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# THE ONE SENATOR, ONE VOTE CLAUSE

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Article I, section 3, clause 1 provides that the Senate "shall be composed of two Senators from each State, * * * and each Senator shall have one Vote." The requirement that each state have two Senators was part of the "Great Compromise" reached in Philadelphia, and may still be defensible today, to assure that the Senate would be a deliberative body with relatively few members and that the interests of the states qua states would be represented. The requirement that each Senator have one vote was also part of the Great Compromise but is much harder to defend today. In my opinion, the "one Senator, one Vote" clause is the most problematic one remaining in the Constitution.

The United States Senate flouts the constitutional principle of "one person, one vote," in large part because of the "one Senator, One Vote" clause. Chief Justice Warren said as much in *Reynolds v. Sims*,[1] where the Court held that state apportionments following the example of the Senate violate the equal protection clause of the Fourteenth Amendment. The Chief Justice wrote:

> * * * The right of a citizen to equal representation and to have [his or her] vote weighted equally with those of all other citizens in the election of members of one house of a bicameral state legislature would amount to little if States could effectively submerge the equal-population principle in the apportionment of seats in the other house. * * * Deadlock between the two bodies might result in compromise and concession on some issues. But in all too many cases the more probable result would be frustration of the majority will through minority veto in the house not apportioned on a population basis[.]

The one Senator, one Vote clause is problematic, both because it is inconsistent with a bedrock constitutional value (majority rule) and because its derogation from that value threatens energetic government. The clause is more worrisome than other problem-

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1. 377 U.S. 533 (1964).

atic clauses, because there is little room for "interpretation" to ameliorate its ill effects.

The one Senator, one Vote clause systematically skews national policy towards sagebrush values. The fourteen sagebrush states[2] have almost one-third of the votes in the U.S. Senate, but less than one-tenth of the people in the country. Although the sagebrush Senators are not completely homogeneous, they do exhibit block voting characteristics and predictably affect closely divided chamber votes. Three recent examples: if Senate votes were weighted according to the states' representation in the House (each Senator receiving half of the state's House allotment), the Senate would have voted 295-140 to override President Bush's veto of the 1990 civil rights bill, would have rejected the nomination of Judge Clarence Thomas for the Supreme Court in 1991 (albeit in a close vote, 224-211), and would have overwhelmingly (238-165) voted to remove the ban on entry into the United States of people who are infected with the HIV virus (a move that was defeated by 52-46 when proposed in 1993). Consider each example in more detail.

The first example reveals the precise contours and some limitations of my objection. Even if the Senate had overridden President Bush's veto in 1990, it is doubtful that the House would have done so. And, in any event, a civil rights bill was enacted in 1991. Nonetheless, Chief Justice Warren's point can still be made: the one Senator, one Vote rule affects the point at which a compromise will be crafted; the 1991 civil rights statute was a diluted version of the 1990 bill.[3] That the one Senator, one Vote rule is so strongly anti-democratic is cause for concern, but that concern might be ameliorated if it served a substantive value. For example, the Framers required bicameral approval and presentment to the President to assure that hasty majorities would not override individual liberties or unsettle the rule of law.[4]

Sagebrush values are often billed as libertarian (less government), but the sagebrush Senators' voting record is not distinctively libertarian or sensitive to rule of law values. As a group, these Senators are libertarian when it comes to private rights to government land (in the West) but not libertarian when it comes

2. Alaska, Arizona, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, and Wyoming.

3. For a key example, the 1990 bill explicitly overrode several Supreme Court decisions retroactively. The 1991 statute was silent on the issue, and the Supreme Court predictably construed the statute not to have retroactive effect. See *Landgraf v. USI Film Products*, 114 S. Ct. 1483 (1994).

4. See *INS v. Chadha*, 462 U.S. 919 (1983).

to farm subsidies, defense spending, and the Alaska Pipeline (where the sagebrush Senators were decisive in the Senate's insistence that pipeline decisions affecting the environment be unreviewable). Moreover, these Senators seem relatively less sympathetic to the liberty of racial, ethnic, or sexual orientation minorities. For instance, they consistently vote for gratuitously anti-homosexual measures having no defensible policy rationale; their vote against HIV-positive immigrants was anti-libertarian and without any defensible medical justification.

The Thomas confirmation vote reflects not just the frequently decisive effect sagebrush overrepresentation has on issues,[5] but also the far-reaching importance of that effect. Unlike the House, the Senate's consent is needed not only for the enactment of legislation, but also for the confirmation of federal judges, agency heads, and department officials, as well as for ratification of treaties (by a two-thirds supermajority). As a result, the sagebrush bloc not only has influence in Congress beyond any democratic or normative justification, but also has similarly indefensible influence on foreign policy, the composition of the judiciary, and public administration.

The overrepresentation of small-population states (especially the sagebrush states) in the Senate does not affect every issue that comes before Congress; it probably has no decisive effect on most issues. When it does have a decisive effect, the phenomenon is anti-majoritarian but perhaps defensible according to some other normative criterion. I am open to such justification, but the most obvious (libertarian) one is not supported by the actual behavior of sagebrush Senators, either recently or historically.[6]

Based upon my review of our post-New Deal constitutional history, I am inclined to say that the one Senator, one Vote clause is the most problematic in the Constitution: it is anti-dem-

5. Nineteen sagebrush Senators (16 Republicans, three Democrats) voted for Judge Thomas, and only nine (all Democrats) voted against him. The overall Senate vote was 52-48 in favor of Judge Thomas. The only other region to support Judge Thomas was the South, including border states (19 Senators for, 15 Senators against). The Midwest, East, and Pacific Coast Senators opposed Judge Thomas' confirmation (14 Senators for, 24 Senators against).

6. The sagebrush Senators have been a distinctive bloc throughout the post-New Deal era. They have decisively influenced national policy through their alliance with Southern Senators to sink strong civil rights laws and their strong support of McCarthyism in the 1950s, their Court-baiting and support for the nation's Indochina policy in the 1960s and 1970s, and their opposition to environmental, health, and safety regulation in the 1970s and 1980s.

ocratic, skews policy in hard-to-defend ways, and cannot be ameliorated by conventional interpretive or practical mechanisms.