



THE SEVENTEENTH AMENDMENT:

Is it the U.S. Constitutional Amendment which would most concern our Founders?

“Sweet”?

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Stephen L. Bakke  August 15, 2013

Re: **Selecting Senators**

*Very recently I read a criticism of many of us who talk about the importance of “states rights” when explaining how our Founders viewed the various checks and balances in our “federalist system.” Federalism explains the relationship between the federal and state governments, i.e. “dual sovereignty,” whereby the federal and state governments each have their own distinct sovereign constitutional powers. My critic pointed out, quite correctly I now realize, that **states don’t have “rights,” only individuals do! States have powers, one of which is to be a buffer between individual citizens and the federal government.** This is pointed out very well by Mark Levin in his new book: “The Liberty Amendments: Restoring the American Republic.” – Stefano Bachovich – obscure curmudgeon, wise political pundit – a prolific purveyor of opinions on just about everything – my primary “go to guy.”*

The United States Constitution, Article One, Section 3, Paragraph One: *The Senate of the United States shall be composed of two Senators from each State, (chosen by the Legislature thereof) for six years; and each Senator shall have one Vote.*

This was changed by:

Amendment Seventeen to the Constitution, Paragraph One: *The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote*

What were they thinkin’?

Our Founders had very specific and oft stated reasons for emphasizing the republican (representative democracy and rule by law)/federalist (dual sovereignty) form of government. Their logic is specifically relevant to their choice of having U.S. Senators selected by their respective state legislatures. Consider:

The State governments may be regarded as constituent and essential parts of the federal government; whilst the latter is nowise essential to the operation or organization of the former. Without the intervention of the State legislatures, the President of the United States cannot be elected at all. They must in all cases have a great share in his appointment, and will, perhaps, in most cases, of themselves

determine it. The Senate will be elected absolutely and exclusively by the State legislatures Thus, each of the principal branches of the federal government will owe its existence more or less to the favor of the State governments, and must consequently feel a dependence, which is much more likely to beget a disposition too obsequious than too overbearing towards them. – from Federalist 45, paragraph 7 (James Madison).

..... giving to the State governments such an agency in the formation of the federal government as must secure the authority of the former [state governments] the equal vote allowed to each State is at once a constitutional recognition of the portion of sovereignty remaining in the individual States and an instrument for preserving that residuary sovereignty the additional impediment it must prove against improper acts of legislation. No law or resolution can now be passed without the concurrence, first of a majority of the people, and then of a majority of the States. – from Federalist 62, paragraphs 3, 5 and 6 (probably James Madison).

Please note the following important facts emerging from the minds of our Founders and disclosed by Federalist 45 and 62 (among many other potential citations) in what I consider their order of importance:

- No law or resolution should be passed without **the concurrence of BOTH the majority of the people (through the House of Representatives), and the majority of the states (through the accountability of the U.S. Senate to the state legislatures).**
- The federal government **owes its existence significantly to the favor of the states.**
- The Founders “hard-wired” states into the federal government by their procedure for selecting senators. **This ensured significant state influence at the federal level.**
- The equal representation in the Senate of each individual state (2 senators whether a state is big or small, rich or poor, vast or confined), **assures the smaller states equal voice to the larger, otherwise more influential, states.** Not only do the states collectively have “dual sovereignty” with the federal government, each individual state can maintain an element of individual sovereignty. (This element was NOT changed by the Amendment.)
- The Senate was intended to have **fewer members** than the House of Representative and **thereby be more deliberative.** (This was NOT changed by the Amendment.)

It’s all about “checks and balances” against a potential tyranny by a majority! The Founders recognized that in a direct “majority rule” government, people sometimes become “scallywags” and if left to their own devices, chaos will result. Consider what one very wise fellow had to say:

They [the Framers, being familiar with ancient and modern republican forms of representative governments] were convinced that popular assemblies are frequently misguided by ignorance, by sudden impulses, and the intrigues of ambitious men; and that some firm barrier against these operations was necessary. They, therefore, instituted your Senate. – Alexander Hamilton speaking to the New York Ratifying Convention in 1788.

The Founders were “all about” states’ power and sovereignty! So what went wrong?

Wendy Schiller from Brown University and Charles Stewart III from MIT looked extensively at data between 1871 and 1913, a time when U.S. senators were selected by the state legislatures. While a majority of the elections were handled satisfactorily, but the 2% of the elections that ended in a deadlock were harmful – the states involved ended up being under-represented in Washington.

In addition to deadlocks, there were reports of corruption, selling of senatorial seats, and general disfunctionality. And because of the growing perceived dissatisfaction, quite a few states had effectively created procedures for selection that were little more than camouflaged direct popular vote selection.

There were threats from the states to call a “Constitutional Convention” with the purpose to revise the Constitution and this worried responsible political leaders. A convention could be called by the states with the express purpose of making changes to senator selection, but wise observers knew that an emotional gathering would not limit itself to that one issue – it would likely end up making impetuous and harmful changes to the Constitution. They didn’t want this so they themselves passed the Seventeenth Amendment which was soon thereafter ratified by the states.

In effect, this Amendment stripped the states of one of their important powers. All of this occurred, quite conveniently, in the midst of a liberal/progressive upheaval in the United States. Woodrow Wilson was President and he purposefully presided over an explosion of federal power that has never been reversed and continues to grow.

[The Seventeenth Amendment] effectively just gave us another house like the House of Representatives and the states lost their place at the federal table. – Former Judge Andrew Napolitano

Whatever the Wilson-era progressives might have held, the federal government was not intended to be a wholly separated layer of government. Instead, it was to be intertwined with the states to such an extent that it could not ride roughshod over their interests without pushback. – Charles C.W. Cooke

The state legislatures will jealously and closely watch the operations of this government the state legislatures to be sure guardians of the people’s liberty. – James Madison

What makes sense to me? Glad you asked!

First let me stipulate certain of my beliefs:

- The U.S. is **not a direct, majority rule democracy** – it never was and wasn’t intended to be.
- The intent by politicians in going to popular senatorial selection was all about creating a popular “people’s house” just like the House of Representatives.
- The **political motivation by the progressives of the time** was to permanently expand by power of the federal government by distancing it from the influence of state governments.
- The original **Constitution is clearly not a “democratic/majoritarian ” document** – rather, it created a “**representative republic.**”
- The Bill of Rights itself is expressly “**counter-majoritarian.**”
- Many supporters of this amendment still think the direct popular selection of senators would make the body more responsive to the people. But the House of Representatives is the “people’s house” and the **Senate was deliberately set up to be more deliberative and actually a check and balance to the majoritarian “people’s house.”**
- The Seventeenth Amendment **did not curtail the frequency of corruption in politics.**
- **Any abuses** that occurred prior to the Seventeenth Amendment could be effectively **eliminated through enforceable procedural policies.**

In retrospect, the amendment failed to accomplish what was expected of it, and in most cases failed dismally. Exorbitant expenditures, alliances with well-financed lobby groups, and electioneering sleights-of-hand have continued to characterize Senate campaigns long after the constitutional nostrum was implemented. In fact, such tendencies have grown increasingly problematic. – C.H. Hoebeke – a quote from his 1996 essay titled “Humanitas.”

The more I study the Constitution, the Bill of Rights and the Federalist Papers, the more I appreciate the fear the Founders had of creating a “tyranny of the majority” and the undesirable potential for impetuous transformation of our government.

Among many other characteristics, two things that makes us “exceptional” are the ingenious concepts of “separation of powers” and the resulting “checks and balances.” Most citizens, even those few who know quite a bit about our form of government, think about these concepts only in the context of the three branches of the federal government – executive, legislative, and judicial.

Those are “horizontal” relationships. It is often forgotten that an even more important separation of powers was intended by the Founders. These are vertical checks and balances between the federal government, the states, and the individual citizens. Consider:

The enumeration in the Constitution, of certain rights shall not be construed to deny or disparage other retained by the people - - - - - The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people. – From the “Bill of Rights” – the Ninth and Tenth Amendments.

I’m with Stefano on this one! The Founders would consider this Amendment to be in direct conflict with their vision for the U.S. government. As did they, I believe in limited and defined power for our federal government and would **support a carefully constructed and orderly repeal of the Seventeenth Amendment.**

There is not in the whole science of politics a more solid or a more important maxim than this – that of all governments, those are the best, which, by the natural effect of their constitutions, are frequently renewed or drawn back to their first principles. – James Wilson, Lectures on Law, 1791

PS: Since this is the 100th anniversary of the Seventeenth Amendment, Scott Bomboy of the National Constitution Center sought to find out what today’s U.S. Senate would look like if members were selected by the state legislatures. He found and reported on a study by Constitution Daily in which they looked at the composition of current state legislatures. According to this study, **it is likely, with selection done by state legislatures, our current Senate would be solidly republican – possibly even with a filibuster-proof majority!**