

VOLUME XXII, NUMBER 4, FALL 2022

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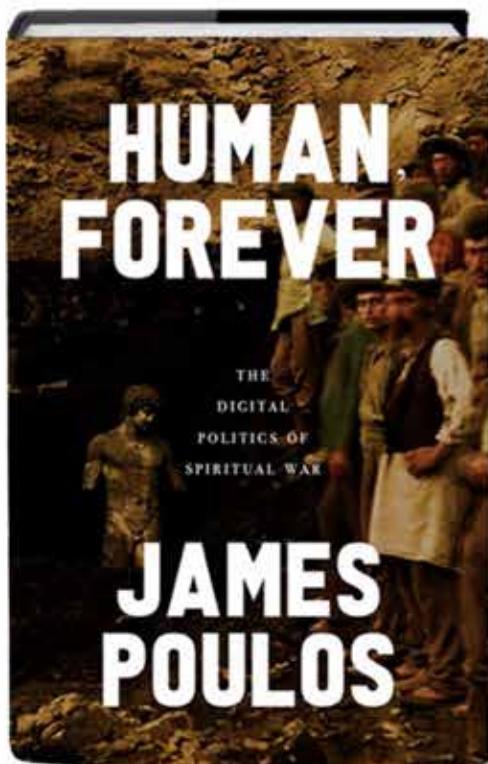
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that cure is a system of representation “to refine and enlarge the public views.” The other part is having a sufficient number of “distinct parties and interests” spread across the land—meaningful diversity—so that the majority is less likely to be concentrated within a limited geographical range, or have a relatively narrow set of opinions or interests.

The likelihood of having a concentrated, monolithic majority—and hence majority faction—is greater now than it was at the founding. In the first census, taken in 1790, four states (Virginia, Pennsylvania, North Carolina, and Massachusetts) accounted for 54% of the total population of the 13 states. In 2020, just ten states (California, Texas, Florida, New York, Pennsylvania, Illinois, Ohio, Georgia, North Carolina, and Michigan) accounted for 54% of the total population of the 50 states. What’s more, unlike in 1787, most of these ten states are dominated by one or two major cities or metropolitan areas. Equal-state representation in the Senate keeps these ten states (and those cities) from dominating the other 40. It ensures that the Senate majority will reflect a “greater variety of parties and interests” and a “greater sphere of country.” The Constitution’s requirement in effect that legislation reflect *the views of a majority of the states*, as well as *the views of a majority of the people*, therefore helps ensure the continued success of Madison’s “republican remedy for the diseases most incident to republican government.”

Yet progressives have gone so far as to argue that a Democratic Congress should change the Senate’s system of representation, or else strip the Senate of its legislative powers and thereby effectively abolish it. Even more disturbingly, they have argued that this should be accomplished through extra-constitutional means—as the survival of “our democracy” allegedly requires overcoming our Constitution. Despite Biden’s claim that our nation—or at least the non-MAGA part of it—is united in revering our founders’ handiwork, his political allies are becoming increasingly vocal in rejecting and even reviling the Constitution.

Short-Circuiting the Electric Cord

SUCH PUBLIC SKEPTICISM REPRESENTS a recent shift. As recently as 2013, Jeffrey Toobin wrote in the *New Yorker*, “If there is a single point of consensus in this heated political moment, it’s that everyone loves the Constitution.” Or at least everyone was pretending to love it. Having learned roughly a century earlier that a Woodrow Wilson-style frontal assault on the founders’

efforts wasn’t a political winner, progressives shifted to a strategy of embracing our founding documents rhetorically while skirting them in practice. As Toobin wrote in that same piece, “The compromises, misjudgments, and failures of the men in Philadelphia haunt us still today. But the founders also left just enough room between the lines to allow for a continuing reinvention of their work.”

Now that we have (at least for a while) a Supreme Court that applies the Constitution and laws as written, even this façade of consensus has started to crumble. Contrast Toobin’s words with the following expressions of sentiment, all published in 2022:

- ✦ Duke University law professor Jedediah Britton-Purdy writes in the *Atlantic* that “we live under a basically undemocratic Constitution.”
- ✦ In an article at the *Root*, Candace McDuffie declares that “the Constitution will always be a hell of an excuse to oppress [b]lack folks on behalf of white supremacy.” She claims that the Constitution’s “primary authors consisted of: John Adams, Thomas Paine, Thomas Jefferson, and James Madison”—only the last of whom actually attended the Constitutional Convention.
- ✦ Washington and Lee law professor Brandon Hasbrouck writes in the *Boston Globe* that “the U.S. Constitution is illegitimate.” He opines, “White men aren’t universally awful,” but “there’s no reasonable way to establish legitimate institutions when only representatives of a minority of the population participate”—and that goes for the legitimacy of the 13th and 14th Amendments, and their almost exclusively white authors and ratifiers, as well.
- ✦ Elie Mystal, the *Nation*’s justice correspondent and the author of *Allow Me to Retort: A Black Guy’s Guide to the Constitution*, contends that the Constitution “was scrawled out over a couple of weeks” and is “actually trash.”

When everyday Americans hear someone mention “our democracy,” most probably assume that this formulation is essentially synonymous with “our republic” or “our Constitution.” That likely helps explain why a CNN poll taken last summer found that, by a 50-point margin (75% yes, 25% no), Republicans think “American democracy is under attack,” while most Democrats disagree (46% say yes, 54% say no). But when progressives speak of “our democracy,” they don’t mean “our Constitution.”

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Progressives have two main objections to the Constitution: they don't like its source—white, 18th-century, property-owning males, some of whom owned slaves—or its structure, which is designed to ensure a limited government that checks power and secures our unalienable rights. The Left tends to emphasize the former objection, inasmuch as it is a lot easier to try to discredit the Constitution by attacking the mores of 18th-century men, viewed more hazily than humbly through a 21st-century lens, than by attacking the document itself.

Hence the ubiquity of the racism charge in the Left's discourse. Few Americans of any race are direct descendants of the founders, yet that doesn't stop most of us from viewing them as *Americans* who brought forth a new nation conceived in liberty. It doesn't prevent us from feeling pride and gratitude as we view the Constitutional Convention for what it was: a providential gathering of greats. Yet the heroism of Washington and the brilliance of Madison are irrelevant to people who view the world, or affect to view it, only through the lens of identity politics.

In fact, progressives view the Constitution as at best morally tainted because its authors—they assert—made a deal with the devil in accepting slavery in the South as the price of union. In reality, there was never any possibility of inducing the South to accept a constitution forbidding slavery. The choice was between uniting the states in a *more* perfect union or having the South and its slave-holding society go its own way. The latter scenario would have guaranteed slavery's perpetuation in America, while hopes were high that the former would do the opposite. In his Chicago speech in his 1858 Senate campaign, Abraham Lincoln maintained that most Americans viewed slavery as “a vast moral evil” and “have rested in the belief that slavery was in course of ultimate extinction.” He declared emphatically, “The adoption of the Constitution and its attendant history led the people to believe so, and that such was the belief of the framers of the Constitution itself.” In other words, the Constitution weakened rather than strengthened slavery's hold on the continent. Of course, it eventually took Lincoln and the lives of hundreds of thousands of mostly white males to end slavery in our country for good.

Ruled by Cities

BUT THE LEFT'S PRINCIPAL QUARREL IS with the Constitution's design. The part of the document that progressives dislike the most is the Electoral College, but most of what they dislike about the Electoral

College is rooted in the system of equal-state representation in the Senate. The Electoral College simply gives each state the same number of electoral votes as its combined number of House and Senate members (plus the District of Columbia receives three electoral votes). Progressives insist this arrangement is undemocratic and unacceptable, not to mention unfair to the Democratic presidential nominee.

The Electoral College has profound virtues. Among these, it requires a candidate to have cross-sectional support, almost always produces a clear winner, avoids the specter of a nationwide recount (to this day, no one knows for sure who won the popular vote in 1960), contains any given state's fraud within its own borders, and reflects the fact that we are the *United States* of America—a stubborn residual reminder of federalism that the Left doesn't like. Nor does the Electoral College necessarily favor one party over the other. In fact, it favored the Democratic nominee in three of the past five presidential

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elections. If Barack Obama's margin in every state had been 8 points worse in 2008 and 4 points worse in 2012, and if John Kerry's had been 2.2 points better in 2004, each would have won the presidency without winning the popular vote.

Progressives also assert that Democrats are greatly disadvantaged by equal-state representation in the Senate. They frequently claim that 82% of the population gets to pick fewer than half of the senators. But it's not really 82% of the population that's doing the picking. The truth is that Democratic dominance in major cities, combined with the statewide nature of Senate elections, means that millions of voters in other parts of populous states often have little ability to influence the outcome.

Take California. Fifty percent of the state's total population resides in the strip running from Los Angeles County, through the five Central Coast counties, to the nine Bay Area counties—basically, from L.A. to San Francisco. The other half lives in the state's other

43 counties. Politically, the Bay Area-to-L.A. coastal corridor is to the left of all 50 states. From 2012 through 2020, it went for the Democratic presidential candidate by an average margin of 46 percentage points. The rest of the state is centrist, as it went for the Democrat by an average of 7 points, just 3.5 points to the left of the nation as a whole. This part of the state voted most similarly to Florida in 2012, New Mexico in 2016, and Virginia in 2020.

If California were divided into two states in this manner, which would create the nation's third- and fourth-largest states (each edging New York), one would effectively be a huge version of Massachusetts and the other a huge swing state. The same result would occur if California were to let the coastal-elite half of the state pick one senator and let the rest of the state pick the other—which nothing in the Constitution forbids, by the way. (The founders didn't anticipate this, but they also didn't anticipate a state of 40 million people.) But as it stands, the half of California outside the L.A.-San Francisco coastal corridor effectively has no influence. No Republican has been elected to the U.S. Senate from California since 1988.

Similar patterns can be seen elsewhere. Cook and DuPage Counties, encompassing Chicago and its closest western suburbs, include almost half of Illinois' population. They collectively went for Biden by 45 points. The state's other 100 counties collectively went to Donald Trump by 7 points, which puts them to the right of Texas. Yet Illinois, which extends from a latitude north of Boston to one south of Richmond, is so dominated by Democratic Chicago that the remainder of the state rarely gets any say in a statewide race. The Land of Lincoln has elected just two GOP senators since the middle of the Reagan Administration, each of whom served only one term.

Back out west, Multnomah and Washington Counties—the heart of the Portland metropolitan area—contain about a third of Oregon's population and went for Biden by 50 points. The other two thirds of Oregon went to Trump by 0.8 points, which is 5.3 points to the right of the nation as a whole. Yet Oregon hasn't had a Republican senator since Obama became president 13 years ago, even though a super-majority of the state (two thirds) is centrist or even Republican-leaning in its voting patterns.

As these examples indicate, the statewide nature of Senate voting allows large cities to control the outcomes of whole states. In fact, statewide voting benefits Democrats to such a degree that it offsets the disadvantages they would otherwise experience from equal-state



representation. This can be seen by comparing the two parties' relative success in the House and Senate. Beginning in 1994, when Republicans' congressional victories ended the Democratic hegemony on Capitol Hill that had begun in the New Deal, Republicans have had a majority in the House of Representatives for 20 of 28 years. The Senate has been more competitive, with 16 years of GOP control, ten years of Democratic control, and two years where control bounced back and forth. Despite equal-state representation in the Senate, therefore, Democrats have actually been more apt to control that chamber than the House.

Without equal-state representation, the Democrats would dominate the Senate—because cities dominate so many large states. This would be true even though the two parties' average percentage of the nationwide House vote over the past half-dozen elections (going into 2022) has been essentially identical—with a sliver of an edge, actually, for Republicans (at 48.2%, to Democrats' 48.1%). (Democrats' average share of the nationwide Senate vote would be close to their share of the nationwide House vote had there been a Republican Senate candidate on the ballot in California in the 2016 and 2018 elections, instead of having the winning and losing can-

didates' votes both go into the Democrats' column.) Such domination of the Senate, even as neither party registers much of an advantage in the nationwide vote, is what the Democrats and their allies want.

Al From, writing for the Brookings Institution, notes that the 39 million people in the 21 smallest states "have 42 votes in the Senate, while the same number of people in California have just two." He writes, "Since California votes Democratic by large margins, if those 44 senators were allotted on a per capita basis, they would overwhelmingly tilt Democratic by a margin of about three to one, or 33 to 11." In suggesting that California should get 22 senators (half of the 44 senators collectively representing California and the 21 smallest states), From is basically saying that Los Angeles County and the Bay Area should get to pick 22% of the nation's Senate allotment—despite having only 5% of the nation's population.

The founders could not have anticipated how important the Senate's equal-state representation would be to offsetting the effects of statewide voting, and hence to keeping a few big cities from dominating statewide vote tallies and disproportionately influencing the composition of the Senate. But their decision to adopt that design, and to make it unamend-

able under the current terms of Article V, has proven to be a very wise one.

Open Lawlessness

THE LEFT, HOWEVER, IS DETERMINED to override that decision by whatever means necessary. Indeed, the most alarming evidence that the Left doesn't much like the Constitution, and that it doesn't remotely equate "our democracy" with our Constitution, comes from a recent law review article by Harvard University law professor Michael Klarman, written before the 2020 election but published after it. The annual foreword to the *Harvard Law Review* is widely considered to be the most prestigious law review article published in the United States each year, and that is the spot that Klarman's article won.

Klarman writes that Republicans play "asymmetric hardball" with their reckless "unraveling of democratic norms," while "fewer Democrats have the authoritarian personality type." He says that President Trump "probably would not" have been elected "were it not for Russian interference" and "the increase in racial resentment ignited by the nation's first African American President." He highlights Republicans' "ideological extremism"

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and their “racial and religious resentment, homophobia, sexism, neo-Ayn Randism, climate change denialism, and hostility toward democracy.” These passages sound more like the partisan rantings on MSNBC than like the serious reflections of a scholar at the pinnacle of his profession, but such is the state of the law schools today.

Facing such a loathsome party, overflowing with “contempt for democracy,” it is Democrats’ obligation to “entrench democracy,” Klarman writes. Accordingly, he wants them to abolish the filibuster, “create additional states” to increase their Senate votes, and pack the Supreme Court. After all, he avers, Republicans “pack[ed] the Court in 2016” when they didn’t confirm Obama’s nominee, Merrick Garland, and thereby engaged in “the theft of a Supreme Court seat.”

But that’s just the beginning. Klarman describes another way to advance democracy more “directly and fairly.” In an extraordinarily brazen passage, he urges that we “simply...ignore the constitutional provision mandating two senators for every state as a particularly egregious example of dead-hand control.” He suggests, “The Senate could then be reapportioned through statute or perhaps a national referendum.” This, of course, would be blatantly unconstitutional, and he coolly admits this, conceding that such an idea “violates the terms of the Constitution.” What’s more, he adds, “Ignoring a clear constitutional provision would trouble many Americans.” Besides, such “democracy-entrenching legislation would still have to survive the scrutiny of Republican Justices,” which implies that no Democratic-appointed justice would balk at ignoring “a clear constitutional provision.”

Klarman argues that such open lawlessness would be justified partly *because* this is the one part of the Constitution that he calls “unamendable.” But that is not entirely correct. The Senate’s equal-state representation is unamendable under the current Article V language—but that language itself is presumably subject to amendment. To eliminate equal-state representation in the Senate, the

Constitution would first have to be amended to remove that exception from Article V; then amended again to change the system of representation. (Any state might then plausibly argue it has grounds for secession, however, as each joined the union under the explicit guarantee that it would not, “without its Consent,” be “deprived of its equal Suffrage in the Senate.”)

Instead of proposing that this difficult constitutional coup be attempted, Klarman seems to make the extraordinary protection that the founders gave to equal-state representation the very grounds for giving it *less* protection than any other constitutional provision. In other words, since it cannot be amended, it should simply be ignored. “Fixing democracy” is how Klarman describes this maneuver.

We soon learn that all of this is necessary to address “income inequality.” Klarman explains that the “more responsive democracy” resulting from a reapportioned Senate “would have more gun control, lower healthcare costs, increased educational spending, and sensible immigration reform.” He adds, “Without such economic reforms, democracy may not survive much longer in any event.” In short, our Constitution must be sacrificed to bring about the “economic reforms” necessary to save “our democracy.”

It took less than two years for these notions to travel from the *Harvard Law Review* to the *New York Times*. This August, law professors Ryan Doerfler and Samuel Moyn, of Harvard and Yale University, respectively, parroted Klarman’s ideas in a *Times* op-ed, “The Constitution Is Broken and Should Not Be Reclaimed.” Doerfler and Moyn write that “constitutions,” especially our “broken” one, “inevitably orient us to the past” and “obstruct a new future,” and this “aids the right,” that is, conservatives. They say our Constitution is “inadequate,” “undemocratic,” and “serves reactionaries well,” especially because the Electoral College and the Senate’s equal-state representation serve as “impediments to redistributive change.”

Doerfler and Moyn therefore assert, “One way to get to [a] more democratic world is to pack the Union with new states.” They then

suggest, “More aggressively, Congress could simply pass a Congress Act...perhaps even reducing the Senate to a mere ‘council of revision’...without the power to obstruct laws.” They plainly admit, “In doing so, Congress would be pretty openly defying the Constitution to get to a more democratic order,” and they add that, “for that reason,” Congress “would need to insulate the law from judicial review”—thereby adding a second proposed unconstitutional action on top of their first one.

There is currently a debate among conservatives concerning whether there is really anything left to conserve. Have the Constitution and culture already been lost? Is it still possible for Red and Blue America to share one country, or has a “cold civil war” already begun?

Opposition to the Constitution by the Left’s leading intellectual lights makes clear that *they* think they’re in a war and that the Constitution is the principal obstacle between them and victory. The appropriate response from the Right, then, is to fight with increased vigor to preserve the Constitution, making the case to our fellow Americans about how vital and irreplaceable it is. Long too reluctant to discuss federalism and the separation of powers—Madison’s “double security...to the rights of the people”—we must do so with increased frequency and persuasiveness. Long too reluctant to defend our founding (except in these pages), we must do so without reservation. Long too inclined to be more accepting of executive overreach—and congressional negligence—than judicial overreach, we must lead by example when possessing executive or legislative power, valuing our Constitution more dearly than any potential policy victory. Despite what Joe Biden may think, American democracy cannot survive without the American Constitution.

Jeffrey H. Anderson is president of the American Main Street Initiative, a think tank for everyday Americans, and served as director of the Bureau of Justice Statistics at the U.S. Department of Justice from 2017 to 2021.

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