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GEOGRAPHIC REPRESENTATION AND THE U.S. CONGRESS

FRANCES E. LEE*

With respect to political representation, it often seems that the United States stands in relation to other democracies around the world today in the position that England stood relative to the colonial U.S. During the colonial era, Americans debated ideas about representation with great energy and attempted political reforms with a constant eye toward bringing practice into line with theory.¹ Colonial reformers extended the franchise, demanded more frequent elections, increased the size of representative assemblies, adopted secret ballots, and required periodic reapportionment.² In Britain during the same period, Members of Parliament were elected with restricted franchises, no electoral districts had been added or subtracted for 100 years, and the crown and private individuals owned “pocket boroughs.”³ The English attitude toward change can be summed up by Lord Braxfield, who in 1793 sentenced Thomas Muir, an advocate of parliamentary reform, to fourteen years exile in Australia: “[T]he British constitution is the best that ever was since the creation of the world and it is not possible to make it better.”⁴

Today, democracies all around the world experiment with and seek to improve upon their representative institutions, while the U.S. seems to have taken Braxfield’s posture: no improvements needed or wanted. Even compared to the other long-established democracies sharing British institutions and traditions, the U.S. is markedly resistant to changes in representational form. At their start, all the English-speaking democracies used first-past-the-post elections in single-member districts for their legislative elections.⁵ Australia embraced preference voting for its House in 1918 and a form of proportional

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1. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787*, at 162–73 (1998).

2. *Id.* at 165–67, 170.

3. SAMUEL H. BEER, *BRITISH POLITICS IN THE COLLECTIVIST AGE* 23 (1967).

4. G. D. H. COLE & RAYMOND POSTGATE, *THE COMMON PEOPLE 1746–1946*, at 155 (Methuen & Co., 1971) (1938).

5. For a definition of first-past-the-post elections and an explanation of a wide variety of electoral systems, see DOUGLAS J. AMY, *REAL CHOICES/NEW VOICES: THE CASE FOR PROPORTIONAL REPRESENTATION ELECTIONS IN THE UNITED STATES* (1993).

representation (PR) for its Senate sixty years ago;⁶ New Zealand adopted PR for its unicameral House of Representatives in 1996;⁷ and even Great Britain created regional parliaments for Scotland, Wales, and Northern Ireland in the 1990s, all of them using some kind of PR.⁸ Looking around the world, most democracies do not elect legislators from single-member geographic districts at all, and those that still use them for some legislative seats choose others by different means to ensure fairer representation of voters' party preferences.⁹ Yet the U.S. still elects members to Congress by plurality vote from geographic constituencies.

Aside from the expanded franchise, the only improvement the U.S. has made on the pure territorial representation in use in Restoration England is that the Constitution requires one chamber of Congress to reapportion once every ten years to adjust representation in accordance with the principle of one person, one vote.¹⁰ The U.S. Senate, however, still cleaves to the old method of representing "trees or acres."¹¹ Unless a new state is added, the Senate is never reapportioned, no matter how extreme its divergence from democratic equality. Given that Wyoming's 509,000 residents and California's 36 million each receive equal Senate representation while Washington, DC's 551,000 inhabitants have none at all,¹² that divergence is extreme enough to put the pre-reform House of Commons to shame.

Relative to the rest of the world, the U.S. system of representation seems decidedly anachronistic. Geographic constituencies hearken back to a time of small, isolated, rural communities where communication and travel were difficult. It was a representational system designed for a time in which geographic location spoke to an individual's most important political interests. It predates modern cities, political parties, the welfare state, the national-security state, multi-

6. Australian Electoral Commission, A Short History of Federal Electoral Reform in Australia, www.aec.gov.au/Elections/Australian_Electoral_History/history.htm (last visited Nov. 19, 2007).

7. CONGRESSIONAL QUARTERLY, POLITICAL HANDBOOK OF THE WORLD: 2007, NEW ZEALAND 893 (Arthur S. Banks et al. eds., 2007) [hereinafter POLITICAL HANDBOOK OF THE WORLD].

8. *Id.* at 1297, 1318.

9. Many studies have documented that plurality voting in single member districts produces significant distortions in party representation. As a general rule, the system inflates the number of seats held by the largest party. *See, e.g.,* DOUGLAS W. RAE, THE POLITICAL CONSEQUENCES OF ELECTORAL LAWS 70-73 (1971).

10. U.S. CONST. art. I, § 2, cl. 3.

11. *Reynolds v. Sims*, 377 U.S. 533, 562 (1964) ("Legislators represent people, not trees or acres.").

12. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES tbl.17 (2006).

ethnic democracy, industrial and now post-industrial society. In a world that grows more interconnected all the time, the U.S. electoral system continues to put supreme emphasis on the protection of local interests. Today, nearly all democracies have implicitly acknowledged that political parties are more important as expressions of voters' values and interests than their local concerns, and hence have adopted some form of PR.¹³

This Essay will briefly examine the consequences of geographic representation for congressional representation and policymaking. The effects examined here by no means exhaust the importance of the subject for U.S. politics. Among others, this type of electoral system also affects the number of effective political parties, the level and extent of party competition, voter turnout, and the style of political campaigns.¹⁴ The system also fails to register voters' party preferences in fair proportion to their presence in the electorate.¹⁵ But less attention has been paid to the way the system affects how representatives see their roles as legislators and how it affects policy outcomes. In particular, the effects of giving to all states equal representation in the Senate remains not widely understood or appreciated.¹⁶ Issues raised by the Senate's composition go far beyond democratic theory and the principle of one person, one vote. Our eighteenth-century system of representation has many twenty-first century consequences for internal legislative politics and policy outcomes.

I. PAROCHIALISM

"[S]ince each representative is beholden to a specific geographical area, issues that are important to a particular neighborhood or region are sure to have a champion."¹⁷ The U.S. system of representation guarantees that each geographic part of the country will have a representative. It also ensures that all members see themselves as "attorneys for their constituencies," as well as national legislators.¹⁸

13. See ROBERT A. DAHL, *HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION?* 55–59 (2003).

14. AMY, *supra* note 5, at 5–6.

15. *Id.*

16. For a wide-ranging treatment of this topic, see FRANCES E. LEE & BRUCE I. OPPENHEIMER, *SIZING UP THE SENATE: THE UNEQUAL CONSEQUENCES OF EQUAL REPRESENTATION*, at xi (1999) (noting that scholars pay surprisingly "little attention to the effects of Senate reapportionment").

17. DOUGLAS J. AMY, *BEHIND THE BALLOT BOX: A CITIZEN'S GUIDE TO VOTING SYSTEMS* 31 (2000).

18. R. Douglas Arnold, *The Local Roots of Domestic Policy*, in *THE NEW CONGRESS* 250 (Thomas E. Mann & Norman J. Ornstein eds., 1981).

Geographic representation makes parochialism normative for members of Congress. Legislators in political systems that take greater cognizance of party do not face the same representational trade-offs as members of Congress. There are many varieties of PR, but compared to the U.S. system, these systems tend to link legislators more tightly to national parties than to local constituencies.¹⁹

As such, PR systems mitigate the difficulties that members of Congress face as they attempt to balance national lawmaking with attention to local constituencies. Indeed, all national legislators in Israel²⁰ and the Netherlands²¹ represent the whole nation; there are no geographic subdivisions for purposes of representation. Other PR systems, such as those in Austria and Sweden, elect multiple representatives from each regional district.²² Whole districts are not represented winner-take-all by a single member; instead, district voters who support one party will elect a member to represent them, and (above specified thresholds of support) district voters who support another party will also have a representative. Some countries, such as Italy, Germany, and New Zealand, use a mixed system, with some representatives serving single member constituencies and others elected in multi-member constituencies from larger regions.²³ In all cases, citizens and legislators alike recognize that legislative representation is engineered to ensure that voters' party preferences are proportionally represented.²⁴

In PR systems, candidates run as members of a party, and once in office they are representatives of the party and its interests and ideological commitments. The role of the member of Congress is not so clear. Members must find a way to navigate the representational difficulties of serving as both a national legislator and a local advocate. In many respects, the U.S. system tilts the balance in favor of the local advocate. Members who behave as party mavericks tend to perform better electorally than loyal partisans.²⁵ Studies of legislative decision making have shown that members of Congress "consider[] the con-

19. MIXED-MEMBER ELECTORAL SYSTEMS I (Matthew Soberg Shugart & Martin P. Wattemberg eds., 2001).

20. POLITICAL HANDBOOK OF THE WORLD, *supra* note 7, at 594.

21. *Id.* at 878–82.

22. See MIXED-MEMBER ELECTORAL SYSTEMS, *supra* note 19, at 10.

23. See *id.* at 1.

24. AMY, *supra* note 5, at 24.

25. Jamie L. Carson et al., The Electoral Consequences of Party Loyalty in Congress, Presentation at the Annual Meeting of the Midwest Political Science Association 13 (Apr. 20–23, 2006) (concluding that a partisan voting record is an electoral liability because electoral votes tend to decline as party unity voting increases), available at <http://ms.cc.sunysb.edu/%7Emlebo/Carson,%20Koger%20&%20Lebo.pdf>.

stituency interest first.”²⁶ Rank-ordering electoral systems worldwide on the basis of legislators’ incentives to cultivate their local constituencies, Carey and Shugart concluded that only one type of electoral system extant in the world (that used in the Philippines) better rewards localism than the U.S. Congress.²⁷

Members of Congress have every incentive to give preference to local over national interests when the two conflict. An economist may be able to simultaneously conclude that free trade is good for the national economy but that it creates difficult economic dislocations for particular areas. But rare is the member of Congress who can even acknowledge that local interests might not be identical to national interests. Members of Congress who believe that the North American Free Trade Agreement is bad for their constituents’ interests typically maintain that free trade is bad national policy as well.

II. RECONCILING THE IRRECONCILABLE

The U.S. system attempts to sustain a legal fiction that all members of a geographic constituency can be represented by a single member. In most cases, of course, congressional constituencies are not meaningful communities of interest.²⁸ Constituents grouped together in most congressional districts often have little or nothing in common.²⁹ Constituencies can be highly heterogeneous in terms of economic interest, religion, race, class, ethnicity, urbanization, and economic development.³⁰ The largest states are microcosms of the nation.³¹ Constituencies may be narrowly divided in terms of partisanship and ideology.³² Members attempt to uphold the legal fiction that they represent everyone in their constituency by seeking a “lowest common denominator” form of representation.³³ They emphasize their personal accessibility to constituents, and narrow, highly localized issues.³⁴ They run vacuous campaigns focusing solely on

26. John W. Kingdon, *Models of Legislative Voting*, 39 J. POL. 563, 578 (1977).

27. John M. Carey & Matthew Soberg Shugart, *Incentives to Cultivate a Personal Vote: A Rank Ordering of Electoral Formulas*, 14 ELECT. STUD. 417, 425 (1995).

28. RICHARD F. FENNO, JR., HOME STYLE: HOUSE MEMBERS IN THEIR DISTRICTS 5–6 (1978).

29. See AMY, *supra* note 5, at 23 (describing a typical district as a place where “interests and political viewpoints diverge, especially over important issues like abortion, defense spending, taxes, [and] affirmative action”).

30. FENNO, *supra* note 28, at 2.

31. *Id.* at 4.

32. *Id.* at 2.

33. *Id.* at 5–6.

34. *Id.* at 96, 104.

their personal qualities and never mentioning their party affiliation or issue positions.³⁵

Some members find themselves representing states or districts that are tilted against them in terms of ideology and partisanship.³⁶ Such members have no secure coalition of political support. Members facing this difficult political challenge may attempt to reconcile the irreconcilable by avoiding national issues as much as possible. They champion legislation that caters to local concerns. They concentrate on casework, office hours, and pork barrel projects.³⁷ A number of studies have shown that electorally vulnerable members secure more federal projects for local constituents.³⁸ Senator Mary Landrieu, a Democratic Senator representing a state that voted for President Bush's reelection by a nine-percentage-point margin, narrowly won in 2004 with a slogan, "We need a senator who will put Louisiana *first*."³⁹ The nature of their geographic constituency often renders such members able only to fulfill effectively the role of attorney for the constituency. By contrast, members of legislatures in PR systems are not saddled with politically debilitating, hostile constituencies; their constituencies are their party's supporters.

III. SIDE PAYMENTS

Geographic representation means that members always have at least two bases for decision making on national policy: "What is best for the nation?" and "What is in it for my constituency?" When Con-

35. For a systematic analysis of Senate candidates' willingness to discuss policy issues in their campaigns, see KIM FRIDKIN KAHN & PATRICK J. KENNEY, *THE SPECTACLE OF U.S. SENATE CAMPAIGNS* (1999). Kahn and Kenney conclude the following:

As a general rule, candidates do not engage in an extensive dialogue about public policy. In fact, the dearth of issue discussion by senatorial candidates is quite dramatic. . . . On average, candidates make issues the fundamental focus of their advertisements only 36 percent of the time When candidates do focus on an issue in one of their ads, they declare a clear position only half of the time.

Id. at 238.

36. See, e.g., Liz Halloran, *One Fierce Nor'easter: A nasty Connecticut race has national significance*, U.S. NEWS & WORLD REPORT, May 29, 2006, at 28, available at <http://www.usnews.com/usnews/news/articles/060529/29shays.htm> (noting that Christopher Shays is one of the year's most vulnerable incumbents because he supports the Iraq War and represents a democratic-leaning district in Connecticut).

37. MORRIS P. FIORINA, *CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT* 39 (2nd ed. 1989).

38. See, e.g., ROBERT M. STEIN & KENNETH N. BICKERS, *PERPETUATING THE PORK BARREL* 119 (1995) (finding a connection between pork-barrel spending and electoral support); Frances E. Lee, *Geographic Politics in the U.S. House of Representatives*, 47 AM. J. POL. SCI. 714, 720 (2003) (finding that marginal members received more pork-barrel projects than members who won their elections by wider margins).

39. Michael Crowley, *Sugar Pill*, NEW REPUB., Dec. 23, 2002, at 12.

gress adopts national policies, it should ideally do so on the basis of what at least a majority of members believe is in the national interest. But geographic representation creates a systematic reason for legislators to decide questions of national policy for reasons that are irrelevant to national interests.

Coalition leaders frequently exploit this second criterion for decision making to build majorities. By targeting special benefits for members' constituencies, they can induce members to vote for national policies that they are reluctant to support on their merits.⁴⁰ In the summer of 2006, for example, the Republican Senate leadership sought to secure support for a broad tax reduction package by including extra write-offs for timber extraction in order to win the votes of three timber-state lawmakers: Senators Mark Pryor (D-Ark.), Maria Cantwell (D-Wash.), and Patty Murray (D-Wash.).⁴¹ When important legislation is hard fought, media reports of similar deals often appear. The outcomes of national policy can thus be decided whenever a pivotal number of members are willing to exchange their political support in order to secure side payments for their constituencies.

IV. DISTRIBUTIVE OUTCOMES

The geographic basis of representation makes members of Congress exquisitely sensitive to the local effects of policies. Members are highly alert to their parochial stakes when considering policies that distribute federal dollars geographically.⁴² Because every member of Congress has an equal vote, they tend to see a "fair distribution" of federal dollars as something approximating equal distribution across constituencies.⁴³ In both chambers, Congress has shown itself unable to target funding in programs to areas of greatest need. The tendency in both chambers is to spread benefits widely, diluting program effectiveness whenever targeting is needed. The problem is most evident in programs supporting infrastructure such as transportation, water,

40. DIANA EVANS, *GREASING THE WHEELS: USING PORK BARREL PROJECTS TO BUILD MAJORITY COALITIONS IN CONGRESS* 43 (2004).

41. Jeffrey H. Birnbaum, *An Estate Tax Twist Reverses Party Roles On Minimum Wage*, WASH. POST, Aug. 3, 2006, at A1.

42. Arnold, *supra* note 18, at 250–51.

43. See LEE & OPPENHEIMER, *supra* note 16, at 189–90 (suggesting that House members believe that allocating funds according to population is fair, whereas senators prefer equal distribution between states).

and sewer grants,⁴⁴ and regional economic development such as enterprise zones and model cities.⁴⁵

Because of its basis of representation, “fairness” in the House usually means a distribution that tracks population.⁴⁶ For senators, however, “fairness” tends towards equality across states.⁴⁷ The Senate’s basis of representation creates unique and serious problems. For policymaking, state population is not just one of many important state characteristics such as “area,” “climate,” or “economic development.” Considering the extreme variation in population across states, the size of a state’s population is, generally speaking, the single best predictor of a state’s funding needs in most federal programs.⁴⁸ States with more people need more money for school lunches, job training, water treatment, and transportation, to name a few areas. States with areas that are at a high risk for terrorist attack are generally more highly populated.⁴⁹ The basis of House representation and its associated definition of “fairness” thus present fewer problems for policy design.

Within the confines of the Senate, a senator contributes only one vote, no matter how many constituents he or she represents. The logic of Senate coalition-building thus dictates the pursuit of the “cheap” votes of small-state Senators.⁵⁰ When senators write formulas to distribute federal funds, they find that relatively small cuts in the most populous states’ budgets will go a long way toward increasing the funding for many small states.⁵¹ In the process, a coalition-builder loses California’s two Senators’ votes but gains those of a greater number of small-state senators. Senator James Inhofe (R-Okla.), chair of the Senate Committee on Environment and Public Works, described

44. R. DOUGLAS ARNOLD, CONGRESS AND THE BUREAUCRACY 129–33 (1979) (describing one example where some of the neediest communities did not receive funding for a water and sewer grant, because the aid needed to be spread across all communities to gather sufficient support to enact the bill).

45. *Id.* at 165–69.

46. *See* Lee & Oppenheimer, *supra* note 16, at 190.

47. *Id.*

48. *See* Frances E. Lee, *Senate Representation and Coalition Building in Distributive Politics*, 94 AM. POL. SCI. REV. 59, 70 (2000) (stating that a state’s need for federal funding corresponds closely with the state’s population size).

49. The 9/11 Commission recommended that homeland security funds be allocated based on assessment of threats and vulnerabilities to geographic areas. The assessment should consider population, population density, and critical infrastructure within each state. 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 396 (2004).

50. Lee, *supra* note 48, at 70.

51. *See, e.g., id.* at 68 (noting that a one percent cut in California’s 1991 transportation budget, or \$199 million, could fund an eighty-six percent increase in Wyoming’s transportation budget).

the typical approach during a 2004 floor debate on the transportation bill: We “pacify some 60 [Senators] by giving them whatever they want in the percentage of the overall, and as to the rest, who cares; we have our 60 votes and we run.”⁵² The “rest” will usually include Senators from the most populous states.

In short, even when funding needs track population, the Senate typically prefers to distribute funds more equally across states.⁵³ Accordingly, close to forty percent of Homeland Security grant dollars under existing formulas are distributed equally across states.⁵⁴ Thus, more than one third of all homeland security grants funds are equally distributed between South Dakota and California and between Vermont and New York.

With population increasingly skewed across the states, Senate representation significantly distorts policy design. Despite conventional wisdom to the contrary, the House of Representatives does not offset the Senate small-state bias.⁵⁵ The House provides no representational bonus for large states. Even when the House and Senate compromise on spending, the outcome tilts toward small states.⁵⁶ A small-state bias can thus be found in most intergovernmental grant programs.⁵⁷ When the Senate allocates federal dollars, whether for transportation, community development, environmental quality, disaster assistance, or infrastructure, small-population states typically win and large-population states lose. The bias is most evident in the programs over which Congress retains greatest control.⁵⁸

52. 150 CONG. REC. S1197 (daily ed. Feb. 12, 2004) (statement of Sen. Inhofe).

53. LEE & OPPENHEIMER, *supra* note 16, at 189.

54. Shawn Reese, *FY2006 Homeland Security Grant Distribution Methods: Issues for the 109th Congress*, CONG. RES. SERV. 1 (2006), <http://www.opencrs.cdt.org/document/RL33241/>.

55. See Frances E. Lee, *Bicameralism and Geographic Politics: Allocating Funds in the House and Senate*, 29 LEGIS. STUD. Q. 185, 205 (2004) (finding that the Senate has a greater impact on the distribution of federal funds and, thus, the House does not effectively counter-balance the Senate).

56. *Id.*

57. See Frances E. Lee, *Representation and Public Policy: The Consequences of Senate Apportionment for the Geographic Distribution of Federal Funds*, 60 J. POL. 34, 35 (1998) (presenting data showing that small states receive more federal support per capita in many domestic funding programs).

58. See *id.* (explaining that the small state bias is strongest when Congress distributes federal money according to congressionally mandated formulas).

V. DIM PROSPECTS FOR REFORM

The Constitution undoubtedly presents a formidable obstacle to political reform.⁵⁹ But the paralysis of representational reform in the U.S. is only partly a consequence of the great difficulty of amending the U.S. Constitution. With respect to the House of Representatives, the Constitution does not require the use of plurality elections in single-member geographic districts. Instead, Article I, Section 2 merely specifies how the number of representatives will be apportioned among the states, and that eligible voters who fill those seats will be the same as those for “the most numerous branch of the State Legislature.”⁶⁰ Under the Times, Places, and Manner Clause,⁶¹ Congress could adopt a different method or permit states to experiment with alternatives. Indeed, Congress first required the use of single-member districts in 1842 as a reform measure to stop general-ticket representation.⁶² Such representation was an anti-democratic practice that many states had used to “negate political opportunities for minority parties that had sufficient power to be competitive in single-member districts by allowing a majority party to win most, if not all, seats through a statewide election.”⁶³

Reform of Senate representation, however, is an entirely different matter. Article V exempts Senate representation even from the normal, extremely arduous amendment process, stating that “no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.”⁶⁴ Article V apparently requires complete unanimity to reform Senate representation. This may be one section of the U.S. Constitution that is, literally, unamendable.

America’s rigid adherence to geographic representation probably stems from sources beyond the institutional barriers to change. There is a notable lack of any ferment for constitutional reform among elites in the contemporary era. The narrow divisions of party control in the Congress and in presidential elections may have encouraged a risk-

59. DANIEL LAZARE, *THE FROZEN REPUBLIC: HOW THE CONSTITUTION IS PARALYZING DEMOCRACY* 9 (1996); SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION* 160 (2006).

60. U.S. CONST. art. I, § 2, cl. 1.

61. *Id.* 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, except as to the Places of chusing Senators.”).

62. The Apportionment Act of June 25, 1842, ch. 47, 5 Stat. 491. The current version of this statute is 2 U.S.C. §§ 2a–2c (2000).

63. James Thomas Tucker, *Redefining American Democracy*, 7 MICH. J. RACE & L. 357, 373 (2002).

64. U.S. CONST. art. V.

aversion among both parties. That only a small increment of support stands between either party and power may have encouraged the leaders of both to think incrementally and to eschew larger agendas or sweeping political reforms. But the American public itself unquestionably has a long-standing and well-established conservatism about U.S. institutions of government.⁶⁵ At all levels, Americans conceptualize representation in geographic terms.⁶⁶ And despite their discontents with the operation of politics and political institutions, overwhelming majorities of Americans persist in believing that the U.S. constitutional system is the best in the world.⁶⁷

65. JOHN R. HIBBING & ELIZABETH THEISS-MORSE, *CONGRESS AS PUBLIC ENEMY* 42–46 (1995) (finding that the American public strongly and consistently approves of American governing institutions, even though it is usually dissatisfied with their actual performance).

66. See ROBERT G. DIXON, JR., *DEMOCRATIC REPRESENTATION* 3–6 (1968) (discussing how voters in many states rejected referenda to reapportion their state legislatures on a population based standard in favor of preserving the representative system in place before the reapportionment revolution).

67. See HIBBING & THEISS-MORSE, *supra* note 65, at 125 (“Americans love the constitutional structure and the abstract principles underlying the political system in the United States.”).