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# TOWARD A MORE DEMOCRATIC CONGRESS?

## OUR IMPERFECT DEMOCRATIC CONSTITUTION: THE CRITICS EXAMINED

STEPHEN MACEDO\*

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### INTRODUCTION

There is much to admire in the work of those recent scholars of constitutional reform – including Sanford Levinson, Larry Sabato, and prior to them, Robert Dahl – who propose to reinvigorate our democracy by “correcting” and “revitalizing” our Constitution. They are right to warn that “Constitution worship” should not supplant critical thinking and sober assessment. There is no doubt that our 220-year-old founding charter – itself the product of compromise and consensus, and not only scholarly musing – could be improved upon. Dahl points out that in 1787, “[h]istory had produced no truly relevant models of representative government on the scale the United States had already attained, not to mention the scale it would reach in years to come.”<sup>1</sup> Political science has since progressed; as Dahl also observes, none of us “would hire an electrician equipped only with Franklin’s knowledge to do our wiring.”<sup>2</sup> But our political plumbing is just as archaic.

I, too, have participated in efforts to assess the state of our democracy, and co-authored a work that offers recommendations, some of which overlap with

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\* Laurance S. Rockefeller Professor of Politics and the University Center for Human Values; Director of the University Center for Human Values, Princeton University. The author would like to thank Joseph Ho and his co-editors for their patience and excellent work.

<sup>1</sup> ROBERT A. DAHL, *HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION?* 9 (2d ed. 2003).

<sup>2</sup> *Id.* at 8.

those proposed by Levinson and Sabato (including non-partisan redistricting and Electoral College reform). That effort resulted in a monograph – *Democracy at Risk: How Political Choices Undermine Citizen Participation, and What We Can Do About It*<sup>3</sup> – proposing reforms that fall within the constitutional framework rather than applying to the constitutional framework itself (though that is also true of some of the reforms offered by Dahl, Levinson, and Sabato).<sup>4</sup> *Democracy at Risk*, moreover, leaves aside any effort to reapportion seats in the United States Senate, in which the smallest states – Wyoming (population 533,000) and Vermont (population 621,000) – secure the same representation as California (population 37 million).<sup>5</sup> Senate malapportionment is “exhibit A” for those constitutional reformers who regard the U.S. Constitution as “undemocratic.”<sup>6</sup>

How should we assess the reform proposals and their underlying analyses? Are the main problems of our democracy best addressed as constitutional problems – perhaps via the sort of popular constitutional convention that Levinson calls for – or are they best addressed through legislation, normal politics, and policy? What are the chances that the public will be mobilized behind reforms such as reapportionment of the U.S. Senate to reflect population?

The constitutional reformers say much that is valuable, but also exhibit some measure of hyperbole and political naiveté; they sometimes fail to appreciate the difficulties of devising well-working institutions and securing popular consent to them. Indeed, while unequal representation in the Senate is often regarded as the greatest democratic flaw in the current system it originated as a concession to secure the democratic value of popular consent. Democracy is a complex ideal. Moreover, while the flaws of the current system are apparent to all, the reform proposals have the glossy sheen of a new car that has never been road tested, let alone driven over vast expanses of unexplored terrain. As Adrian Vermeule has argued elsewhere, while complex packages of constitutional reforms taken together might move us closer to

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<sup>3</sup> STEPHEN MACEDO ET AL., *DEMOCRACY AT RISK: HOW POLITICAL CHOICES UNDERMINE CITIZEN PARTICIPATION, AND WHAT WE CAN DO ABOUT IT* 5 (2005).

<sup>4</sup> See SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* 168-69 (2006) (examining amendments that would create better succession rules and modify the Qualifications Clauses); LARRY J. SABATO, *A MORE PERFECT CONSTITUTION: 23 PROPOSALS TO REVITALIZE OUR CONSTITUTION AND MAKE AMERICA A FAIRER COUNTRY* 4 (2007) (discussing reforms but acknowledging that “[m]uch of the Constitution’s superstructure needs no fundamental fix”). For my contribution, see MACEDO ET AL., *supra* note 3, at 5.

<sup>5</sup> U.S. CENSUS BUREAU, U.S. DEP’T OF COMMERCE, TABLE 1: ANNUAL ESTIMATES OF THE RESIDENT POPULATION FOR THE UNITED STATES, REGIONS, STATES, AND PUERTO RICO (2008), <http://www.census.gov/popest/states/tables/NST-EST2008-01.xls>.

<sup>6</sup> See *infra* Part I.

optimal political arrangements, partial success might weaken our already flawed system by creating new imbalances among our political institutions.<sup>7</sup>

I address several broad issues raised by the reformers. First, how serious an affront to the principle of political equality is Senate malapportionment and are citizens likely to rally around it? Part I argues that Senate malapportionment is a tolerable imperfection rather than an egregious affront to the political and moral equality of citizens. Part II offers a defense of the peculiar deliberative virtues of the Senate. Part III argues that the imperfections of the Senate were consequences of the need to secure small-state consent, and so are based on pursuit of a democratic virtue. Part IV considers whether we should reform the redistricting process for House seats and also reform or eliminate the Electoral College. Part V examines the alleged vices of status quo bias and gridlock, offering a qualified defense of institutional mechanisms that make it hard to make law and much harder still to amend the Constitution. Along the way, I express some doubts and reservations concerning the reformers' recommendations, but also some sympathy.

Political reform energies should focus on those problems most morally and practically urgent from the standpoint of democratic constitutionalist principles and ideals. It should also focus on problems that are amenable to reform, remembering that practical compromises may be necessary to secure sufficient popular consent. There are imperfections, even serious imperfections, which nevertheless are tolerable, and which ought to be tolerated, in part because they would be so difficult to change. In the end we need to remember that constitutional democracies are complex systems that need to be assessed as a whole rather than piecemeal.

#### I. SENATE MALAPPORTIONMENT AND POLITICAL EQUALITY

Dahl and Levinson are correct that political equality is fundamental to democracy.<sup>8</sup> Thomas Christiano usefully defines democracy as follows:

Democracy is a scheme of collective decision making that gives every sane adult member an equal say at a crucial stage of the decision making. . . . [D]emocracy is the only way to make collective decisions about the structure of our common world that publicly treats each person as an equal when we must make collective decisions about that common world.<sup>9</sup>

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<sup>7</sup> See Adrian Vermeule, *Second-Best Democracy*, 1 HARV. L. & POL'Y REV. ONLINE (Dec. 4, 2006), [http://www.hlpronline.com/2006/11/vermeule\\_01.html](http://www.hlpronline.com/2006/11/vermeule_01.html) (arguing that an imperfectly revised Constitution might be less democratic than the current one). As an example, Vermeule discusses reforms that could weaken the two-party system and thereby weaken Congress's capacity to check presidential power. *Id.*

<sup>8</sup> DAHL, *supra* note 1, at 3-4; LEVINSON, *supra* note 4, at 32.

<sup>9</sup> Thomas Christiano, *A Democratic Theory of Territory and Some Puzzles About Global Democracy*, 37 J. SOC. PHIL. 81, 83 (2006). On Christiano's understanding, "the principle of equal advancement of interests is the fundamental principle for evaluating societies." *Id.*

Dahl and Levinson are also right that our political system fails in some important respects to treat all Americans as moral and political equals.<sup>10</sup> The political system is far more responsive to the interests of wealthier Americans: the poorest one-third receives very little political representation, and a disproportion of the poorest are also racial and ethnic minorities.<sup>11</sup> These primordial political divisions of class and race remain the most potent sources of inequality and injustice in American politics.

Giving every state two senators regardless of population defies the principle of “one person, one vote” – the principle that underlay two of the most important Supreme Court decisions of the twentieth century.<sup>12</sup> We need to be careful to specify why it is that we should care about Senate malapportionment. Senate malapportionment may have a variety of unfair and unfortunate consequences, some regrettable but tolerable, others more morally outrageous and intolerable. Arbitrary differences in federal spending across big and small states may be regrettable but tolerable, especially if the cost to citizens in large states is small. Insofar as Senate malapportionment contributes to the persistence of class and race-based inequalities, then there is greater cause for concern. We also need to consider the legitimate rationales for giving states equal representation in the Senate at the framing and ratification of the Constitution. Moreover, even if we think political representation by state has little to be said for it now, equal representation by state is not the sort of intrinsically offensive and invidious affront to the moral equality of citizens that is racial discrimination, gender discrimination, or other forms of discrimination. Equal representation of states in the Senate is a singularly unlikely candidate for mass political mobilization for at least three reasons: it has various respectable rationales, it is deeply entrenched constitutionally and therefore would be very costly to change, and even if it does contribute somewhat to injustice it does so without embodying and expressing direct moral insult (like racial discrimination).

Dahl and Levinson emphasize that California has roughly seventy times the population of Wyoming, but each gets two Senate seats.<sup>13</sup> Small states wield

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Furthermore, “equality must be realized in a public way.” *Id.* at 83-84. Finally, “each person has an interest in being recognized and affirmed as an equal by her fellow citizens.” *Id.* at 85. In sum, each person’s fundamental interest can be restated from a democratic perspective as the principle of “public equality, according to which the society should be organized so that each person can see that she is being treated as an equal.” *Id.*

<sup>10</sup> DAHL, *supra* note 1, at 1-6; LEVINSON, *supra* note 4, at 25-29.

<sup>11</sup> For an excellent account arguing that America’s wealthy use their wealth to promote self-interested policies, see LARRY BARTELS, *UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE* 5-6 (2008).

<sup>12</sup> *Reynolds v. Sims*, 377 U.S. 533, 576 (1963); *Baker v. Carr*, 369 U.S. 186, 237 (1962). For an excellent account of the political consequences of these opinions, see STEPHEN ANSOLABEHERE & JAMES M. SNYDER JR., *THE END OF INEQUALITY: ONE PERSON, ONE VOTE AND THE TRANSFORMATION OF AMERICAN POLITICS* (2008).

<sup>13</sup> DAHL, *supra* note 1, at 49-50; LEVINSON, *supra* note 4, at 51.

disproportionate power: five percent of the population elects one-fourth of the Senate.<sup>14</sup> Forty-one senators can block legislation because it takes sixty senators to invoke cloture against a filibuster, so senators representing a small percentage of the population can muster enough votes to block legislation that is preferred by senators representing the vast majority of American citizens.<sup>15</sup> These small-state advantages in the Senate are partly offset by far more equal representation by population in the House (Wyoming has one House seat compared with fifty-three for California).<sup>16</sup>

The overrepresentation of citizens of small states in the Senate also gives small state citizens a disproportionate share of votes in the Electoral College (which allocates electors according to the number of Senate and House seats in every state). Here again, small states are awarded more than the share of power they should have based on the principle of “one person, one vote.”

And so, let us ask: *What difference does the small-state advantage make in practice?*

William Eskridge and Suzanna Sherry point out that while Clarence Thomas won his Supreme Court confirmation on a close vote of 52-48, if we allocated senators in proportion to state shares of the population, and each state’s delegation voted the same way, Thomas would have failed to be confirmed by 52-48.<sup>17</sup> So the extra voting power enjoyed by smaller states may sometimes make a difference.

Somewhat more systematically, Levinson cites evidence of behavioral differences between senators from small states and big states, with small-state senators tending to concentrate on a few issues, and big state senators working on and representing a wider array of interests.<sup>18</sup> Then there is the fact that all those sparsely populated but large square states in the middle of the country represent certain special interests, including agricultural interests. Small state senatorial influence helps sustain measures that make the price of food artificially high in the U.S. and flood international markets with artificially cheap agricultural commodities, impoverishing poor farmers in Africa and

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<sup>14</sup> LEVINSON, *supra* note 4, at 50-51.

<sup>15</sup> *Id.* at 52-53.

<sup>16</sup> LORRAINE C. MILLER, CLERK OF THE HOUSE OF REPRESENTATIVES, OFFICIAL LIST OF MEMBERS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES AND THEIR PLACES OF RESIDENCE 2, 11 (Feb. 25, 2009), available at [http://clerk.house.gov/member\\_info/olm\\_111.pdf](http://clerk.house.gov/member_info/olm_111.pdf).

<sup>17</sup> See LEVINSON, *supra* note 4, at 58 (citing William N. Eskridge, Jr., *The One Senator, One Vote Clauses*, in CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES, 35, 35-39 (William N. Eskridge & Sanford Levinson eds., 1988); Suzanna Sherry, *Our Unconstitutional Senate*, in CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES, *supra*, at 95, 95-97) (giving examples of the impact the Senate’s non-majoritarian structure has on politics).

<sup>18</sup> Small-state senators seem more used to personal politics and appear more apt to become leaders of the Senate (their cultivation of personal ties with voters at home may give them more policy leeway, enabling them to occupy leadership positions). See *id.* at 55-56.

making it impossible for them to develop cash crops (African cotton farmers in particular suffer from U.S. dumping).<sup>19</sup>

Scholars have identified two other systematic forms of bias that may be associated with small-state over-representation. First is *spending bias*. The small-state advantage yields some tangible rewards in federal resources. Dahl argues that “Wyoming’s annual share of federal expenditures is likely to be around \$209 per capita compared with California’s \$132.”<sup>20</sup> Empirical evidence suggests that the smallest states enjoy an advantage in receipt of federal funds, net of taxes, but the cost is spread over very many people in big and medium-sized states, and so the cost to the large number of net “losers” appears minimal and inconsequential.<sup>21</sup> Moreover, part of the advantage that small states enjoy in terms of federal spending may have a legitimate rationale. It is more expensive to live in under-populated areas, more difficult to travel and communicate, but we are committed as a nation to tying all regions of the country together through communications networks. The Constitution itself provides Congress with the power “To establish Post Offices and post Roads.”<sup>22</sup> So some of the subsidies from more to less populated regions is legitimate.

Another possible consequence of small-state over-representation is anti-urban bias, which will tend to disproportionately affect racial minorities. Some have argued – without furnishing a great deal of evidence – that Senate malapportionment adversely affects racial minorities who tend to be concentrated in larger states. Senate malapportionment could allow smaller states to block or qualify reforms needed to address race-based inequalities and urban poverty, thus helping to perpetuate injustices. But there is scant evidence that the Senate has been systematically less favorable to cities or toward racial minorities in recent decades as compared with the House.<sup>23</sup>

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<sup>19</sup> See JOSEPH STIGLITZ & ANDREW CHARLTON, FAIR TRADE FOR ALL 46-49 (2005) (examining the distortions created by the current trade regime). Of course, the United States is far from alone among advanced nations in having powerful protectionist lobbies for domestic agriculture.

<sup>20</sup> DAHL, *supra* note 1, at 164 (citing FRANCIS I. LEE & BRUCE I. OPPENHEIMER, SIZING UP THE SENATE: THE UNEQUAL CONSEQUENCES OF ELECTORAL SYSTEM DESIGN 173-76 (1999)).

<sup>21</sup> Lee and Oppenheimer argue that Californians would have received roughly \$10 more a year from the federal government if the sum of all federal discretionary and nondiscretionary benefits had been delivered during the time frame of their study on a national per capita basis absent any small-state skew. LEE & OPPENHEIMER, *supra* note 20, at 176. For other studies on the spending disparities, see Cary M. Atlas, Thomas W. Gilligan, Robert J. Hendershott & Mark A. Zupan, *Slicing the Federal Government Pie: Who Wins, Who Loses, and Why*, 85 AM. ECON. REV. 624, 625 (1995), and B.E. Lauderdale, *Pass the Pork*, 16 POL. ANALYSIS 235, 235-39 (2008). I am very grateful to David Mayhew for discussion on this point.

<sup>22</sup> U.S. CONST. art. 1, § 8.

<sup>23</sup> There are studies that suggest some evidence of Senate bias. See, e.g., Neil Malhotra & Connor Raso, *Racial Representation and U.S. Senate Apportionment*, 88 SOC. SCI. Q.

There is yet a third form of possible bias which could result from the over-representation of small states in the Senate: that is, partisan bias toward one party or the other. Interestingly, Senate malapportionment does not seem to be associated with the sort of large partisan bias that characterized *state legislatures* prior to the Supreme Court's decisions in *Baker vs. Carr*<sup>24</sup> and *Reynolds vs. Sims*.<sup>25</sup> In the two decades prior to the Supreme Court decisions that required "one person, one vote" (1940-1964), the partisan bias in upper chambers of state legislatures was no less than 15.5%.<sup>26</sup> As Ansolabehere and Snyder explain, this means that "in an evenly divided election, the party favored by the districting scheme would expect to win 65 percent of the seats!"<sup>27</sup> Malapportionment prior to "one person, one vote" tended to favor rural areas at the expense of cities and suburbs. The bias tended to favor Republicans in the Northeast and Midwest, and Democrats in the South.<sup>28</sup>

There is no evidence of a similarly large partisan bias resulting from the malapportionment of the U.S. Senate, though there may be a small bias toward Republicans.<sup>29</sup> This is extremely important, because class differences in American politics are reflected in the significant differences between the performance of Republicans and Democrats in office. As Bartels and others have shown, the two political parties in America have come to compete based on economic class interests. Economic wealth under Republicans tends to flow to the top, while under Democrats the less well off do better. Bartels puts it succinctly:

Democratic officials have provided strong support for policies favoring the "have-nots" – expanding the economy, increasing funding for domestic programs, raising the minimum wage – while Republicans have pursued policies favoring the "haves" – fighting inflation, cutting taxes, repealing the estate tax.<sup>30</sup>

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1038, 1044-45 (2007) (arguing that small-state over-representation in the Senate adversely affects racial minorities, with likely increasing effects for Hispanics in coming decades due to their geographical concentration in larger states). I am grateful once again to David Mayhew for discussion on this point.

<sup>24</sup> 369 U.S. 186 (1962).

<sup>25</sup> 377 U.S. 533 (1963).

<sup>26</sup> ANSOLABEHHERE & SNYDER, *supra* note 12, at 251.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 74-83.

<sup>29</sup> I have benefited from David Mayhew's unpublished lectures, describing the pro-Republican bias of the U.S. Senate as perhaps a bit over 1%, only slightly more than the similar House bias. David R. Mayhew, Professor of Political Science, Yale University, *Partisan Equipose?*, Princeton Lectures in Politics and Public Affairs (Mar. 9-11, 2009); *see also* David R. Mayhew, *Is Congress "the Broken Branch"?*, 89 B.U. L. REV. 357, 365-66 (2009).

<sup>30</sup> BARTELS, *supra* note 11, at 292.

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And so, large-scale historical analyses of the past half-century suggest that which party controls government is “by far the most important determinant of policy outputs.”<sup>31</sup>

Insofar as the political system tilts toward Republican success it disadvantages politically those who are disadvantaged economically (people who are disproportionately black and Hispanic). Bartels finds that Republicans do have significant structural advantages, but these advantages are *unrelated to Senate malapportionment*. Bartels’s catalogue of Republican advantages include: voter myopia that tends to reward only election year economic growth (which Republicans tend to deliver), a tendency of all voters (including the poor) to attach weight to income growth among the better off, and Republican campaign spending advantages due to the privatized system of campaign finance.<sup>32</sup> There are a variety of policies that could help address these imbalances short of constitutional reform. The policy differences between the Republican and Democratic parties have substantial consequences for the poor. But there is no evidence that equal representation of states in the Senate leads to a strong Republican tilt, and certainly not at the level of pre-reform state legislative districts. This seems to be a lucky accident, based on the fairly random distribution of Republican and Democratic-leaning states across the small to big state spectrum (with Wyoming and Vermont at one end, and California and Texas at the other).

There is great value in exploring the possible problems resulting from unequal representation by population in the Senate, as Dahl, Levinson, and Sabato do. Senate malapportionment may contribute to some degree – along with other factors – to downstream policy imbalances and unfairness; it may make a contribution, but probably not a major one, to the egregious race and class-based inequalities that continue to plague American life. In itself, however, the unequal representation of citizens of big and small states in the Senate is not intrinsically morally offensive. Senate malapportionment does not embody a violation of a moral principle of political equality akin to denial of the franchise based on race or gender (or property qualifications for voting); all of these are far more intrinsically invidious and morally insulting. Senate malapportionment is very unlikely to stir public passions or lead to mass mobilization or calls for a new constitutional convention.

Large states like California, New York and Texas are not suffering oppression or domination at the hands of an unholy coalition of mighty midgets like Wyoming, Vermont, the Dakotas, Delaware, and Alaska. Indeed, the absence of any worry about *small-state victimization* by the large states can be regarded as an achievement of the Constitution. The fear of big-state domination of small states was a major reason for the equal apportionment of Senate seats. The over-representation of small states was held to be a way of protecting smaller political units against larger ones within our federal system.

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<sup>31</sup> *Id.* at 293.

<sup>32</sup> *Id.* at 99-126.

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Absent some measure of small-state over-representation in Congress, one might worry that the wealth of the country would flow to the prosperous coasts and cities and away from the less populated rural areas. Over-representation of minority interests often makes sense as a way of protecting minority interests.

There are places in the world where regional inequalities are stark and extreme. Recent news reports from China describe vast inequalities across regions of the country. Peasants in the Chinese countryside are not sharing in the wealth that is flowing to large urban centers, and major government efforts are underway to address these geographically based inequalities.<sup>33</sup> In Mexico as well, wealth is distributed highly unequally, and rural peasants are at the bottom of the income scale.<sup>34</sup>

When considering the invidiousness of one form or another of inequality, it is important to consider (among other things) the justification or rationale for the political arrangement that leads to the inequality. In the case of malapportionment in the Senate, small states were worried about big state domination. No doubt small states bargained for this arrangement to secure maximal advantage, but at least there was a respectable rationale. Such was not the case with those constitutional provisions denying equality to African-Americans: there, the rationale was the ascription of inferior moral status to persons based on skin color, and the moral insult was deep and utterly intolerable. Race-based inequalities are rooted in some of the worst forms of oppression known to mankind: slavery and apartheid are morally abhorrent. Small-state over-representation does not represent a deep and direct moral affront, and in this the contrast with racial inequality is palpable.

It is a terrible moral shame that the American underclass is a disproportionate minority, and there is little doubt that the tendency to associate welfare benefits with minority status contributes powerfully to undoing public support for welfare benefits.<sup>35</sup> The tremendous problem of class divisions is worsening in American society – for those who are born to very poor circumstances, birth increasingly defines fate. Poor children are far less likely than children from advantaged households to attend a top college or

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<sup>33</sup> See Edward Wong, *In Major Shift, China May Let Peasants Sell Rights to Farmland*, N.Y. TIMES, Oct. 11, 2008, at A1 (examining China's attempt to increase the rural peasants' wealth by allowing sales and transfers of rural property).

<sup>34</sup> See THE WORLD BANK, MEXICO: INCOME GENERATION AND SOCIAL PROTECTION FOR THE POOR 164-70 (2005), available at <http://go.worldbank.org/3U8KCVRRG0> (comparing results from 1992 and 2002 to conclude that “[h]ouseholds in disperse rural areas were more likely to be poor than those in semi-urban areas”).

<sup>35</sup> See MARTIN GILENS, WHY AMERICANS HATE WELFARE: RACE, MEDIA, AND THE POLITICS OF ANTIPOVERTY POLICY 67-68 (1999) (“Although political elites typically use race-neutral language in discussing poverty and welfare, it is now widely believed that welfare is a ‘race-coded’ topic that evokes racial imagery and attitudes even when racial minorities are not explicitly mentioned.”).

compete for the best jobs and positions of leadership in society, and the disparities in opportunity appear to be widening.<sup>36</sup>

Unequal representation based on socio-economic class *is* a large and serious problem: political power and public policy all too often tilt toward the rich in America. Consider that – as Larry Bartels, Martin Gilens and others have argued – the bottom third of the population of the United States in terms of economic class secure *zero substantive representation in Congress*.<sup>37</sup> That is, when the interests of the bottom third diverge from the rest, the bottom third never wins. The socioeconomic bias in government performance – masterfully described by Bartels in *Unequal Democracy*<sup>38</sup> – is deeply unfair. But while small-state over-representation may contribute somewhat to the neglect of the urban agenda, and thereby, the persistence of race and class-based inequalities, the evidence for that is thin. Senate apportionment appears not to be a major cause of persisting class- and race-based inequalities. And, unlike racial discrimination, small state overrepresentation is not intrinsically morally invidious. Moreover, Senate malapportionment appears far less consequential with respect to partisan bias than the forms of malapportionment which the Supreme Court struck down in the early 1960s.

The mode of apportioning senators may contribute to some imbalances in public policy, disfavoring urban interests. I would join the reformers in welcoming greater public scrutiny and more serious empirical work on these matters. Nevertheless, the solution to the problem of Senate malapportionment is unclear, in part because it seems an unlikely object of popular mobilization. In addition, unlike state legislative districts or House districts, Senate malapportionment is constitutionally “hard-wired,” rendering it an unlikely object of judicial intervention (hence, the Warren Court left it untouched). My tentative conclusion is that Senate malapportionment is not as great a problem as the critics of our “undemocratic” Constitution suggest: it has some respectable rationales grounded in both substantive and procedural justice (as we see below), and it would be extremely difficult to amend. So I conclude that Senate malapportionment is but a tolerable imperfection.

## II. IN DEFENSE OF THE SENATE

It is worth considering that the Framers sought to make a virtue out of the small states’ demands for special protection. In the Senate they crafted an upper legislative chamber that would not only operate on a republican basis – its authority rested altogether on popular consent and accountability to the electorate (albeit, accountability at first secured indirectly) – but also one they

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<sup>36</sup> E.g., Mary Beth Marklein, *The Wealth Gap on Campus: Low-Income Students Scarce at Elite Colleges*, USA TODAY, Sept. 20, 2004, at 1A (“At the nation’s 146 most selective colleges, only 3% of students come from the lowest socioeconomic quarter . . . [while] 74% come from the top quarter.”).

<sup>37</sup> BARTELS, *supra* note 11, at 72-78; GILENS, *supra* note 35, at 45-52.

<sup>38</sup> See BARTELS, *supra* note 11, at 257-75.

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hoped would provide Americans the best features of traditionally aristocratic institutions.<sup>39</sup> The Senate, with its six-year terms with re-eligibility, small size and high visibility, indirect selection by state legislatures, and relatively large and diverse constituencies, would – it was hoped – be a “temperate and respectable body of citizens,” representing the “cool and deliberate sense of the community,” capable of standing against the people’s own “temporary errors and delusions.”<sup>40</sup> As Madison concluded in *The Federalist No. 63*:

Against the force of the immediate representatives of the people nothing will be able to maintain even the constitutional authority of the Senate, but such a display of enlightened policy, and attachment to the public god, as will divide with that branch of the legislature, the affections and support of the entire body of the people themselves.<sup>41</sup>

While the House – with its shorter terms, direct popular election, and smaller constituencies – would tend to be responsive to shifts in public preferences, the Senate was famously intended to represent the virtues of responsibility for the public good rather than responsiveness to the immediate preferences of the public. Put differently, the Senate is designed to represent the public’s capacity for sober and deliberate judgment.

It is worth emphasizing that the virtues of the Senate are virtues of democratic constitutionalism – or what we can properly call “democracy” in modern parlance. If we understand – as we should, I think – democracy as *the capacity of the people as a whole to govern themselves on due reflection over the long term*, then the Senate’s peculiar virtues enhance democracy. Democracy should not be understood as responsiveness to temporary whims or fleeting preferences: the people will not own or identify with policies that represent only today’s passing fancy or temporary conviction.

Of course, the mode of selection of senators has evolved so that senators are now directly elected, and this should make them more responsive to public sentiments.<sup>42</sup> But other features should still have some positive benefits, including the longer terms and greater stability, and the smaller chamber permitting greater deliberation and stronger personal relationships. Because senators represent larger and more diverse constituencies as compared with their colleagues in the House, they should be less prone to capture by narrow interests. Fixed districts that depend on state boundaries mean that partisan redistricting is not a problem.

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<sup>39</sup> I owe this excellent point to Jeffrey Tulis. And indeed, this Essay is much improved for his comments on an earlier draft.

<sup>40</sup> THE FEDERALIST NO. 63, at 425 (James Madison) (Jacob E. Cooke ed., 1961).

<sup>41</sup> *Id.* at 431.

<sup>42</sup> U.S. CONST. art. I, § 3, cl. 1, *amended by* U.S. CONST. amend. XVII, § 1.

### III. CONSENT AS A DEMOCRATIC VIRTUE

There is another problem with the democracy-based critique of small-state over-representation. Equal apportionment in the Senate was the price that had to be paid to get small states to ratify the new constitutional order. Would it have been more democratic to force them in? Would it be a gain for democracy on balance now if the big states ganged up and forced more equal representation by population on the small states? Article V of the Constitution declares: “[N]o State, without its Consent, shall be deprived of its equal Suffrage in the Senate.”<sup>43</sup> Would it be “democratic” to override this provision in the name of population equality in Senate representation?

Democracy in practice is a complex ideal that contains both procedural and substantive elements. It might be nice to have more equal representation by population in the Senate – or to have state boundaries rearranged periodically to equalize population (but without partisan gerrymandering!) – but the states pre-dated the Constitution and the Framers had to reconcile idealism with the realities of state-based political authority, allegiances, identities, and jealousies. Insofar as the Senate represents accommodations necessary to secure consent to the Constitution, those concessions cannot simply be scored as a “loss” in terms of democracy: consent is also a democratic value, so in the case of over-representation of the small states, democratic values were and are in tension.<sup>44</sup>

### IV. REDISTRICTING AND THE ELECTORAL COLLEGE REFORM?

Levinson and other democracy-advocates argue for some reforms more plausible than Senate reapportionment. Periodic redistricting of House electoral districts is a highly partisan process undertaken by state legislatures – and a terrible practice that ought to be reformed.<sup>45</sup> The book on democratic reform I co-authored, *Democracy at Risk*, argues that the current practice of ever-more-sophisticated partisan districting allows majority parties in state legislatures to nominate ideological extremists to “safe” congressional seats,

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<sup>43</sup> *Id.* at art. V.

<sup>44</sup> It also is true that, as Levinson points out, the population ratios among the biggest and smallest states are much larger than they were at the time of the founding (there are also many more states). See LEVINSON, *supra* note 4, at 60-61.

<sup>45</sup> According to Levinson, partisan gerrymandering “has destroyed the House of Representatives as a forum of genuine deliberation and turned it into a venue for ever more poisonous partisan warfare.” *Id.* at 29. Further, he suggests that partisan gerrymandering is “a true disease, threatening the very notion of representative democracy.” *Id.* This is overstated. Elite polarization is not mainly attributable to gerrymandering, but rather to post-Great Society party realignment. Moreover, there is greater geographical polarization as people sort themselves into enclaves of the like-minded. See Bill Bishop, *When Policy Defines Identity; State’s Stand on Issues Like Stem Cells Affect Who Opts to Live Here*, AUSTIN-AM. STATESMAN, May 25, 2005, at A1. Nevertheless, I agree with Levinson’s basic sentiment that partisan redistricting should be reformed.

contributing somewhat to the creation of a Congress that is more ideologically polarized than the electorate.<sup>46</sup> Voters are turned off by the harsh tone of polarized politics and the decline of bipartisan cooperation.<sup>47</sup> Reforming the redistricting process could help to moderate polarization and political rancor by making it harder for party elites to nominate ideological zealots.<sup>48</sup> Redistricting reform may also lessen incumbent protection and promote greater turnover in Congress.<sup>49</sup> It should be emphasized that the magnitude of these effects is disputed,<sup>50</sup> and districting is far from being the main cause of polarization. Redistricting reform would be unlikely to lead to radical changes in our politics.

Presidential campaigns are educative for voters, and Electoral College reforms that do not require constitutional amendment could help spread the educative experience of campaigns more evenly across the country. Under the current “winner take all” rule for allocating states’ Electoral College votes, candidates now spend the majority of their time campaigning in a small number of “battleground” states, while ignoring the many states that are “safe” for one candidate or the other.<sup>51</sup> To encourage more national presidential campaigns, *Democracy at Risk* proposes that rather than allocating all of the votes to the statewide winner, the Electoral College should award two votes to the state-wide winner and award the additional votes to the winner of each congressional district.<sup>52</sup> An alternate approach awards the additional votes in proportion to statewide popular vote totals. One problem with these proposals is that they might encourage third-party candidates – by suggesting that they could win some Electoral College votes – thus making a majority winner less likely and throwing elections to the House of Representatives. The wider systemic effects and risks of these and other proposed reforms need to be carefully considered.

It bears noting that the Constitution is *not a bar* to reforming current redistricting practices or presidential campaigns. While state ballot initiatives to establish non-partisan redistricting commissions have unfortunately been

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<sup>46</sup> MACEDO ET AL., *supra* note 3, at 164-66.

<sup>47</sup> *Id.* at 36-37.

<sup>48</sup> *Id.* at 164-66.

<sup>49</sup> *Id.* at 56-58.

<sup>50</sup> *Id.* at 45-47.

<sup>51</sup> President Obama, who adopted a “fifty state strategy,” was an exception. *E.g.*, Jay Newton-Small, *Inside Obama’s 50-State Fight*, TIME, June 10, 2008, <http://www.time.com/time/politics/article/0,8599,1813397,00.html>. *But see* Jay Newton-Small, *Obama Scales Back His 50-State Strategy*, TIME, Sept. 23, 2008, <http://www.time.com/time/politics/article/0,8599,1843532,00.html>.

<sup>52</sup> MACEDO ET AL., *supra* note 3, at 60.

defeated recently in two states, the fight for redistricting reform – and other political reforms – should continue.<sup>53</sup>

Levinson expresses outrage that the Electoral College has permitted – twice in the last fifty years – the selection of winning presidential candidates who did not win a majority of the national popular vote.<sup>54</sup> As he also recognizes, however, there is no national popular vote contest.<sup>55</sup> Since the rules of the game specify that the winner is the one who prevails in the Electoral College, it cannot be said that there is a contest for winning the popular vote (and in the absence of a contest for the popular vote it is vain to say that someone “won” it).<sup>56</sup> Under different rules, candidates would deploy their campaign resources differently.

V. THE PROBLEM OF GRIDLOCK, MINORITY VETOES, AND STATUS-QUO BIAS: UNCLOGGING THE CHANNELS OF POLITICAL CHANGE?

Another broad class of criticisms that reformers such as Levinson and Sabato level at the Constitution deserves attention: the difficulty of enacting changes to laws and to the Constitution itself.

Many who criticize the Constitution for being an obstacle to the realization of democracy point to the difficulty of enacting amendments.<sup>57</sup> Formal ratification of amendments through Article V requires two-thirds approval by both Houses of Congress followed by approval by three-quarters of the states.<sup>58</sup> Alternatively, two-thirds of the states’ legislatures could call for a constitutional convention to propose amendments – which would also need to be ratified by three-quarters of the states.<sup>59</sup> As Levinson argues, “Article V makes it next to impossible to amend the Constitution with regard to genuinely controversial issues, even if substantial – and intense – majorities advocate

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<sup>53</sup> In California, Proposition 77 on the November 2005 ballot requiring an immediate round of redistricting – off the ten-year cycle – was regarded as a partisan element which contributed to its defeat. FairVote – Proposition 77, <http://www.fairvote.org/?page=2422> (last visited Mar. 16, 2009). An Ohio initiative on its November 2005 ballot was also defeated. FairVote – Ballot Initiative, <http://www.fairvote.org/?page=1601> (last visited Mar. 16, 2009).

<sup>54</sup> LEVINSON, *supra* note 4, at 6.

<sup>55</sup> *Id.* at 87.

<sup>56</sup> George W. Bush enjoyed a safe lead in many states in 2000. Thus, he had no incentive to maximize the vote total in states like Texas, as he would have if winning the presidency depended on coming out in front on the national popular vote. As such, the national popular vote was not contested and Bush did not lose it to Gore.

<sup>57</sup> LEVINSON, *supra* note 4, at 7.

<sup>58</sup> U.S. CONST. art V.

<sup>59</sup> *Id.*

amendment.”<sup>60</sup> As Donald Lutz has opined, the U.S. Constitution may be the hardest constitution to amend in the world.<sup>61</sup>

In addition, Levinson criticizes the Constitution’s “strong bicameralism” for making it too hard to pass legislation.<sup>62</sup> The combination of bicameralism and federalism gives local interests considerable clout in national legislative deliberations. This clout allows multiple minority veto points in the legislative process, including via the committee system in Congress.<sup>63</sup> Levinson concedes that there are powerful reasons for bicameralism: unalloyed majority rule is not the best way to understand democracy, and minority interests ought also to be fairly represented.<sup>64</sup> Moreover, checks and balances, and the relative stability of an upper house, can function as a “safeguard against foolish legislation.”<sup>65</sup> As Roger D. Congleton argues, “bicameralism may improve public policy by making it more predictable and more consensual – especially in settings where policy deliberations are partisan.”<sup>66</sup>

An illustrious line of reformers have argued that the American political system acts as an excessive impediment to the enactment of coherent party platforms responsive to majority demands for political change. Perhaps most famous was the 1950 report of the American Political Science Association’s Committee on Political Parties, chaired by E.E. Schattschneider: *Toward a More Responsible Two-Party System*.<sup>67</sup> The report called for strengthening the role of the two parties in formulating cohesive party platforms (the parties are now much stronger and more cohesive than they were in the 1950s, ’60s and ’70s), lengthening the terms of members of the House of Representatives and electing the entire body together with the President every four years.<sup>68</sup> Sabato would have the entire House and Senate “elected anytime the presidency was contested on the ballot.”<sup>69</sup> These proposals are intended to move the U.S. somewhat in the direction of a parliamentary system of government, increasing the likelihood that majorities in quadrennial elections could choose both a

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<sup>60</sup> LEVINSON, *supra* note 4, at 21.

<sup>61</sup> Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, 88 AM. POL. SCI. REV. 355, 362 (1994).

<sup>62</sup> LEVINSON, *supra* note 4, at 29-38.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* (discussing the tradeoff of making it difficult to pass good legislation because of the fear of passing bad legislation).

<sup>65</sup> *Id.* at 35.

<sup>66</sup> *Id.* at 36, 206 n.25 (quoting Roger D. Congleton, On the Merits of Bicameral Legislatures: Policy Stability Within Partisan Politics (Dec. 13, 2002) (unpublished manuscript) (on file with author)).

<sup>67</sup> Committee on Political Parties, American Political Science Association, *Towards a More Responsible Two-Party System*, 44 AM. POL. SCI. REV. 1 (Supp. 1950).

<sup>68</sup> *Id.* at 11.

<sup>69</sup> SABATO, *supra* note 4, at 226.

President and a congressional majority.<sup>70</sup> Such reforms aim to make it more likely that Congress will reflect along with the President the prevailing mood of the country, which is to say, the preferences of a current electoral majority.<sup>71</sup>

There is much more to be said about these broad themes, and I have not conveyed all of the subtlety and nuance of the reformers' arguments. As many have argued, compared with an ideal political order, our system may tend in the direction of too many minority veto points, and a misallocation of minority veto points. Enacting legislative change in the U.S. is onerous, and amending the Constitution is extremely difficult. Nevertheless, it is far from clear that we would be better off on balance if we enacted institutional reforms that made change easier by undermining the system of checks and balances. Levinson and Sabato offer only a partial accounting of the possible benefits of institutional features that render constitutional amendment and legislative change difficult rather than easy.

Levinson complains, "guarding against the risk of bad legislation winds up being counterproductive insofar as it prevents as well the passage of good legislation."<sup>72</sup> He argues that "there is much in the status quo to bemoan," and is "inclined to believe that it is much too hard to pass legislation in the United States."<sup>73</sup> He argues that "[e]ven if no two persons can necessarily be expected to agree on what kind of change is desirable, it should be relatively easy these days to find a wide range of agreement that the American system is impervious to needed changes."<sup>74</sup> But that conclusion does not follow. Oddly, Levinson says this while applauding many examples of legislative minorities succeeding in blocking legislation, including President Bush's attempt to revise and significantly privatize Social Security.<sup>75</sup>

That most people strongly favor their own preferred legislative and constitutional changes does not mean most people favor making it much easier for temporary majorities to legislate and amend the Constitution. Given similar probabilities, we might well rate the avoidance of bad legislation higher than the achievement of good legislation. After all, we learn to live with the status quo, make adjustments, and plan around the parameters that exist. Frequent changes to the legal framework can disrupt all settled plans. Given the risk of empowering temporarily popular but lousy ideas, most people might well prefer to maintain a system that requires concerted and prolonged efforts to enact most changes.

Christopher Eisgruber and Lawrence Sager are among the scholars who argue for the virtues of relatively obdurate constitutional structures, especially

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<sup>70</sup> Committee on Political Parties, *supra* note 67, at 1-2, 11.

<sup>71</sup> *Id.* at 11.

<sup>72</sup> LEVINSON, *supra* note 4, at 36.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 38.

<sup>75</sup> *Id.* at 37 (using the example to suggest that both the left and right have reason to support bicameralism).

concerning the allocation of powers to governing institutions.<sup>76</sup> Institutional design will always be imperfect, but there is virtue in setting the rules of the game and then getting on with the game: the serious enterprise of democratic deliberation and lawmaking. Those participating in this enterprise will always have two options: to play the game of politics – advocating and seeking to advance their proposed policy aims – or to seek to change the rules of the game to improve their prospects for success. A resort to the latter enterprise – changing the rules – can easily derail serious engagement on the former: the normal politics of policy debate and deliberation. Thus, the fact that institutional change is difficult, and that existing institutional rules are relatively obdurate, should encourage participants in democratic debate and deliberation to get on with it, rather than scheming to change the rules when awarded a temporary advantage.

Moreover, the fact that constitutional amendment is difficult means that those who propose constitutional changes face the prospect of living under possible changes for a considerable period of time, through shifting currents and fortunes of partisan politics. As Adrian Vermeule usefully points out, the prospect of having to live under a law or constitutional provision for an extended period constitute a sort of “veil mechanism” – in the manner of John Rawls’s famous “veil of ignorance,” which was designed to encourage an impartial consideration of the interests of persons in various social and political positions.<sup>77</sup> That we, our children, and our grandchildren have to live under proposed rules changes, in the face of an uncertain future, should help induce a measure of circumspection and uncertainty as to whether short-term advantages can be sustained over time, and these may be decent proxies for impartiality.

Vermeule interestingly casts “veil mechanisms” as an extension of the values associated with the rule of law: the insistence that laws should be public, prospective, general in their application (to everyone similarly situated), and durable.<sup>78</sup> All of these features make it harder for those wielding power to fine-tune the rules to benefit particular people.<sup>79</sup> Vermeule adds that delay can have the same effect: building in a time lag before some rule change takes effect.<sup>80</sup> If “veil effects” work for constitutional amendments that will be

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<sup>76</sup> CHRISTOPHER L. EISGRUBER, *CONSTITUTIONAL SELF-GOVERNMENT* chs. 1-3 (2001); LAWRENCE G. SAGER, *JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE* 2-5, 8-9 (2004).

<sup>77</sup> ADRIAN VERMEULE, *MECHANISMS OF DEMOCRACY: INSTITUTIONAL DESIGN* WRIT SMALL 32-37 (2007) (citing JOHN RAWLS, *A THEORY OF JUSTICE* 118-23 (rev. ed. 1999)).

<sup>78</sup> *Id.* at 37.

<sup>79</sup> *Id.* at 33.

<sup>80</sup> *See id.* at 36-37 (explaining that this mechanism is based on the assumption that the decision-makers’ long-term interests are unpredictable).

hard to reverse, the same should be true for legislative reforms which are both difficult to enact and difficult to revise.<sup>81</sup>

One final observation: Levinson complains about the difficulty of enacting policy changes over time and about the excessive powers of the executive branch.<sup>82</sup> But extensive policy-making through executive branch and independent administrative agencies is a way of bypassing the “vetogates” and adjusting “to changing circumstances as new administrations, with new views, succeed each other over time.”<sup>83</sup> As Vermeule once again observes, Levinson dislikes the New Deal’s “pumped up executive,” but that was an attempt to “cure the status quo bias he also dislikes.”<sup>84</sup> Thus, “a regime with both status quo bias and a strong executive is better, not worse, than a regime with only one of those two features, according to Levinson’s own criteria.”<sup>85</sup> There is a danger that piecemeal criticisms of particular constitutional structures can miss interactions among institutions that offset various institutional deficiencies.<sup>86</sup>

Admittedly, none of these observations settle the difficult question of whether constitutional amendment and legislation should be easier under the American system. They do, however, help make clear the difficulty of the question, highlighting the fact that there is much to be said for making legislation difficult and for subjecting proposed changes to many hurdles and critical tests.

Moreover, these observations also make clear that it is incorrect to label as “undemocratic” those constitutional mechanisms designed to slow the pace of change. We cannot call “undemocratic” those safeguards that make it difficult for temporary majorities to enact dramatic changes to the law that applies to everyone and to the institutional structures within which political competition occurs. Our constitutional framework creates multiple hurdles to be cleared before legislative and constitutional change can be enacted, with the aim of promoting inclusion (the consideration of minority as well as majority interests) and deliberation (changes based on thorough reflection rather than temporary and fleeting impulses). Inclusion and deliberation are not values brought to bear in order to qualify our commitment to democracy; they are rather constitutive features of democracy properly understood. The ideal of

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<sup>81</sup> Vermeule also argues that there may be a downside: self-interest can be a spur to energetic execution of office, and veil effects may dampen that important motivation. *See id.* at 59. Of course, when it comes to high office such as the presidency and the Senate – and perhaps the House as well – there are higher forms of self-interest that ought to be engaged, such as the love of fame. These general themes are explored in DOUGLAS ADAIR, *FAME AND THE FOUNDING FATHERS* (1974).

<sup>82</sup> LEVINSON, *supra* note 4, at 39.

<sup>83</sup> Vermeule, *supra* note 7.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* (describing how Levinson’s piecemeal critique “overlooks that our constitutional order may be more democratic than the sum of its parts”).

democracy embodies the notions that the law applied to all should reflect the good of all, and that legislation should be based on the deliberate will of the political community rather than some temporary whim or passion.<sup>87</sup>

#### CONCLUSION

While conceding that the U.S. Constitution is far from perfect, I have offered a democracy-based defense of some aspects of the Constitution often subject to intense democracy-based criticism. Political reform ought to focus on our deepest injustices, and on those injustices most amenable to correction. While in an ideal world it might be hard to defend a perpetual system of equal representation of states in the Senate – a principal target of the critics ire – this is a settled feature of our institutions, and the hurdles to reform seem insurmountable. Moreover, as I have argued, Senate malapportionment does not express an egregious ascription of second-class status to any group of citizens, making it an unlikely object of popular mass mobilization. Moreover, it does not seem to represent a strong partisan bias in favor of either political party, in contrast to state legislatures before “one person, one vote.” One could say that small-state over-representation in the Senate is a tolerable imperfection because it does not run afoul of any truly basic principle of democratic morality: it may treat citizens unequally in one respect, but it is consistent with treating citizens as moral equals, because it has respectable rationales that can be offered in good faith to all. Senate malapportionment appears largely unrelated to all of the truly basic injustices of American democracy, especially class and race-based inequality. It seems highly doubtful that reform energies should be dedicated to constitutional reform of the Senate. In the end I believe that Dahl is correct to regard federalism, presidentialism, and unequal representation in the Senate as fixed elements of our constitutional system with which we should learn to live.<sup>88</sup>

There is a case to be made, I have argued, for other pro-democratic reforms which do not require constitutional amendment. These would include putting an end to partisan redistricting, and at least considering reform of the electoral college to encourage wider presidential campaigning. With respect to the question of whether legislative and constitutional change in the U.S. are too difficult, I have argued that there is no clear answer: making change difficult, and favoring a system in which those who make new law must live with it over the long term can be ways of promoting the virtues of deliberation, inclusiveness, and impartiality, virtues that are constitutive of any ideal of democracy.

Reformers such as Levinson have a tendency to compare actual constitutional arrangements, which are the product of design plus compromise

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<sup>87</sup> See Robert Keohane, Stephen Macedo & Andrew Moravcsik, *Democracy-Enhancing Multilateralism*, 63 INT'L ORG. 1, 8 (2009) (explaining that policies adopted after careful deliberation are “more likely to be policies that people are prepared to live with”).

<sup>88</sup> DAHL, *supra* note 1, at 145.

for the sake of securing consent, with academic proposals that are the product of speculative design alone. We should not forget that the flaws of our Constitution are partly the result of its successes: it reflects compromises needed to secure popular ratification, and it has endured for a very long time.