

Is the US Constitution Broken and Can it Be Fixed?

BY RONALD M. SANDGRUND

“Our new Constitution is now established, everything seems to promise it will be durable; but, in this world, nothing is certain except death and taxes.”

—Benjamin Franklin, 1789

“[A]n American system of government that was meant to preserve minority rights has instead ended up enabling minority rule.”

—Gautam Mukunda¹

“The United States Senate is perhaps the greatest institution of consensus ever designed.”

—Jay Coss²

This is the eighth article series by The Inquiring Lawyer addressing a topic that Colorado lawyers may discuss privately but rarely talk about publicly. The topics in this column are explored through dialogues with lawyers, judges, law professors, law students, and law school deans, as well as entrepreneurs, journalists, business leaders, politicians, economists, sociologists, mental health professionals, academics, children, gadflies, and know-it-alls (myself included). If you have an idea for a future column, I hope you will share it with me via email at rms.sandgrund@gmail.com.

This month’s article asks whether the US Constitution is broken and whether it can be repaired.

Introduction

A friend of mine is a retired constitutional law professor. By and large we are political opposites, perhaps even polar opposites, but we are not polarized. During President Trump’s tenure I kidded him that he retired too early, missing

out on lecturing about the many fascinating constitutional issues that arose during the Trump administration. Of course, for those with memories that reach further back than the last administration, there have been plenty of constitutional issues—some might say “crises”—that arose during every presidential administration that I can remember. (Technically, I can be carbon-dated to the Eisenhower administration, but I didn’t really care what was going on politically until the Johnson administration.³) My friend and I got together for two very long breakfasts—the second, a “virtual” pandemic meal—to discuss the pros and cons of impeachment, the vagaries of the 2020 presidential election, and the events of January 6, 2021. My friend is cut from a fairly conservative political cloth; me, mostly the opposite. But we were able to discuss, quite civilly, these typically contentious issues, often punctuated with wide swaths of common ground.

I am intrigued by politics but have no special schooling in the subject. I am interested in not just political science, but politicians—what makes them tick, why they do what they do, how the sausage maker works, and why people seem so emotionally invested in this or that office-bearer these days. While the pandemic wound itself up and down, I got sucked into the TV series *Billions*, which follows the careers of two quasi-sociopaths, both seeking power, one through the accumulation of immense wealth, the other through law and politics. As the show develops, a third rival emerges, a younger, idealistic, brilliant foil. It struck me that *Billions* was just a fix for my previous *Game of Thrones* addiction for high-stakes political intrigue. Politics: cage-fighting by other means.

I think many of us believe the US Constitution is “broken” in one respect or another—that beyond US Supreme Court decisions with which we disagree or the weaknesses of our elected class, the Constitution itself has baked-in flaws, some emanating from the fact that it represents a great compromise struck in 1789 between small and large states, rural and more urban states, and pro-slavery and anti-slavery states, in order to form a more perfect union.⁴ Today the Constitution’s guarantees of freedom of the press, an individual’s right to bear arms, and religious liberty and the separation of church and state are all points of conflict and criticism. This article examines one of the Constitution’s perceived flaws—the US Senate.

Amid the past year’s political machinations and my TV binge-watching, I came across an article noting that demographers were in general agreement that in another couple of decades states representing just 30% of Americans would be electing 70 out of 100 US senators.⁵ My gut reaction was that this was a recipe for political disaster. A country that prides itself on being a pluralistic representative democracy might be controlled by a small and arguably less heterogenous political minority. Of course, I had to check my native-New Yorker instincts for a moment and remind myself that this great country of ours is a representative republic. Each state is its own sovereign, and protecting the rights of political minorities is part and parcel of our glorious institutional fabric—a view I’ve come to embrace. So, I decided to sit down with a constitutional law professor and a nationally syndicated political pundit to get their thoughts on this possible future.

Participants



Jay Ambrose is the former editor of the *Rocky Mountain News* and the *El Paso-Herald Post*, and is currently a syndicated op-ed columnist for the Tribune

News Service. His opinions are sent to hundreds of newspapers throughout the country. He has taught opinion writing in classes at the University of Texas at El Paso, Virginia Commonwealth University, and Colorado Christian University.



Scott Skinner-Thompson is a professor at Colorado Law, focusing on constitutional, civil rights, and privacy law, with a particular interest in LGBTQ and HIV issues.

Bringing together these topics, his new book, *Privacy at the Margins* (Cambridge Univ. Press 2020), examines how privacy can function as an expressive, anti-subordination tool of resistance to surveillance regimes.

Our Constitution, One Among Many



The Inquiring Lawyer: Most modern nation-states have adopted governing documents, like constitutions, to express the social contract between

the state and its people. Only a few democratic countries—including the United Kingdom, New Zealand, and Israel—don't have constitutions.⁶ There's always tension between the conditions that existed when a constitution was adopted and future conditions under which that constitution operates due to changing beliefs, values, and technology. As a result, most constitutions allow for their amendment.

I examined with my interviewees the merits of the US Senate's dynamics. The Senate has the power to pass or deny legislation. The Senate has the power to approve or block the appointment of cabinet members, ambassadors, Supreme Court justices, federal judges, and most executive agency heads. The Senate has the power to ratify or reject treaties. The Senate sits in judgment during the trial of federal officials who have been impeached. This power is sometimes referred to as "The Kill Switch."⁷ Given these extensive powers, does it make sense that, for example, the number of senators granted to California (40 million people) equals that of Wyoming (500,000 people)?⁸ I am going to explore with my two guests whether our Constitution can stand the test of time and, if it cannot, whether amending it can remedy its shortcomings. Also, if our senatorial selection process is leading us toward the abyss, we consider whether our constitutional order can keep us safe.

InQ: Jay, we've been friends for years, and I've enjoyed our many debates on all things political, even though we often disagree. Still,

I'm always rendered a bit wiser after hashing through the issues with you. Do you believe the way the US Constitution is written allows it to deal with changing conditions over time, without any immediate need for amendment?



Jay Ambrose: Thomas Jefferson thought we ought to have a new Constitution every 20 years or so as an adjustment to a new generation, and I think he was wrong. Our Constitution is a powerful document by virtue of addressing central issues in few words by means of assiduously researched and debated principles that have something akin to universal reach. Redressing all of this could easily veer in wrong directions and lessen the meaning of the document.

InQ: Still, the Constitution has been amended many times—so the need to do so has arisen.

Ambrose: Many would agree that amendments are needed right now; the question is what amendments? And, even if dozens of political bigwigs think a constitutional amendment is crucial for our future, they can be wrong. Amendments per se are not always wonderful.

InQ: But times change—surely many of these changes could not have been imagined by our country's founders?

Ambrose: Changing conditions can mean all kinds of things—a government becoming autocratic, new cultural mores that seem either splendid or disgusting, technological developments, a pandemic, demographic change, racial strife, accruing an unbelievable debt, a white working class that is killing itself off at the rate of 150,000 a year, rising crime rates, political insanity, climate change, and more. It seems to me there are many ways to address these issues without necessarily changing a constitution that has ably weathered the passage of time.

InQ: Professor Skinner-Thompson, your thoughts—do you believe the US Constitution is written in a way to allow it to deal with changing conditions over time?



Prof. Skinner-Thompson: For the most part, yes. In a variety of contexts ranging from recognition of fundamental rights to construing constitutional limits on the states' ability to interfere with interstate commerce, the US Supreme

Court has shown an awareness—albeit imperfect—of changing social, political, and economic conditions. For example, when recognizing fundamental rights under the Due Process Clause, the Court has recognized that while history and tradition are guideposts in terms of what counts as a fundamental right, the Constitution's guarantees for individual rights are capable of evolution. As put by then-Justice Kennedy in *Lawrence v. Texas*,⁹ where the Court struck down bans on same-sex intimate relations, the Founders "did not presume" to know "the components of liberty in its manifold possibilities." Instead, "[t]hey knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom." Similarly, in the recent case of *South Dakota v. Wayfair*,¹⁰ the Court responded to the changing nature of the digital economy by overturning a prior decision and permitting states to tax purchases on out-of-state sellers even if the seller didn't have a physical presence in the state. This isn't to say amendments are never appropriate or needed—they are. For example, the Equal Rights Amendment explicitly guaranteeing sex equality would be an important change. But even failing an amendment on a particular issue, the Constitution was designed capaciously enough to often permit evolution with social understandings of justice through judicial interpretation.

Amending the Constitution: Two Paths

InQ: A quick primer for the readers on how to amend our Constitution: Option 1—An amendment to the Constitution may be proposed by any member of Congress and will be considered under the standard legislative process in the form of a joint resolution. In addition, all American citizens are free to petition Congress or their state legislatures to amend the Constitution. To be approved, the amending resolution must be passed by a two-thirds supermajority vote in both the House and the Senate. If approved by Congress, the proposed amendment is sent to the governors of all 50 states for the states' approval, called "ratification." Congress has

specified one of two ways by which the states should consider ratification: The governor submits the amendment to the state legislature for its consideration; or the governor convenes a state ratifying convention. If the amendment is ratified by three-fourths (currently 38) of the state legislatures or ratifying conventions, it becomes part of the Constitution. Option 2—If two-thirds (currently 34) of the state legislatures vote to demand an amendment, Congress is required to convene a full constitutional convention, just as occurred with the 1787 Constitutional Convention. Delegates from every state would attend for the purpose of proposing one or more amendments.

Whew!

InQ: Professor, do you believe the US Constitution’s amendment provisions are still workable and sufficiently responsive to our country’s needs going forward?

Prof. Skinner-Thompson: Without question, the amendment process as outlined in the Constitution is a difficult hurdle. But intentionally so. The Constitution is in many ways counter-majoritarian and designed to limit the ability of political majorities at any given time to enact constitutional changes. This was done in part to protect political minorities and insulate the Constitution from the ebb and flow of politics.

InQ: Jay, same question to you.

Ambrose: Yes, the process is working reasonably well because, from 1789 to 2019, it’s reported that 11,770 amendments were proposed, while 11,743 didn’t make it. My guess is that thousands of those proposals were unworthy at the least and that even a truly modest fraction of them would have made the Constitution a mess. We should be grateful that we have had tough, democratic means that must be passed before

intrusion on a very, very precious document, although it can still be said that the amendment process is too tough.

InQ: So, you’d agree some amendments have been necessary?

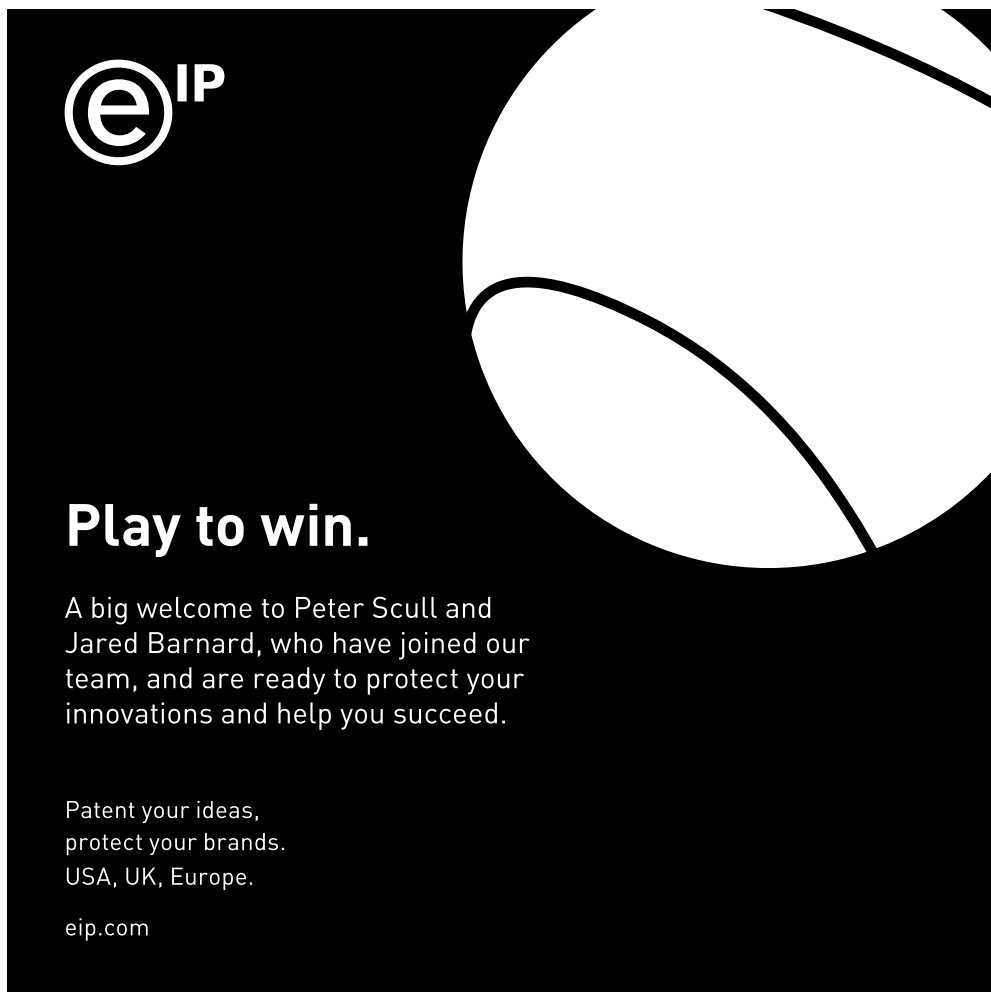
Ambrose: I am in a debate with myself because such intrusions have occurred, and not just a little bit, but frequently, and, just maybe, an easier amendment process is inconceivable. The problem is the philosophy of “a living constitution” that essentially means justices can make it up as they go along because the world has changed, and they think the Constitution is lagging behind. What they don’t need to worry about under this philosophy is what the Constitution actually means or says but that they can indulge in modes of interpretation vague enough to suit their own moral or ideological druthers. If, then, the amendment process outside of Supreme Court chambers were easier, would judges be less likely to evade the rule of law on behalf of their own supremacist opinions? I am not sure, but it seems to me a possibility.

InQ: I’ve helped draft several narrowly focused Colorado laws in my area of expertise, and I have been humbled by the inadequacy of my and others’ ability to write a law that clearly addresses every circumstance that law will be asked to address. Our country’s founders took on a similar task in 1788—except it was a million times more difficult—which is why we end up needing a Supreme Court to decide what the Constitution means and how to apply it today.

Ambrose: To be fair, there obviously are instances in which it is highly arguable how the Constitution should be applied to a given case and a decision is unfairly said to be more biased than analytical. But there are also loads of instances in which justices’ decisions are plainly at odds with constitutional law.

Demography as Destiny

InQ: The phrase “demography as destiny” is often traced to a 1970 book¹¹ about electoral politics and the role played by changing US demographics. Several demographers have concluded that in 20 years 70% of the US population will live in 30% of the states, meaning 30% of the US population will choose 70 of the 100 US senators. Since all federal legislation, and all



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Supreme Court, federal judiciary, and cabinet member appointments require the approval of, at a minimum, a majority vote of the senators, some see political or other problems emerging from this demographic change. Professor, do you feel that this is something that we, as a country, should worry about—do you think the way that senatorial power is distributed among states makes sense today?

Prof. Skinner-Thompson: Undoubtedly, the relative population disparities among the states today are dramatic, putting questions about the fairness of the Senate structure into sharper relief. That said, I believe that disrupting the two-senators-per-state structure would be unwise. That structure helps provide smaller, often more rural states and the people that live there some voice at the national level and is so ingrained in our democratic tradition that to revise it may deepen rather than alleviate partisanship. I think a more appropriate solution would be to recognize statehood for Puerto Rico and Washington, D.C., increasing the number of senators.

InQ: Jay, your thoughts?

Ambrose: When the union was being formed, as we all know, the small-population colonies were afraid they could in effect become toadies allowed a minimal voice at best. Well, okay, the more populated colonies said, we can work out a mechanism where you can protect your rights and enjoy fair play. There will be a House of Representatives that will be elected every two years with each state getting as many representatives as population allows, making it highly responsive to voters, and a Senate in which every state will have two senators, to be selected every six years and therefore likely to be guided more by calm deliberation while showing respect for the whole country. There would also be an electoral college subject to population in federal voting but with a system that allows smaller states to go a tad beyond that. It seems to me the system has worked reasonably well. The big states know they do have to treat the small states equitably or just maybe suffer some unwanted consequences, and the big and small seem to work out things between them with more harmony than might otherwise be the case.

InQ: So, you envision no future problems?

Ambrose: No, I see problems, especially if the small-population states are at odds on major issues with the large-population states and always win, or if things are changed so that the large-population states always win. It does not seem to me a given that they will be at odds to a considerable degree, although, even then, there could be indignation—from the big states if the small states simply seem to have too much of a say in things and from the small-population states if the more populated states lord it over them, making their presence seem meaningless.

InQ: Jay, nearly all residents of the federal districts of Puerto Rico, population 2.8 million, and Washington, D.C., population 715,000, are US citizens. Each district has one nonvoting member of the House of Representatives and no representation in the US Senate. Wyoming has a population of 550,000, entitling it to two US Senators and one voting House member. How would you feel if these two federal districts were admitted as states and given two senators apiece?

Ambrose: I wouldn't like it. Under the Constitution that I respect, the federal entanglement we call Washington is understandably a federal district under the final command of Congress. The Democrats would love its votes in the Senate so they could slice it up to leave a small circle someplace or the other for the feds, but that's playing games with the Constitution and the reality of what Washington is. What we have here is a self-governing city, not a state in any sense of the word. Instead of making it a separate state, it would make more sense to make it part of Maryland or Virginia or divided between the two, increasing their political oomph. But there's still the exceptional federal issue and the constitutional problem. In various confused votes, Puerto Ricans have mostly said they do not want to be a state. Iowa would never say that. Nor do Puerto Ricans want to be independent. Its situation is vastly different from that of the states we are discussing.

The 70/30 Problem: Does the Constitution Need Fixing?

InQ: Does the US Constitution afford the anticipated 70% of our population that will be represented by 30 out of 100 senators a realistic path

via amendment to remedy any resentment?¹²

If not, what other pathways do you think are available to this 70%, short of secession or civil war? For example, could the more populous states effectively exert economic or political leverage against the small-population states to alter their voting behavior in a meaningful way from the more populous states' standpoint? Might the more populous states boycott these other states economically, similar to how some states have prohibited state employees from traveling to certain states to protest these other states' conduct or laws, or by refusing to allow their state university teams from competing in those states?


Ambrose: As of now, using the amendment process to remedy the situation may not be workable, given the need for most states to agree to the amendment and depending on exactly what the amendment says. Also, it's not just populous state resentment that could be at play depending on what happens, but the resentment of the less populated states that, by the way, might have fairly large populations by today's standards. The possible tyranny of the majority could leave them in a fix, leading them to angry steps impossible to project. A state, no matter what its population, is an important entity, its people equally citizens of the country, its needs as real as the other states and a contributor to the national good. Take away the two-seat Senate rule without some adjustment to compensate and you are going to have David furious at Goliath.

InQ: Professor, do you think the US Constitution affords the 70% a realistic path via amendment to remedy any resentment that may arise on their part to what they perceive as a disproportionate and unfair shift of power to a minority of Americans?

Prof. Skinner-Thompson: No doubt amending the Constitution is a tall order. And, as noted, this is intentional to make sure that the most authoritative law of our country is not changed frequently as a result of political winds. When considering the difficulty of amending the Constitution, I think it is helpful to bear in mind that obtaining political majorities in Congress and winning the White House are much less onerous than amending the Constitution.

That is, although the federal government is a representative republic rather than a proportional democracy, recent elections demonstrate that the two major parties regularly compete, and the tide of political power ebbs and flows. So while the Constitution may be difficult to amend, enacting federal executive policy and legislation remains within reach.

Conclusion

Someday, in the not-too-distant future, 70% or more of our country's peoples will be represented by just 30 or fewer US Senators. The other 30% and their 70 or more senators will have the power to advance or stop any piece of legislation and to install or block the appointment of most high-ranking federal and judicial officers, including Supreme Court justices. What do you think? Is this a feature or bug of our esteemed founding compact? 



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NOTES

1. As quoted by Friedman, "What Trump, San Francisco and the Deer in My Backyard Have in Common," *N.Y. Times* (Feb. 16, 2021).
2. Coss, "U.S. Senate: Progressive Critics Misunderstand Its Constitutional Role," *Nat'l Rev.* (Mar. 21, 2021).

3. My earliest memories of anything related to national politics was my 6th birthday. Expecting to come home from first grade to a great celebration, I found my mother and sister crying in front of the TV—November 22, 1963. President Johnson was sworn in later that day. I remained pretty ignorant about politics after that, until my big brother was sent to Vietnam in January 1968, and my interest later became super-charged watching the televised Watergate hearings with my dad in 1973. (Somehow, the assassinations of Sen. Robert Kennedy and Dr. Martin Luther King Jr., as scary and shocking as they were to a 10-year-old, paled in comparison to my brother leaving for the rice paddies of Southeast Asia.)

4. US Senate Historical Highlights (1787—1800), https://www.senate.gov/artandhistory/history/minute/A_Great_Compromise.htm.

5. See Seib, "The Varied—And Global—Threats Confronting Democracy," *Wall Street J.* (Nov. 21, 2017) ("Demographic trends also are straining the American model. . . . David Birdsell, dean of the school of public and international affairs at Baruch College, notes that by 2040, about 70% of Americans are expected to live in the 15 largest states. They will have only 30 senators representing them, while the remaining 30% of Americans will have 70 senators representing them."). See also Bump, "By 2040, Two-Thirds of Americans will be Represented by 30 Percent of the Senate," *Wash. Post* (Nov. 28, 2017) (a "list of the largest states . . . reveals one reason that the Senate tends to work anyway: Senators from Texas and senators from New York don't tend to vote the same way, nor do senators from the small states of Vermont and Wyoming."); Bump, "In About 20 Years, Half the Population Will Live in Eight States," *Wash. Post* (July 12, 2018) (examining the "possible anti-democratic effects of the lopsided Senate" and concluding that "the partisan ramifications of the uneven distribution of the country's population aren't clear. But the possible anti-democratic effects of the lopsided Senate are.").

6. So what do countries like England substitute for a written governing compact? Well, as "one British journalist gushed in 1832 . . . '[o]ur constitution is the air we breathe, the restless blood that circulates in our veins, the food that we eat, the soil that nourishes us.'" Lepore, "When Constitutions Took Over the World," *New Yorker* (Mar. 29, 2021), <https://www.newyorker.com/magazine/2021/03/29/when->

[constitutions-took-over-the-world](#).

7. Szalai, "As the Georgia Runoffs Arrive, a New Book Says the Senate is Broken," *N.Y. Times* (Books of the Times, Jan. 4, 2021) (the filibuster "has endowed . . . senators with formidable powers of obstruction"), <https://www.nytimes.com/2021/01/04/books/review-kill-switch-modern-senate-adam-jentleson.html>.

8. In addition to the big state/little state dichotomy, Wyoming is 92.5% white, while California is 56% white.

9. *Lawrence v. Texas*, 539 U.S. 558 (2003).

10. *South Dakota v. Wayfair*, 585 U.S. ____ , 138 S.Ct. 2080 (2018).

11. Scammon and Wattenberg, *The Real Majority: An Extraordinary Examination of the American Electorate* (Coward-McCann 1970).

12. Amending the Constitution to change a state's senatorial representation faces the additional challenge of Article V's limitation on amendments, which some argue renders such amendment ineffective under any circumstances: "Article V: The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution . . . provided that . . . no state, without its consent, shall be deprived of its equal suffrage in the Senate." Even if this provision prevents an amendment changing the number of senators each state sends to Congress, perhaps other amendments could alter the Senate's power by, for example, requiring a super-majority vote of 67% or 75% of the Senate to approve certain appointments or legislation, thereby making such appointments or legislation more difficult. Or, conversely, the amendment could forbid filibusters and make every vote turn on garnering just 50.1% support, making such appointments or legislation easier. Of course, it may be unlikely that a super-majority amendment could pass without the approval of some of the same states whose senatorial power is sought to be altered. Some have suggested adjusting the big state/little state senatorial imbalance by breaking the biggest states (California, Texas, and Florida) into smaller states, which would simply require the state's legislature's and congressional approval. See Millman, "America Needs to Break up its Biggest States," *N.Y. Times* (July 7, 2021), <https://www.nytimes.com/2021/07/07/opinion/us-states.html>.

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