RESPONSE

THERE IS A WAY, BUT WILL THERE EVER BE A WILL?: COMMENTS ON ERIC ORTS'S *SENATE DEMOCRACY*

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It is a pleasure to comment on Professor Eric Orts's truly important article *Senate Democracy: Our Lockean Paradox*.[1] It represents outside-the-box thinking in at least two important respects. One is simply its audacity in suggesting fundamental reform of one of our basic institutional structures, the United States Senate, whose probably most important single feature, often valorized as the capitalized "Great Compromise," is the assignment of equal voting power to each of the now-fifty states.[2] But another is simply the fact that Professor Orts is in fact addressing a crucial *structural* feature of the Constitution and not, as is far too often the case within the legal academy, limiting his scholarly domain to the kinds of issues that are in fact litigated and that comprise the docket of the current Supreme Court, as important and interesting as they may be.

I am increasingly becoming ever more crankish in my belief that most students at America's leading law schools are systematically deprived of much of what they need to know as citizens, even if not as practicing lawyers, about the United States Constitution and the way it in fact structures our political order. In my book *Framed*,[3] I posited the difference between what I called the "Constitution of Settlement" and the "Constitution of Conversation."[4] The former, briefly, are those structural features that in fact present no genuinely interesting issues of "interpretation" as legal academics define that term, i.e., the occasion to display legal pyrotechnics with regard to genuinely ambiguous parts of the Constitution.[5] Equal voting power in the Senate is a perfect illustration. We "know" that Wyoming currently is entitled to the same two senators as California simply by reading the text of the Constitution.[6] Any "debates" about the correct answer can be answered by asking "what part of 'two' do you not understand?" Similar answers can be given to someone who asks how many votes it takes to override a presidential veto, how long a (nonimpeached) president serves in

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1. Eric W. Orts, *Senate Democracy: Our Lockean Paradox*, 68 AM. U. L. REV. 1981 (2019).
2. *See id.* at 1981–82 (introducing a novel proposition to reform the equal voting power of states in the Senate).
3. SANFORD LEVINSON, FRAMED: AMERICA'S FIFTY-ONE CONSTITUTIONS AND THE CRISIS OF GOVERNANCE (2012).
4. *Id.* at 19.
5. *Id.* at 21, 23, 383–84.
6. U.S. CONST. art. III, § 2.

office, and when new presidents are inaugurated.[7] Mindless textualism correctly rules the roost in such debates. The Constitution of Conversation, on the other hand, which is basically the only part of the Constitution of interest to legal academics and, therefore, their students, focuses on those parts of the Constitution in which appeal to the text serves only to generate, rather than to end, debate.[8] No one asking what "equal protection of the law" means will get the slightest help simply by reading the Fourteenth Amendment, nor will anyone perplexed about the limits of freedom of speech be aided by repeated readings of the First Amendment.

I have become convinced that the Constitution of Settlement is in substantial ways more important than the Constitution of Conversation simply because it is (or at least appears to be) far more impervious to needed changes than the latter. The latter in many ways illustrates the prescience of Madison's insight about "parchment barriers," i.e., patches of text that, precisely because they are so obviously open to interpretation, can be manipulated in all sorts of ways conducive to reaching a given result.[9] There is a reason, after all, why courses on the Fourteenth or First Amendment can take a full semester, because at least that much time is needed to lay out the sometimes remarkable changes in interpretation that have taken place over our history (and, therefore, that may well take place in the future given electoral outcomes, changes in public opinion, and the appointment of new judges).[10]

There is, of course, no such history of relentless changes with regard to most of our basic institutions. To be sure, the Senate *was* importantly modified in 1913 with the ratification of the Seventeenth Amendment, which took the appointment power away from state legislatures and placed it instead in the electorate.[11] I believe a standard course treating constitutional federalism is derelict if it fails to address some of the important changes generated by that Amendment concerning the plausibility of viewing senators as necessarily committed to maintaining the prerogatives of state governments except when their voting constituents hold that as a highly salient value. But what James Madison in *Federalist 62* called the "evil" of equal voting power continues unabated.[12] One must recognize, of course, that he described it as a "lesser evil"[13] to the presumably greater evil of attaining no Constitution at all should Delaware and other small states carry out their threat to walk out and therefore torpedo the entire project of reforming what Edmund Randolph and Alexander Hamilton both agreed was the "imbecili[c]" government created by the Articles of Confederation.[14] But a "lesser evil" remains an "evil," and Professor Orts is fully to be

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7. *Id.* art. I, § 7, cl. 2; *id.* art. II, § 1, cl. 1; *id.* amend. XX.

8. *See* LEVINSON, *supra* note 3, at 19, 383–84 (delineating the characteristics of the "Constitution of Conversation").

9. THE FEDERALIST NO. 48 at 327–28 (James Madison) (Paul Leicester Ford ed., 1898).

10. *See* Garrett Epps, *The Struggle Over the Meaning of the 14th Amendment Continues*, ATLANTIC (July 10, 2018), https://www.theatlantic.com/ideas/archive/2018/07/the-struggle-over-the-meaning-of-the-14th-amendment-continues/564722.

11. U.S. CONST. amend. XVII.

12. *See* THE FEDERALIST NO. 62, *supra* note 9, at 408, 410 (James Madison) (outlining Madison's concerns surrounding the Constitutional structures of the Senate).

13. *Id.*

14. *See* THE FEDERALIST NO. 15, *supra* note 9, at 87–89 (Alexander Hamilton) (decrying the insufficiency or "imbecility" of the government structure at the time); *see also* Sanford Levinson, *Our Imbecilic Constitution*, N.Y. TIMES (May 28, 2012), https://campaignstops.blogs.nytimes.com/2012/05/28/our-imbecilic-constitution [https://perma.cc/JH85-ACMN] (criticizing the modern day dysfunction resulting from what Hamilton referred to in part as the "imbecilic" Constitution).

commended for educating us about the indefensible aspects of the United States Senate in the twenty-first century.

In my first book criticizing the United States Constitution, *Our Undemocratic Constitution*,[15] the Senate took pride of place, though, alas, there are many other examples of patent deviations from what would be required in a genuine democracy. These include the sheer difficulty-unto-impossibility, as a practical matter, of amending the Constitution precisely because of the same disastrous allocation of voting power to the individual states.[16] Law students almost undoubtedly are forced to confront the so-called "counter-majoritarian difficulty" of judicial review in their introductory courses on the United States Constitution.[17] Rarely, if ever, are they equally forced to confront the far more serious counter-majoritarianism of the United States Senate and the other practices mentioned above that rely on the same indefensible allocation of voting power. However the United States should be described, "democracy" is not the first word that comes to (my) mind. It is the worst form of ideological indoctrination to believe that the United States *is* a genuine democracy, in terms of twenty-first century notions of that term, and law schools share the blame by failing to confront this fact, and, more to the point, graduating students who have almost literally never been invited seriously to reflect on this possibility.[18]

As Professor Orts convincingly sets out, the problem is getting worse and worse.[19] The United States at present is governed by a president who did not get even a plurality of the popular vote in the 2016 election (though he obviously got a majority of the electoral vote);[20] a Senate whose majority consists of senators elected from states with less than a majority of the total population of the country;[21] and a Supreme Court whose most two recent members were confirmed by senators representing significantly less than a majority of the electorate.[22] It is no surprise that an increasing number of Americans describe themselves as disillusioned with democracy, given the extraordinarily

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15. SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) (2006).

16. *See id.* at 159–63 (describing the difficult amendment process within the Constitution from a practical and historical perspective). Another such example, incidentally, is the method by which the House of Representatives breaks deadlocks in the Electoral College, which is also one-state/one-vote. *See* U.S. CONST. art II, § 1, cl. 3, *superseded by* U.S. CONST. amend. XII.

17. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16–17 (2d ed. 1986) (describing the idea of constitutional structures creating roadblocks to majoritarian change, which Bickel describes as a "Counter-majoritarian Difficulty"); *see also* Matthew D. Adler, *Judicial Restraint in the Administrative State: Beyond the Countermajoritarian Difficulty*, 145 U. PA. L. REV. 759, 785–87 (1997) (expanding on Bickel's theory of the countermajoritarian difficulty).

18. *Cf.* LEVINSON, *supra* note 15, at 6–7, 9 (postulating that the Constitution is not adequately democratic and challenging readers to question the Constitution more than they previously have).

19. *See* Orts, *supra* note 1, at 1984–85 (describing the trend toward greater disparities in representation between high and low-population states).

20. *Presidential Results*, CNN (2016), https://www.cnn.com/election/2016/results/president [https://perma.cc/PZ7N-WB3M].

21. *See* Orts, *supra* note 1, at 1985–86 (outlining the minority population represented both within the Senate majority and the Senators who voted for Justices Gorsuch and Kavanaugh); *see also* Ian Millhiser, *A Modest Proposal to Save American Democracy*, VOX (Jan. 14, 2020), https://www.vox.com/2020/1/14/21063591/modest-proposal-to-save-american-democracy-pack-the-union-harvard-law-review [https://perma.cc/88X3-NVKF] (calculating that the Senate majority represents fifteen million less people than the Senate minority).

22. *See* Orts, *supra* note 1, at 1986 (describing the minority population represented by the Senators who voted for Justices Gorsuch and Kavanaugh).

flawed version of the concept that operates in the United States today.[23] Many of the reasons for disillusionment have to do with the corruptions induced by, say, the role of money in politics or the distortions generated by modern social media, coupled with the relentless attack on what has come to be called "mainstream media" by not only Donald Trump,[24] but, increasingly, the entire Republican Party that now appears to be in his thrall.[25] But some of them have to do with the consequences of the formal institutions created in 1787 and, at most, only marginally amended since that time. Among those institutions, obviously, is the United States Senate.

Every person who cares about the future of the United States as a functioning system of government should ponder carefully and at length the implications of the numbers set out in Tables 1 and 4 of Professor Orts's article.[26] The first focuses on raw numbers and forces us to confront the fact that Wyoming, with 0.18% of the national population, has the same voting power as California's 12.13%.[27] I have written elsewhere that the Senate today functions as a grotesque example of a form of "affirmative action," by which residents of small states are rewarded with extraordinarily more say in one of the essential institutions of American governance than are their purportedly equal fellow citizens living in larger states.[28] Not even the strongest supporters of conventional "affirmative action" would advocate giving members of their favorite groups extra voting power, yet that is the operative reality of the Senate. Perhaps there are Americans who agree with Thomas Jefferson that rural Americans are more virtuous and trustworthy than those who are exposed to the corruption of urban life.[29]

Increasing political science research suggests that the modern "red-blue" split is increasingly a rural-urban (or urban-exurban) division inasmuch as there is a growing kind of homogeneity with regard to where people choose to settle.[30] Although Professor Orts does not

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23. *See* Sean Kates et al., *New Poll Shows Dissatisfaction with American Democracy, Especially Among the Young*, VOX (Oct. 31, 2018), https://www.vox.com/mischiefs-of-faction/2018/10/31/18042060/poll-dissatisfaction-american-democracy-young [https://perma.cc/SVP9-WEV9] (outlining the growing discontent with both American democracy and Democracy in general amongst Americans).

24. *See, e.g.*, Donald J. Trump (@realDonaldTrump), TWITTER (July 22, 2019, 8:37am), https://twitter.com/realdonaldtrump/status/1153282896549036032?lang=en [https://perma.cc/8PZG-8W73] (attacking the "Mainstream Media" as "sick" and for pushing "Radical Left Democrat views").

25. *See, e.g.*, Press Release, Rep. Devin Nunes, Nunes Opening Statement for Vindman and Williams Hearing on Impeachment (Nov. 19, 2019), https://republicans-intelligence.house.gov/news/documentsingle.aspx?DocumentID=1016 [https://perma.cc/PK9Z-SKQF] (opening remarks in the House Impeachment Hearings on November 19, 2019, in which he described almost all mainstream media as the "puppets" of the "Democrat" [sic] Party and therefore not at all to be trusted, as against, presumably, the variety of conspiracy theories spun by Fox News and social media even more unconstrained by traditional constraints of journalistic ethics).

26. Orts, *supra* note 1, at 2002–03, 2019–20.

27. *Id.* at 2002–03.

28. *See* LEVINSON, *supra* note 15, at 206 (arguing that the population disparities between states have effectively made the Senate an affirmative action program for less populous states).

29. *See, e.g.*, A. WHITNEY GRISWOLD, FARMING AND DEMOCRACY 18–20 (1948).

30. *See* BILL BISHOP, THE BIG SORT: WHY THE CLUSTERING OF LIKE-MINDED AMERICA IS TEARING US APART 5, 7–11, 13, 15 (2008) (describing the discovery of the patterns leading to this general idea of "The Big Sort"); *see also* Jonathan Rodden, *The Urban-Rural Divide*, STAN. MAG. (May 2018), https://stanfordmag.org/contents/the-urban-rural-divide [https://perma.cc/6AV2-Q2XK] (describing political implications from the big sort); Scott Stossel, *Subdivided We Fall*, N.Y. TIMES (May 18, 2018), https://www.nytimes.com/2008/05/18/books/review/Stossel-t.html (articulating key ideas discovered and implications of "the Big Sort").

measure the particular variable of religion, one suspects that the smaller, better-represented states are also likely to be higher in their percentage of religious believers who feel themselves challenged in a "culture war" being carried on by the increasing number of nonconventionally religious or even out-and-out nonbelievers in urban centers.[31]

If Table 1 raises the most basic issues of formal equality (and inequality), then Tables 4 (and 5) force us to address what lawyers might well regard as the clear "disparate impact" of allocating voting power in the Senate.[32] The smallest states tend, with few exceptions, to be by far the whitest states in the Union today.[33] Each of the three upper New England states of New Hampshire, Vermont, and Maine has an African-American population of one percent.[34] The same is basically true of the upper Plains and Rocky Mountain states, where North Dakota leads the pack with a three percent African-American population.[35]

There is a greater range of population dispersion in several other minority populations as Hispanic (18.5% nationally), Asian (6%), Native American (1%), and Pacific Islander (>1%) populations are not evenly spread throughout the country. Our two most recently-admitted states—Alaska and Hawaii—are potentially the most interesting demographically, with Alaska's Native American population comprising the greatest proportion of total population of any state (17%) and Hawaii housing disproportionately high proportions of Asians (39%) and Pacific Islanders (17%) relative to its white population (19%).[36] But the overall message sent by looking at the basic demography of the bulk of American states is, frankly, "white power" and the likelihood that their senators, even if viewed as politically liberal, have relatively little incentive to devote significant energy to addressing the problems of the 26.8% of Americans who are classified as nonwhite.[37]

These blunt facts, and the concomitant fact that it becomes increasingly difficult to defend the legitimacy of the American system of government to anyone who takes seriously the Lockean proviso quoted by Professor Orts at the outset of his article,[38] leads him to advocate a Senate Reform Act that is designed to cure to some significant extent, even if not completely, the countermajoritarianism and specific demographic effects of the status quo. It is an audacious proposal not only in terms of its concrete suggestions and the changes it would bring about with regard to organizing the Senate; it is also audacious with regard to the legal arguments presented. Two further aspects of this article are especially worthy of note. First is that Orts

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31. *See In U.S., Decline of Christianity Continues at Rapid Pace*, PEW RES. CTR. (Oct. 17, 2019), https://www.pewforum.org/2019/10/17/in-u-s-decline-of-christianity-continues-at-rapid-pace [https://perma.cc/T5YW-GM4Z] (describing the declining proportion of Americans identifying as "Christian"); Michael Lipka, *Major U.S. Metropolitan Areas Differ in Their Religious Profiles*, PEW RES. CTR. (July 29, 2015), https://www.pewresearch.org/fact-tank/2015/07/29/major-u-s-metropolitan-areas-differ-in-their-religious-profiles [https://perma.cc/6M4S-9J38] (outlining the difference in religious identification between coastal urban centers and other metropolitan centers).

32. *See* Orts, *supra* note 1, at 2019–22 (illustrating the levels of racial minorities in the states and the relative underrepresentation of these groups compared to the median state).

33. *See id.* at 2002–03, 2019–20 (illustrating the relative whiteness of the smallest states by population).

34. *Id.* at 2019–20.

35. *Id.*

36. *Id.*

37. *See id.* at 2002–03, 2019–21 (identifying the disparity between relative voting power and relative whiteness of states thereby allowing whiter and smaller states outsized voting power).

38. *See* Orts, *supra* note 1, at 1983 (citing JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT §§ 157–58, at 89–91 (Thomas P. Peardon ed. 1952) (1690)).

rejects in toto any argument that the Constitution should be imaginatively construed to require fairness in representation by judicial decree.[39] Second is that Congress has the power right now, without any corrective constitutional amendments, to alleviate the situation by passing the Reform Act.[40] I will address each in turn.

Although I do regard the allocation of votes in the Senate as part of the Constitution of Settlement, I do not want to be understood as saying that a supremely clever, perhaps Herculean, lawyer could not make arguments that, however outside the mainstream, might still be outside the category of Rule 11 "frivolity."[41] Recall the Court's dramatic nullification of "little federalism" in forty-nine of the fifty states in *Reynolds v. Sims*,[42] for example, where Chief Justice Warren, writing for the Court, emphasized that representatives represent people and not trees.[43] What he identified as the basic American (and constitutional) principles of both majority rule and what he called "fair and effective representation" rendered invalid the practice, say, of my home state North Carolina in assigning each of its 100 counties a single senator in the North Carolina Senate.[44] And, of course, Warren had earlier outlined in *Bolling v. Sharpe*,[45] the 1954 companion case from the District of Columbia that accompanied the state cases at issue in *Brown v. Board of Education*,[46] the equally audacious "reverse incorporation" by which the Equal Protection Clause of the Fourteenth Amendment, added to the Constitution in 1868, was in effect made part of the Fifth Amendment, added the Constitution in 1791.[47] If one fully runs with this particular doctrinal ball, then it is at least thinkable—in a quite literal sense—to say that the Fifth Amendment, as construed to include the constituent value of political equality, makes the national Senate equally illegitimate as a constitutional matter.

Chief Justice Warren was careful to say that the only basis for treating the U.S. Senate differently from the Alabama Senate that was the subject of *Reynolds* was the raw text of the national Constitution and the fact that it evidenced the Great Compromise necessary to establish the Union in the first place.[48] Even if one accepts as a historical fact the proposition that the Great Compromise was once necessary to establish the Union, it is not unthinkable that at some point in the future, and for the reasons eloquently developed by Professor Orts, it would become the chief threat to maintaining the Union, just as the compromises with slavery that were necessary to procure the Constitution in 1787 tore it apart in 1860 to 1861.[49] So imagine that,

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39. *See* Orts, *supra* note 1, at 1989–90, 1992–93 (arguing that the Constitution's structures are not inherently "fair" and instead should be reformed to fit modern norms of equity and fairness).

40. *See id.* at 1990–93 (proposing a Constitutional means of reforming the Senate while maintaining the Rule of One Hundred within the Senate).

41. FED. R. CIV. P. 11.

42. 377 U.S. 533 (1964); LEVINSON, *supra* note 15, at 34.

43. *Reynolds*, 377 U.S. at 562.

44. *Id.* at 565.

45. 347 U.S. 497 (1954).

46. 347 U.S. 483 (1954).

47. *See Bolling*, 347 U.S. at 499 (using the Fourteenth Amendment's equal protection clause to apply anti-discrimination principles to the District of Columbia).

48. *See Reynolds*, 377 U.S. at 559–60 (justifying holding a disproportionate state representational scheme unconstitutional by reference to the principles embodied in the Great Compromise).

49. *See* Stephen Kantrowitz, *The Other Thirteenth Amendment: Free African Americans and the Constitution That Wasn't*, 93 MARQ. L. REV. 1367, 1371–72 (2010) (stating that the slavery debate in the 1860s posed an existential threat to the Union which threatened to rip it apart).

say, Pacifica, led by California, plausibly threatens at some point in the future to secede from a political arrangement deemed manifestly indifferent to their collective welfare. Think only of the attempt by the Trump Administration to wreck that state's independent automobile emission standards in the name of the purported virtues of a single (and more propollution) national policy.[50] At what point should we expect a state that itself now constitutes the world's fifth-largest economy[51] to remain in a Union that is aggressively hostile to its most basic environmental interests and the concomitant survival of its residents? Should we approach that point, where the already existing secessionist movements within California actually become politically serious and supported by recognized and respectable leaders, why not argue that what Justice Holmes called "[t]he felt necessities of the times,"[52] which justified the Court's *coup de main* in *Baker v. Carr*[53] and then *Reynolds v. Sims*—or, for some, *Bush v. Gore*[54]—should trigger similar judicial audacity with regard to the U.S. Senate? We are, after all, often told that the Constitution is not a "suicide pact."[55] Should the Senate be (properly) recognized as clear and present danger to our political system, then who knows what would become thinkable?

It is telling that Professor Orts quotes, without endorsing, Akhil Reed Amar's question: "If the Court could on one day say that most states had unconstitutional governments that required major restructuring after the next census, what was to stop the Court from saying the same thing the next day about the Senate?"[56] His response, in effect, is that federal courts should

> decline to entertain such a challenge because it would create an impractical and unwise conflict between the courts and the political branches. If the Supreme Court ordered reform of the Senate, it would set up an untenable power contest, and courts should therefore deny standing in these cases on grounds of the political question doctrine.[57]

It is hard to disagree with him, as a prudential matter, about the wisdom of the Court's decision to engage in what Alexander Bickel called its "passive virtues,"[58] exemplified by the mysterious but always invocable "political question" doctrine. One should remember, though, that Bickel's critics, most notably Gerald Gunther, accused him of

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50. *See* Tony Barboza, *California Sues Trump Again for Revoking State's Authority to Limit Auto Emissions*, L.A. TIMES (Nov. 15, 2019), https://www.latimes.com/california/story/2019-11-15/california-trump-administration-lawsuit-auto-emissions-climate-change [https://perma.cc/SPC5-ZZ7L] (reporting that California was joined by twenty-two other states in challenging the Trump Administration's policies on clean air pollution and climate change).

51. Jonathan Cooper, *California Now World's 5th Largest Economy, Surpassing UK*, USA TODAY (May 5, 2018), https://www.usatoday.com/story/news/nation-now/2018/05/05/california-now-worlds-5th-largest-economy-beating-out-uk/583508002 [https://perma.cc/7QU4-LEBE].

52. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1881).

53. 369 U.S. 186, 209 (1962) (holding apportionment claims justiciable).

54. 531 U.S. 98, 110 (2000) (per curiam) (stopping the Florida recount in the 2000 presidential election); *see, e.g.*, RICHARD A. POSNER, BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS, at viii (2001) (describing the public impact of *Bush v. Gore* on the body politic).

55. The best-known use of this phrase is undoubtedly Robert Jackson's dissent in *Terminiello v. City of Chicago*, 337 U.S. 1, 38 (1949) (Jackson, J., dissenting).

56. Orts, *supra* note 1, at 2072 n.387.

57. *Id.* at 2072.

58. *See generally* Alexander M. Bickel, Foreword, *The Supreme Court 1960 Term: The Passive Virtues*, 75 HARV. L. REV. 40 (1961) (positing that the court should utilize justiciability doctrines—such as the political question doctrine or mootness—to avoid unnecessarily reaching constitutional questions to preserve its institutional power).

endorsing a view of the Court that required that it be 100% principled, though only on the 20% of those occasions in which it decided in fact to decide cases on the merits.[59] No real principles other than prudence operated with regard to the exercise of "the decision to decide."[60]

Still, it is overdetermined that anyone counseling litigating the constitutionality of the Senate would be told that it is almost certainly a waste of both time and money doomed to failure, even if one disagreed with Professor Orts as to the wisdom of judicial intervention. It is simply not going to happen in the foreseeable future, and for that to change would require, I believe, the kind of socio-political instability and perceived threat to national survival that renders ordinary legal analysis problematic, if not irrelevant.

So this requires turning to the heart of the article, which is the Senate Reform Bill, which Professor Orts argues should, and constitutionally could, be passed by Congress. It would reallocate the votes in ways that would alleviate, even if not completely overcome, the disproportionate power enjoyed by small (and distinctly demographically unrepresentative) states.[61] Where would the power come from? The answer is (deceptively) simple—though I think plausible, at least in the rarified world of the legal academic: the Reconstruction Amendments, especially the Fourteenth and Fifteenth Amendments, are committed to both a general vision of equal citizenship *and*, equally important, the empowerment of a vigorous and suitably audacious Congress to invade any traditional state practices or claimed prerogatives that manifestly violate our contemporary notions of what equality requires.[62] Congress, at the time of the Reconstruction, was viewed as perhaps the essential player in giving flesh to the inchoate terms found particularly in the Thirteenth and Fourteenth Amendments.[63] Certainly, given the recent memories of *Dred Scott v. Sandford*,[64] there is no reason at all to believe that the authors of the Amendments were content to rely exclusively on the judiciary.[65] The contemporary doctrine of "juricentricity," enunciated especially by the

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59. Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 3 (1964). The percentage of cases granted has plummeted in recent years. During the 2016 Term, for example, the percentage of applications for cert. actually granted by the Court was a total of 1.2%, and the percentage goes up to a resounding 4.6% with regard to the 70 petitions accepted out a total of 1535 petitions on its Appellate Docket. *See The Supreme Court 2016 Term: The Statistics*, 131 HARV. L. REV. 403, 410 tbl.II(B) (2017). The remainder were from the Miscellaneous Docket, where the acceptance rate is 0.1%. *Id.*

60. *See* H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 16 (1991) (arguing for a justice-specific approach to understanding how the Supreme Court decides which cases to take).

61. *See* Orts, *supra* note 1, at 1984–85 (arguing that historical shifts in population render the U.S. Senate unrepresentative and that it should be reformed).

62. U.S. CONST. amends. XIV, XV.

63. U.S. CONST. amends. XIII, XIV, XV (abolishing slavery, conferring citizenship on persons born in the United States, establishing due process rights, voting rights, and empowering congress to create additional legislation to enforce these provisions); Eric Foner, *Why Reconstruction Matters*, N.Y. TIMES (Mar. 28, 2015), https://www.nytimes.com/2015/03/29/opinion/sunday/why-reconstruction-matters.html (discussing how Congress and the courts expanded the scope of rights afforded by the Reconstruction Amendments after their passage).

64. 60 U.S. 393 (1857).

65. *See* U.S. CONST. amends. XIII, XIV, XV. I am especially indebted to yet unpublished work by Mark Graber setting out the argument that Congressional empowerment—and the hope that Sections Two, Three, and Four of the Fourteenth Amendment would assure Republican domination of the Congress—was the heart of the Amendment.

Rehnquist Court,[66] is a distinctly modern creation certainly not envisioned by those supporting the Reconstruction Amendments. And Section 2 of the Thirteenth and Fifteenth Amendments and Section 5 of the Fourteenth Amendment explicitly empower Congress to pass all "appropriate" legislation[67] in a context where well-trained lawyers could be expected to be on notice that this in effect adopted the capacious reading of congressional power enunciated in John Marshall's reading of the "necessary and proper" clause in *McCulloch v. Maryland*.[68]

Clearly, the basis of the Senate Reform Act has to be the discriminatory impact the present allocation of voting power has with regard to the ability of "minority groups" (even if as a matter of fact they are moving ever closer, as an aggregate, to constituting the majority of the population of the United States) to adequately protect themselves in the forum of congressional decision-making. As Chief Justice Warren emphasized in *Reynolds*, it really does not matter if, by stipulation, the allocation of voting power in the House of Representatives meets the standards set out in the opinion;[69] the essence of what might be termed "strong bicameralism"[70] of the kind found in the United States is that each of the two Houses of Congress has what I sometimes refer to as a "death-ray veto" over legislation passed by the other.[71] That is being illustrated in the current Congress: it is basically irrelevant that the Democratic-controlled House of Representatives, which also happens to represent a majority of the national population, has passed a plethora of bills. Almost none has even received hearings, let alone a vote, in the Republican Senate, where Republican senators, though a majority of the Senate, in fact represent less than half of the population.[72]

Where there is a will, there is a way, we are often told, and Professor Orts has certainly provided a way by which we can avoid the twin evils of judicial imposition and the belief that only an unattainable constitutional amendment—given the realities of Article V—could provide a cure for the disease that is the Senate. But, obviously, the question is whether "We the People" will ever develop the requisite will to upend our system in a way that will create the proper incentives for re-election-seeking members of the House and Senate to vote for the Senate Reform Act—at least as audacious as the English Reform Bill of

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66. *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507, 516 (1997) (affirming that the judiciary is empowered to determine the constitutionality of laws); Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L. REV. 1, 2 (2003) (stating that the Supreme Court's invalidation of Section 5 legislation "invoke the Constitution as a document that speaks only to courts").

67. U.S. CONST. amends. XIII, XIV, XV.

68. 17 U.S. (4 Wheat.) 316, 324 (1819).

69. *See* Reynolds v. Sims, 377 U.S. 533, 574 (1964) (discussing how a compromise between larger and smaller states to create two houses of Congress—one proportional to representation and one not—was essential to "[avert] a deadlock in the Constitutional Convention which had threatened to abort the birth of our Nation").

70. LEVINSON, *supra* note 3, at 154.

71. *See id.* at 142; CYNTHIA LEVINSON & SANFORD LEVINSON, FAULT LINES IN THE CONSTITUTION: THE FRAMERS, THEIR FIGHTS, AND THE FLAWS THAT AFFECT US TODAY 24–25 (2019) (detailing efforts to pass anti-lynching legislation that ultimately passed the House but repeatedly died in the Senate); LEVINSON & LEVINSON, *supra*, at 55–60 (highlighting passage of the "DREAM Act" that failed to receive a vote in the Senate because there were not enough votes to support a cloture motion to end debate on the bill).

72. Ella Nilsen, *House Democrats Have Passed Nearly 400 Bills. Trump and Republicans Are Ignoring Them*, VOX (Nov. 29, 2019), https://www.vox.com/2019/11/29/20977735/how-many-bills-passed-house-democrats-trump [https://perma.cc/4KP4-VL73].

1832.[73] And, of course, passage would require as well a President willing to sign the legislation, inasmuch as a veto would be successful so long as 1/3+1 additional vote of the Senate, i.e., thirty-four senators who might well collectively represent significantly less than a quarter of the entire population, voted to uphold the veto.

As a practical matter, it is hard to be hopeful, at least thinking in terms of my own necessarily truncated time horizon as one who will in 2021 (if all is well) turn eighty years old. Professor Orts's article thus seems far more of a welcome "thought experiment" rather than a practical suggestion for legislative action. One reason, frankly, is that no political leader even close to the "mainstream" is suggesting radical reform of the Senate. Political candidates who proudly pronounce themselves "revolutionaries" or even proponents of "structural reform" and speak of a "rigged" political system to a remarkable degree hesitate to raise any questions at all about basic constitutional reform.[74] Perhaps this is because the leading self-styled "revolutionary" and critic of our "rigged" system is a senator from Vermont, and any criticism of the Senate on his part would require a totally absent sense of self-reflection about his own tainted power in the Senate and a willingness to risk the ire of his constituents who benefit from that power.[75] Or consider even such vehement critics of contemporary American politics, including the Senate, as Norman Ornstein and Thomas Mann, who titled their 2012 book *It's Even Worse than It Looks: How the American Constitutional System Collided with the New Politics of Extremism*.[76] Though their title suggests that the "American constitutional system" might be rigorously critiqued, that turns out not to be the case, and there is no hint that genuine constitutional reform might be necessary.[77] Perhaps one reason is that reform seems so hopeless, especially if one thinks that constitutional amendment is necessary, given the reality of Article V. This was essentially the conclusion of the great political scientist Robert Dahl, who asked in 2003 *How Democratic is the American Constitution?*, answered in effect "not very," especially by reference to the Senate and the Electoral College, but went on to conclude that almost nothing could be done because of Article V.[78]

The only part of the Constitution that elicits any general discussion at present is the Electoral College, which, so far as reforms go, counts as low-hanging fruit: every poll taken since 1944 indicates a majority of the population is skeptical of the institution and supportive of direct

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73. Great Reform Act 1832, 2 & 3 Will. 4 c. 45; *see* U.K. Nat'l Archives, *The Great Reform Act*, POWER, POL., & PROTEST, https://www.nationalarchives.gov.uk/education/politics/g6 [https://perma.cc/B6TC-7LZK].

74. *See* Jackie McDermott, *Constitution Mentions in Round Two of the Democratic Debates—Explained*, CONST. DAILY (Aug. 9, 2019), https://constitutioncenter.org/blog /constitution-mentions-in-round-2-of-the-democratic-debatesexplained [https://perma.cc/R7ZP-Z9NZ] (cataloging when democratic candidates mentioned the Constitution, none of which included constitutional reform outside of abolishing the Electoral College).

75. Matt Stevens, *Bernie Sanders on the Issues: Where he Stands and What Could Derail Him*, N.Y. TIMES (Feb. 19, 2019), https://www.nytimes.com/2019/02/19/us/politics/bernie-sanders-on-the-issues.html.

76. THOMAS E. MANN & NORMAN J. ORNSTEIN, IT'S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM, at xiii-xiv (2019). And 2012 now looks almost halcyon given contemporary reality.

77. *Id.* at xiv.

78. *See generally* ROBERT A. DAHL, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION? 144–45 (2003) (discussing the structural barriers that Article V poses to amending the constitution).

election.[79] But, of course, there has been no movement at all because of the dreaded Article V and the practical impossibility of getting the requisite two-thirds vote in the Senate. At one point reforms that got through the House apparently failed in the Senate because of small states who prefer the bump that the Electoral College gives them in choosing presidents.[80] Consider, for example, that George W. Bush became president because of the nine electoral votes cast by the two Dakotas and Wyoming, which have the same combined population as New Mexico did at the time.[81] However, Al Gore received only five votes for carrying New Mexico.[82] But, paradoxically or not, reforms in the 1980s apparently failed because senators from large states, especially those from "battlegrounds," thought their states benefited not only from the excess attention they received, in the latter case, but also from their ability to aggregate their votes on a winner-take-all basis and thus enjoy marginally greater support from presidents already thinking of their re-election campaigns.[83] Still, the Electoral College endures, whatever its legitimacy and mischief with regard to our political and constitutional order. And so does the Senate.

What one must hope for is that Professor Orts's invaluable article is widely read, absorbed into the readers' consciousness, and then discussed. Even if, at the outset, this will be plausibly viewed as an academic's fantasy, unlikely to be realized, we should be aware that almost all great political projects are equally dismissed in their initial stages as literally fantastic. For example, who in 1776 would really think that women should have the right to vote? Abigail Adams's plaintive request to her husband to "Remember the Ladies" was met with laughter and disdain.[84] And readers can supply their own additional examples, from the left and the right. The important thing is to place audacious ideas on the table. Most will be ignored, but every now and then one will initiate a real movement. May this be one of the latter!

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79. *Americans Have Historically Favored Changing Way Presidents Are Elected*, GALLUP (Nov. 10, 2000), https://news.gallup.com/poll/2323/americans-historically-favored-changing-way-presidents-elected.aspx [https://perma.cc/498V-AWFX].

80. *See* Warren Weaver Jr., *Senate Refuses to Halt Debate on Direct Voting*, N.Y. TIMES (Sept. 18, 1970), https://www.nytimes.com/1970/09/18/archives/senate-refuses-to-halt-debate-on-direct-voting-plan-for-popular.html (stating that the vote to end debate on the bill failed to reach the required supermajority in a vote of fifty-four to thirty-six).

81. FED. ELECTION COMM'N, 2000 OFFICIAL PRESIDENTIAL GENERAL ELECTION RESULTS, https://transition.fec.gov/pubrec/2000presgeresults.htm [https://perma.cc/CU3F-GN9E] (last updated Dec. 2001).

82. *Id.*

83. *See* Mario Trujillo, *After* Bush v. Gore*, Obama, Clinton Wanted Electoral College Scrapped*, HILL (Oct. 27, 2012), https://thehill.com/homenews/campaign/264347-obama-clinton-backed-reforms-to-electoral-college-after-bush-v-gore [https://perma.cc/GWT4-5WWS] (highlighting opposing views of those who see the Electoral College as undemocratic versus those from smaller states who are reluctant to give up the strategic advantage the Electoral College provides them). I should note that I am a plaintiff, from Texas, in a suit challenging the constitutionality of states allocating their electoral votes on a winner-take-all basis, in part because I believe that such aggregation clearly runs afoul of the "fair and effective representation" requirement enunciated by Chief Justice Warren in *Reynolds*.

84. Letter from Abigail Adams to John Adams (Mar. 31, 1776), https://www.masshist.org/digitaladams/archive/doc?id=L17760331aa&rec=sheet&archive=&hi=&numRecs=&query=&queryid=&start=&tag=&num=10&bc= [https://perma.cc/TT22-57CW].