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Who Counted, Who Voted, and Who Could They Vote For

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Professor Levinson reminds us—with great clarity and sharp analysis—about the problems of voting and representation in the United States. It seems to me that there are three fundamental issues of "who counts" in our republican form of government that is based on democratic elections.[1] First, and most obvious, is the question of who votes. That is, who is in the electorate, or as Levinson notes, "who counts." The second issue concerns the size of the electoral district. Put simply, if electoral districts are not more or less equal in the size of their population, then representation is not "democratic." Districts must reflect what the Supreme Court called "one person, one vote."[2] The third

1. In public debate, conservatives often assert that America is a "republic" not a democracy, with the implication that we do not need to be overly worried about the "democratic" nature of the electoral process. This assertion—that we are a "republic not a democracy"—is technically true, but misunderstood. In eighteenth century terminology a "democracy" was a political system in which all the voters directly participated in the passage of laws. A New England town meeting is such a body. A "republic" means that the voters choose (elect) representatives who pass laws. The United States is a "republic" because we have a Congress that is elected to pass legislation. But the electoral process itself—who votes—is "democratic" in the sense that the voters choose their representatives in a democratic process.

2. Gray v. Sanders, 372 U.S. 368, 381 (1963). The more famous reapportionment cases are *Baker v. Carr*, 369 U.S. 186 (1962) and *Reynolds v. Sims*, 377 U.S. 533 (1964). Scholars often use the phrase "one man, one vote," which of course was inaccurate then, since women had been voting in the United States since 1869 in some places, and all places since 1920. *See Maps: States Grant Women the Right to Vote*, NAT'L CONST. CTR., http://constitutioncenter.org/timeline/html/cw08_12159.html (last visited Jan. 18, 2014). The Wyoming Territory granted women suffrage in 1869 and other territories followed. *Id.* In 1890, Wyoming became the first state to give women the right to vote. *Id.* Before the adoption of the Nineteenth Amendment, women had full voting rights in fifteen states (including New York and California) and could vote in presidential elections in another twelve states. *Id.*

issue is the shape and make-up of the electoral district. Does the district unfairly discriminate against one group through a manipulation of the shape of the district, a practice more commonly known as gerrymandering? Most of this Essay will focus on the first and second issues. I want to start, however, by briefly discussing the problem of gerrymandering.

I. GERRYMANDERING

Professor Levinson has made a strong case against gerrymandering, arguing that it effectively distorts the electorate by ensuring that a particular voice will never be heard. He notes that the city of Austin, Texas, where he lives, has been sliced and diced to the point where Levinson feels like a "'filler person' in [his] congressional district that includes part of Austin, Texas."[3] He writes:

> I can say that I don't even know my Congressman's name. Why should I? In no way do I feel "represented" by him. I do not genuinely count, except in the most unhelpfully literal sense, and this is precisely what was intended by Texas Republicans who engaged in ruthlessly partisan gerrymandering consciously designed to make Austin the largest city in the country without a "representative" it can genuinely call its own.[4]

As Levinson notes, the Republican majority in the Texas state legislature has gerrymandered Austin to perhaps deprive the city of a moderate Democratic seat in Congress. It is not clear how that seat would be created, however, without creative gerrymandering to make sure there were two Democratic seats. In 2010, Travis County contained slightly over a million people.[5] The city of Austin had an estimated population of 790,000 in 2010.[6] That is enough for slightly more than one congressional district, but not enough for two. Thus, Austin had to be divided in some fashion. Part of Austin is represented by Lloyd A. Doggett, a reliable moderate-to-liberal Democrat who has been in Texas politics since 1973, serving in the state senate, on the state supreme court, and in Congress.[7] Republicans have moved his district around, and tinkered with it, but he is still there, representing liberal Austin, even if Professor Levinson is not technically in his district. Next time the

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3. Sanford Levinson, *Who Counts? Sez Who?*, 58 ST. LOUIS U. L.J. 937, 954 (2014).

4. *Id.* at 955 n.88.

5. *See State and County Quickfacts, Travis County Texas*, U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, http://quickfacts.census.gov/qfd/states/48/48453.html (last visited Jan. 29, 2014).

6. *See State and County Quickfacts, Austin (city) Texas*, U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, http://quickfacts.census.gov/qfd/states/48/4805000.html (last visited Jan. 29, 2014).

7. *Meet Lloyd Doggett*, DOGGETT.HOUSE.GOV, http://doggett.house.gov/index.php/about-lloyd/biography/ (last visited Jan. 18, 2014).

Democrats take control of the Texas legislature, no doubt they will redo the district as well, carving just enough voters out of Doggett's district to add to other moderate and liberal voters to create a second Democratic district in central Texas. When that happens Levinson will be happier, but his conservative neighbors in north Travis County or some neighboring county will then discover that they have become "filler persons."

Gerrymandering has been around for a *very* long time—at least since 1812 when Governor Elbridge Gerry of Massachusetts helped carve out districts that favored his party.[8] Political opponents noted that the oddly shaped, curved district resembled a salamander and it immediately became known as a Gerrymander.[9] Meanwhile, the *Boston Gazette* published one of the most famous political cartoons in American history, mocking the "gerrymander." The paper creatively turned the salamander into a dragon-like monster.[10]

[11]

For many Americans, the gerrymander has been a monster ever since the publication of this cartoon. The gerrymander is an oddly shaped—often grotesquely shaped—political district, designed to ensure electoral success (or failure) for a particular candidate, party, or political constituency.

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8. George Athan Billias, *Gerry, Elbridge*, AM. NAT'L BIOGRAPHY ONLINE (Feb. 2000), http://www.anb.org/articles/02/02-00142.html (last visited Jan. 18, 2014); *see also* GEORGE ATHAN BILLIAS, ELBRIDGE GERRY: FOUNDING FATHER AND REPUBLICAN STATESMAN 316–17 (1976).

9. Billias, *supra* note 8, at 316.

10. *The Gerry-mander*, BOSTON GAZETTE, Mar. 26, 1812. On the use of pictures in law review publications, see my LSU colleague's article, Paul R. Baier, *What Is the Use of a Law Book Without Pictures or Conversations*, 34 J. LEGAL EDUC. 619 (1984).

11. *The Gerry-mander, supra* note 10, *available at* http://commons.wikimedia.org/wiki/File:The_Gerry-Mander.png.

The technique has been used for more than two centuries to shape districts that protect political incumbents, political parties, and certain interests. The game is as old as American politics. Levinson is correct that gerrymandering led to the odd result in 2012 that Democratic candidates for Congress had nearly a million and a half more popular votes than Republicans, but do not control the House because of the way districts are shaped.[12]

Drawing electoral districts in a more responsible (i.e., less cynically political) way would doubtless make congressional elections more representative, but they might not fully solve the problem. There are two reasons for this. First, as long as districts represent contiguous population groups, and more or less rational geographic areas, there will always be a significant imbalance in total votes for candidates and representation. To offer a simple example, in some densely populated cities (New York, Chicago, Philadelphia, St. Louis) the overwhelming majority of voters are Democrats.[13] Levinson uses Pennsylvania as an example, where in 2012 the Democratic Senate candidate Bob Casey carried fifty-three percent of the vote, but the majority of the state congressional districts (thirteen of eighteen) were captured by Republicans.[14] Some of that was the result of very creative gerrymandering by the Republican legislature, but some of this imbalance may also be the result of very high concentrations of Democratic voters in Philadelphia, Pittsburgh, Erie, and a few other cities.[15] Thus, only by spreading those voters out across the whole state is it likely that the percentage of Democratic votes would lead to the same percentage of House seats. Only by creating very oddly shaped districts, with a core segment of Philadelphia connected to distant urban and suburban populations, could this be alleviated. And if that happened, then the rural Pennsylvanians who were outvoted in their gerrymandered districts would feel just like Levinson—they would be "filler people." The Supreme Court has generally allowed gerrymandering for political purposes[16] and only interferes when the gerrymandering is racially motivated.[17]

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12. Levinson, *supra* note 3, at 955.

13. *See U.S. Congressional Districts, Party Colors as of July 23, 2009*, WIKIPEDIA, http://en. wikipedia.org/wiki/File:US_Congressional_Districts,_party_colors.svg (last visited Jan. 18, 2014).

14. Levinson, *supra* note 3, at 955.

15. *See Pennsylvania Presidential Race: 2012 Election Center*, CNN, http://www.cnn.com/ election/2012/results/state/PA/president (last visited Jan. 18, 2014).

16. Easley v. Cromartie, 532 U.S. 234, 257 (2001) (upholding a gerrymandered North Carolina district on the grounds that it was politically motivated, rather than racially motivated). The district led to the first election of a black Congressman from that state since 1898.

17. Gomillion v. Lightfoot, 364 U.S. 339, 347–48 (1960) (striking down a plan that effectively excluded almost all blacks from voting in elections in Tuskegee, Alabama); Abrams v. Johnson, 521 U.S. 74, 75, 90 (1997) (striking down the creation of majority-black districts—also called "majority-minority districts"—in Georgia as being racially motivated). Despite the Court's decision in *Johnson*, there are numerous such districts throughout the nation that are drawn in

There are a number of potential cures for gerrymandering although some, like proportional representation, would violate the long tradition and the constitutional mandate that members represent a specific and defined congressional district, rather than represent a party or voters who are scattered throughout a state.[18] I think there is no likelihood of the United States moving to such a system in the foreseeable future. In a large state—like Texas, California, New York, or Pennsylvania—this might lead to huge geographic areas (and significant numbers of people) having no representation in Congress.

A better solution would be to move to independent commissions drawing electoral boundaries based on geographic considerations. This would lead to more compact districts and probably more competitive ones. It might eliminate some seats in Congress currently held by racial minorities, but more likely, it would simply shift them around. It might also not have as much of an effect on minority voting today as it would have a decade or so ago. Non-whites are increasingly able to win elections in districts where they are not the majority. The election of President Obama is the most prominent example, but he is certainly not the only example. Black mayors are found in majority-white cities; minorities in the U.S. Senate have been elected in majority-white states; and in some majority-white congressional districts, minorities have been elected to Congress.[19]

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such a way as to put almost all African-Americans in the same district—thus insuring the election of a black Democratic representative—but preventing the election of a second Democrat if some of the African-American voters were in a second district.

18. Under a proportional representation scheme, each party would run a slate of candidates for all the congressional seats in a state. If the one party won fifty-five percent of the votes, then it would get fifty-five percent of the seats. To use the Pennsylvania example from Levinson's essay, if the Democrats had won fifty-three percent of the vote in 2012, they would have won ten seats in Pennsylvania (instead of five) and the Republicans would have won the remaining eight seats. Under such a system, it would be more likely that a minority party candidate might win a seat by capturing enough votes statewide.

19. Examples of this include black mayors in New York City, Chicago, Los Angeles, Seattle, Denver, and Columbia (South Carolina). *See* RAVI K. PERRY, BLACK MAYORS, WHITE MAJORITIES: THE BALANCING ACT OF RACIAL POLITICS 27, 29, 31 (2013). In Ohio, blacks have been mayors of the state's major white-majority cities, including Cincinnati and Columbus. *See id.* at 21–24. There have been non-white governors in Massachusetts, Virginia, New York, South Carolina, and Louisiana, *see The Demographics of America's Governors: Race and Gender*, THE POLITIKAL BLOG (Oct. 10, 2011), http://mypolitikal.com/2011/10/10/the-demographics-of-ameri cas-governors/; *Spitzer Successor Will Be Nation's 4th Black Governor*, CNN POLITICS.COM (Mar. 10, 2008), http://www.cnn.com/2008/POLITICS/03/10/paterson.bio/; black U.S. Senators (e.g., Edward Brooke III (Massachusetts), Carol Moseley Braun (Illinois), Barack Obama (Illinois), and Cory Booker (New Jersey)); and black members of the House (e.g., Ronald Dellums (California), Allen West (Florida), J.C. Watts (Oklahoma), Tim Scott (South Carolina), and Gary Franks (Connecticut)), *Black-American Representatives and Senators by Congress, 1870–Present*, HIST., ART. & ARCHIVES, U.S. HOUSE REPRESENTATIVES, http://history.house.

Non-partisan redistricting would not totally solve Levinson's complaint about "filler people," but it would go a long way to dealing with the issue. A non-partisan commission aided by sophisticated computer analysis and mapping could create relatively compact districts that were more or less equal in size. It would change the face of American politics.

Such redistricting could be done on a state-by-state basis, with some states adopting the policy and others not. However, as more states adopted the policy there would be greater pressure in Congress to have a national system of redistricting based on such principles. If enough states adopted non-partisan redistricting, the courts might ultimately weigh in and consider it as a matter of equal protection. This is not far-fetched, but given the tenacity of sitting politicians to hold their seats, changes along these lines would be slow. A more important change could come about if the United States Congress increased its size to recognize the fact that the nation has grown dramatically since Congress established the current size of the House in 1911.[20] I will turn to this issue in the next section of this Essay, which focuses on the absurdly undemocratic nature of the United States Congress, and by extension, the way we choose our presidents.

II. PRESIDENTIAL ELECTIONS, THE SENATE, AND THE ANTI-DEMOCRATIC NATURE OF THE AMERICAN SYSTEM

The United States has a truly bizarre and deeply anti-democratic system of electing presidents and the national legislature. Part of this is a function of the Constitution, which allocates two senators for each state and requires that each state agree to any change that would deny states equal representation in the Senate.[21] It is important to understand the absurdity of this structure in our modern world, even if there is no likelihood that it can ever be fixed. A second problem is the Electoral College, which is imbedded in our Constitution,[22] but unlike the Senate, which seems unchangeable, it might be more easily changed through amendment, or through a political "end run" known as the "National Popular Vote" proposal.[23] The "end run" is the proposal that individual states pass legislation requiring their presidential electors to vote for the candidate

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gov/Exhibitions-and-Publications/BAIC/Historical-Data/Black-American-Representatives-and-Senators-by-Congress/ (last visited Mar. 26, 2014).

20. Act of Aug. 8, 1911, Pub. L. No. 62-5, 37 Stat. 13. The law provided for 433 representatives with two more to be added when Arizona and New Mexico became states. *Id.* § 2. The number (435) became permanent in 1929. Act of Jun. 18, 1929, Pub. L. No. 71-13, § 22(a), 46 Stat. 26.

21. U.S. CONST. art. I, § 3, cl. 1 (allocating two senators to every state); *id.* art. V ("no State, without its Consent, shall be deprived of its equal Suffrage in the Senate").

22. U.S. CONST. art. II, § 1, cl. 2.

23. NAT'L POPULAR VOTE, http://www.nationalpopularvote.com/index.php (last visited Jan. 18, 2014).

with the most votes nationwide, provided that enough states to constitute a majority of the electoral college pass such legislation. If this occurs, then we will effectively have a popular election of the president. One would imagine that each state adopting this rule would have a process by which "neutral" presidential electors were chosen and they would cast all their ballots for the candidate receiving the most popular votes.[24] In 2007, Maryland adopted such a scheme, but it will only go into effect if states representing a majority of the Electoral College votes adopt it.[25] At present, ten jurisdictions, including California,[26] altogether representing 136 electoral votes, have passed such a statute.[27] Bills are pending in a number of other states and have bipartisan support.[28]

More easily fixed is the problem of a House of Representatives that is no longer even plausibly representative because in 1911 Congress arbitrarily set a maximum number of representatives at 435.[29] As I will set out below, this has led to an absurd imbalance in representatives and a Congress that is probably too small to effectively do its job. This could easily be changed by statute. Before turning to the House of Representatives, it is worth setting out the undemocratic and unrepresentative nature of the Electoral College and the Senate.

A.   The Electoral College and Who Does Not Count

Under the Constitution, the President is indirectly elected through the Electoral College.[30] Each state is allocated electors based on its two senators and the total number of members of the House of Representatives.[31] The smallest number of electors for any state is three.[32] The District of Columbia

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24. *Explanation of National Popular Vote Bill*, NAT'L POPULAR VOTE, http://www.national popularvote.com/pages/explanation.php (last visited Jan. 18, 2014).

25. 2007 Md. Laws ch. 44. For a discussion of this legislation, see *Maryland Sidesteps Electoral College*, NBC NEWS (Apr. 11, 2007, 11:17 AM), http://www.nbcnews.com/id/18053 715.

26. *California*, NAT'L POPULAR VOTE, http://www.nationalpopularvote.com/pages/states. php?s=CA (last visited Jan. 18, 2014).

27. NAT'L POPULAR VOTE, *supra* note 23.

28. *Id.*

29. *See supra* note 20.

30. U.S. CONST. art. II, § 1, cl. 3, *amended by* U.S. CONST. amend. XII.

31. U.S. CONST. art. II, § 1, cl. 2.

32. Each state gets two senators, and the smallest states have only one member of the House of Representatives, which gives the smallest states three electoral votes. U.S. CONST. art. I, § 2, cl. 3; U.S. CONST. art. I, § 3, cl. 1.

also gets three electors,[33] creating a total of 538 electors. Thus, it takes 270 electoral votes—a majority of the electoral votes—to become President.[34]

   The 2010 census found about 309 million people living in the United States.[35] The ten largest states[36] have a combined population of about 167 million people; the remaining 40 states have about 142 million people.[37] The ten largest states, containing about fifty-four percent of the population, are allocated 256 electoral votes.[38] The remaining forty states, plus the District of Columbia, have 282 electoral votes,[39] even though they have only about forty-six percent of the total population. It does not take a mathematical genius to figure out that under the present system, forty-six percent of the population can outvote fifty-four percent of the population in electing the President. This is of course not merely a theoretical question. We all know that in 2000 Al Gore beat George Bush in the popular vote by about 544,000 votes.[40] But because of the utterly undemocratic nature of the Electoral College, Bush was elected President.[41]

   This was not the first time this had happened. In 1888, Grover Cleveland won about 90,000 more votes than Benjamin Harrison but lost the election.[42] In 1876, Samuel Tilden was credited with about 250,000 more votes than the winner, Rutherford B. Hayes.[43] In 1824, John Quincy Adams won only

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   33. U.S. CONST. amend. XXIII.

   34. U.S. CONST. amend. XII ("The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of electors appointed . . . .").

   35. Kristin D. Burnett, *Congressional Apportionment*, U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE 2 tbl.1 (Nov. 2011), *available at* http://www.census.gov/prod/cen2010/briefs/c2010 br-08.pdf. This does not include data for the District of Columbia. Also, I will use the data from the "Total" column under the "2010 apportionment population" because, even though this means that certain U.S. population overseas is included, the apportionment is based off of this number. *See Congressional Apportionment, Frequently Asked Questions*, U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE Q3, http://www.census.gov/population/apportionment/about/faq.html#Q3 (last updated Feb. 4, 2013).

   36. California, Texas, New York, Florida, Illinois, Pennsylvania, Ohio, Georgia, Michigan, and North Carolina. *See id.*

   37. *Id.*

   38. *Distribution of Electoral Votes*, NAT'L ARCHIVES & RECORDS ADMIN, http://www.ar chives.gov/federal-register/electoral-college/allocation.html (last updated Dec. 10, 2010).

   39. *Id.*

   40. Bush had 50,456,002 votes; Gore at 50,999,897. *Presidential Election History from 1789 to 2008*, PROCON.ORG, http://2008election.procon.org/view.resource.php?resourceID=001565 (last updated Nov. 1, 2010, 11:29 AM) [hereinafter *Presidential Election History*].

   41. *Id. See also* Bush v. Gore, 531 U.S. 98, 110 (2000).

   42. Harrison had 5,443,892 popular votes; Cleveland had 5,534,488. *Presidential Election History*, *supra* note 40.

   43. Hayes had 4,034,311 popular votes; Tilden had 4,288,546. *Id.* These numbers are suspect because of the massive violence, intimidation, and corruption in the south used to

113,122 popular votes, but defeated Andrew Jackson who won 151,271 popular votes.[44]

In at least one other election it is likely that the candidate with the most popular support lost the election. In 1800, Thomas Jefferson defeated John Adams by eight electoral votes.[45] We do not have a record of the popular vote for this election,[46] and in some states the electors were chosen by the state legislature. However, fifty-three of Jefferson's seventy-three electoral votes came from the slave states, where the electoral count was enhanced by counting slaves, who of course could not vote.[47] Had there been a popular vote, Jefferson would probably have been defeated by the larger voting populations in the North.[48] Had slaves not been factored into the Electoral College, Jefferson would not have won a majority of the electoral votes either.[49]

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suppress black voters or prevent their votes from being counted. Lewis L. Gould, *Presidency, 1877–1901*, *in* 2 ENCYCLOPEDIA OF THE UNITED STATES IN THE NINETEENTH CENTURY 577–83 (Paul Finkelman ed., 2001) [hereinafter 19TH CENTURY ENCYCLOPEDIA].

44. Jackson also won more electoral votes but did not have a majority, and so the election was decided in the House of Representatives where Adams won. *Presidential Election History*, *supra* note 40.

45. *Id.* Jefferson and running mate Aaron Burr both received seventy-three electoral votes, leading to a tie in the election, and under the Constitution before the ratification of Amendment XII, both were entitled to be President. It took the House of Representatives thirty-six ballots to finally choose Jefferson. Robert Allen Rutland, *Presidency, 1801–1829*, *in* 19TH CENTURY ENCYCLOPEDIA, *supra* note 43, at 551–57.

46. *Electoral College Box Scores 1789–1996*, NAT'L ARCHIVES & RECORDS ADMIN, http://www.archives.gov/federal-register/electoral-college/scores.html#1800 (last visited Jan. 8, 2014) [hereinafter *Electoral College Box Scores*] (noting there is no record of a popular vote for this election); *see also Presidential Election History*, *supra* note 40.

47. Jefferson won all the electoral votes from Virginia, South Carolina, Georgia, Kentucky, and Tennessee. *Tally of Electoral Votes for the 1800 Presidential Election*, NAT'L ARCHIVES & RECORDS ADMIN, (Feb. 11, 1801), *available at* http://www.archives.gov/global-pages/larger-image.html?i=/legislative/features/1800-election/images/1800-election-l.jpg&c=/legislative/features/1800-election/images/1800-election.caption.html. He received eight of North Carolina's twelve electoral votes and five of Maryland's ten electoral votes. *Id.* These states provided him with fifty-three electoral votes. These states (counting only two thirds of North Carolina's population and only half of Maryland's) had about 1.4 million free people. Campbell Gibson & Kay Jung, *Historical Census Statistics on Population Totals By Race, 1790 to 1990, and By Hispanic Origin, 1970 to 1990, For The United States, Regions, Divisions, and States* tbls.25, 32, 35, 48, 55, 57, 61 (U.S. Census Bureau, Working Paper Series No. 56, 2002), *available at* http://www.census.gov/population/www/documentation/twps0056/twps0056.html. But they also had 740,962 slaves (counting only two thirds of North Carolina's slaves and only half of Maryland's). *Id.* These slaves produced significantly more than eight seats in Congress (and thus eight electoral votes), which was Jefferson's margin of victory over Adams. *See* Paul Finkelman, *The Proslavery Origins of the Electoral College*, 23 CARDOZO L. REV. 1145 (2002).

48. Finkelman, *supra* note 47, at 1154–56.

49. *Id.* In the razor close popular vote in the election of 1960, John F. Kennedy defeated Richard M. Nixon by about 118,574 popular votes (0.17% of the total vote). It seems likely that a

This result was consistent with one of the main purposes of the Electoral College: to give the southern states extra political muscle in the election of the President by folding their slaves into the formulae for electing the President. At the Constitutional Convention, James Wilson argued for a direct election of the President through a popular vote.[50] James Madison, a slaveholder from Virginia, agreed with Wilson in theory, explaining that "the people at large" were "the fittest" to choose the President.[51] But he could not support the idea because "one difficulty . . . of a serious nature" made election by the people impossible.[52] Madison noted that the "right of suffrage was much more diffusive in the Northern than the Southern States; and the latter could have no influence in the election on the score of the Negroes."[53] Thus, in order to guarantee that the nonvoting slaves could nevertheless influence the presidential election, Madison favored the creation of the Electoral College,[54] which allocated presidential votes on the basis of members of the House of Representatives. Because slaves were counted for purposes of representation under the Three-Fifths Clause,[55] the Electoral College made sure that the southern states would have "influence in the election on the score of the Negroes."[56] Hugh Williamson of North Carolina was more open about the reasons for southern opposition to a popular election of the President. He noted that under a direct election of the President, Virginia would not be able to elect her leaders President because "[h]er slaves will have no suffrage."[57] Madison's creation of the Electoral College later helped secure the presidency for his close friend and ally, Thomas Jefferson, and strengthened his own electoral victories when he ran for President in 1808 and 1812.

Thus, under the Electoral College, the person with the most popular votes does not necessarily win the presidency. This makes the United States virtually unique among democracies.[58] The presidential election is the only election in the nation that is rigged in this way. In some places and in some locations,

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fair recount might have reversed that vote. Officially, Kennedy received 34,226,731 votes and Nixon received 34,108,157. *Electoral College Box Scores*, *supra* note 46.

50. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 68 (Max Farrand ed., 1911).

51. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 56 (Max Farrand ed., 1911) [hereinafter 2 RECORDS]. For a more elaborate discussion of this debate, see Finkelman, *supra* note 47.

52. 2 RECORDS, *supra* note 51, at 57.

53. *Id.*

54. *Id.* at 56–57.

55. U.S. CONST. art. I, § 2, cl. 3.

56. 2 RECORDS, *supra* note 51, at 57.

57. *Id.* at 32.

58. The only result that can be close to this is found in multi-party parliamentary systems where the party with the most seats, but nothing close to a majority, fails to put together a ruling coalition, and so the party with the second most seats is able to organize the government through a multi-party coalition.

there are run-offs if neither candidate gets a majority, or a sufficient plurality,[59] but only in the presidential election is it possible to win the most votes—as Al Gore did in 2000 and others before him—and not win the election.

B.   The Senate

While the Electoral College sometimes brings about strange and bizarre undemocratic results, it pales in its undemocratic nature when compared to the United States Senate. The U.S. Constitution provides that every state gets two senators, without regard to its population.[60] This means that people from small states are dramatically overrepresented in the Senate, and people from large states are dramatically underrepresented. Thus, the approximately 568,000 people in Wyoming get two senators—one for every 284,000 people.[61] The approximately 37 million people in California also get only two senators, or one for every 18.5 million people.[62] California has about sixty-five times more people than Wyoming. If representation in the Senate were proportional, then California would have 130 senators to Wyoming's two senators.

In 2010, about sixty-six percent of the nation lived in the fifteen largest states.[63] These approximately 204 million people were represented by thirty U.S. Senators. The remaining thirty-four percent of the nation, about 105 million people were represented by seventy U.S. Senators. The disparity is even more appalling if we look at the difference between the fifty-two senators representing the twenty-six smallest states and the forty-eight senators

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59. For example, in New York City, a candidate in the primaries must win at least forty percent of the vote to avoid a run-off. N. Y. CITY CHARTER § 10(c)(10) (2004).

60. U.S. CONST. art. I, § 3, cl. 1.

61. Burnett, *supra* note 35.

62. *Id.*

63. *See id.* They are, in rank order, according to the 2010 census (with population rounded to the nearest 1000):

    1. California (37,342,000)
    2. Texas (25,268,000)
    3. New York (19,421,000)
    4. Florida (18,901,000)
    5. Illinois (12,864,000)
    6. Pennsylvania (12,735,000)
    7. Ohio (11,568,000)
    8. Michigan (9,912,000)
    9. Georgia (9,728,000)
   10. North Carolina (9,566,000)
   11. New Jersey (8,808,000)
   12. Virginia (8,038,000)
   13. Washington (6,753,000)
   14. Massachusetts (6,560,000)
   15. Indiana (6,502,000)

See id.

representing the twenty-four largest states.[64] About 254 million people elect forty-eight senators and about 55 million people elect fifty-two senators.[65] No one needs a degree in mathematics or statistics to realize there is something terribly wrong with this picture.

While the United States imagines itself a democracy with representative government, the Senate belies this conceit. Nothing short of a constitutional revolution can change this, and such a revolution is not likely to occur. But when Americans think about "who counts," it is important to realize that those Americans living in the largest states do not count nearly as much as those living in small states.[66]

C. *The House of Representatives*

The House of Representatives also has disproportionate representation. This is the result of an absurdity in American law, dating from 1911. In that year Congress set the size of the House of Representatives at 435.[67] It has not changed since then. In 1910, the United States population was about 92 million.[68] A century later, it was about 309 million, or about 340 percent larger.[69] This in itself suggests a huge problem for meaningful representation.

When Congress adopted the limit on the total size of the House in 1911, the average member of the House represented about 210,000 people; today the average is about 711,000.[70] This means that it is impossible for most representatives to have any sense of the people in their district. Representatives cannot know any more than a small fraction of the people in their district. They have no hope of visiting more than a miniscule number of public meetings, schools, houses of worship, or other venues where the candidate or member of the House can interact with "the people." Furthermore, the vote of an individual person is all but meaningless. It is no wonder that voter participation is distressingly low. Average voters do not know who their representatives are; they have never met them or even seen them.

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64. *See id.*

65. *See id.*

66. Since this Essay is being published in a law review in Missouri it is worth noting that Missouri, with approximately 6,011,000 people, ranked eighteenth in population in 2010, and is thus one of those states which is severely underrepresented in the Senate. Missouri has a population that is more than ten times greater than Wyoming (568,000), which gets two senators just as Missouri. *Id.*

67. *See supra* note 20.

68. Gibson & Jung, *supra* note 47, at tbl.1.

69. Burnett, *supra* note 35.

70. *Id.* at 1 ("The average size of a congressional district based on the 2010 Census apportionment population will be 710,767, more than triple the average district size of 210,328 based on the 1910 Census apportionment . . . .").

Similarly, representatives know little or nothing about their constituents. They can barely provide constituent services for them or take time to consider their needs. Reaching so many constituents in an election requires ever expanding budgets, and thus members of the House increasingly only interact with those who can afford to pay to attend fundraisers, in the form of dinners, picnics, barbecues, or coffees at private homes. Money becomes the substitute for communication with voters. Where votes and contacts were once the coin of the realm in politics—today the coin of the realm is not even coin. It is large checks.

Beyond the massive population of House districts, there is a disturbing inequity among them. The Constitution requires that every state have at least one member of the House.[71] This is perfectly reasonable—if we are going to have states, then surely they should have a member in the House of Representatives. But when this constitutional requirement is combined with the fact that the size of the House has not been increased for more than a century, there are huge disparities in the size of House districts.

The average House seat contains about 711,000 people, but Wyoming gets a House seat with only 568,000 people, because that is the total size of the state.[72] Vermont also gets a representative with only about 630,000 people.[73] The contrast between Wyoming and its neighbor Montana is striking. With about 994,000 people, Montana was entitled to only one House seat under the 2010 census, while Wyoming with a mere 568,000 people also got one seat in the House.[74] Montana is almost, but not quite, twice the size of Wyoming but gets the same representation in the House.

The Montana/Wyoming disparity results from the fact that a state must have more than one million people to get two seats in the House. Thus, oddly, the greatest disparity in representation is between two relatively small states, not between a large state and a small state. In 2010, Rhode Island had a population of 1,055,000, while Montana had 994,000.[75] Thus, Rhode Island had 61,000 more people than Montana, but that put the Island State over a million people, giving it two House seats.[76] So, Rhode Island has one representative for every 527,500 people, while Montana has one representative for every 994,000 people. Similarly, Delaware, with about 901,000 people, gets only one seat in the House.[77] While this disparity is most noticeable for small states, it also affects larger one. For example, North Carolina, with

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71. U.S. CONST. art. I, § 2, cl. 3 ("[E]ach State shall have at Least one Representative . . . .").
72. Burnett, *supra* note 35.
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. Burnett, *supra* note 35.

thirteen seats in Congress, gets one representative for about every 736,000 people in the state, while South Carolina, with seven members of the House, gets one representative for about every 664,000 people.[78] It is also worth remembering that the more than 600,000 American citizens who live in Washington, D.C. have no representation in Congress, even though they are granted three electoral votes.[79]

These rather unsophisticated numbers illustrate that the United States is very far away from the democratic goal of "one person, one vote." Despite the Supreme Court's mandates in the reapportionment cases,[80] the House is severely malapportioned.

There is a fix for this problem, and it is a relatively easy one. We need to increase the size of the House of Representatives to create smaller, more representative districts and to ensure that districts are more equal in size. Congress might set the size of a Congressional district at half the size of the smallest state. Under the 2010 census that would be one half of the 568,000 people who live in Wyoming, or 284,000. This would give each House district a population that was much closer to the same number of residents that districts had a century ago.[81] This would give us about 1100 members in the House, which is perhaps too many to contemplate. A less drastic measure would be to set a House seat at the size of the smallest state, or in today's numbers 568,000. This would give us just over 100 more members of the House, putting it at around 550 members. There would still be differences in the size of House districts but the differences would be much smaller and hence representation would be much more democratic.[82]

This change might actually make the House more efficient, not more cumbersome. Right now representatives serve on far too many committees and cannot possibly keep up with the work of each committee while running their office, trying to serve constituents, and of course, all the while raising money

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78. *See id.*

79. In 2010, the Census reported Washington, D.C. at just over 601,000 people. *State and County Quickfacts, District of Columbia*, U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, http://quickfacts.census.gov/qfd/states/11000.html (last visited Mar. 13, 2014). The 2013 population estimate is 646,449.

80. Baker v. Carr, 369 U.S. 186, 237 (1962); Reynolds v. Sims, 377 U.S. 533, 567 (1964).

81. Gibson & Jung, *supra* note 47.

82. If all districts were exactly the size of Wyoming it would create 544 seats in the House, but of course there would still be some imbalance because as long as seats were allocated to states there could never be a mathematically perfect allocation of seats in the House of Representatives. This highlights a technicality of the apportionment process that is worth noting: "The Constitution provides that each state will have a minimum of one member in the U.S. House of Representatives, and then the apportionment calculation divides the remaining 385 seats among the 50 states." *Congressional Apportionment: How It's Calculated*, U. S. CENSUS BUREAU, http://www.census.gov/population/apportionment/about/how.html (last updated Feb. 4, 2013). To keep things simple, however, throughout this Essay I use 435 for my calculations.

and preparing for the next election. A larger House of Representatives would better serve the nation. Given that the nation is almost three-and-a-half times larger than it was when the House set its total membership at 435, it seems that increasing the size of the House by approximately twenty–five percent is reasonable.

III. WHO VOTED AND WHO HELD OFFICE

How did we get to this mess? And how badly are we off? Surely representation in the nation is problematic and gerrymandering undermines the idea that the House of Representatives is actually a "representative" body. The nation has twice voted for a Democratic President, but the House is dominated by the other party.[83] This is not, as some pundits would have us believe, because Americans want "divided government."[84] Rather, as Sandy Levinson shows, gerrymandering has created deeply unrepresentative congressional districting.[85] Similarly, as I note above,[86] a passel of small, and even tiny, states can outvote much larger populations through the election of senators. Americans have not chosen to have "divided" government, but rather a bunch of small states with disproportionate power in the House, and even more so in the Senate, can create divided government. And of course, every four years we face the possibility of an Electoral College train wreck, with a score of virtually empty states outvoting the American people through the Electoral College.

Despite all this, the United States is far more "democratic" than it has ever been. Whether voters "feel" connected to the political process is another matter. Voter participation waxes and wanes with elections. For most of our history, voting has been restricted and, thus, most people did not count. Yet, understanding who could vote and who could not is useful in thinking about voting today. Most people who write about early voting—and elections—paint their picture with a broad brush that is often misleading. For example, during the bicentennial of the Bill of Rights, one author asserted that suffrage at the

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83. Barack Obama was elected in 2008 and reelected in 2012, but the Republicans won control of the House of Representatives in 2010 and retained that control in the 2012 election.

84. Doug Mataconis, *Despite Gridlock, Americans Prefer Divided Government To One-Party Rule*, OUTSIDE THE BELTWAY (Oct. 12, 2013), http://www.outsidethebeltway.com/despite-gridlock-americans-prefer-divided-government-to-one-party-rule/; *see also* Robert Schlesinger, *Conservatives Can't Win at the Negotiating Table What They Lost at the Ballot Box*, U.S. NEWS (Jan. 4, 2013), http://www.usnews.com/opinion/blogs/robert-schlesinger/2013/01/04/the-final-2012-presidential-election-results-arent-close (noting that 1.4 million more Americans voted for Democratic House members than for Republicans).

85. Levinson, *supra* note 3, at 955 n.88.

86. *See supra* Part II.B.

founding was limited to "Christian White Men of Property."[87] My goal here is to sort out who could vote, who could not vote, and who could or could not hold public office since the Revolution.

British settlers brought with them a notion that voting was based on land, taxes, and membership in the Church of England.[88] But such rules did not always work very well in colonies where Anglicans were a minority, where land ownership was diffuse, and community defense against Indians, the French, or slaves required participation of all free men. While some colonies discriminated against Catholics or the wrong kind of Protestants,[89] at the same time, others allowed non-English newcomers to assimilate to the extent they could have civic participation.[90] Some colonies also began "to relax" property requirements or even religious limitations on voting, although by 1776 only five had allowed men (and of course only men) to use "personal property" rather than "real property" as a basis for voting.[91] Serving in the militia or on the night watch gave some men claims to political participation, as the history of Asser Levy in New York shows.[92] In the 1660s, Asser Levy stood the night watch in New York City then leveraged that public service to a successful claim that he could vote, even though he was a Jew and he did not own any land.[93] Other practical realities set in as well. In the most important and comprehensive scholarly study of citizenship, Rogers Smith notes:

> But just as the imperatives of colony-building led to lessened suffrage restrictions, limitations on full membership for non-British Europeans were not always rigorously enforced. The need for new settlers was felt to be too great for discouraging rules to maintain enduring support. Occasionally, colonial authorities even tolerated political participation by aliens though they also tended to sustain doctrines limiting alien land rights, which could in turn disqualify aliens from full political privileges.[94]

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87. Christopher Collier, *The American People as Christian White Men of Property: Suffrage and Elections in Colonial and Early National America*, *in* VOTING AND THE SPIRIT OF AMERICAN DEMOCRACY: ESSAYS ON THE HISTORY OF VOTING AND VOTING RIGHTS IN AMERICA 19, 19 (Donald W. Rogers ed., 1992) (1990).

88. ROGERS M. SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY 57–58 (1997).

89. *Id.*

90. *Id.* at 58.

91. *Id.*

92. Leon Hühner, *Asser Levy: A Noted Jewish Burgher of New Amsterdam*, 8 AM. JEWISH HIST. SOC'Y J. 9, 15–16 (1900); *see also* Paul Finkelman, *Toleration and Diversity in New Netherland and the Duke's Colony: The Roots of America's First Disestablishment*, *in* NO ESTABLISHMENT OF RELIGION: AMERICA'S ORIGINAL CONTRIBUTION TO RELIGIOUS LIBERTY 125 (T. Jeremy Gunn & John Witte, Jr. eds., 2012).

93. Hühner, *supra* note 92; Finkelman, *supra* note 92.

94. SMITH, *supra* note 88, at 58.

On the eve of the Revolution, most colonies restricted the franchise in a variety of ways. Eight colonies required property ownership or payment of taxes to vote,[95] but in reality this did not severely limit voting, since land ownership outside of the few colonial towns and cities was remarkably diffuse.[96] A number of colonies explicitly limited suffrage to white, Protestant men. In 1762, for example, Virginia limited suffrage to white male Protestants, and explicitly prohibited Catholics from voting.[97] On the other hand, after 1740, Parliament allowed for the naturalization in the colonies of Jews, Quakers, and various non-British immigrants (but not Catholics).[98] By the time of the Revolution, Jews could vote in nine of the colonies and Catholics in eight of them.[99]

During the Revolution, the rules for voting changed. By 1790, sixty to seventy percent of all white men could vote in America.[100] During or after the Revolution, every state abolished religious tests for voting—but not for officeholding.[101] That came later, and by the Civil War the bans on Catholic or Jewish officeholding were gone.[102] These changes in state constitutions reflected the federal constitution's ban on religious tests for officeholding.[103] As late as the 1960s and 1970s, however, there were still a few stray restrictions on officeholding based on religion. In *Torcaso v. Watkins*, the Supreme Court struck down a Maryland law requiring that officeholders believe in God.[104] Similarly in *McDaniel v. Paty*, the Supreme Court struck down a Tennessee constitutional provision prohibiting members of the clergy from holding office.[105] The tenacity of such constitutional clauses, which stem from eighteenth century notions, is remarkable. As late as 1997, the South Carolina Supreme Court had to intervene to strike down a similar rule in that state.[106] The Freedom From Religion Foundation reports that eight states still

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95. *Id. See also* ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 5 (2000).

96. KEYSSAR, *supra* note 95, at 7.

97. SMITH, *supra* note 88, at 58.

98. *Id.* at 56.

99. KEYSSAR, *supra* note 95, at 6.

100. *Id.* at 24.

101. J. Jackson Barlow, *Officeholding: Religious-Based Limitations in Eighteenth-Century State Constitutions*, *in* RELIGION AND AMERICAN LAW: AN ENCYCLOPEDIA 346, 346–47 (Paul Finkelman ed., 2000).

102. For a discussion of religious restrictions on officeholding, see MORTON BORDEN, JEWS, TURKS, AND INFIDELS (1984).

103. U.S. CONST. art. VI, cl. 3.

104. Torcaso v. Watkins, 367 U.S. 488, 496 (1961).

105. McDaniel v. Paty, 435 U.S. 618, 629 (1978).

106. Silverman v. Campbell, 486 S.E.2d 1, 2 (S.C. 1997).

have provisions in their constitutions requiring that office holders profess a belief in God, although none have been enforced in recent memory.[107]

The Northwest Ordinance, passed by the Congress under the Articles of Confederation in 1787 and then reenacted in 1789, provided for suffrage for anyone owning 50 acres of land.[108] But the Governor needed to own 1000 acres[109] and other officeholders 200 or 500 acres.[110] Meanwhile, most states began to reduce property requirements or eliminate them. By 1860, every state except Rhode Island and South Carolina had eliminated property requirements for white male voters.[111] In part, the rule was too hard to police, and in part, it was an anachronism in Jacksonian America.[112] New York retained a property requirement for black voters, which was evaded throughout upstate New York.[113]

Black voting was different. At the time of ratification free blacks voted in Massachusetts, New Hampshire, New York, Pennsylvania, New Jersey, and North Carolina.[114] In 1791, Vermont enfranchised blacks, as did Tennessee in 1796.[115] In 1820, Maine entered the Union with black suffrage.[116] But then came a long decline; by 1840 blacks had lost the right to vote in North Carolina, Tennessee, Pennsylvania, and New Jersey.[117] New York had eliminated its property requirements for white men but not for blacks.[118] When Rhode Island finally wrote a constitution in 1842, it enfranchised blacks.[119] Voters in Wisconsin supported black suffrage in 1849, but the state supreme

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107. *Religious Tests for Public Office*, FREEDOM FROM RELIGION FOUNDATION, http://ffrf. org/faq/state-church/item/14017-religious-tests-for-public-office (last updated Feb. 11, 2010).

108. Northwest Ordinance of 1787, § 9.

109. *Id.* at § 3.

110. *Id.* at § 4, 9.

111. KEYSSAR, *supra* note 95, at 336 tbl.A.3, 332 tbl.A.2; Rhode Island exempted native-born citizens and South Carolina provided an alternative residency requirement. *Id.* at 336 tbl.A.3.

112. In 1820, on the eve of the Age of Jackson, nine of the twenty-three states had property requirements for voting. *Id.* at 336 tbl.A.3. By 1855, only two of thirty-one states had such requirements for white men. *Id.*

113. *Id.* at 339 tbl.A.4; Paul Finkelman, *Prelude to the Fourteenth Amendment: Black Legal Rights in the Antebellum North*, 17 RUTGERS L. J. 415, 477 (1986).

114. KEYSSAR, *supra* note 95, at 338–39 tbl.A.4. Keyssar does not find any rules or laws that prohibited blacks from voting in Delaware (until 1792), Connecticut (until 1818), Maryland (until 1801), or Rhode Island. *Id.* at 337–39 tbl.A.4. But, with the exception of some references after the fact that some free blacks might have voted in Maryland in the 1790s, there is no evidence that blacks were allowed to vote in any of these states. *Id.*

115. *Id.* at 340 tbl.A.4.

116. *Id.* at 338 tbl.A.4.

117. *Id.* at 339–40 tbl.A.4.

118. *Id.* at 339 tbl.A.4.

119. KEYSSAR, *supra* note 95, at 339 tbl.A.4.

court managed to undo the outcome.[120] In the 1850s, Michigan allowed blacks to vote in school funding elections because the state constitution required that a majority of property owners support county school budgets; thus, in Michigan there was an odd flipping of the property requirement—instead of limiting the franchise, the connection between property ownership, taxation, and voting in the Michigan constitution forced an expansion of voting rights in that state.[121] Meanwhile in the 1850s, Republicans unsuccessfully attempted to give blacks full voting rights in New York and Connecticut.[122] In Ohio blacks could not vote, but John Mercer Langston was elected to public office.[123] The state's ban on black voting did not extend to officeholding.[124] By the Civil War, blacks had held some sort of public office in Vermont, New Hampshire, Ohio, Massachusetts, Rhode Island, and California.[125]

Nevertheless, most blacks—the 4,000,000 slaves, the 275,000 or so free blacks in the south, and most of the quarter million free blacks in the north—were disfranchised and did not "count" in determining the will of the people. Nevertheless, free blacks were "counted" in the census for representation as were slaves under the three-fifths clause. The slaves and free blacks in the south dramatically enhanced the power of the slave states in Congress and in the Electoral College. All this changed with the end of the Civil War. Black enfranchisement loops us back to Asser Levy—the New York Jew who stood

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120. RICHARD CURRENT, THE HISTORY OF WISCONSIN, THE CIVIL WAR ERA, 1848–1873, at 265–66 (1976); Finkelman, *supra* note 113, at 478 & n.386.

121. Finkelman, *supra* note 113, at 425 (citing *An Act to Extend Certain Rights and Privileges to Persons Who are Tax Payers But not Qualified Voters in School Districts*, Act of Feb. 8, 1855, MICH. COMP. LAWS ANN. § 44 (1855)). "Blacks voted in large numbers during the election of 1844 and in other elections as well. Some blacks simply swore they were legal voters and election judges showed no desire to challenge them." *Id.* (citing DAVID M. KATZMAN, BEFORE THE GHETTO: BLACK DETROIT IN THE NINETEENTH CENTURY 33–40 (1973)).

122. Finkelman, *supra* note 113, at 429–30, 478.

123. Paul Finkelman, *The Strange Career of Race Discrimination in Antebellum Ohio*, 55 CASE W. RES. L. REV. 373, 380–81 & n.35 (2004) [hereinafter *Strange Career*]; Paul Finkelman, *Not Only the Judges' Robes Were Black: African-American Lawyers as Social Engineers*, 47 STAN. L. REV. 161, 174 n.90 (1994) [hereinafter *Not Only the Judges' Robes*]. *See also* WILLIAM CHEEK & AIMEE LEE CHEEK, JOHN MERCER LANGSTON AND THE FIGHT FOR BLACK FREEDOM, 1829–65, at 260 (1989).

124. *Strange Career*, *supra* note 123, at 381.

125. *Not Only the Judges' Robes*, *supra* note 123 (describing antebellum black public office holders in Ohio, Massachusetts, Rhode Island, and California). African-American Alexander Lucius Twilight was elected to the Vermont legislature in 1836. Borgna Brunner, *Famous Firsts by African Americans*, INFOPLEASE.COM, http://www.infoplease.com/spot/bhmfirsts.html (last visited Mar. 13, 2014). African-American Wentworth Cheswell was elected to public office in New Hampshire for the first time in 1765. Renee Dubie, *Wentworth Cheswell*, DISCOVERY BARNETT (Dec. 5, 2013), http://discoverybarnett.weebly.com/uploads/1/2/9/0/12901430/wentworth_cheswell.pdf.

the night watch and demanded the right to vote.[126] In his last speech, Lincoln publicly argued for enfranchisement of black veterans and some other blacks.[127] Defending the nation gives individuals and groups a strong claim to being counted. The Fifteenth Amendment followed in 1870, and for a brief moment blacks voted in large numbers in the south.[128]

The connection between political rights and military service has two very modern implications. The end of "don't ask, don't tell" in the military has led to new legal rights for gays, including the military recognizing same sex couples.[129] Supreme Court decisions[130] have helped this change come about.[131] But, it is clear that if gays and lesbians can serve their country in combat it is much harder to deny them equality at home. Similarly, thousands of undocumented aliens would like to serve[132] or have served in our military.[133] It is illegal for undocumented aliens to serve in the military, but as the Congressional Research Service, an arm of Congress housed at the Library of Congress, notes: "Despite . . . restrictions, nonimmigrant and even undocumented (i.e.,"illegal") aliens have apparently enlisted in the military at times."[134] The Dream Act,[135] which has yet to pass Congress, would allow

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126. *See supra* notes 92–93 and accompanying text.

127. Abraham Lincoln, Last Public Address (Apr. 11, 1865), *in* 8 THE COLLECTED WORKS OF ABRAHAM LINCOLN 399, 403 (Roy P. Basler ed., 1953).

128. JOHN HOPE FRANKLIN & EVELYN BROOKS HIGGINBOTHAM, FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS 240–47 (9th ed. 2011); ERIC FONER, FREEDOM'S LAWMAKERS: A DIRECTORY OF BLACK OFFICEHOLDERS DURING RECONSTRUCTION xiii (rev. ed. 1996).

129. Elisabeth Bumiller, *A Final Phase for Ending "Don't Ask, Don't Tell"*, N.Y. TIMES, July 23, 2011, at A13. *See also* Memorandum from the Secretary of Defense to the Secretaries of Military Departments (Feb. 11, 2013), *available at* http://www.defense.gov/news/same-sexbene fitsmemo.pdf (extending benefits to same-sex partners of military members).

130. *See, e.g.*, United States v. Windsor, 133 S. Ct. 2675 (2013).

131. *LGBT Organizations Fact Sheet Series: After DOMA What it Means for You: Military Spousal Benefits*, LAMBDA LEGAL, http://www.lambdalegal.org/publications/after-doma-military-spouses (last updated Nov. 15, 2013).

132. Elise Foley, *Undocumented Immigrants Push for Military Service Under Deferred Action*, HUFFINGTON POST, http://www.huffingtonpost.com/2013/01/25/immigrants-military-de ferred-action_n_2553726.html (last updated Jan 26, 2013, 10:50 AM).

133. *See* Miriam Jordan, *Soldier Finds Minefield on Road to Citizenship*, WALL ST. J., Feb. 10, 2011, at A9.

134. MARGARET MIKYUNG LEE & RUTH ELLEN WASEM, CONG. RESEARCH SERV., RL 31884, EXPEDITED CITIZENSHIP THROUGH MILITARY SERVICE: POLICY AND ISSUES 15 (2003), *available at* http://www.fas.org/sgp/crs/natsec/RL31884.pdf. *See also In re* Watson, 502 F. Supp. 145, 146 (D.D.C. 1980); Darlene C. Goring, *In Service to America: Naturalization of Undocumented Alien Veterans*, 31 SETON HALL L. REV. 400, 408–430 (2000).

135. *DREAM Act: Summary*, NAT'L IMMIGR. L. CTR., http://nilc.org/dreamsummary.html (last updated May 2011).

this.[136] Once undocumented aliens are allowed to openly serve their adopted country, there will be increased political pressure to allow them, and their families, to be naturalized and to "count" in politics, and not just "counted" for purposes of allocation, representation, and other benefits to states through the census.

Segregation, violence, white terrorism, intimidation, and a myriad of complicated laws led to massive disfranchisement of blacks in the 1890s.[137] By 1910, there were almost no black voters in the South.[138] Meanwhile, after the Civil War millions of Europeans flooded into the Northeast and Midwest. Many states allowed these immigrants to vote if they declared their intention to become citizens, even though they had not yet been naturalized.[139] They could also serve on juries.[140] They counted for representation in Congress and they were now counted as voters. This is a lesson modern American ought to learn.

After World War I, women were finally enfranchised all over the country,[141] although the process had started in 1869 when the Wyoming Territory enfranchised women.[142] More modern amendments gave residents of Washington, D.C. the power to vote in presidential elections[143] and enfranchised eighteen year olds.[144] The Poll Tax Amendment[145] and the Voting

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136. The Obama administration is slowly moving in this direction. Recently the administration eased rules for the spouses of military personnel to become documented residents if they came here as undocumented aliens. Julie Preston, *Immigrants Closely Tied to Military Get Reprieve*, N.Y. TIMES, Nov. 16, 2013, at A10.

137. KEYSSAR, *supra* note 95, at 105–16.

138. *Id.*

139. As one opponent of non-citizen voting concedes, "non-citizen voting was, at one time, allowed in a number [sic] early American states and territories and that it is also allowed in other Western democracies." Stanley A. Renshon, *Allowing Non-Citizens to Vote in the United States? Why Not*, 8 (Ctr. for Immigr. Stud., Paper No. 26, Sept. 2008), *available at* http://cis.org/Non citizenVoting. He points out in a footnote that as many as 35 states have at one time or another allowed non-citizen voting. *Id.* at 32 n.106.

140.

> There's plenty of precedent for allowing non-citizens to sit in judgment, said UC Irvine Political Science Professor Louis Desipio. Most states in the 19th century allowed permanent residents to serve on juries, and even vote.
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> "In the old days, we understood the period of permanent residence as one where immigrants were citizens in waiting, or citizens in training," Desipio said. The practice ended as laws became more restrictive.

Frank Stoltze, *Immigration: Governor Brown Considers Allowing 3.4M Non-citizens to Serve on Juries*, REPRESENT! (Aug. 26, 2013, 6:06 AM), http://www.scpr.org/blogs/politics/2013/08/26/14587/governor-brown-considers-allowing-3-4m-non-citizen/.

141. U.S. CONST. amend. XIX.

142. KEYSSAR, *supra* note 95, at 186.

143. U.S. CONST. amend. XXIII.

144. U.S. CONST. amend. XXVI.

145. U.S. CONST. amend. XXIV.

Rights Act of 1965[146] provided federal protection for black voters in the South and led to a massive re-enfranchisement of African Americans. In 2008, there were more than twenty African-Americans in the Congress from former slave states and over forty blacks between the House and Senate.[147] In 1965, there were just five black members of the House (none in the Senate), and all were from the North, even though more than half the black population lived in the seventeen former slave states and territories.[148] Despite the recent hemming in of the Voting Rights Act by the Supreme Court,[149] and decisions upholding what are arguably racially motivated voter identification laws,[150] federal protection for minority voters seems essential to protect the ballot. Access is threatened and voter suppression seems to be growing.[151] But, overall, African-Americans have far greater access to the ballot box than they had a generation ago.

While the franchise has expanded dramatically in the last century, the value of that vote in Congressional elections has diminished because, as I noted above, the Congressional districts are too large, too inconsistent, and as Professor Levinson notes, too gerrymandered.

Finally, the United States needs to come to terms with the impact of both legal and undocumented aliens on the allocation of political power in the United States. There are about forty million immigrants in the United States.[152] About 22.5 million of these immigrants are non-citizens.[153] The "non-citizen" figure includes about 11.7 million undocumented aliens.[154] These non-citizens, including undocumented immigrants, pay taxes at all levels of government, interact with various government institutions including public schools, law enforcement agencies, and health departments. Many serve in the armed

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146. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2006)).

147. MILDRED L. AMER, CONG. RESEARCH SERV., RL 30378, AFRICAN AMERICAN MEMBERS OF THE UNITED STATES CONGRESS: 1870–2008, at Summary, 42–46, (2008), *available at* http://www.senate.gov/reference/resources/pdf/RL30378.pdf.

148. Gibson & Jung, *supra* note 47, at tbls.4, A-1.

149. Shelby Cnty v. Holder, 133 S.Ct. 2612 (2013).

150. Crawford v. Marion Cnty. Elec. Bd., 553 U.S. 181 (2008).

151. Keith Bentele & Erin O'Brien, *States with Higher Black Turnout are More Likely to Restrict Voting*, WASH. POST (Dec. 17, 2013, 2:59 PM), http://www.washingtonpost.com/blogs/monkey-cage/wp/2013/12/17/states-with-higher-black-turnout-are-more-likely-to-restrict-voting/.

152. For a more comprehensive study, see Steven A. Camarota, *Immigrants in the United States: A Profile of America's Foreign-Born Population*, CTR. FOR IMMIGR. STUD. (Aug. 2012), http://www.cis.org/2012-profile-of-americas-foreign-born-population.

153. ELIZABETH M. GRIECO ET AL., THE FOREIGN BORN POPULATION IN THE UNITED STATES: 2010, U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE 2 tbl.1 (May 2012), *available at* http://www.census.gov/prod/2012pubs/acs-19.pdf.

154. Julia Preston, *Number of Illegal Immigrants in U.S. May Be on Rise Again, Estimates Say*, N.Y. TIMES, Sept. 24, 2013, at A16.

forces. Yet, none of these people can vote. In the language of the American Revolution, they pay taxes without representation. Should they vote? Should they count?

Significantly, whether they "count" or not, they are "counted" for per capita allocation of federal funds to states[155] and more importantly, for the creation of congressional districts. Counting them is required by the U.S. Constitution, which provides that "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State . . . ."[156] The job of the census is to count everyone, citizens and non-citizens alike. All non-citizen immigrants are counted by the census,[157] and thus, the 11.7 million undocumented aliens could account for as many as 16.5 seats in the House of Representatives.[158] Similarly, the 10.8 million resident aliens could account for as many as fifteen seats in the House.[159] Furthermore, recent immigrants who are not citizens add substantial numbers to the population because of their American-born children, who are citizens but who are not "represented" because their parents cannot vote. In the first decade of the twenty-first century, new immigrants—those arriving in that period—had about 2.26 million children,[160] which could produce about another three seats in the House. Thus, it is possible that as many as thirty-four seats in the House are created (or moved from one state to another) by non-citizens and their young children, none of whom are represented in the political system.[161]

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155. Steven A. Camarota, *The High Cost of Cheap Labor*, CTR. FOR IMMIGR. STUD. (Aug. 2004), http://cis.org/High-Cost-of-Cheap-Labor.

156. U.S. CONST. amend. XIV, § 2.

157. *Immigrants and the Census*, LEADERSHIP CONF., http://www.civilrights.org/census/mes saging/immigrants.html (last visited Jan. 1, 2014). Most demographers recognize that the U.S. Census Bureau probably undercounts undocumented aliens, most of whom are not likely to want to be tabulated by an agency of the federal government, but many are still counted. *Id.*

158. *See supra* notes 67–72 and accompanying text. The 11.7 million undocumented aliens account for about 16.5 seats in the House of Representatives, based on the average size of a House district of 711,000 people.

159. *Id.*

160. Camarota, *supra* note 152, at 13, 15 tbl.2.

161. Camarota, in another study, states:

The 22.5 million non-citizens (legal and illegal) in the country redistributed nine seats in the House in 2010. Indiana, Iowa, Louisiana, Michigan, Missouri, Montana, North Carolina, Ohio, and Pennsylvania each lost a seat. Florida and New York each gained a seat, Texas gained two seats, and California gained five seats.

Steven A. Camarota, *Shifting the Balance: How the Gang of Eight Bill and Immigration Generally Shift Seats in the House of Representatives*, CTR. FOR IMMIGR. STUD. 3 (Nov. 2013), http://cis.org/gang-of-eight-bill-shifts-house-seats. This analysis is predicated on the assumption that no aliens (even legal aliens) should be counted for congressional representation, and thus Camarota subtracts all aliens from the total U.S. population and then determines what the Congressional allocation would be. *Id.* The problem with this analysis is that it presumes a violation of the U.S. Constitution (amend. XXIV, § 2), which requires that representation should

Immigrants are not uniformly spread across the nation. About sixty-five percent of all foreign born Americans (this includes naturalized citizens who were born outside the United States) live in just six states—California, Texas, New York, Florida, Illinois, and New Jersey.[162] Thus, the impact of representation in Congress is more pronounced in these states. Texas estimates it has about 1.7 million illegal immigrants,[163] which is the equivalent of more than two seats in Congress. Add the legal immigrants (about 1.3 million)[164] to the mix and Texas gains four Congressional seats based on non-citizens. California gains about 3.5 seats in Congress from its undocumented aliens and their children, and perhaps the same from its legal resident aliens and their children.[165] The impact is not only on the large states with huge non-citizen populations. Rhode Island, as we have seen, gained a second seat in Congress because its population, at 1,055,000, exceeds one million people. But without its 67,000 non-citizens, Rhode Island's population would fall to 988,000 and it would lose a seat in Congress.[166] All of these non-citizens are "counted" for allocating representation in Congress and in state legislatures. But none of these people vote or "count," in the political process. Perhaps many of these taxpayers and wage earners should count and not merely be "counted."

I will end this Essay on a personal note. My maternal grandfather came to the United States shortly before World War I, as what today would be an

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be determined by "counting the whole number of persons in each State," (except Indians not taxed). At the time the Fourteenth Amendment was written, passed by Congress, and ratified, there were substantial numbers of non-citizens in the country. These facts preclude any serious argument that the Framers of the Amendment did not intend to count aliens.

162. *See* Camarota, *supra* note 161, at 15 tbl.2.

163. Dianne Solís, *Illegal Immigration into Texas Increasing Slowly, Says Pew Research Center*, DALLAS NEWS (Sept. 23, 2013, 10:59 PM), http://www.dallasnews.com/news/state/head lines/20130923-illegal-immigration-into-texas-increasing-slowly-says-pew-research-center.ece.

164. *See* Camarota, *supra* note 161, at 9 tbl.A4 (giving population of all citizens and the population of only non-immigrant citizens). Camarota's numbers are somewhat misleading, because he includes in "immigrants" people who have been naturalized citizens. However, his analysis based on 2010 census figures is that Texas has a population of 22,460,740 people who are native-born American citizens, and 2,807,678 immigrants, of whom 1,485,000 are undocumented aliens. *See id.*; *see also id.* at 8 tbl.A3 (giving total population of state and the population of undocumented aliens).

165. According to the Immigration Policy Center, there are about 2.5 million unauthorized immigrants in California. *New Americans in California: The Economic Power of Immigrants, Latinos, and Asians in the Golden State*, IMMIGR. POL'Y CTR. (May 2013), http://www.immigra tionpolicy.org/just-facts/new-americans-california. These immigrants produce about 3.5 seats in the House of Representatives.

166. Earlier in this Essay I compared Rhode Island, with about 1,055,000 people and two seats in Congress to Montana, with about 994,000 people and only one seat. *See supra* notes 75–76 and accompanying text. Montana recorded only about 8,000 non-citizens in 2010, which were not enough to push it over a million people and give it another seat in Congress. Camarota, *supra* note 161, at 9 tbl.A4.

illegal alien. This is because he lied to the inspectors at Ellis Island claiming to be 16 when he was really only about 13. He wanted to go to work right away, and he did. Today he would be deported for such dishonesty, but not then. He entered the country and worked, and in 1917 when he was really about 16 or 17, he was drafted. He served in France in World War I as a draftee because the government believed he was over 18. The immigrant kid—the illegal alien by today's standards—was given a uniform and citizenship. When he returned and turned twenty-one, he could vote. He now counted. And he proudly voted in every election after that. Perhaps the United States needs to remember this heritage of easy immigration and citizenship for those who serve the nation, so that in addition to paying taxes and being counted to create legislative districts, their votes can also be counted.