

The New Countermajoritarian Difficulty

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INTRODUCTION

The “countermajoritarian difficulty” was a central preoccupation for twentieth-century constitutional law scholars.¹ Alexander Bickel, who coined the phrase in *The Least Dangerous Branch*, located that difficulty institutionally in the courts. Judicial review, he wrote, involved the “reality that when the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but

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1. See Aaron Tang, *Reverse Political Process Theory*, 70 VAND. L. REV. 1427, 1436 (2017) (“For decades, the great villain of constitutional theory has been the counter-majoritarian difficulty.”).

against it.”² In one of the most influential responses to Bickel’s argument, John Hart Ely asserted that “representation-reinforcing” judicial review poses no such difficulty. According to Ely, that form of judicial intervention carries out the Constitution’s commitment to democratic self-governance—a “constitutional development” that in his description had moved “continuously, even relentlessly” away from limits on “government by majority.”³

But what if Ely and Bickel were wrong—Bickel in supposing that the countermajoritarian difficulty was tied to the judiciary⁴ and Ely in supposing that our constitutional development has moved unidirectionally toward greater majoritarian democracy?⁵ Observers as diverse as poet Langston Hughes, professor Alexander Keyssar, and (apocryphally) President George W. Bush have remarked on the cyclical nature of America’s commitment to democratic inclusion—Hughes in his poem *Long View: Negro*, Keyssar in his magisterial history of *The Right to Vote*, and Bush in his remark that “we are on an irreversible trend toward more freedom and democracy—but that could change.”⁶ In reality, the way our nation is constituted may be interacting with the way our Constitution was written to produce one of those periods of retrenchment in which we move once again towards government by minority.

This article explores how changes in demography are interacting with constitutional law—both structural features of how political power is allocated and recent Supreme Court decisions—to create a new countermajoritarian difficulty. Part I lays out the constitution of the American electorate. That electorate is changing demographically—becoming more racially and ethnically diverse, more geographically concentrated and homogeneous, and more divided,

2. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16–17 (1962).

3. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 6 (1980). For discussion of the intellectual debate swirling around the idea of countermajoritarianism, see Mark A. Graber, *The Countermajoritarian Difficulty: From Courts to Congress to Constitutional Order*, 4 ANN. REV. L. & SOC. SCI. 361 (2008).

4. See *infra* text accompanying notes 150–151 (discussing the irony in Bickel’s assumption that mid-twentieth-century legislation reflected the will of prevailing *popular* majorities). A renewed countermajoritarian skew lies at the heart of our current politics. See *infra* text accompanying notes 103–132.

5. For one discussion of “how scholarly concern with democratic deficits in American constitutionalism has shifted from the courts to electoral institutions,” see Graber, *supra* note 3, at 362.

6. See LANGSTON HUGHES, *Long View: Negro in THE COLLECTED POEMS OF LANGSTON HUGHES* 547, 547 (Arnold Rampersad ed., 1994) (“Emancipation: 1865 / Sighted through the / Telescope of dreams / Looms larger, / So much larger, / So it seems, / Than truth can be. / But turn the telescope around, / Look through the larger end— / And wonder why / What was so large / Becomes so small / Again.”); ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES*, at xix–xx (2000) (replacing “the idea of an inexorable march toward universal suffrage” with the understanding that “[t]he history of suffrage in the United States is a history of both expansion and contraction, of inclusion and exclusion, of shifts in direction and momentum at different places and at different times”); ROBERT M. MARTIN, *WRITING WRONGS: COMMON ERRORS IN ENGLISH* 52 (2018) (quoting Bush as having said, “I believe we are on an irreversible trend toward more freedom and democracy—but that could change”).

not only in its partisan affiliations, but in its values and its prospects for the future. Part II explains that some fundamental, hard-wired features of our Constitution—in particular, the Senate and the Electoral College—are assisting a shrinking white, conservative, exurban numerical minority to exert substantial control over the national government and its policies. Part III then shows that the current Supreme Court is countermajoritarian in a way that enables this entrenchment. Far from engaging in representation-reinforcing judicial review, the Court’s decisions contribute to “the ins . . . choking off the channels of political change to ensure that they will stay in and the outs will stay out” regardless of what the people would choose.⁷

I.

THE CHANGING CONSTITUTION OF THE AMERICAN ELECTORATE

Over the past half century, the composition of the American electorate has changed in profound ways. These changes in demography, attitudes, and geographic distribution have created the conditions for a countermajoritarian reaction in which a declining political bloc seeks to retain power.

For most of the twentieth century—and for nearly all our prior history—the American electorate was overwhelmingly white and overwhelmingly native-born. This reflected, in part, the demographic composition of the nation as a whole: the restrictions imposed by the Immigration Act of 1924,⁸ meant that in 1970, non-Latinx whites were 83.5 percent of the U.S. population,⁹ and only 4.7 percent of the population (the lowest percentage since 1850) was foreign-born.¹⁰ The electorate was even whiter and more native. The Voting Rights Act of 1965 had only just begun to effectively enfranchise the majority of Black citizens, who lived in the South, and most of the people who arrived after the Immigration and Nationality Act of 1965 reopened the flow of immigration were not yet citizens or were children not yet of voting age.¹¹

7. ELY, *supra* note 3, at 103.

8. Immigration Act of 1924, ch. 190, 43 Stat. 153.

9. U.S. CENSUS BUREAU, A LOOK AT THE 1940 CENSUS 11, https://www.census.gov/newsroom/cspan/1940census/CSPAN_1940slides.pdf [<https://perma.cc/HJ8Z-AKYN>]. In keeping with the preference of the *California Law Review*, I use the descriptor “Latinx” to refer to the category of persons that the Census describes as “Hispanic, Latino, or Spanish.”

10. U.S. CENSUS BUREAU, THE FOREIGN-BORN POPULATION IN THE UNITED STATES 3 (2011) [hereinafter FOREIGN-BORN], https://www.census.gov/newsroom/pdf/cspan_fb_slides.pdf [<https://perma.cc/FZK7-G727>].

11. See *Shelby Cnty. v. Holder*, 570 U.S. 529, 545–46 (2013) (describing the low levels of Black voter registration prior to enactment of the VRA); Press Release, Abby Budiman, Luis Noe-Bustamante & Mark Hugo Lopez, Pew Rsch. Ctr., Naturalized Citizens Make Up Record One-in-Ten U.S. Eligible Voters in 2020, at 5 (Feb. 26, 2020), https://www.pewresearch.org/hispanic/wp-content/uploads/sites/5/2020/02/GMD_2020.02.26_Immigrant-Eligible-Voters.pdf [<https://perma.cc/2W59-V87D>] (describing the rise in foreign-born members of the electorate).

Moreover, the mid-century United States was a nation with two “catchall, ideologically heterogeneous (political) parties.”¹² The demographic and ideological profiles of Democratic and Republican voters overlapped significantly. In the 1950s, with the exception of southerners (in a then one-party Democratic South) and Protestants (who leaned heavily Republican), no major demographic group “saw more than a 10 percentage point difference in the percentage of its members represented within each party.”¹³ The parties “looked reasonably similar in their representation of African Americans and whites, of men and women, of married and unmarried voters; even liberals were only slightly more populous in the Democratic Party.”¹⁴ As for ideology, even in the early 1970s, “partisan-group affiliations were not significantly different” along most dimensions; for example, only “10 percent more Democrats than Republicans called themselves liberal.”¹⁵ While 20 percent more Republicans than Democrats called themselves conservatives, white conservatives made up less than half of the Republican coalition.¹⁶ Given this overlap, Democrats and Republicans didn’t differ systematically in their views on several of the culture wars issues—for example, abortion or school prayer—that today serve as sharp cleavages between the parties.¹⁷ While there was regional variation, the Democrats were a primarily urban party only in heavily industrialized parts of the Northeast and Midwest; elsewhere support for the Democratic Party was not correlated with population density.¹⁸ Forty-four percent of San Francisco County’s voters cast their ballots for Republican Gerald Ford in the 1976 election.¹⁹

The overlap between the two parties extended to their attitudes about how to deal with what W.E.B. DuBois called *the* problem of the twentieth century: the color line.²⁰ Prior to the 1960s, the Democratic Party consisted uneasily of both a southern wing committed to the maintenance of white supremacy and a northern and midwestern wing whose electoral success often depended on the

12. Thomas Carothers & Andrew O’Donohue, *How Americans Were Driven to Extremes: In the United States, Polarization Runs Particularly Deep*, FOREIGN AFFS. (Sept. 25, 2019), <https://www.foreignaffairs.com/articles/united-states/2019-09-25/how-americans-were-driven-extremes> [https://perma.cc/XPW8-JUY7].

13. LILLIANA MASON, *UNCIVIL AGREEMENT: HOW POLITICS BECAME OUR IDENTITY* 34 (2018).

14. EZRA KLEIN, *WHY WE’RE POLARIZED* 37 (2020).

15. MASON, *supra* note 13, at 36; *see also* ALAN I. ABRAMOWITZ, *THE GREAT ALIGNMENT: RACE, PARTY TRANSFORMATION, AND THE RISE OF DONALD TRUMP* 27 (2018) (“[T]he parties in the fifties were much less ideologically aligned: liberals and conservatives were found in considerable numbers in both parties.”).

16. ABRAMOWITZ, *supra* note 15, at 16.

17. BILL BISHOP, *THE BIG SORT: WHY THE CLUSTERING OF LIKE-MINDED AMERICANS IS TEARING US APART* 230 (2008).

18. *See* JONATHAN A. RODDEN, *WHY CITIES LOSE: THE DEEP ROOTS OF THE URBAN-RURAL POLITICAL DIVIDE* 41–47 (2019).

19. BISHOP, *supra* note 17, at 44.

20. W.E.B. DUBOIS, *THE SOULS OF BLACK FOLK* 13 (1903).

support of Black voters.²¹ The great legislation of the Second Reconstruction—the Civil Rights Act of 1964 and the Voting Rights Act of 1965—was passed by a bipartisan coalition of Republicans and northern, midwestern, and western Democrats.²² In 1982, northern Republican legislators were instrumental in strengthening the Voting Rights Act.²³

Then the demographics of the nation changed. The Immigration and Nationality Act of 1965 ushered in a wave of immigration, with three-quarters of the new arrivals coming from Latin America or Asia, and only 12 percent from Europe.²⁴ By 2010, 12.9 percent of the U.S. population was foreign-born, a figure approaching the historic high-water marks of 1890 and 1910.²⁵ And the foreign-born percentage of the U.S. population will exceed those marks by 2030.²⁶ Also by 2030, the net growth in the U.S.’s population will be primarily a product of immigration, rather than new births.²⁷

Even new births reflect the changing demographics. In 2013, a majority of infants born in the United States were non-Latinx white.²⁸ By 2060, only about one-third of U.S. children will be.²⁹ And “by 2044, more than half of all Americans are projected to belong to a minority group.”³⁰ The implications for the composition of the electorate are straightforward. “Between 1992 and 2012, the nonwhite share of voters in presidential elections more than doubled, going from 13 percent to 28 percent,”³¹ and that share will skyrocket over the next few decades. America is “undergoing a transition perhaps no rich and stable democracy has ever experienced: [i]ts historically dominant group is on its way to becoming a political minority.”³²

21. See ALEXANDER KEYSAR, *WHY DO WE STILL HAVE THE ELECTORAL COLLEGE?* 283–87 (2020) (explaining the key role of Black support in presidential elections).

22. See KLEIN, *supra* note 14, at 29.

23. See MICHAEL PERTSCHUK, *GIANT KILLERS* 158–78 (1986).

24. See Philip E. Wolgin, *The Immigration and Nationality Act of 1965 Turns 50*, CTR. FOR AM. PROGRESS, Oct. 16, 2015, available at <https://perma.cc/VL4D-K62U>.

25. See FOREIGN-BORN, *supra* note 10; KLEIN, *supra* note 14, at 105.

26. See SANDRA L. COLBY & JENNIFER M. ORTMAN, U.S. CENSUS BUREAU, *PROJECTIONS OF THE SIZE AND COMPOSITION OF THE U.S. POPULATION: 2014 TO 2060*, at 2 (2015), <https://www.census.gov/content/dam/Census/library/publications/2015/demo/p25-1143.pdf> [<https://perma.cc/FED8-PYRZ>].

27. Press Release, U.S. Census Bureau, *Older People Projected to Outnumber Children for First Time in U.S. History* (Mar. 13, 2018) [hereinafter U.S. Census Projections], <https://www.census.gov/newsroom/press-releases/2018/cb18-41-population-projections.html> [<https://perma.cc/GY2S-G74A>] (“Net international migration is projected to overtake natural increase in 2030 as the primary driver of population growth in the United States, another demographic first for the United States.”).

28. KLEIN, *supra* note 14, at 103–04.

29. U.S. Census Projections, *supra* note 27 (showing that 36.4 percent of children will be “non-Hispanic white alone”).

30. COLBY & ORTMAN, *supra* note 26, at 1.

31. ABRAMOWITZ, *supra* note 15, at 127–28.

32. Yoni Appelbaum, *How America Ends*, ATLANTIC (Dec. 2019), <https://www.theatlantic.com/magazine/archive/2019/12/how-america-ends/600757/> [<https://perma.cc/R2Z7-Y8J5>]; see also Tara Bahrapour & Ted Mellnik, *All Population Growth in*

The electorate has also been changing in other dramatic ways. Captured in the titles of two recent books, the electorate has undergone a “Big Sort”³³ and a “Great Alignment.”³⁴ The “Big Sort” is a description of how Americans are increasingly moving to, and living in, communities that are homogeneous with respect to a number of important characteristics. The “Great Alignment” refers to the way in which the range of socioeconomic characteristics—from race, to religion, to the nature of one’s work, to geographic location, to ideology—all align. Various important aspects of individual identity are “fusing together” and “stacking atop one another” to create “mega-identities” that get aligned with partisanship.³⁵ The two parties each identify with one of these competing mega-identities.

We no longer have ideologically overlapping parties. To the contrary: “Americans perceive their two parties as ideologically further apart than respondents in any other wealthy democracy.”³⁶ And they have reason for that perception. Americans’ party affiliations are distinctive in their “powerful alignment of ethnicity, ideology, and religion on each side of the divide”—what two scholars call an “iron triangle” that makes U.S. polarization “unusually encompassing and sharp.”³⁷

In contemporary America, one’s identity as a Democrat or a Republican therefore captures on which side of key cultural divides individuals find themselves.³⁸ Indeed, individuals sometimes actually shift their beliefs, even on significant policy issues, to bring them into agreement with their party’s positions.³⁹ Perhaps it’s therefore not a surprise that while less than 5 percent of

U.S. Driven by Minorities, Upcoming Census Data Is Likely to Reveal, WASH. POST (Aug. 10, 2021), <https://www.washingtonpost.com/dc-md-va/2021/08/10/census-race-population-changes-redistricting/> [<https://perma.cc/4MBZ-KR7R>] (stating that the 2020 census will show that “[f]or the first time in the history of the country’s census-taking, the number of White people in the United States” will decline, with all of the decade’s population growth being attributable to an increase in people of color).

33. BISHOP, *supra* note 17.

34. ABRAMOWITZ, *supra* note 15.

35. KLEIN, *supra* note 14, at 136.

36. RODDEN, *supra* note 18, at 235. In the 1992 American National Election Survey, 55 percent of respondents thought that there were some “important differences in what the Republicans and Democrats stand for,” but 31 percent thought there were not. *1992 Time Series Study*, AM. NAT’L ELECTION STUD. (1992), https://isr-anesweb.isr.umich.edu/ANES_Data_Tools/variable_v2.html?year=1992&variable=V925901 [<https://perma.cc/4DCG-XUV4>]. By contrast, in the 2016 survey, 83 percent of respondents saw such differences; only 16 percent did not. *2016 Time Series Study*, AM. NAT’L ELECTION STUD. (2016), https://isr-anesweb.isr.umich.edu/ANES_Data_Tools/variable_v2.html?year=2016&variable=V162190 [<https://perma.cc/H65Y-37LQ>].

37. Thomas Carothers & Andrew O’Donohue, *How to Understand the Global Spread of Political Polarization*, CARNEGIE ENDOWMENT FOR INT’L PEACE (Oct. 1, 2019), <https://carnegieendowment.org/2019/10/01/how-to-understand-global-spread-of-political-polarization-pub-79893> [<https://perma.cc/XL56-Q7SL>].

38. RODDEN, *supra* note 18, at 91.

39. See Thomas M. Carsey & Geoffrey C. Layman, *Changing Sides or Changing Minds? Party Identification and Policy Preferences in the American Electorate*, 50 AM. J. POL. SCI. 464, 475 (2006) (claiming on the basis of their empirical study, that “many people do change their minds on the issues . . . in response to party identification” and that “[i]f a substantial number of individual party identifiers bring

respondents in 1960 expressed displeasure at the prospect that their child might marry a member of the other political party, a staggering 49 percent of Republicans and 33 percent of Democrats responded that way in 2010.⁴⁰

Nowhere is this division starker than with respect to race. A partisan divide over racial issues began to emerge in the 1960s, as racially conservative white Americans deserted the Democratic Party, leading (among other things) to the demise of the Solid South.⁴¹ That divide is reflected in the parties' adherents. In 2012, the American National Election Survey reported that 43 percent of self-identified Democrats were people of color; by contrast, only 9 percent of self-identified Republicans were.⁴²

The realignment has been accompanied by shifts in attitudes. The American National Election Survey found that “in the late 1980s, partisans differed little” in their attitudes about Black Americans.⁴³ By this century, the attitudes on the so-called “racial resentment” scale had diverged significantly, with Republicans expressing significantly higher levels of resentment. Interestingly, since 2012 the continued increase in partisan divergence seems to be a product of the fact that white Democrats are expressing “a substantial decline in their average levels of racial resentment.”⁴⁴ To give one salient example involving current issues, three-quarters of Democratic and Democratic-leaning voters believe that the way the criminal justice system treats people of color is a very big problem, while only one-fifth of Republican and Republican-leaning voters do.⁴⁵

The current constitution of the electorate maps onto the U.S. landmass in a distinctive way: “Just as the racial, cultural, and ideological divides between the parties have widened in recent decades, so has the geographic divide.”⁴⁶ The

their views on various issue agendas into line with their party's stands, then citizens' attitudes on previously cross-cutting policy dimensions will move closer into line with each other, and the parties' coalitions may grow more polarized”). Carsey and Layman found that “[e]ven on issues as divisive and emotion-laden as abortion and racial equality, there is evidence of individuals bringing their attitudes into line with their party ties.” *Id.* at 470.

40. KLEIN, *supra* note 14, at 75.

41. For discussion of this realignment, see Michael J. Klarman, *Foreword: The Degradation of American Democracy—and the Court*, 134 HARV. L. REV. 1, 108–12 (2020). See also Pamela S. Karlan, *Loss and Redemption: Voting Rights at the Turn of a Century*, 50 VAND. L. REV. 291, 313–16 (1997). Ilyana Kuziemko and Ebonya Washington argue that “defection among racially conservative whites just after Democrats introduce sweeping Civil Rights legislation explains virtually all of the party's losses in the region.” Ilyana Kuziemko & Ebonya Washington, *Why Did the Democrats Lose the South? Bringing New Data to an Old Debate*, 108 AM. ECON. REV. 2830, 2865 (2018).

42. KLEIN, *supra* note 14, at 37.

43. Drew Engelhardt, *White People's Racial Attitudes Are Changing to Match Partisanship*, DATA FOR PROGRESS (Mar. 21, 2019), <https://www.dataforprogress.org/blog/2019/3/20/racial-resentment-is-the-defining-feature-of-american-politics> [<https://perma.cc/D9DP-LB4X>].

44. *Id.*

45. Amina Dunn, *As the U.S. Copes with Multiple Crises, Partisans Disagree Sharply on Severity of Problems Facing the Nation*, PEW RSCH. CTR. (July 14, 2020), <https://www.pewresearch.org/fact-tank/2020/07/14/as-the-u-s-cope-with-multiple-crises-partisans-disagree-sharply-on-severity-of-problems-facing-the-nation/> [<https://perma.cc/K3QW-YBYN>].

46. ABRAMOWITZ, *supra* note 15, at 72.

number of “landslide” counties—counties where either the Democratic or the Republican candidate for President wins by more than 20 percentage points (that is, by more than 60:40)—has increased dramatically. In 1976, less than a quarter of Americans lived in landslide counties; by 2004, nearly half did.⁴⁷ Nearly two-thirds of U.S. counties became less politically competitive over the past half century. To return to an earlier example, while Republican Gerald Ford got 44 percent of the vote in San Francisco County, George Bush received only 15 percent in 2004, and Donald Trump received a tiny 9 percent in 2016 and 12.7 percent in 2020.⁴⁸

Even at the statewide level, presidential elections are becoming less competitive. In 1960, twenty-four states with 327 electoral votes were competitive; by 2004, that number had declined to thirteen states with 159 electoral votes.⁴⁹ In 2012, the winning candidate’s margin was more than 15 percent in twenty-seven states plus the District of Columbia; only four states—Florida, Ohio, Virginia, and North Carolina—were decided by less than 5 percentage points,⁵⁰ and roughly two-thirds of the \$1 billion-plus spent nationwide on the presidential race was spent in the first three of those states.⁵¹ In 2016, two-thirds of general election campaign events were held in only six states.⁵²

Here is a map of the presidential election results, by county, in 2020.⁵³

47. BISHOP, *supra* note 17, at 6.

48. *Id.* at 44; see *General Election—Statement of Vote, November 8, 2016: President, Statewide Summary By County*, CAL. SEC’Y OF STATE, <https://elections.cdn.sos.ca.gov/sov/2016-general/sov/17-presidential-formatted.pdf> [<https://perma.cc/6JC3-FH93>] (providing the percentage for Trump in 2016); *General Election—Statement of Vote, November 3, 2020: President, Statewide Summary by County*, CAL. SEC’Y OF STATE, <https://elections.cdn.sos.ca.gov/sov/2020-general/sov/18-presidential.pdf> [<https://perma.cc/UW74-TSQW>] (providing the percentage for Trump in 2020).

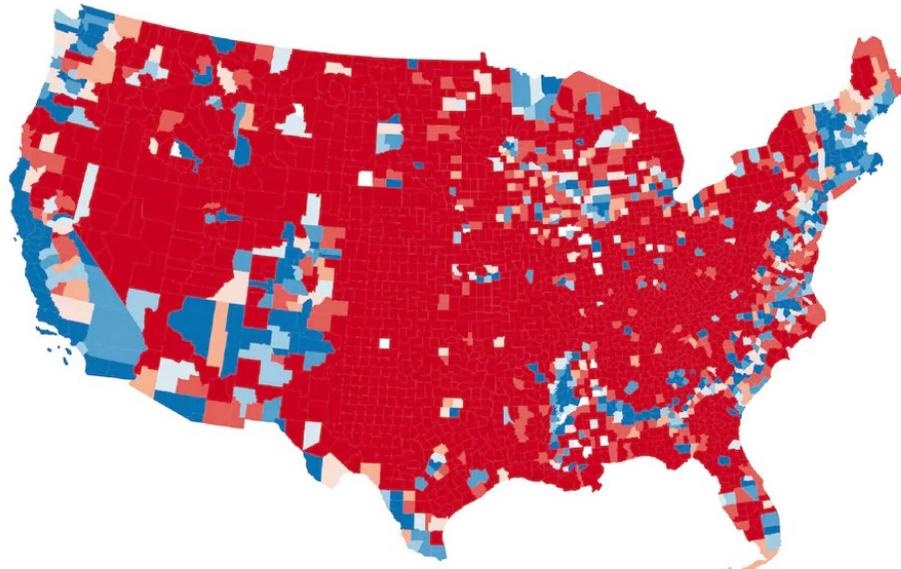
49. See SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* 88 (2006).

50. See ABRAMOWITZ, *supra* note 15, at 94.

51. JESSE WEGMAN, *LET THE PEOPLE PICK THE PRESIDENT: THE CASE FOR ABOLISHING THE ELECTORAL COLLEGE* 168 (2020).

52. *Id.*

53. Philip Bump, *Let’s Get Ahead of It: A Map of the Early 2020 Results by Population, Not Acreage*, WASH. POST (Nov. 5, 2020), <https://www.washingtonpost.com/politics/2020/11/05/lets-get-ahead-it-map-early-2020-results-by-population-not-acreage/> [<https://perma.cc/Y35Z-KY6A>].



Source: Preliminary Edison Research results

THE WASHINGTON POST

Figure 1. Preliminary 2020 presidential results by county. Lines delineate the borders of counties. Red represents counties Donald Trump carried in the 2020 election. Blue represents counties Joseph Biden carried. The darker the color, the greater the share of the vote for the candidate who carried the county.

As a matter of landmass alone, the United States is a red nation. In the vast majority of the nation's roughly 3,000 counties, Donald Trump received more votes than Joe Biden. But "people, not land or trees or pastures, vote."⁵⁴ Biden received roughly seven million more votes than Trump.⁵⁵ And in part as a product of the Big Sort and the Great Alignment, Democrats are concentrated in far fewer counties than Republicans. By the beginning of this century, "the Democrats had become an almost exclusively urban political party."⁵⁶ There is virtually a straight-line relationship between population density and the Democratic share of the presidential vote.⁵⁷

The urban-rural divide maps onto a string of other differences between heavily Democratic and heavily Republican counties. Residents of the Democratic counties share a set of cultural values that differ from their

54. *Reynolds v. Sims*, 377 U.S. 533, 580 (1964).

55. See *Presidential Election Results: Biden Wins*, N.Y. TIMES [hereinafter *Presidential Election Results*], https://www.nytimes.com/interactive/2020/11/03/us/elections/results-president.html?action=click&pgtype=Article&state=default&module=styl-elections-2020®ion=TOP_BANNER&context=election_recirc [https://perma.cc/D3NX-MCCT] (giving the national vote totals for each candidate).

56. RODDEN, *supra* note 18, at 5.

57. BISHOP, *supra* note 17, at 205. By contrast, "[w]ith only a handful of exceptions, the Republican delegation in the US House of Representatives contains no representatives of cities." RODDEN, *supra* note 18, at 258.

Republican counterparts.⁵⁸ Democratic counties are more ethnically and racially diverse, and a far higher percentage of their population is foreign-born.⁵⁹

Moreover, Democratic counties are growing, both demographically and economically. In the thirty-five fastest-growing counties, the Democratic vote share increased from 2012 to 2016 even though the nationwide swing went in the opposite direction.⁶⁰ One feature of the Big Sort has been that more highly educated younger Americans are moving to areas of the country more deeply involved in the globalized knowledge economy.⁶¹ Prior to 1990, the twenty-one metropolitan areas with the highest amount of technology “were at the national average in terms of party identification.”⁶² But since then, they have become Democratic strongholds.⁶³ Overall, the Democratic counties’ greater populations and greater productivity meant that “[w]hile Hillary Clinton won fewer than 500 counties and Donald Trump won more than 2,500 in 2016, according to Internal Revenue Service (IRS) data, the Democratic-majority counties were responsible for over two-thirds of federal income taxes collected in 2014.”⁶⁴

The consequences of the Big Sort and the Great Alignment for political attitudes, and thus for our politics, are profound. The stark alignment of the urban-rural and Democratic-Republican divides means that urban and rural voters now each view a win for the other party “as an existential threat to their sense of national identity and way of life.”⁶⁵ The Democratic Party’s base is a multiracial, multiethnic, cosmopolitan population, while the Republican Party has become a home for white conservatives in outer suburbs and rural areas who

58. See BISHOP, *supra* note 17, at 47; RODDEN, *supra* note 18, at 84, 89.

59. BISHOP, *supra* note 17, at 53 (showing that in Democratic landslide counties, 21 percent of the population was foreign-born while in Republican landslide counties, only 5 percent of the population was foreign-born).

60. RODDEN, *supra* note 18, at 271; see also BISHOP, *supra* note 17, at 269 (describing the wholesale shift to the Republican Party in counties with very few voters); Philip Bump, *Presenting the Least Misleading Map of the 2016 Election*, WASH. POST (July 30, 2018), <https://www.washingtonpost.com/news/politics/wp/2018/07/30/presenting-the-least-misleading-map-of-the-2016-election/> [<https://perma.cc/KYU9-A3AP>] (“Forty-four percent of counties that voted more Republican in 2016 than 2000 lost population. Seventy-nine percent of counties that voted more heavily Democratic increased in population.”).

61. See BISHOP, *supra* note 17, at 131–33.

62. *Id.* at 153.

63. *Id.* at 154–55.

64. RODDEN, *supra* note 18, at 259; see also KLEIN, *supra* note 14, at 41 (showing that the counties Clinton carried in 2016 “encompassed a massive 64 percent of America’s economic activity as measured by total output in 2015”).

65. RODDEN, *supra* note 18, at 258. For a recent discussion of this point, see Thomas B. Edsall, Opinion, *Whose America Is It?*, N.Y. TIMES (Sept. 16, 2020), <https://www.nytimes.com/2020/09/16/opinion/biden-trump-2020-violence.html> [<https://perma.cc/CUV9-EXF2>] (discussing the high level of distrust between liberals and conservatives and quoting Seth Jones, director of the Transnational Threats Project at the Center for International and Strategic Studies, as saying that “[a]ll sides are defining the election in apocalyptic terms: the election will decide the success or failure of the United States”).

feel “threatened by the loss of their dominant status in American society and politics.”⁶⁶

There has, of course, long been an urban-rural divide in American politics. Indeed, this past year marked the centennial of a particularly striking example of that divide’s central place in American politics: Congress’s failure to reapportion the House of Representatives after the 1920 census revealed that America was no longer a majority-rural nation.⁶⁷ Walter Lippman described the mood of the nation then in terms that mirror contemporary descriptions of the tension between “the new urban civilization with its irresistible economic and scientific and mass power” and “the older American village civilization making its last stand against what to it looks like an alien invasion.”⁶⁸ But the current divide also reflects something else: a partisan divide between large-population and small-population states.

To say that we are in new territory is not to say that there has never been division between more populous and less populous states. The Constitutional Convention “nearly dissolved amid conflict between small and large states over how to apportion representation in the national legislature.”⁶⁹ Ultimately, that conflict was resolved by the “Connecticut Compromise” under which each state received equal suffrage in the Senate while seats in the House of Representatives were allocated on the basis of population.⁷⁰

But even at the time, observers like James Madison recognized that the most salient disagreements among states stemmed not from differences in their population, but from “other circumstances; . . . principally from [the effects of their] having or not having slaves.”⁷¹ The “great division of interests in the United States” lay between the North and the South.⁷²

For most of American history, while large-population and small-population states might have had distinctive interests, their differences did not map onto a

66. ABRAMOWITZ, *supra* note 15, at 129.

67. For discussion of that episode, and its potential bearing on contemporary reapportionment and redistricting, see Pamela S. Karlan, *Reapportionment, Nonapportionment, and Recovering Some Lost History of One Person, One Vote*, 59 WM. & MARY L. REV. 1921, 1935–38, 1956–59 (2018) [hereinafter *Reapportionment*]. The “struggle between urban and rural America” infected every part of the deliberation over the post-1920 allocation of seats, and influenced debates over immigration, prohibition, taxation, and tariffs. WEGMAN, *supra* note 51, at 125.

68. CHARLES W. EAGLES, *DEMOCRACY DELAYED: CONGRESSIONAL REAPPORTIONMENT AND URBAN-RURAL CONFLICT IN THE 1920S* 4–5 (1990); see also Ronald Brownstein, *How the Election Revealed the Divide Between City and Country*, ATLANTIC (Nov. 17, 2016), <https://www.theatlantic.com/politics/archive/2016/11/clinton-trump-city-country-divide/507902/> [<https://perma.cc/42PM-XQH2>] (comparing the political landscape prior to the 2020 election to the landscape of 1920).

69. MICHAEL J. KLARMAN, *THE FRAMERS’ COUP: THE MAKING OF THE UNITED STATES CONSTITUTION* 257 (2016).

70. For an account of the arguments and maneuvering, see *id.* at 182–205.

71. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 486 (Max Farrand ed., rev. ed. 1937).

72. *Id.*

partisan divide. During the twentieth century, small states were diverse in “their interests and political alignments.”⁷³ There was a “fortuitous distribution of Democratic and Republican voters across the fifty states.”⁷⁴

The Great Alignment has changed that. We now have a “highly polarized partisan geography.”⁷⁵ Overall, sparsely populated, low-population states now tilt decisively toward the Republican Party.⁷⁶ As a result “there is now a clear and pronounced *partisan* small-state” effect in which “mostly rural, less populated states [are] voting increasingly Republican.”⁷⁷ At the same time, more and more Americans are moving to a small set of states: by 2040, 70 percent of Americans will live in the fifteen largest states, leaving only 30 percent of Americans in the remaining thirty-five.⁷⁸ In the next Section, I discuss how demographic changes of the past half century interact with constitutional structures that date to the time of the framing.

II.

THE FIXED CONSTITUTION AND THE AMERICAN ELECTORATE

The worsening disjuncture between where Americans live and how the Constitution allocates political power is a major source of a new countermajoritarian difficulty, which lies not only in the courts, but in the Senate and the Electoral College as well. Put squarely, our political system may be incapable of reflecting the new majority.

Our electoral system consists of a mixture of elements that are mutable, elements that are fixed by constitutional text, and elements that fall in between. Polling places, for example, are mutable because they regularly change from election to election. So too with the districts from which public officials are elected: since the Reapportionment Revolution of the 1960s, every decennial census has required the reconfiguration of a huge number of electoral districts for the House of Representatives, state legislatures, and municipal bodies.

Some electoral features are sticky, even if not formally constitutional. For example, the number of seats in the House of Representatives is not firmly set by the Constitution. Between 1800 and 1910 the number of seats changed after

73. KEYSSAR, *supra* note 21, at 198 (showing that in many of the twentieth-century debates over the Electoral College, invocations of a supposed small-state versus large-state divide were in fact used to mask the continued North-South divide involving race and suppression of Black political strength).

74. David R. Mayhew, *Is Congress “The Broken Branch”?*, 89 B.U. L. REV. 357, 366 (2009).

75. RODDEN, *supra* note 18, at 3.

76. ABRAMOWITZ, *supra* note 15, at xii.

77. Lee Drutman, *The Senate Has Always Favored Smaller States. It Just Didn’t Help Republicans Until Now*, FIVETHIRTYEIGHT (July 29, 2020), <https://fivethirtyeight.com/features/the-senate-has-always-favored-smaller-states-it-just-didnt-help-republicans-until-now/> [<https://perma.cc/GN4B-FTJ6>].

78. KLEIN, *supra* note 14, at 257; see also Note, *Pack the Union: A Proposal to Admit New States for the Purpose of Amending the Constitution to Ensure Equal Representation*, 133 HARV. L. REV. 1049, 1057–58 (2020) [hereinafter *Pack the Union*].

nearly every decennial census. But the number has remained essentially fixed since then.⁷⁹ The same is true for the method of electing Representatives: since 1842, federal law has required that they be elected from single-member districts (rather than, for example, at large or through some explicit method of proportional representation).⁸⁰

These sticky features have major consequences. There is consensus among political scientists that single-member districts with first-past-the-post elections lead to a two-party system, thus creating special opportunities for polarization.⁸¹ Using single-member geographic districts with equal populations—particularly if there is any requirement that the districts be geographically compact—disadvantages a party whose adherents are geographically concentrated relative to its competitor, without regard to whether there is partisan gerrymandering.⁸² Moreover, the scale of House districts—the average congressional district now contains more than 700,000 people—means that smaller urban areas often get combined with outlying populations, thereby losing out on effective representation.⁸³

And of course, some electoral features truly are “hard-wired”—that is, written into the Constitution.⁸⁴ By that measure, perhaps the most hard-wired provision of all involves the Senate. Article V provides a mechanism for amending the Constitution—a process that has been used repeatedly to change the electoral process, each time to make it more inclusive and democratic.⁸⁵ But Article V ends with a proviso that “no State, without its Consent, shall be

79. The Constitution sets a lower and upper bound on the size of the House. *See* U.S. CONST. art. I, § 2, cl. 3. Each state must receive at least one seat and there cannot be more than one seat for every 30,000 persons. *See* Karlan, *Reapportionment*, *supra* note 67, at 1925–26 (calculating the current lower bound of persons as 50 and the current upward bound as around 10,200). With respect to the changing number of seats after each apportionment, *see id.* at 1928.

80. *See* Karlan, *Reapportionment*, *supra* note 67, at 1929. For discussions of the move to single-member districts, *see* ERIK J. ENGSTROM, *PARTISAN GERRYMANDERING AND THE CONSTRUCTION OF AMERICAN DEMOCRACY* 43–55 (2013); ROSEMARIE ZAGARRI, *THE POLITICS OF SIZE: REPRESENTATION IN THE UNITED STATES, 1776–1850*, at 129–31 (1987).

81. Carothers & O’Donohue, *supra* note 12. In the early 1950s, the French political scientist Maurice Duverger propounded what has come to be called “Duverger’s law”: if a jurisdiction uses single-member districts to select officeholders and winners are determined by a plurality, then the jurisdiction will end up with a two-party, rather than a multiparty, system because both voters and candidates will believe they will be more likely to win by doing so. For a detailed explanation of why both voters and candidates will gravitate towards the two major parties, rather than aligning themselves with a minor party that perhaps better reflects their policy preferences, *see* SAMUEL ISSACHAROFF, PAMELA S. KARLAN, RICHARD H. PILDES & NATHANIEL PERSILY, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 1210–13 (5th ed. 2016) (discussing Duverger’s work on single-member, first-past-the-post systems).

82. *See* RODDEN, *supra* note 18, at 136, 187.

83. *See id.* at 148–51.

84. I borrow the phrase “hard-wired” from LEVINSON, *supra* note 49, at 29.

85. A majority of the constitutional amendments ratified since the Bill of Rights concern electoral arrangements, at least in part. *See* U.S. CONST. amends. XII, XIV, XV, XVII, XIX, XX, XXII, XXIII, XXIV, XXVI.

deprived of its equal Suffrage in the Senate.”⁸⁶ The U.S. Constitution is already “the most difficult to amend of any constitution currently existing in the world today,”⁸⁷ and it would require an amendment to Article V before it would be possible to amend the requirement that each state be given two senators. That’s not likely to happen any time soon.

From its inception, the Senate was countermajoritarian in an important sense: according to the 1790 census, a majority of the U.S. population lived in the four largest states, but those states selected only eight of the twenty-six senators.⁸⁸ But the current countermajoritarian structure of the Senate is not simply the product of a 1787 “compromise and concession indispensable to the establishment of our federal republic.”⁸⁹ Rather, it rests on the interaction between that compromise and a series of highly partisan, and sometimes directly race-conscious, decisions about the admission—or nonadmission—of new states. The Constitution may have required an equal suffrage Senate, but it does not require the Senate we now have.

Prior to the Civil War, “disputes over state admissions were primarily proxy fights in the sectional battle over slavery.”⁹⁰ In order to maintain the balance of power between the North and the South, Congress adopted a practice of pairing the admission of new free states and new slave states.⁹¹ So racial considerations directly inflected the decision of how to constitute the upper chamber of Congress.

Then, during the Civil War and Reconstruction, Republicans in Congress pushed through the admission of four new states in order to shore up their control of the national government, despite the readmission of the Southern states. Most strikingly, “while denying admission to the more populous (but Democratic) Utah, Congress voted to admit (Republican) Nevada when its population was only one fifth that of the next-smallest state and one seventh that of Utah.”⁹² In fact, had Congress used the traditional criterion that a territory should not be

86. U.S. CONST. art. V. The proviso also originally declared that “no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article”—in plain English, that no amendment ending the slave trade could be enacted before 1808. See AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 292–93 (2005).

87. LEVINSON, *supra* note 49, at 21.

88. I derived this percentage from the official 1790 census figures. See U.S. CENSUS BUREAU, *1790 CENSUS: RETURN OF THE WHOLE NUMBER OF PERSONS WITHIN THE SEVERAL DISTRICTS OF THE UNITED STATES (1793)*, https://www2.census.gov/library/publications/decennial/1790/number_of_persons/1790a-02.pdf [<https://perma.cc/Y3Z7-TN9V>].

89. *Reynolds v. Sims*, 377 U.S. 533, 574 (1964).

90. Daryl Levinson & Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 *YALE L.J.* 400, 443 (2015).

91. See Charles Stewart III & Barry R. Weingast, *Stacking the Senate, Changing the Nation: Republican Rotten Boroughs, Statehood Politics, and American Political Development*, 6 *STUD. AM. POL. DEV.* 223, 226 (1992).

92. *Id.* at 227.

admitted to statehood until its population roughly equaled the population of the smallest existing state, Nevada “would not have entered the Union until 1970.”⁹³

After the Civil War ended, popular support nationwide for the two parties was closely balanced. Republicans continued their “use of statehood politics to secure their hold on the presidency and the Senate.”⁹⁴ In 1889, Congress split the Dakota Territory and admitted North Dakota, South Dakota, and Washington, each of them heavily Republican, and none of them meeting the traditional population criterion. Although it admitted one state that leaned Democratic (Montana), it declined to confer statehood on two other Democratic-leaning territories (Utah and New Mexico), despite the fact that all these areas had similar populations.⁹⁵ And with respect to New Mexico, “[t]he Spanish heritage of most New Mexico residents and the prevalence of the Spanish language in the region frequently prompted Republican statements wondering whether such people were even capable of independent self-government.”⁹⁶ Overall, of the eleven states admitted between 1861 and 1890 (excluding West Virginia, which really was simply a partition of a preexisting state), five had populations smaller than the average existing congressional district.⁹⁷ Wyoming has never reached that size.

The politics of admission are not a relic of the nineteenth century. Both Puerto Rico and the District of Columbia have larger populations than Wyoming; Puerto Rico actually has a larger population than eighteen states.⁹⁸ But despite the fact that 78 percent of D.C. voters in a 2016 statehood referendum voted in favor of statehood,⁹⁹ and the Democratic-controlled House voted 232 to 180 in favor of admitting the new state (to be named in commemoration of Frederick Douglass), there is no prospect that any Republican member of Congress would support statehood.¹⁰⁰ Similarly, although 52.34 percent of Puerto Rican voters in a 2020 referendum favored immediate admission of the commonwealth as a

93. *Id.* at 232.

94. *Id.* at 226.

95. *See id.* at 236–37.

96. *Id.* at 240.

97. *Id.* at 255.

98. For 2020 total population estimates for each state, the District of Columbia, and Puerto Rico, see *State Population Totals: 2010–2020*, U.S. CENSUS BUREAU (Oct. 8, 2021), <https://www.census.gov/programs-surveys/popest/technical-documentation/research/evaluation-estimates/2020-evaluation-estimates/2010s-state-total.html> [<https://perma.cc/9WPP-23X2>]. The District of Columbia’s population is also larger than Vermont’s and roughly the same as Alaska’s. *See id.*

99. *Washington D.C., Statehood Referendum (November 2016)*, BALLOTPEdia, [https://ballotpedia.org/Washington_D.C.,_Statehood_Referendum_\(November_2016\)](https://ballotpedia.org/Washington_D.C.,_Statehood_Referendum_(November_2016)) [<https://perma.cc/2RMG-QCNE>].

100. Emily Cochrane, *In Historic Vote, House Approves Statehood for the District of Columbia*, N.Y. TIMES (June 26, 2020), <https://www.nytimes.com/2020/06/26/us/politics/dc-statehood-house-vote.html> [<https://perma.cc/W6Q2-45NT>].

state,¹⁰¹ it too faces little prospect of admission as long as Republicans control either house of Congress—or, indeed, as long as Republicans in the Senate control enough seats for a filibuster.¹⁰²

As at the founding, the Senate has a countermajoritarian cast. According to the 2010 Census, a majority of the U.S. population lives in only ten states; those states elect only twenty of the one hundred senators.¹⁰³ And the mismatch is growing: by 2040, 70 percent of Americans will live in the fifteen largest states. So 70 percent of the population will elect only thirty senators, leaving less than a third of the population to control the selection of nearly three-quarters of the Senate.¹⁰⁴

Even if political affiliation were randomly—or in David Mayhew’s formulation, “fortuitous[ly]”—distributed across small and large states, the constitution of the Senate would flout the otherwise strong constitutional commitment to individual political equality and the idea that “in a society ostensibly grounded on representative government, . . . a majority of the people” should have the ability to elect a majority of the legislators.¹⁰⁵ But the countermajoritarian nature of the contemporary Senate is heightened by the way that it maps onto the map. The “significant super-majoritarianism” that the distribution of the American electorate “injects . . . into the federal lawmaking process”¹⁰⁶ is an aspect of the Great Alignment.

One way to appreciate this is by comparing the aggregate vote totals for the two parties’ senatorial candidates. In 2018, for example, Democratic candidates for the U.S. Senate received 58 percent of the Senate votes cast nationwide, while Republican candidates received only 38 percent.¹⁰⁷ This is a landslide-adjacent differential in vote totals: for example, in 1984 Ronald Reagan won 58.8 percent of the nationwide popular vote for president to Walter Mondale’s 40.6 percent.

101. *Puerto Rico Statehood Referendum (2020)*, BALLOTPEDIA, [https://ballotpedia.org/Puerto_Rico_Statehood_Referendum_\(2020\)](https://ballotpedia.org/Puerto_Rico_Statehood_Referendum_(2020)) [<https://perma.cc/NE5N-X7B5>].

102. See Chris Cioffi, *Puerto Rico Inches Closer to Statehood, but Without Key GOP Support*, ROLL CALL (Nov. 4, 2020), <https://www.rollcall.com/2020/11/04/puerto-rico-inches-closer-to-statehood-but-without-key-gop-support/> [<https://perma.cc/38MZ-MYRV>] (stating that despite statehood for Puerto Rico being part of the Republican Party platform, party leaders are opposed, and quoting Senate minority leader Mitch McConnell as saying of Democrats that “[a]fter they change the filibuster, they’re going to admit the District as a state. They’re going to admit Puerto Rico as a state. That’s four new Democratic senators in perpetuity”).

103. I made this calculation based on the 2010 state-by-state population figures. See PAUL MACKUN & STEVE WILSON, U.S. CENSUS BUREAU, POPULATION DISTRIBUTION AND CHANGE: 2000 TO 2010, at 2 tbl.1 (2011), <https://www.census.gov/prod/cen2010/briefs/c2010br-01.pdf> [<https://perma.cc/95QU-W5YP>].

104. KLEIN, *supra* note 14, at 257.

105. *Reynolds v. Sims*, 377 U.S. 533, 565 (1964). To be sure, the Court went on to recognize that the constitution of the Senate flouted that principle. But it explained that the Senate was “conceived out of compromise and concession indispensable to the establishment of our federal republic” and arose from “unique historical circumstances.” *Id.* at 574.

106. Lynn A. Baker & Samuel H. Dinkin, *The Senate: An Institution Whose Time Has Gone?*, 13 J.L. & POL. 21, 23 (1997).

107. *Pack the Union*, *supra* note 78, at 1054.

But despite losing the nationwide vote by a wide margin, Republicans actually *increased* their Senate majority.¹⁰⁸ My point here is not that in a nationwide vote for who should control the Senate, Democrats would necessarily receive 58.8 percent of the vote; perhaps in a particular election cycle they might not even prevail. The current construction of the parties is no doubt inflected by the nature of the Senate: because the Republican Party can gain a Senate majority without having to appeal to the nationwide median voter, the Party has less incentive to move its policies towards the center. My point is simply that “aggregation rules” matter.¹⁰⁹

And of course the countermajoritarian skew in the Senate translates into governance and policy. Scholars have long recognized that the Senate works to redistribute wealth from large-population states to smaller ones.¹¹⁰ The Big Sort and the Great Alignment exacerbate this problem. The small-state bias involves more than just redistribution of material wealth. It gives the Republican Party a built-in advantage in competition for control of a central organ of the federal government—an organ that, among other things, is responsible for deciding whether to confirm or reject judicial nominees. In 2017, for the first time in the nation’s history, “the median share of senators supporting passed bills, confirmed judges and agency leaders, and other matters dropped to 58% (the lowest since 1930), with those senators representing just 49.5% of the U.S. population (the lowest ever)”¹¹¹ And for then-Senate majority leader Mitch McConnell to have argued that Republicans should race to fill Justice Ginsburg’s seat on the Supreme Court even though voting in the 2020 presidential election had already begun because “Americans re-elected our majority in 2016 and expanded it in 2018” ignores the fact that a majority of Americans did no such thing.¹¹² As the country becomes more racially and ethnically diverse, less

108. *Id.* at 1055.

109. For discussion of aggregation rules, see Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1712–13 (1993) [hereinafter *Rights to Vote*].

110. See e.g., FRANCES E. LEE & BRUCE I. OPPENHEIMER, *SIZING UP THE SENATE: THE UNEQUAL CONSEQUENCE OF EQUAL REPRESENTATION* 158–223 (1999); Baker & Dinkin, *supra* note 106, at 39–42; Graber, *supra* note 3, at 376 (reviewing scholarship on this topic).

111. Joshua Tauberer, *The Senate Has Never Been as Un-democratic as It Was in 2017–2018, and Minority Rule Could Continue in 2019 for Nominations*, GOVTRACK INSIDER (Dec. 30, 2018), <https://govtrackinsider.com/the-senate-has-never-been-as-un-democratic-as-it-was-in-2017-2018-and-minority-rule-could-801e1046af28> [<https://perma.cc/ASL3-RFAK>].

112. Carl Hulse, *For McConnell, Ginsburg’s Death Prompts Stark Turnabout from 2016 Stance*, N.Y. TIMES (Sept. 18, 2020), <https://www.nytimes.com/2020/09/18/us/mitch-mcconnell-rbg-trump.html> [<https://perma.cc/HD9L-G7UB>]. With the confirmation of Justice Barrett, a majority of the members of the Supreme Court have been confirmed by Senators who represent a minority of the U.S. population. See JACK M. BALKIN, *THE CYCLES OF CONSTITUTIONAL TIME* 141 (2020) (pointing out that Justices Thomas, Alito, Gorsuch, and Kavanaugh were confirmed by Senators who represent a minority of the U.S. population); Camille Caldera, *Fact Check: “Living Under Minority Rule” Post Contains 6 True Facts on Trump, Barrett*, USA TODAY (Oct. 21, 2020), <https://www.usatoday.com/story/news/factcheck/2020/10/21/fact-check-minority-rule-post-has-6-true-facts-trump-barrett/3669988001/> [<https://perma.cc/J7YH-L68D>] (stating that Barrett was confirmed on

religiously observant, and more economically dependent on the knowledge economy, it retains a Senate disproportionately accountable to white voters who want to turn back the clock.¹¹³

The uneven partisan geography also creates an enhanced likelihood of a countermajoritarian President, with the concomitant nomination of judges whose positions are also countermajoritarian. To be sure, the conferral of two extra electoral votes on each state (because the Constitution gives each state a number of electors “equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress”¹¹⁴) does give each individual voter in a small-population state a mathematically weightier vote than that voter’s large-state counterpart. But that theoretical bump-up is counterbalanced in some respect by the fact that, given winner-take-all selection of electors within states—only Maine and Nebraska use a different rule¹¹⁵—voters in larger swing states have far more of an actual impact in deciding the outcome.¹¹⁶

The real driver of countermajoritarian presidential elections is the way the two parties’ supporters are distributed among the states. During “the modern period, Democrats have tended to win large states by large margins and lose them by small margins.”¹¹⁷ For example, in 2016, Hillary Clinton won the electoral vote of three of the ten largest states—by 30 percentage points in California, 22.5 percentage points in New York, and 16.8 percentage points in Illinois. But in the seven large states that Donald Trump won, his largest margin of victory was 9 percentage points (in Texas), and in three states (Florida, Michigan, and Pennsylvania), his margin of victory was less than 1.3 percent. Overall, in the ten largest states, Hillary Clinton received 36,440,207 votes and Donald Trump received 31,295,308. But because of how their supporters were geographically distributed, Clinton garnered 98 electoral votes, while Trump garnered 138.¹¹⁸ These large states account for the majority of Trump’s electoral vote margin of victory.

a party-line vote and that “Republicans in the Senate represent 14.3 million fewer Americans than Senate Democrats”).

113. See Graber, *supra* note 3, at 377 (“Had Senate seats at the turn of the twenty-first century been allocated by population, the tax system in the United States would be a little more progressive, the welfare system a bit more generous, and Supreme Court justices less conservative than Clarence Thomas and Samuel Alito.”).

114. U.S. CONST. art. II, § 1, cl. 2.

115. KEYSSAR, *supra* note 21, at 1.

116. See WEGMAN, *supra* note 51, at 173–77 (discussing the “plus-two fallacy”); see also Michael Geruso, Dean Spears & Ishaana Talesara, *Inversions in US Presidential Elections: 1836–2016*, at 17 (Nat’l Bureau of Econ. Rsch., Working Paper No. 26247, 2019), <http://www.nber.org/papers/w26247> [<https://perma.cc/5CKJ-NCWY>] (offering empirical support for this view).

117. Geruso, Spears & Talesara, *supra* note 116, at 13.

118. Figures derived from *Presidential Election Results*, *supra* note 55.

The 2016 election was the second time in the six most recent elections that a candidate who lost the national popular vote won the presidency.¹¹⁹ While there are at least five other elections where at least some scholars have suggested the winning candidate received fewer popular votes than a competitor, only the two twenty-first century examples are straightforward.¹²⁰ For example, the claim that Andrew Jackson won a plurality of the popular vote in 1824 (but lost the presidency to John Quincy Adams when the election was thrown into the House) fails to account for the fact that six state legislatures—including New York’s, an Adams stronghold—“chose electors without holding a popular vote.”¹²¹

As for the other three elections, there too the story is more complicated. Additional confounding factors make it difficult to glean any useful information from other potentially counter-majoritarian elections. In 1876, high levels of fraud and violent suppression of the Black vote in the South marred the election, and Republican Rutherford B. Hayes was declared the electoral vote winner over Democrat Samuel Tilden only after proceedings before a jury-rigged electoral commission and hardball behind-the-scenes bargaining within Congress.¹²² Moreover, Congressional Republicans timed the admission of Colorado to enable its participation in the 1876 election, where the state legislature, rather than the state’s voters, appointed the state’s three, predictably Republican, electors.¹²³ So it is impossible to know, and perhaps immaterial, whether Tilden in fact received more popular votes than Hayes. Even the 1888 election, where Democrat Grover Cleveland was reported to have received more popular votes than the electoral vote-winning Benjamin Harrison, might not be a “clear-cut case,” because suppression of the Black vote in the South likely reduced Harrison’s total.¹²⁴ And although there is some debate whether Richard Nixon actually received more votes than John F. Kennedy in 1960,¹²⁵ that possibility has never received real public attention.

Moreover, the nineteenth-century elections occurred under a very different political system altogether—one the Supreme Court characterized, in its first one-person, one-vote decision, as embracing a “conception of political equality

119. See *Splits Between the Electoral College and Popular Vote*, BALLOTPEdia, https://ballotpedia.org/Splits_between_the_Electoral_College_and_popular_vote [https://perma.cc/379S-UL4A].

120. One weird but interesting fact about these elections: four of the five (1824, 1888, 2000, and 2016) involved candidates who were relatives of prior presidents: John Quincy Adams (son of John Adams) in 1824; Benjamin Harrison (grandson of William Henry Harrison) in 1888; George W. Bush (son of George H.W. Bush) in 2000; and Hillary Clinton (wife of Bill Clinton) in 2016.

121. KEYSSAR, *supra* note 21, at 280 & 422 n.107.

122. *Id.* at 280.

123. See Stewart & Weingast, *supra* note 92, at 236 n.33.

124. See KEYSSAR, *supra* note 21, at 280.

125. See Brian J. Gaines, *Popular Myths About Popular Vote-Electoral College Splits*, 34 PS: POL. SCI. & POL. 71, 73 (2002) (suggesting that Kennedy should not be credited with votes cast for the six Democratic electors who ran unpledged and ultimately cast their electoral votes for Harry Byrd, and that once those popular votes were reattributed, his nationwide margin of around 120,000 votes “evaporates”).

[that] belongs to a bygone day.”¹²⁶ Although concern with the Electoral College has been a through line in American constitutional arguments since the Framing—laid out in magisterial detail in Alexander Keyssar’s five-hundred-plus-page new book¹²⁷—the possibility of the system producing a “wrong winner” in the sense that a candidate who receives fewer votes than his or her opponent nevertheless garners a majority in the Electoral College became a common phrase “only in the final decade of the [twentieth] century.”¹²⁸ By contrast, earlier objections to the Electoral College largely focused on other problems, such as its winner-take-all quality.¹²⁹

Recent work by a trio of University of Texas economists has suggested that the United States’s experience since 2000 with “electoral inversions” has not been a fluke. They have estimated that in elections where the candidates’ popular votes are closely matched, the probability of inversions in which the candidate with fewer votes gets elected is quite real: “in elections decided by a percentage point or less (equal to 1.3 million votes by 2016 turnout), the probability of inversion is about 40%. For races decided by two percentage points or less, the probability of inversion is about 30%.”¹³⁰ Even at a three-percentage-point margin in favor of the Democratic candidate—which would be a four million vote margin in a turnout like 2016’s—the likelihood of a Republican inversion would be 16 percent.¹³¹

Moreover, the likelihood of a wrong winner is not symmetrical. Given the current geographic distribution of Democratic and Republican support, it is far more likely that a Democratic candidate will win the popular vote and lose the electoral vote than that a Republican candidate will suffer that fate.¹³²

And the countermajoritarian effects on the Electoral College are, even more than in the Senate, inflected by race. The constitutional formula for allocating electoral votes has always “sat atop” the base for allocating House seats—in the original Constitution, a base embodying the infamous three-fifths clause.¹³³ While enslaved people might have counted as three-fifths of a person for purpose of allocating seats in Congress, they counted not at all in elections for those seats

126. *Gray v. Sanders*, 372 U.S. 368, 376 n.8 (1963) (rejecting Georgia’s use of an Electoral College analog to select its governor).

127. KEYSSAR, *supra* note 21.

128. *Id.* at 324.

129. *See id.* at 57–170 (discussing the “long struggle to abolish winner-take-all”).

130. Geruso, Spears & Talesara, *supra* note 116, at 2.

131. *Id.* at 12.

132. *See id.* at 3 (stating that “conditional on an inversion occurring, the ex ante probability that it will be won by a Republican ranges from 69% to 93% across models (in contrast to the ex post realization of 100%)”). In fact, depending on the model, they estimated that “the probability that any single Presidential win arises from a popular vote loss ranges from 28% to 71% across models for Republicans, compared to 3% to 14% across models for Democrats.” *Id.* at 13.

133. AMAR, *supra* note 86, at 98; *see* U.S. CONST. art. I, § 2, cl. 3 (apportioning seats in the House to states “according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons”); *see also* KEYSSAR, *supra* note 21, at 21.

(or for a state's electors) given that they were not permitted to vote.¹³⁴ Their presence in the apportionment base served only to reinforce slaveholders' political power in both Congress and the presidency.¹³⁵ And after the Civil War, the political power of white southerners ironically *increased*. Following ratification of the Fourteenth Amendment, southern states, where the vast majority of Black citizens lived, were given full credit for their Black population in apportionment of House seats and electoral votes. But after the end of Reconstruction, that Black population was totally disenfranchised. This "undeclared 'five-fifths clause'"¹³⁶ gave southern white supremacists disproportionate power both in the House of Representatives and in picking the President and thereby in setting federal policy.¹³⁷ For example, in 1904, voters in Ohio cast the same number of votes for President as were cast in nine southern states put together, but Ohio had only twenty-three electoral votes, compared to those states' ninety-nine.¹³⁸ This disparity persisted through the presidential elections of the 1960s as "there were many fewer ballots cast per electoral vote in the South than elsewhere."¹³⁹

Even today, the presidential election system undermines the voting strength of Black citizens. Nearly half the nation's Black citizens live in the eleven states of the former confederacy. And they vote overwhelmingly for the Democratic presidential candidate. But in this century, of all those states, only Georgia, North Carolina, and Virginia have ever cast their electoral votes for a Democrat. For example, "in Texas, a state with thirty-eight electoral votes and a population that was 40 percent Black or Hispanic, not a single electoral vote had been cast for the candidate preferred by voters of color from 1980 through [the present]."¹⁴⁰

Anglo individuals are already a minority of Texas's total population.¹⁴¹ For now, however, they remain a majority of the state's citizens of voting age.¹⁴² But in a modern countermajoritarian twist, state legislatures have acted to shore up white voters' power in the face of changing state demography, by adopting voting restrictions that target voters of color "with almost surgical precision."¹⁴³

134. See Karlan, *Reapportionment*, *supra* note 67, at 1926.

135. See WEGMAN, *supra* note 51, at 82, 95, 105–07.

136. KEYSSAR, *supra* note 21, at 9.

137. WEGMAN, *supra* note 51, at 107.

138. KEYSSAR, *supra* note 21, at 190.

139. *Id.*

140. *Id.* at 360.

141. See *Quick Facts: Texas*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/TX> [<https://perma.cc/B979-VLMB>] (reporting that as of 2019, 41.2 percent of Texas's population was "White alone, not Hispanic").

142. *Citizen Voting-Age Population: Texas*, U.S. CENSUS BUREAU (Nov. 15, 2016), https://www.census.gov/library/visualizations/2016/comm/citizen_voting_age_population/cb16-tps18_texas.html [<https://perma.cc/92FP-V8AS>] (reporting that as of 2016, 53.1 percent of Texas's CVAP was non-Latinx white—as opposed to roughly 69 percent of the U.S. population nationwide).

143. *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016); see also *Veasey v. Abbott*, 830 F.3d 216, 235–42, 272 (5th Cir. 2016) (pointing to significant evidence that Texas deliberately adopted a draconian voter-ID law to suppress minority voting strength, but leaving open the

And they have jiggered district lines to take away the ability for voters of color to elect candidates of their choice just as those voters “were about to exercise it.”¹⁴⁴

Nor are these reactions limited to a few states. “Voting barriers have been erected over the last decade at the highest rate since the civil rights era.”¹⁴⁵ Across the country, “the single predictor necessary to determine whether a state will impose voter-access restrictions is whether Republicans control the ballot-access process.”¹⁴⁶ After the 2020 election, with its historically high turnout, Republican-controlled state legislatures have introduced a wide variety of bills trying to make it harder to vote.¹⁴⁷

The new efforts to suppress minority voting strength of course leave untouched those states’ electoral votes, once again magnifying and entrenching the existing political landscape.¹⁴⁸ They also mean that even with a shifting demography, Republican-dominated state legislatures will likely control the redistricting process after the 2020 census.¹⁴⁹ If so, artful line drawing may succeed in preserving Republican seats in state legislatures and Congress for another decade, regardless of demographic change or a majority of voters’ preferences.

III.

THE SUPREME COURT’S CONSTITUTION OF THE AMERICAN ELECTORATE

The Roberts Court’s decisions regarding the political process have exacerbated the countermajoritarian drift in our politics. In sharp contrast to the

question whether the plaintiffs had proven discriminatory purpose and holding that the law was invalid because it violated the results test of section 2 of the Voting Rights Act).

144. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 403 (2006) (striking down Texas’s reconfiguration of House District 23 to ensure that a Latinx population “that was becoming increasingly politically active and cohesive,” would not be able to oust a Republican incumbent).

145. Nicholas O. Stephanopoulos, *The Anti-Carolene Court*, 2019 SUP. CT. REV. 111, 159. For other discussions of the “new vote denial,” see, for example, Dale E. Ho, *Voting Rights Litigation After Shelby County: Mechanics and Standards in Section 2 Vote Denial Claims*, 17 N.Y.U. J. LEGIS. & PUB. POL’Y 675 (2014); Janai S. Nelson, *The Causal Context of Disparate Vote Denial*, 54 B.C. L. REV. 579 (2013); Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689 (2006).

146. Samuel Issacharoff, *Ballot Bedlam*, 64 DUKE L.J. 1363, 1369 (2015); see also Lisa Marshall Manheim & Elizabeth G. Porter, *The Elephant in the Room: Intentional Voter Suppression*, 2018 SUP. CT. REV. 213, 217, 232–36, 239.

147. Michael Wines, *After Record Turnout, Republicans Are Trying to Make It Harder to Vote*, N.Y. TIMES (Jan. 30, 2021), <https://www.nytimes.com/2021/01/30/us/republicans-voting-georgia-arizona.html?searchResultPosition=1> [<https://perma.cc/Z8PV-LWEX>].

148. Three of the Court’s nine Justices—Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett—were nominees of a President who lost the popular vote. See BALKIN, *supra* note 112, at 140–41.

149. See *State Partisan Composition*, Nat’l Conf. of State Legislatures, (Sept. 14, 2021), <https://www.ncsl.org/research/about-state-legislatures/partisan-composition.aspx#> [<https://perma.cc/83VP-8S5X>] (showing that Republicans control the state legislature and the governorship in twenty-three states, while Democrats control both in only fifteen states).

Warren and Burger Courts, the current Supreme Court has done virtually nothing to make elections more inclusive or more responsive.

Whatever might be true of the Warren Court's other decisions, its reapportionment decisions posed no countermajoritarian difficulty. Far from it. The allocation of seats in congressional delegations (and within state legislatures) that confronted the Warren Court reflected no kind of majority of "the actual people of the here and now."¹⁵⁰ At most, those allocations reflected something about some group of people in some long-gone there and then. The boundaries of the Georgia congressional districts at issue in *Wesberry v. Sanders*¹⁵¹—which required that U.S. House districts have equal populations—had been drawn in 1931.¹⁵² The Alabama state legislature districts that were challenged in *Reynolds v. Sims*¹⁵³ were prescribed almost entirely by the 1901 Alabama Constitution.¹⁵⁴ And the convention that had adopted that constitution had been called "largely, if not principally," to "eliminate" Black voters, many of them in majority-Black counties.¹⁵⁵ Indeed, that convention was "part of a movement that swept the post-Reconstruction South to disenfranchise" Black citizens.¹⁵⁶

The shorthand description of the substantive rule the Court adopted—"one person, one vote"¹⁵⁷—should not obscure the fact that the reapportionment decisions were quite consciously aimed at a form of countermajoritarian difficulty distinct from the one that preoccupied Alexander Bickel. In each of the state legislative cases, the Court pointedly highlighted the way in which the challenged plan enabled a numerical minority of the state's current population to control a majority of the seats.¹⁵⁸

150. BICKEL, *supra* note 2, at 17.

151. 376 U.S. 1 (1964).

152. *Id.* at 2.

153. 377 U.S. 533 (1964).

154. *Id.* at 540.

155. *United States v. Alabama*, 252 F. Supp. 95, 98 (M.D. Ala. 1966) (three-judge court).

156. *Hunter v. Underwood*, 471 U.S. 222, 229 (1985).

157. *Wesberry*, 376 U.S. at 18.

158. *See Reynolds*, 377 U.S. at 545 (noting that in Alabama "only 25.1% of the State's total population resided in districts represented by a majority of the members of the [state] Senate, and only 25.7% lived in counties which could elect a majority of the members of the [state] House of Representatives"); *Md. Comm. for Fair Representation v. Tawes*, 377 U.S. 656, 665–66 (1964) (noting that in Maryland, 14.1 percent of the population could elect a majority of the state senate and 24.7 percent could elect a majority of the state house); *Roman v. Sincok*, 377 U.S. 695, 705 (1964) (noting that in Delaware, about 22 percent of the population could elect a majority of the state senate and 18.5 percent could elect a majority of the state house); *Lucas v. Colo. Gen. Assembly*, 377 U.S. 713, 725 (1964) (noting that in Colorado, 29.8 percent could elect a majority of the senate and 32.1 percent could elect a majority of the house); *WMCA, Inc. v. Lomenzo*, 377 U.S. 633, 647–79 (1964) (noting that 41.8 percent could elect a majority of the senate and 34.7 percent could elect a majority of the house); *Davis v. Mann*, 377 U.S. 678, 688–89 (1964) (noting that in Virginia, 41.1 percent could elect a majority of the senate and 40.5 percent could elect a majority of the lower house).

And while in one sense the challenged plans could be described as “topsy-turvical” or “crazy quilt[s],”¹⁵⁹ the huge population disparities were not random. The apportionments before the Court “systematically biased the overall legislative complexion in favor of identifiable groups”—most notably white rural voters.¹⁶⁰ And the Court was well aware of the effects that bias had on substantive decision-making about the most pressing issues of the day. Much of the Court’s workload—“particularly in the area of civil rights, where extremist politicians from underpopulated and disenfranchised ‘Black Belt’ regions were at the forefront of massive resistance—was an indirect consequence of malapportionment’s hold on state legislatures.”¹⁶¹

Nor was malapportionment the only countermajoritarian feature of the political system that the Warren and Burger Courts addressed. In addition to the one-person, one-vote cases, the Court also confronted a variety of participation-focused restrictions designed to entrench the existing political order. One of the Court’s first forays into representation-reinforcing judicial review occurred in 1960 in *Gomillion v. Lightfoot*.¹⁶² Tuskegee, Alabama was a majority-Black city in a majority-Black county. Facing a rising tide of civic engagement in which Black citizens sought to register, Alabama enacted a statute that redrew the city’s boundaries to remove all but a handful of Black residents, leaving them unable to vote in municipal elections but still governed by the city’s police jurisdiction.¹⁶³ At roughly the same time, the white state senator from the county proposed abolishing the county altogether to prevent Black citizens from gaining political power.¹⁶⁴ Later, in *Carrington v. Rash*¹⁶⁵ and *Dunn v. Blumstein*,¹⁶⁶ the Court struck down state laws that put barriers in the way of newcomers who had not had “impress[ed] upon” them the “local viewpoint.”¹⁶⁷ The fact that the

159. *Baker v. Carr*, 369 U.S. 186, 254 (1962) (Clark, J., concurring).

160. Karlan, *Rights to Vote*, *supra* note 109, at 1718.

161. Pamela S. Karlan, *John Hart Ely and the Problem of Gerrymandering: The Lion in Winter*, 114 YALE L.J. 1329, 1333 (2005); *see also* JOHN HART ELY, ON CONSTITUTIONAL GROUND 4 (1996) (reporting that Chief Justice Warren “used to say that if *Reynolds v. Sims* had been decided before 1954, *Brown v. Board of Education* would have been unnecessary”); Anthony Lewis, *Legislative Apportionment and the Federal Courts*, 71 HARV. L. REV. 1057, 1065–66, 1065 n.44 (1958) (commenting on the consequences of malapportioned state legislatures “ignor[ing] urban needs” and quoting Senator Paul Douglas about the irony of “those who complain most about Federal encroachment in the affairs of the States” being the ones who deny to “urban majorities in their States the opportunity to solve their problems through State action”). For discussion of the majoritarian cast of the Warren Court’s constitutional and statutory voting-rights-related decisions, *see* Pamela S. Karlan, *Foreword: Democracy and Disdain*, 126 HARV. L. REV. 1, 16–21 (2012) [hereinafter *Democracy and Disdain*].

162. 364 U.S. 339 (1960).

163. *See* Pamela S. Karlan, *Just Politics? Five Not So Easy Pieces of the 1995 Term*, 34 Hous. L. REV. 289, 301–02 (1997) (describing the backdrop to *Gomillion*).

164. *See* ISSACHAROFF ET AL., *supra* note 81, at 61–62 (describing the Alabama legislation); Pamela S. Karlan, *The Alabama Foundations of the Law of Democracy*, 67 ALA. L. REV. 415, 418 (2015) (describing the resistance to Black political power).

165. 380 U.S. 89 (1965).

166. 405 U.S. 330 (1972).

167. *Id.* at 354–55.

newcomers might have a different interest than the preexisting population provided no basis for excluding them. “‘Fencing out’ from the franchise a sector of the population because of the way they may vote,” the Court explained, was “constitutionally impermissible” because it undermined “‘the maintenance of democratic institutions.’”¹⁶⁸ Thus, “‘if a challenged statute grants the right to vote to some citizens and denies the franchise to others, ‘the Court must determine whether the exclusions are *necessary* to promote a *compelling* state interest.’”¹⁶⁹

The current Supreme Court has retreated from the proposition that restrictions on voting rights should be subjected to some form of heightened judicial skepticism. In its place, the Court has imported a more “flexible” standard first developed in cases involving candidates’ access to the ballot.¹⁷⁰ Under the new standard, only if the burdens on a citizen’s ability are “severe” must the restriction be “narrowly drawn to advance a state interest of compelling importance.”¹⁷¹ Otherwise, a state’s “‘important regulatory interests are generally sufficient to justify’ the restrictions.”¹⁷²

The relaxation of the level of scrutiny for infringements on the right to vote would have been troubling even if it had not coincided with a wave of new state laws that made it harder to vote. But the Court adopted its more deferential approach in a series of cases where there was strong evidence of partisan motivation.

Consider *Crawford v. Marion County Election Board*,¹⁷³ where the Court upheld Indiana’s imposition of a strict voter-ID law. For most of U.S. history, no state required voters to present government-issued identity documents in order to cast their ballots. The surge of voter-ID laws postdated the 2000 election debacle and occurred almost entirely in states where Republicans controlled the legislative process.¹⁷⁴ Justice Stevens’s opinion announcing the judgment of the Court declared that preventing voter fraud and promoting voter confidence were sufficiently important regulatory interests to justify the statute.¹⁷⁵ With respect to preventing fraud, there was no evidence whatsoever that Indiana had ever in

168. *Carrington*, 380 U.S. at 94 (quoting *Schneider v. New Jersey*, 308 U.S. 147, 161 (1939)).

169. *Dunn*, 405 U.S. at 337 (1972) (quoting *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 627 (1969)).

170. The test can be traced back to the Supreme Court’s decisions in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), a case involving Ohio’s deadline for independent candidates to qualify for the ballot in presidential elections, and *Burdick v. Takushi*, 504 U.S. 428 (1992), a case involving Hawaii’s refusal to make any provision for voters to cast write-in votes for candidates not on the ballot.

171. *Burdick*, 504 U.S. at 434 (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)).

172. *Id.* (quoting *Anderson*, 460 U.S. at 788). I discuss the doctrinal shift in more depth in Pamela S. Karlan, *Undue Burdens and Potential Opportunities in Voting Rights and Abortion Law*, 93 IND. L.J. 139 (2018) [hereinafter *Undue Burdens*].

173. 553 U.S. 181 (2008).

174. For discussion of the rise of voter-ID requirements, see ISSACHAROFF ET AL., *supra* note 81, at 118–20.

175. See *Crawford*, 553 U.S. at 194–97 (Stevens, J.) (discussing these interests). Justice Stevens wrote for himself, the Chief Justice, and Justice Kennedy. Justice Scalia, joined by Justices Thomas, and Alito, concurred in the judgment.

its history experienced any occasion of in-person impersonation of a voter—the only sort of fraud that an ID requirement might prevent.¹⁷⁶ As for protecting public confidence, the Court was later to assert that “[v]oter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised” and presumably will forgo their right to vote.¹⁷⁷ That hypothesis too lacks any empirical support.¹⁷⁸ But the upshot was to permit jurisdictions to protect the rights of voters who would otherwise “feel” disenfranchised by actually excluding some number of their citizens from voting. Men feared witches and burnt women.¹⁷⁹

Crawford gave a green light to jurisdictions to shape the electorate for partisan advantage. Justice Stevens recognized that partisan consideration might have “played a significant role” in the Republican-dominated legislature’s decision to impose the new ID requirement.¹⁸⁰ But he “did not ask the normal next question in constitutional law: would the challenged ID requirement have been adopted in the absence of that impermissible motive?”¹⁸¹ The answer to that question was almost certainly “No.” But unless courts ask that further question, they are likely to uphold such laws.¹⁸²

176. *Id.* at 194. The concurring Justices agreed with Justice Stevens’s analysis of the state’s interests as being “sufficient to sustain” what they saw as the “minimal burden” an ID requirement imposed. *See id.* at 209 (Scalia, J., concurring).

177. *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam).

178. *See* Stephen Ansolabehere & Nathaniel Persily, *Vote Fraud in the Eye of the Beholder: The Role of Public Opinion in the Challenge to Voter Identification Requirements*, 121 HARV. L. REV. 1737, 1754–59 (2008).

179. *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).

180. 553 U.S. at 203.

181. Karlan, *Undue Burdens*, *supra* note 172, at 148. That is the established standard for cases involving an impermissible purpose: once the plaintiff shows that the government was motivated, even in part, by a forbidden purpose, the government bears “the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered.” *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 270 n.21 (1977); *see also* *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977).

182. The Seventh Circuit’s recent decision in *Lufi v. Evers*, 963 F.3d 665 (7th Cir. 2020), provides a striking example of this point. The case challenged, among other things, Wisconsin’s reduction in the number of hours available for early voting. The district court found that the Republican-dominated legislature—itsself the product of aggressive partisan gerrymandering that entrenched Republican control even in years when a majority of voters supported Democratic candidates, *see* *Gill v. Whitford*, 138 S. Ct. 1916 (2018)—had adopted the reduction to dampen turnout among Black, overwhelmingly Democratic, voters. *Lufi*, 963 F.3d at 671. Judge Easterbrook, however, declared that that finding could not support striking down the reduction because “the belief that a legislature cannot take politics into account when making decisions that affect voting was disapproved” by *Rucho v. Common Cause*. *Id.* at 670. “If one party can make changes that it believes help its candidates, the other can restore the original rules or revise the new ones. The process does not include a constitutional ratchet.” *Id.*; *see also* *Veasey v. Abbott*, 830 F.3d 216, 303 (5th Cir. 2016) (Jones, J., dissenting) (defending Texas’s draconian voter-ID law, despite its intended disparate impact on Black and Latino voters because the law reflected “party politics, not racism”).

The Court took a further countermajoritarian step in *Rucho v. Common Cause*.¹⁸³ There, the Court held that “partisan gerrymandering claims present political questions beyond the reach of the federal courts.”¹⁸⁴ The top-line rationale for the Court’s decision was that although such gerrymandering might be “incompatible with democratic principles,”¹⁸⁵ there was no “judicially discernible and manageable” standard that “provide[d] a solid grounding for judges to take the extraordinary step of reallocating power and influence between political parties.”¹⁸⁶

Justice Kagan’s dissent and recent scholarship have offered detailed and, to my mind, persuasive responses to this assertion.¹⁸⁷ But it is worth recognizing the countermajoritarian strand in the Court’s reasoning even if one were to accept Louis Michael Seidman’s recent argument that “on balance, we are better off without the Supreme Court mucking around with this problem,” because the current Court (like most Courts in U.S. history) is stacked against political change.¹⁸⁸

To begin, in *Rucho*, as in *Crawford*, the Court seemed to treat seeking partisan advantage as a legitimate use of government power. It cited a string of cases that it asserted had recognized that jurisdictions could take “[p]olitics and political considerations” into account in drawing district lines.¹⁸⁹ But in none of those prior cases was there anything like the entrenchment that characterized the North Carolina plan, where even in an election where a majority of the state’s voters preferred Democratic congressional candidates, Republicans managed to preserve their 10 to 3 advantage in seats.¹⁹⁰ Indeed, the only case the Court cited that actually involved a political gerrymandering claim challenged a plan that “within quite tolerable limits,” had “allocate[d] political power to the parties in accordance with their voting strength.”¹⁹¹ To be sure, bipartisan incumbent-protecting gerrymanders pose a threat to the “vitality of democratic governance.”¹⁹² But that threat does not necessarily involve countermajoritarian entrenchment. Many bipartisan gerrymanders give a majority of the seats to a

183. 139 S. Ct. 2484 (2019).

184. *Id.* at 2506–07.

185. *Id.* at 2506 (quoting *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2658 (2015)).

186. *Id.* at 2502.

187. *See id.* at 2515–25 (Kagan, J., dissenting) (explaining why a judicially manageable standard is both available and important to apply); Jamal Greene, *Foreword: Rights as Trumps?*, 132 HARV. L. REV. 28, 127–31 (2018); Klarman, *supra* note 41, at 191–94; Stephanopoulos, *supra* note 145, at 113–15, 12–35, 141–47.

188. Louis Michael Seidman, *Rucho Is Right—But for the Wrong Reasons*, 23 U. PA. J. CONST. L. 865, 866, 876–77 (2021).

189. *Rucho*, 139 S. Ct. at 2497 (quoting *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973)).

190. Stephanopoulos, *supra* note 145, at 113.

191. *Gaffney*, 412 U.S. at 754.

192. For discussion of this point, see Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541, 572–74 (2004) [hereinafter *Where to Draw the Line*].

party that in fact has received a majority of the votes cast statewide. The other three cases on which the Court relied in *Rucho* all involved claims that a particular plan was unconstitutional because it was excessively race-conscious. In each case, the states defended against that assertion by claiming the contours of the plan were explicable on political, rather than racial, grounds. Nor did any of the cases involve the assertion that the plan unfairly cemented a party into power regardless of how the electorate voted.¹⁹³ Indeed, the question of vote dilution did not even arise.¹⁹⁴

The Court's account of the history was equally incomplete. The starting point for its analysis was the proposition that "[t]o hold that legislators cannot take partisan interests into account when drawing district lines would essentially countermand the Framers' decision to entrust districting to political entities."¹⁹⁵ The Framers, the Court suggested, assumed that Congress, rather than the courts, would enforce constitutional principles of fairness between parties.

But the Framers famously assumed they had created a Constitution that would *prevent* the emergence of parties (what they called "faction").¹⁹⁶ So the idea that they anticipated, and approved of, political gerrymandering seems implausible. As for the idea of a minority-entrenching political gerrymander, Madison famously wrote that "[i]f a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote. It may clog the administration, it may convulse the society; but it will be unable to execute and mask its violence under the forms of the Constitution."¹⁹⁷ Today, we face exactly that risk.

In any event, the political mechanism the Framers included in the Constitution for dealing with unfair allocation of congressional seats—a grant of power to Congress to override a state's choice of the manner used to elect members of Congress¹⁹⁸—does not work in a world of political parties. To the contrary, "national intervention" in the form of involvement by the parties' leadership in state redistricting "now actually exacerbates the problems of partisanship rather than dampening them," because a party can consolidate its power by finding additional seats anywhere in the country.¹⁹⁹

193. For further discussion of the way in which jurisdictions have defended themselves against claims of impermissible race-consciousness by asserting partisan motivations, see Manheim & Porter, *supra* note 146, at 245.

194. See Samuel Issacharoff & Pamela S. Karlan, *Standing and Misunderstanding in Voting Rights Law*, 111 HARV. L. REV. 2276, 2277 (1998).

195. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2497 (2019).

196. See Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2313 (2006).

197. THE FEDERALIST NO. 10 (James Madison).

198. See U.S. CONST., art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations . . .").

199. Issacharoff & Karlan, *Where to Draw the Line*, *supra* note 192, at 560.

As for the idea that the Framers were deeply concerned with districting, it is worth remembering that “[f]or more than 50 years after ratification of the Constitution, many States elected their congressional representatives through at-large or ‘general ticket’ elections”²⁰⁰—that is, elections without districting. The *Rucho* Court emphasized that at-large elections “meant that a party could garner nearly half of the vote statewide and wind up without any seats in the congressional delegation.”²⁰¹ True enough, but an at-large or general ticket election could *never* result in a party that received fewer votes obtaining more seats than the party that received more votes. The vice of that system is that winner-take-all is excessively majoritarian, not that it is *countermajoritarian*.

As for its own precedent, the Court’s account of the one-person, one-vote cases that made quantitative vote dilution claims justiciable²⁰² is striking for the way it focused entirely on the Warren Court’s individualist rhetoric. It avoided any recognition of the decisions’ majoritarian underpinnings.²⁰³ The Warren Court’s intervention was, as I explained earlier, motivated in significant part by its view that conservative rural legislators had entrenched themselves in power long after demographic changes had rendered their constituents a numerical minority.²⁰⁴

Ironically, although *Rucho* suggests that the Constitution has given Congress the power to do something about partisan gerrymandering,²⁰⁵ the Roberts Court’s prior decisions hardly suggest deference to Congress. Consider the Court’s response to Congress’s most ambitious prior effort to ensure political fairness: the special preclearance regime of the Voting Rights Act of 1965. As I have explained elsewhere, while the one-person, one-vote cases required the Court to derive a theory of democracy for itself, the Voting Rights Act was the product of a national, majoritarian consensus in favor of a more inclusive

200. *Rucho*, 139 S. Ct. at 2499. For discussions of the motivations behind, and arguments over, the 1842 Act’s single-member district requirement, see ENGSTROM, *supra* note 80, at 43–55; ZAGARRI, *supra* note 80, at 129–31; Martin H. Quitt, *Congressional (Partisan) Constitutionalism: The Apportionment Act Debates of 1842 and 1844*, 28 J. EARLY REPUBLIC 627, 637–39, 641–42 (2008).

201. *Rucho*, 139 S. Ct. at 2499.

202. “Quantitative” vote dilution cases are “based solely on a mathematical analysis” that shows that the votes of persons in one district are devalued relative to the votes of persons in a less populated district. *Nevett v. Sides*, 571 F.2d 209, 215 (5th Cir. 1978). “Qualitative” vote dilution claims involve an assertion that “the election method”—for example, the way district lines have been drawn—“impairs the political effectiveness of an identifiable subgroup of the electorate,” and thus, “‘the quality of representation’ the affected group receives is adversely affected.” Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 HARV. C.R.-C.L. L. REV. 173, 176 (1989) (quoting *Whitcomb v. Chavis*, 403 U.S. 124, 142 (1971)); see also Pamela S. Karlan, *Answering Questions, Questioning Answers, and the Roles of Empiricism in the Law of Democracy*, 65 STAN. L. REV. 1269, 1289 (2013) (describing the move from quantitative to qualitative vote dilution claims).

203. See *Rucho*, 139 S. Ct. at 2496.

204. See *supra* text accompanying notes 157–161.

205. *Rucho*, 139 S. Ct. at 2498.

electorate.²⁰⁶ But in *Shelby County v. Holder*,²⁰⁷ the Supreme Court struck down the formula used to bring jurisdictions under the preclearance regime, thereby relieving the previously covered jurisdictions (primarily in the South and Southwest) of the obligation to prove that changes in their election laws would have neither a discriminatory purpose nor a discriminatory effect.²⁰⁸ And it did so in a period of rapid change within the electorate that threatened continued white Republican legislative control in several previously covered jurisdictions.²⁰⁹

It is an open question how the current Court would respond to more sweeping congressional attempts to guarantee political fairness by using its enforcement power under the Fourteenth Amendment, or even the seemingly “paramount” power of the Election Clause of Article I.²¹⁰ In *Arizona v. Inter Tribal Council*, its most recent exposition of the Elections Clause, the Court declared that “[p]rescribing voting qualifications . . . ‘forms no part of the power to be conferred upon the national government’ by the Elections Clause, which is ‘expressly restricted to the regulation of the times, the places, and the manner of elections.’”²¹¹ So presumably, Congress could regulate fairness in districting itself—either by setting criteria or by requiring the use of nonpartisan commissions—because that would regulate the “manner” of electing Representatives.²¹² But given the Court’s deferential standard with regard to restrictions on who can vote (and, buried in a footnote, the question whether registration rules involve “qualifications” or “manner”²¹³), the Court may be unwilling to approve expansive congressional protection of voting rights as “congruen[t] and proportional[.]” to “the injury to be prevented or remedied.”²¹⁴

206. See Karlan, *Democracy and Disdain*, *supra* note 161, at 21.

207. 570 U.S. 529 (2013).

208. Thus, Nick Stephanopoulos has described *Shelby County* as a “perverse *Carolene*” decision—that is, a decision that turned on its head the second pillar of the Court’s decision in *United States v. Carolene Products Co.* that courts should apply “more exacting judicial scrutiny” to “legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation.” 304 U.S. 144, 152 n.4 (1938). In *Shelby*, he pointed out, the Court affirmatively “blocked a nonjudicial actor from curbing undemocratic practices” that the Court’s own decisions did not directly reach. Stephanopoulos, *supra* note 145, at 169. Stephanopoulos predicted that *Shelby County* might just be the opening shot in a perverse *Carolene* jurisprudence, across an array of areas in the law of democracy. See *id.* at 147–69.

209. See *supra* text accompanying notes 143–145 (describing efforts in Texas and North Carolina—both covered (in North Carolina’s case, partially covered)—jurisdictions to stem changing demographics in the electorate); Lynn Adelman, *The Roberts Court’s Assault on Democracy*, 14 HARV. L. & POL’Y REV. 131, 141–42 (2019).

210. *Ex parte Siebold*, 100 U.S. 371, 392 (1880); see also *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 8–9 (2013).

211. *Inter Tribal Council*, 570 U.S. at 17 (quoting THE FEDERALIST NO. 60, at 371 (Alexander Hamilton)).

212. See *id.*

213. See *id.* at 17 n.9.

214. *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997) (applying this standard to Congress’s use of its enforcement powers generally); see also *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557

Nor is it clear that the Court will permit popular majorities to combat the countermajoritarian difficulty through the initiative. In *Arizona State Legislature v. Arizona Independent Redistricting Commission*,²¹⁵ the Court voted five to four to permit the people of Arizona to adopt an independent redistricting commission over the objection of the legislature. But the four most conservative members of the Court dissented on the grounds that such legislation trenched impermissibly on the state legislature's power under Article I, section 4 to prescribe the manner of electing representatives.²¹⁶ And since then, the Court has become more conservative, with the replacement of Justices Kennedy and Ginsburg (both part of the five-Justice majority in the Arizona case) with Justices Kavanaugh and Barrett, respectively. Some of the recent stay activity before the Court in the run-up to the 2020 election suggests there may be an appetite for a more robust reading of the state legislature's prerogative to control election rules.²¹⁷ The Justices, then, are not just themselves unwilling to protect majoritarian democracy; they seem poised to disable other actors from protecting it as well.

A number of scholars have offered explanations that account for this countermajoritarian turn at the Court. Nick Stephanopoulos has offered a "legal realist thesis": the Court's decisions "empirically benefit the Republican Party, whose presidents appointed a majority of the sitting Justices."²¹⁸ Whatever the Justices' subjective motivations, their decisions align with partisan advantage.²¹⁹ Mike Klarman has added that in a world of deep ideological and partisan polarization, Justices appointed by Republican Presidents and Justices appointed by Democratic Presidents "disagree about values and probably about facts."²²⁰ Thus, "whether conscious strategizing or motivated reasoning is doing the work, the bottom line is the same: a Republican Court will not protect democracy from Republican efforts to undermine it."²²¹ Jack Balkin has advanced an even more intricate account, in which the current moment falls at a particular intersection of three cycles of constitutional time.²²² We are at a point of regime change, as the Reagan era in which Republicans dominated national politics is ending; democracy is experiencing a high level of polarization; and the country is

U.S. 193, 204 (2009) (suggesting this was the appropriate constitutional test for protections of voting rights).

215. 576 U.S. 787 (2015).

216. See *id.* at 824–50 (Roberts, C.J., joined by Scalia, Thomas & Alito, JJ., dissenting).

217. See, e.g., *Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 29 (2020) (Gorsuch, J., joined by Kavanaugh, J., concurring in denial of application to vacate stay) ("The Constitution provides that state legislatures—not federal judges, not state judges, not state governors, not other state officials—bear primary responsibility for setting election rules."); *Republican Party of Pa. v. Boockvar*, 141 S. Ct. 1, 2 (2020) (Alito, J., joined by Thomas & Gorsuch, JJ.) (suggesting that state courts may lack authority, even under the state constitution, to "override" state legislatures' decisions with regard to election rules).

218. Stephanopoulos, *supra* note 145, at 178.

219. *Id.* at 180.

220. Klarman, *supra* note 41, at 231.

221. *Id.*

222. See BALKIN, *supra* note 112.

confronting “constitutional rot.”²²³ In such a world, “the Supreme Court may be a vanguard of partisan policy, but is unlikely to be a vanguard of democracy protection and constitutional renewal.”²²⁴ The parties “disagree about what democracy actually is,”²²⁵ and “as a result, when Justices on a polarized Court promote their appointing party’s constitutional values, they may also be helping that party entrench itself politically.”²²⁶ But whatever the explanation, this is a countermajoritarian Court.

CONCLUSION

Regardless of why the Court has abandoned majoritarian, representation-reinforcing judicial review, the starting point for moving towards a democracy reflective of a contemporary “We the People” depends on understanding what has happened to our politics over the past half century. The current Court and its democracy-depleting decisions are a symptom, even more than a cause, of our present condition.

The political fault lines that divide us seem particularly deep after the 2020 election. In the face of a deadly pandemic, more citizens voted than ever before.²²⁷ They were able to do so in part because election officials in many parts of the country responded to the health crisis with ingenuity and a commitment to enabling every citizen to cast a ballot. Jurisdictions expanded opportunities to vote by mail, made it easier for voters to return their ballots, and even made it possible for citizens to vote round the clock from their cars.²²⁸ And yet, a supermajority of Republican voters believe that the election results are illegitimate.²²⁹ Perhaps this reflects a fundamental divide over the very concept of the right to vote as a constitutional value: while 78 percent of Democrats and independent voters who lean Democratic believe voting is a fundamental right

223. *See id.* at 136–37.

224. *Id.* at 144.

225. *Id.* at 123.

226. *Id.* at 126.

227. *See* Drew Desilver, *Turnout Soared in 2020 as Nearly Two-Thirds of Eligible U.S. Voters Cast Ballots for President*, PEW RSCH. CTR. (Jan. 28, 2021), <https://www.pewresearch.org/fact-tank/2021/01/28/turnout-soared-in-2020-as-nearly-two-thirds-of-eligible-u-s-voters-cast-ballots-for-president/> [<https://perma.cc/MA2L-2AX8>].

228. *See, e.g.*, Peter Holley, *Meet the Harris County Voters Who Showed Up After Midnight to Cast Their Ballots*, TEX. MONTHLY (Oct. 30, 2020), <https://www.texasmonthly.com/news-politics/harris-county-24-hour-voting/> [<https://perma.cc/67BM-HJEQ>] (describing how Houston enabled voters to vote twenty-four hours a day and drop off their ballots from their cars).

229. *See* Geoffrey Skelley, *Most Republicans Still Won’t Accept That Biden Won*, FIVETHIRTYEIGHT (May 7, 2021), <https://fivethirtyeight.com/features/most-republicans-still-wont-accept-that-biden-won/> [<https://perma.cc/B9PV-NF8E>] (reporting the results of a recent poll that showed that 97 percent of Democrats and 69 percent of independents thought Biden legitimately won, while 70 percent of Republican voters did not believe he won).

that should not be restricted, less than a third of Republicans and Republican-leaning independents think so.²³⁰

But even if we could overcome that disagreement, and every eligible citizen in the United States were to cast a ballot and have that ballot counted, we would still face the new countermajoritarian difficulty for as long as Americans sort themselves as they have been doing for the past half century. The countermajoritarian features of the Senate are not going away any time soon. Neither is the countermajoritarian potential of the Electoral College. A difficulty we face is that while the words of many rights-creating provisions in the Constitution are capacious enough to respond to changes in the way America is constituted—think of how the Eighth Amendment or the Equal Protection Clause jurisprudence has evolved—the words of structural provisions like Article II, Section 1, the Twelfth Amendment, and the equal suffrage provision in Article V are not. At some point, the American people will have to confront that fact and they will have to develop a political and constitutional response. “Not everything that is faced can be changed; but nothing can be changed until it is faced.”²³¹

230. See Vianney Gomez & Carroll Doherty, *Wide Partisan Divide on Whether Voting Is a Fundamental Right or a Privilege with Responsibilities*, PEW RSCH. CTR. (July 22, 2021), <https://www.pewresearch.org/fact-tank/2021/07/22/wide-partisan-divide-on-whether-voting-is-a-fundamental-right-or-a-privilege-with-responsibilities/> [https://perma.cc/PW2E-VME7].

231. James Baldwin, *As Much Truth as One Can Bear*, N.Y. TIMES, Jan. 14, 1962 (§ 7), at 1.