OUR UNCONSTITUTIONAL SENATE

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In the race to the bottom that characterizes this Symposium, I cast my vote for Article I, section 3: "The Senate of the United States shall be composed of two Senators from each State . . . ." Indeed, were this provision not unequivocally enshrined in the Constitution itself, it would undoubtedly be unconstitutional, for, as the United States Supreme Court has recognized, it is in conflict with the most basic principles of democracy underlying our Constitution and the form of government it establishes.

The Court has held that "[l]egislators represent people, not trees or acres,"[1] and that "[t]he conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote."[2] To hold otherwise would be to allow a vote to be "worth more in one district than in another" and would thus "run counter to our fundamental ideas of democratic government."[3] The Court has accordingly invalidated legislative districting schemes where the disparity in population between the largest and smallest districts entitled to the same number of legislators is as little as 1.07 to 1.[4] How, then, can a democratic nation tolerate a Senate in which the largest state has more than 65 times the population of the smallest and yet each has two Senators? Moreover, the Court has waxed eloquent on the inequity of "minority control of . . . legislative bodies" in "a society ostensibly grounded on representative government."[5] What, then, should we conclude about a Senate in which slightly over 17% of the population elects a majority of the members?

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1. *Reynolds v. Sims*, 377 U.S. 533, 562 (1964).
2. *Gray v. Sanders*, 372 U.S. 368, 381 (1963).
3. *Wesberry v. Sanders*, 376 U.S. 1, 8 (1964).
4. *Karcher v. Daggett*, 462 U.S. 725 (1983) (invalidating Congressional districts where maximum deviation was 0.7%); but see *Brown v. Thomson*, 462 U.S. 835 (1983) (upholding state legislative districts where maximum deviation was 89%).
5. *Reynolds v. Sims*, 377 U.S. 533, 565 (1964).

To answer that the provision, while indefensible, is harmless because laws require the concurrence of the House of Representatives as well, is to forget that the Senate has unique powers. On October 15, 1991, the Senate voted to confirm Clarence Thomas to the Supreme Court, by a vote of 52 to 48.[6] But the vote in the Senate conceals an exactly opposite split in the population at large. The delegations from twenty-two states split their votes, with one Senator voting in favor and one against. Fifteen states voted entirely in favor and thirteen entirely against. Tallying the populations of each state (and allocating half the population of the split-vote states to each side) yields the conclusion that the Senators voting in favor of Judge Thomas represented 48% of the population and the Senators voting against him represented 52% of the population.[7] A single change in vote by Senator D'Amato from New York would have increased the margin to 56% against, without changing the result; a single change in vote by Senator Seymour of California would have increased the margin to 58% against, again without changing the result. (If both men had switched their votes, the percentage against would have increased to 62%, and presumably Vice President Quayle would have cast the deciding vote in favor.) Justice Thomas still sits on the United States Supreme Court despite the fact that the representatives of a majority of the population voted against him.[8]

The other standard defense of this otherwise unjustifiable provision is as a necessary compromise between the large and small states: without it, we are told, the Constitution might never have been successfully written and ratified. While this may or may not be true, the circumstances of the 1787 Constitutional Convention reinforced the beliefs of the small states that they were entitled to equal representation, and made the ultimate compromise a foregone conclusion. Even before the Convention began, the state delegations agreed that each state would have a single vote during the proceedings, regardless of its population. Moreover, when even that rule did not preclude a deadlock over whether to allocate representation by state or by population, the Convention sent the matter to a Committee of Eleven which consisted of one delegate from each of the states present at the Con-

6. 137 Cong. Rec. S 14704-05 (October 15, 1991).

7. All calculations are based on the population according to the 1990 census, as recorded in *The World Almanac and Book of Facts: 1995* at 376-77.

8. This is not an isolated example. A minority of the population similarly prevailed in 1986, when Daniel Manion was confirmed to sit on the Seventh Circuit by a closely divided vote. A thorough historical search would undoubtedly turn up many other such incidents.

vention. More ominous still, the Committee consisted of many of the most able and vocal delegates from the small states and none of the most uncompromising firebrands from the large states.[9] The compromise—or concession, depending on one's point of view—was inevitable. We can only speculate on the results had the larger states been more insistent from the beginning.

Why did the large states agree to such a crippling and ridiculous situation? Because, at bottom, they trusted each other and the likely Senators from each state to represent the interests of the nation rather than of the individual states. The aristocratic Senate was never meant to be particularly representative of the population at large. As the nation became more and more democratic, however, the Senate became an ever more glaring anomaly. The Seventeenth Amendment repaired a small part of the problem, but the more egregious malapportionment remains.

9. See Daniel A. Farber & Suzanna Sherry, *A History of the American Constitution* 128-29 (West Pub. Co., 1990).