.pdf>).

C. A Daring Proposal—Ranked Choice and Cross-Party Voting

The final proposal is my own creation. I believe this system would produce desirable outcomes if tested. It would likely face stiff opposition because it intentionally includes Republican voters as part of the Democratic Primary, and vice versa. My principle for this idea is simple. The parties have abdicated their responsibility as “gatekeepers” to the primary voters. It is unlikely that they will regain that institutional role. But, if the parties are unwilling to police themselves, perhaps voters across the aisle would be willing to lend a hand.

The voting process would work as follows. A voter receives either a “Democrat” or a “Republican” ballot based on the state primary system. The voter then votes using RCV for candidates in the voter’s party. The voter then uses RCV to vote for candidates of the *opposing* party. Election officials will first count the ballots from voters who identify as the same party as the candidates in question. Officials will use the RCV process to shrink the pool down to the final two candidates. Then, officials will count the votes from the opposing party with respect to the remaining two candidates. After adding the cross-party ballots, the candidate with a majority wins.¹²⁵

Why would the Republican Party want Democrats voting in its primary, and vice versa? The answer is that this mechanism is actually in the best interest of both parties. When an extremist candidate prevails in a primary, that party’s vote share and probability of winning the general election substantially decreases.¹²⁶ Evidence suggests that the general electorate decreases its support of a party that nominates an extremist candidate for years after that nomination.¹²⁷ Allowing voters from the opposing party into the primary tent provides the moderating force that the parties desperately need but are unwilling to impose from the top down.

At the same time, parties would be understandably nervous if voters from the opposite side had unchecked influence in a partisan primary. If there were no restrictions, an incentive would exist to vote for a repugnant candidate to represent the opposite party in the general election: the thought being that the general electorate would be “forced” to vote for the other candidate in the general election. But this system accounts for that risk. Voters from the opposing party only come into play once the voters from inside the party have narrowed the candidates down to the top two choices.

By conducting a primary in this fashion, candidates would have an incentive to reach outside of the “base” of their party. It would encourage both Republicans and Democrats to reach across the aisle and demonstrate that they are willing to make compromises. And neither party gains an advantage in this

125. See Appendix A for an illustrative example of this sort of voting system.

126. Andrew B. Hall, *What Happens When Extremists Win Primaries?*, 109 AM. POL. SCI. REV. 18, 18 (2015).

127. *See id.* at 29.

system because both parties are subject to an equal amount of influence by members of the other party. At the same time, voters who identify with a party still hold a more significant amount of influence over “their” party than they would in an open primary because these voters decide who the final two candidates are that are eligible to receive cross-party votes.

CONCLUSION

In sum, proposals for senatorial reform should be both meaningful and possible. Changes to direct primaries check both of these boxes. By implementing the reforms described above, candidates who are more willing to compromise will appear as representatives of the two major parties on the general election ballot. Furthermore, these reforms may take place on the state level, as opposed to gargantuan measures that would require multiple constitutional amendments. Hopefully, these changes will lead to senators representing the interests of a greater number of people in their respective states outside of partisan primary voters.

*Hunter Ross Myers**

* University of Alabama, J.D. Candidate 2022. I am deeply grateful to Professor Tara Leigh Grove for her commentary and guidance. Thank you to Zach Gillespie for your thoughtful suggestions. Thank you to the *Alabama Law Review* for edits. A special thank you to my parents, Robin and Tracy, and my wife, Peyton, for their encouragement and support in writing this note and completing law school.

APPENDIX A – AN ILLUSTRATION OF CROSS-PARTY RANKED-CHOICE VOTING

The following provides an example of cross-party ranked-choice voting. It follows two voters, Joe and Jill. Joe is a Democrat, and Jill is a Republican. They are voting for a U.S. senator in State X. Votes for Democratic candidates are symbolized by squares, and votes for Republican candidates are symbolized by circles.

