

# RETHINKING THE SENATE

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To give you a sense of where I'm headed, the very first article I published about the Senate back in 1997 was titled, "*The Senate: An Institution Whose Time Has Gone?*"<sup>1</sup>

I do not know if I would term the Senate evil, but I would certainly term it deeply problematic today. I do think it is very important to have some protection for minority viewpoints. Much of my scholarship has sought to underscore the benefits of some measure of state sovereignty within our federal system.<sup>2</sup> I teach state and

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

2. See, e.g., Lynn A. Baker, *The Spending Power After NFIB v. Sebelius*, 37 HARV. J.L. & PUB. POL'Y 71 (2014); Lynn A. Baker & Sanford Levinson, *Twenty-Year Legacy of South Dakota v. Dole: Dole Dialogue*, 52 S.D. L. REV. 468 (2007); Lynn A. Baker, *Federalism and Redistribution: Lessons from the American Experience*, in 8 PATTERNS OF REGIONALISM AND FEDERALISM: LESSONS FOR THE U.K. 173 (Jörg Fedtke & Basil S. Markesinis eds., 2006); Lynn A. Baker, *Federalism and the Spending Power from Dole to Birmingham Board of Education*, in THE REHNQUIST LEGACY 205 (Craig Bradley ed., 2006); Lynn A. Baker, *The Future of Federalism?: Pierce County v. Guillen as a Case Study*, 50 N.Y.L.S. L. REV. 699 (2005–2006); Lynn A. Baker, *Lochner's Legacy for Modern Federalism: Pierce County v. Guillen as a Case Study*, 85 B.U. L. REV. 727 (2005); Lynn A. Baker & Mitchell N. Berman, *Getting off the Dole: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It to Do So*, 78 IND. L.J. 459 (2003); Lynn A. Baker, *Should Liberals Fear Federalism?*, 70 U. CIN. L. REV. 433 (2002); Lynn A. Baker, *Conditional Federal Spending and States' Rights*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 104 (2001); Lynn

local government law. I am a big fan of state government. Yet, somehow, I end up in a different place with regard to the Senate than many other scholars.<sup>3</sup>

We are all aware that from the very beginning of our constitutional democracy the Senate has held an exalted place. For example, Article I's apportionment of representation in the Senate is the only provision among our current Constitution's dictates that cannot be amended pursuant to the ordinary procedures of Article V.<sup>4</sup> This provision was critical to getting the country off the ground, ensuring that the smaller states would feel protected and represented in the federal government.<sup>5</sup>

But there are two particular harms today that derive from the fact that the existing allocation of representation in the Senate provides small population states what we all understand to be disproportionate power relative to their populations.<sup>6</sup> The first is that the Senate systematically and unjustifiably redistributes wealth from large population states to small population states.<sup>7</sup>

Secondly, the Senate, systematically and to my mind unjustifiably, affords large population states disproportionately little power, relative to their shares of the nation's population, to block

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A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75 (2001); Lynn A. Baker, *Putting the Safeguards Back into the Political Safeguards of Federalism*, 46 VILL. L. REV. 951 (2001); Lynn A. Baker & Samuel H. Dinkin, *Getting from Here to There: The Rebirth of Constitutional Constraints on the Special Interest State*, 40 WM. & MARY L. REV. 515 (1999); Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911 (1995).

3. See, e.g., JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 2 (1980) (arguing that "state interests are forcefully represented in the national political process"); Stephen Macedo, *Towards A More Democratic Congress? Our Imperfect Constitution: The Critics Examined*, 89 B.U. L. REV. 609, 611 (2009) ("Senate malapportionment is a tolerable imperfection rather than an egregious affront to the political and moral equality of citizens."); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 548 (1954) (identifying the Senate as the "guardian of state interests").

4. Baker & Dinkin, *supra* note 1, at 21–22 (citing U.S. CONST. art. V ("[N]o State, without its Consent, shall be deprived of its equal Suffrage in the Senate.")).

5. See *id.* at 85–86.

6. *Id.* at 24.

7. *Id.* at 30–42.

federal homogenizing legislation.<sup>8</sup> This is a blocking power that I might favor to protect minority viewpoints that minority states might have. The Senate will help provide the blocking power, but the problem is the allocation of that power: the large population states will be at a disadvantage relative to the small population states in protecting their own minority viewpoints in this way.<sup>9</sup>

Let me go into some detail now about each of these aspects of the Senate. The redistribution of wealth from large population states to small ones is not entirely the fault of the Senate's structure of representation.<sup>10</sup> That's what our panel's topic is, so I will focus on that. But I have elsewhere discussed, and have published significantly on this topic as well, that some of the problem is also what the U.S. Supreme Court has done since the Founding, by taking provisions of the Constitution such as the spending power and rendering essentially meaningless or nonjusticiable notions like "general welfare" that could provide constraints on congressional power.<sup>11</sup> We might similarly think of some of the other Article I limitations that, if enforced by the courts, might have helped to further reinforce state sovereignty.<sup>12</sup> But we are where we are, and the Supreme Court has played the role that it has, and we are here to discuss the Senate.

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8. *Id.* at 53–55.

9. *Id.* at 54.

10. See *infra* notes 11–12 and accompanying text; cf. Matthew C. Klein, *Who Wins and Loses From America's Transfer Union?*, FT ALPHAVILLE (Dec. 16, 2016), <https://ftal-phaville.ft.com/2016/12/16/2181274/who-wins-and-loses-from-americas-transfer-union> [<https://perma.cc/G8CT-THQY>] (discussing some demographic and economic causes of interstate wealth transfers).

11. See, e.g., Lynn A. Baker, *Constitutional Ambiguities and Originalism: Lessons from the Spending Power*, 103 NW. U. L. REV. 495, 518–19 (2009) [hereinafter *Constitutional Ambiguities*] (arguing that the Court's refusal to enforce the General Welfare Clause enables small states to use their disproportionate power to their advantage); Lynn A. Baker, *The Spending Power and the Federalist Revival*, 4 CHAP. L. REV. 195, 196 (2001) ("[T]he states will be at the mercy of Congress so long as there are no meaningful limits on its spending power.").

12. See generally Lynn A. Baker, *Putting the Safeguards Back into the Political Safeguards of Federalism*, 46 VILL. L. REV. 951 (2001) (comparing intrinsic and extrinsic limits on federal congressional power).

The disproportionate power that the Senate gives small population states is not going to affect the total dollar amount of what I will call federal pork barrel spending, but it is absolutely going to affect the distribution of that spending.

Consider that if the Senate alone could enact legislation, we would expect the total dollar amount that each state would receive over time to be roughly equal. And this would mean, for example, that if one billion dollars of special legislation or other benefits from the federal government were provided to the states, that each resident of California would receive \$34 while each resident of Wyoming would receive in excess of \$2,200.<sup>13</sup> That is sixty-five times as much benefit. By contrast, of course, if the House alone were engaged in this, we would expect to see substantially equal per capita benefits over time.<sup>14</sup>

Now, of course, our current system includes both the House and the Senate. Neither body alone is able to adopt legislation of this or any other sort, and it is important to appreciate the balancing effect of having these two different houses apportioned in very different ways. Sometimes in elementary school civics, one is taught that this is a very nice balance, that the large population states and the small population states are somehow made equal through this fact of the two chambers, that they precisely balance each other.

And in fact, in that 1997 publication I mentioned at the outset of my remarks, a coauthor and I deployed a formal game theoretic model.<sup>15</sup> We calculated the Shapley-Shubik indices of the various states, given the population of each at the time.<sup>16</sup> And here is the math of how the balancing actually works out. Let us look at California and Rhode Island. Consider that the population ratio is 32:1 between California and Rhode Island.<sup>17</sup> The power in the House in terms of representation is 33.5:1, very similar to what we would, in

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13. Baker & Dinkin, *supra* note 1, at 37.

14. *Id.*

15. *Id.* at 24–29; see also *Constitutional Ambiguities*, *supra* note 11, at 528–29.

16. Baker & Dinkin, *supra* note 1, at 26–27, 96 app. 1; see also *Constitutional Ambiguities*, *supra* note 11, at 528–29.

17. *Constitutional Ambiguities*, *supra* note 11, at 528–29.

fact, expect. Power in the Senate, we understand, has a ratio of 1:1.<sup>18</sup> And then power in Congress turns out to be 5.5:1.<sup>19</sup> Thus, when we combine, theoretically, the power in the House and the Senate, we do not get an even midpoint between those two bodies. What we get is 5.5, which looks a whole lot closer to 1 than it does to 32.<sup>20</sup>

In that initial research we also looked to see what one might find empirically. We looked systematically with the help of statistics compiled by both the federal government and the Harvard Kennedy School, and we looked at something called the balance of payments that individual states have with the federal government. And it turns out that the ten largest states are minus \$560 per person, which means that people who live in large population states are coming out minus \$560 or so with the federal government.<sup>21</sup> Meanwhile, the ten smallest states at the time were coming up plus \$543.<sup>22</sup> We looked at this empirical data to be certain that our theory was not just a theory, but was actually matched in reality.

Now, as is always the case with empirical data, one can quibble around the edges. In any event, the first concern is that the Senate plays a role but it is a redistributive role. And we might think that perhaps poverty explains this. There are forms of redistribution among the states that we might favor as a matter of social policy. For example, maybe this is largely about federal poverty relief programs and maybe that can explain the redistribution. In fact, however, the ten largest states at the time had higher poverty rates on average than the ten smallest states.<sup>23</sup> So the direction of redistribution is in precisely the wrong direction if poverty relief were an explanation.

Now, I will turn to my second point, which has to do with federal homogenizing legislation. We all share a concern that, beyond what is unconstitutional, diversity among the states—having states and

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18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* at 535; see also Baker & Dinkin, *supra* note 1, at 39–41.

22. *Constitutional Ambiguities*, *supra* note 11, at 535.

23. See Baker & Dinkin, *supra* note 1, at 41–42.

localities fulfill the preferences of their constituents in areas of reasonable disagreement—would be preferable.<sup>24</sup>

As an example here, consider that sixteen states did not have the death penalty available at the end of 2017; thirty-four states did.<sup>25</sup> So in the absence of a federal government, the thirty-four states that did have the death penalty would have only two ways to compete for residents with regard to what Professor Charles M. Tiebout told us is the migration of people from state to state.<sup>26</sup> Those states would be free to offer their own package of laws, which would include the death penalty in the pro-death penalty states, along with their taxes and whatever other services they were interested in providing their citizens. Or those states could make some adjustments to their own package of laws and adopt a statutory or constitutional prohibition against the death penalty.

But now we bring Congress into the picture, and Congress is able to give the thirty-four states that favor the death penalty an additional option when competing for residents, which I will term the “anticompetitive option.” Congress has the option to intervene and tip the scales further against the minority viewpoint. This might take the form of conditional spending legislation.<sup>27</sup> It might simply take the form of a federal law prohibiting states from having the death penalty. I am going to term this “federal homogenizing legislation,” which will reduce the diversity among the states and would therefore arguably be disfavored insofar as it reduces aggregate welfare across the nation.<sup>28</sup>

Now, a potential reply is, “But isn’t one of the roles of the Senate that it, in fact, makes it more difficult for Congress to pass laws? So,

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24. *Id.* at 47–49; see also Baker, *Conditional Federal Spending After Lopez*, *supra* note 2, at 1950–51; Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 424 (1956).

25. TRACY L. SNELL, U.S. DEP’T JUST., NCJ 253060, CAPITAL PUNISHMENT, 2017: SELECTED FINDINGS (2019), <https://www.bjs.gov/content/pub/pdf/cp17sf.pdf> [<https://perma.cc/VP4E-EEEXK>].

26. Tiebout, *supra* note 24, at 418.

27. Baker, *Conditional Federal Spending After Lopez*, *supra* note 2, at 1949.

28. Baker & Dinkin, *supra* note 1, at 50–55.

to the extent you're concerned about federal homogenizing legislation, isn't the Senate actually to be favored?" And my response here goes to the allocation of the power to block federal homogenizing legislation: Certain homogenizing legislation will be able to be blocked more readily than others.<sup>29</sup> In particular, the large population states will have disproportionately little ability to block federal homogenizing legislation that they disfavor.<sup>30</sup> Meanwhile, the small population states will have relatively more ability in that particular regard.<sup>31</sup>

Consider that the representatives of the nine largest states represent fully fifty percent of the nation's population.<sup>32</sup> Those nine states, if they did band together, would not be able to block federal homogenizing legislation that they found unattractive. Meanwhile, Senators from the twenty-six smallest states, which represent only eighteen percent of the nation's population, would have a vastly easier time blocking such legislation.<sup>33</sup>

So what can we do about this? As a purely theoretical improvement, I personally might want the states to be represented proportionally in the Senate. I would be fine having a federal legislature with two chambers, each of which is proportionally represented. The two chambers would not have to be the same size. I would also want, though, for one of those bodies, let us call it the Senate, to also have a supermajority rule. We like supermajority rules in certain parts of the Constitution. We have already mentioned impeachment and overriding presidential vetoes. All of those are two-thirds rules.<sup>34</sup> So I would offer a combination of those as a possible improvement on the current regime.

Now, of course, the fact is we will never see my personal utopia. Article V, as has already been mentioned, requires the consent of a

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29. *Id.* at 53–54.

30. *Id.* at 54–55.

31. *Id.* at 53–54.

32. *Id.* at 54.

33. *Id.* at 53.

34. U.S. CONST. art I, § 3, cl. 6; U.S. CONST. art I, § 7, cl. 2.

small population state in order to have its allocation of representation altered.<sup>35</sup> It is fair to assume that no small population state is going to be excited or interested to agree to any reduction in its power within the Senate.

Thus my last suggestion is that, in the interim, the U.S. Supreme Court help with some of this problem by returning to a reading of, for example, the federal spending power that would provide more meaningful constraint through the “general welfare” language in the constitutional text.<sup>36</sup> I am in favor of the Tenth Amendment doing more work for us than it has come to do. I am in favor of some of the Article I enumerated powers, such as the commerce power, being read by the courts in a way that is stricter rather than more permissive. So, recommending a shift in how the courts play their role is the partial remedy I can offer in the meantime.

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35. See Baker & Dinkin, *supra* note 1, at 68–72; Baker & Dinkin, *supra* note 2, at 519.

36. Baker, *Constitutional Ambiguities*, *supra* note 11, at 540–41.