

## Constitution Corner – The 17<sup>th</sup> Amendment Should Be Repealed

Note: On “We the People – The Constitution Matters” for 6 January we discussed repeal of the 17<sup>th</sup> Amendment with our guest, Andrew Langer, President of [Institute for Liberty](http://www.instituteforliberty.org/).<sup>1</sup> There just wasn’t sufficient time to cover all the nuances of that issue; hence this essay.

On December 5, 1933, the necessary 36<sup>th</sup> state (Utah) ratified the 21<sup>st</sup> Amendment, bringing to an end 13 years of national prohibition and proving beyond doubt that Americans are able to detect and correct errors they have made in their Constitutional order. If only we were so observant today.

It had not taken long for Americans to realize the folly of trying to modify human behavior by Constitutional amendment; prohibition laws were openly flaunted and juries often refused to convict those accused of violating the law -- Americans were determined to drink alcohol.

The 18<sup>th</sup> Amendment, which created prohibition, had been ratified in 1919 only six years after the 17<sup>th</sup> Amendment was added to the Constitution; and the 17<sup>th</sup> came only two months after the 16<sup>th</sup>. America had gone nearly 40 years since the 15<sup>th</sup> Amendment to the Constitution was added and suddenly we were amending with great frequency.

The 17<sup>th</sup> Amendment, which changed Senators from being appointed to the Senate by their state legislatures to being elected instead by the citizens of the state, was seen by some as anticlimactic; many states had already begun allowing their citizens to elect their Senators, if not directly, at least through a non-binding primary election. For these people, the amendment only confirmed a *fait accompli*.

Yet the effort to change the appointment of Senators actually goes back to at least 1826, when New York Representative Henry Storrs first proposed an amendment to provide for popular election. Similar amendments were introduced in 1829, 1855 and 1868.

By the 1890s, support for the introduction of direct election for the Senate began to accelerate, primarily due to the efforts of the Populist Party, which added direct election of Senators to its party platform. In 1908, Oregon became the first state to base its selection of Senators on a popular vote. Nebraska soon followed.

William Randolph Hearst threw his weight behind the movement for direct election by publishing a series of articles in his 1906 *Cosmopolitan Magazine*, attacking “The Treason of the Senate.” “Muckraking” journalists described Rhode Island Senator Nelson Aldrich as the principal “traitor” among the “scurvy lot,” who controlled the Senate through “theft, perjury, and bribes which corrupted the vote in the legislature to gain their election.”

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<sup>1</sup> <http://www.instituteforliberty.org/>

Gradually, more state legislatures began to petition the Congress for direct election of Senators. The House soon had the two-thirds vote necessary to pass just such an amendment; when the joint resolution reached the Senate, however, it failed year after year. By 1910, 31 state legislatures had petitioned Congress to pass and send the amendment for ratification, while 28 of them applied to Congress for an Article V convention for drafting such an amendment. This was only three applications short of the threshold that would have required Congress to convene such a convention. That same year, ten Republican Senators who were opposed to the change were “unelected,” sending a further “wake-up call to the Senate.” Two years later the Senate finally passed the joint resolution and the proposed amendment was sent to the states for ratification.

The amendment reads: “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. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures...” The amendment concludes by specifying how vacancies in a Senate seat will be filled.

The framers of the Constitution could have specified election by the people. In the Convention, James Wilson of Pennsylvania had been the sole advocate for popularly electing Senators; but his proposal to do so was soundly defeated, 10–1. The Virginia Plan proposed the Senate be elected by the members of the “lower House.” So why did the Framers of the Constitution choose appointment by the state legislatures instead?

Perhaps the reason can be summed up by a familiar Madisonian statement: “Power lodged as it must be in human hands, will forever be liable to abuse.” In other words: “Checks and balances” were needed. The people would exert their political power in the House of Representatives, the states would exert theirs in the Senate, and the two bodies would provide a check on each other to prevent excesses. The interests of the people in the House would be, must be, balanced by the interests of the state governments in the Senate.

Madison confirmed in Federalist #45: “The Senate will be elected absolutely and exclusively by the State legislatures.”

In Federalist #63, Madison discussed the importance of the role of a Senate elected by state legislatures rather than the people:

*“To a people as little blinded by prejudice or corrupted by flattery as those whom I address, I shall not scruple to add, that such an institution [a Senate elected by the state legislatures] may be sometimes necessary as a defense to the people against their own temporary errors and delusions. ... so there are particular moments in public affairs when the people, stimulated by some irregular passion, or some illicit advantage, or misled by the artful misrepresentations of interested men, may call for measures which they themselves will afterwards be the most ready to lament and condemn.”*

*“In these critical moments, how salutary will be the interference of some temperate and respectable body of citizens, in order to check the misguided career, and to suspend the blow meditated by the people against themselves, until reason, justice, and truth can regain their authority over the public mind?”* (emphasis added)

If the Senate could provide a check against the people, it could also provide a check against the Executive, particularly given its unique role in confirming executive appointments and ratifying treaties; especially if the state governments were able to instruct their Senators.

So what has been the result of direct election of Senators?

Here’s where the argument for repeal falters a bit; it is always difficult to state with certainty what would have happened in any situation, “if only.” But it is not too hard to see some of the effects:

For starters, the states are well on their way to being considered mere administrative units of the national government. As former Senator Tom Coburn explains [in this interview](#),<sup>2</sup> the federal government has grown to the point where it dominates the states. As Mr. Langer pointed out on our radio interview, the vast majority of this growth took place after the 17<sup>th</sup> Amendment was ratified. We might rightfully ask: would this growth have taken place if the states still controlled the Senate?

State governments rightfully claim responsibility over matters of taxation, education, employment, disaster relief, public safety, transportation, health care, marriage, and property rights, to name just a few. Yet in all those issues, and many more, the federal government mandates, regulates, or directs policy, and the states are usually forced to obey. Although state governments bear much of the responsibility for their citizens, they enjoy greatly reduced authority to do anything about the issues they face. A [reinvigoration of state power](#)<sup>3</sup> is long overdue.

A third effect of popular election of Senators was that states, especially those which did not ratify the 17<sup>th</sup>, lost the “equal suffrage” in the Senate guaranteed by Article 5. Senators now represent the people who elected them, and the states no longer have a controlling vote in the Senate; they have arguably lost their suffrage. “But there remain two Senators for every state, every state is therefore equally represented,” comes the refrain. Because Senators can no longer be recalled by the state legislatures, they no longer must vote as a state delegation, they now “vote their conscience.” This leads to a hundred individual votes in the Senate instead of what used to be, in essence, one vote per state. One could argue (and, no doubt, some will)

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<sup>2</sup> [http://www.conventionofstates.com/tom\\_coburn\\_the\\_federal](http://www.conventionofstates.com/tom_coburn_the_federal)

<sup>3</sup> <http://usconservatives.about.com/od/conservativepolitics101/a/The-Conservative-Case-For-Returning-Government-Power-To-The-States.htm>

that Senators could always “vote their conscience,” and this must be conceded; but the “persuasiveness” attendant to instructing Senators how their state government views an upcoming measure cannot be dismissed. Because the dominant party in the state legislature would likely have appointed Senators from that party, Senators would normally share the party’s political philosophy and could be expected to vote alike on most issues. Today there is even the potential for the two Senators to come from *different* parties. Thirteen states in our last Congress, in fact, had Senators from opposing parties. On strongly partisan issues, their votes could be expected to nullify each other.

Virginia M. McInerney has posted on the LONANG<sup>4</sup> website [a well-reasoned article](#)<sup>5</sup> explaining why the 17<sup>th</sup> should be repealed. It is worth the read. She points out: “The national government, having taken on too much power, is unable to properly administer all the areas it has arrogated unto itself. On the other hand, the state governments are impotent in legislating and executing the will of the people because they are subject to unpredictable subjugation by the national government.”

But repeal of the 17<sup>th</sup> Amendment face several [challenges](#).<sup>6</sup> The American people have become accustomed to electing “their” Senators, and few Americans today understand or could explain the reasoning behind the original design.

The next challenge is found in the mechanism of repeal. According to Article V there are two ways to amend the Constitution: Congress can propose the necessary amendment, as they did with the 17<sup>th</sup>, or the states can petition for an Article V convention to do so. The first method is problematic; it is almost certain that a repeal amendment will ever gain the necessary 2/3 vote in the Senate; today’s Senators have become accustomed to the corporate donations to their re-election campaigns. This money would dry up overnight once Senators were once again appointed by their states. That leaves an Article V convention as the only mechanism with any chance of success. Due to a perceived risk of untoward results, the Article V Convention method is being fought tooth and nail, most vehemently by conservatives themselves.

In Feb 2016, the Utah Senate [passed a resolution](#)<sup>7</sup> calling on their Congressional delegation to push for repeal of 17<sup>th</sup> Amendment. I’ve not discovered if this actually happened; if it did, no

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<sup>4</sup> Laws of Nature and Nature’s God Institute

<sup>5</sup> <http://lonang.com/commentaries/conlaw/federalism/repeal-seventeenth-amendment/>

<sup>6</sup> <http://blog.constitutioncenter.org/2016/05/repealing-the-17th-amendment-would-be-no-small-task/>

<sup>7</sup> <http://www.standard.net/Government/2016/02/24/Utah-Senate-passes-resolution-to-repeal-17th-Amendment-in-states-rights-push>

one took much notice. [Georgia Senator Zell Miller](#)<sup>8</sup> famously tried every year he was in the Senate to pass a repeal measure through that chamber, each time unsuccessfully.

Some, however, urge caution. David Gordon, writing on Mises.org points out that [Repealing the 17th Amendment Won't Fix the Senate](#).<sup>9</sup> Merely repealing the 17th might only place the issue back in the hands of the state legislatures where some could continue to let their citizens elect Senators if they so choose. “A fundamental problem of the Senate has long been the fact that Senators do not vote as representatives of a state delegation, but as independent legislators. The *status quo* should be abandoned in favor of allowing each state delegation only a single vote in the Senate, and that vote should be interpreted as the member state's position.” Such a change: one vote per state, could be included in a repeal amendment. Unless a repeal amendment also gave the state legislatures specific power to recall the Senators, there would be no incentive for Senators to follow their state's instructions. The repeal amendment should also address the issue of long-vacant seats, which was an occasional problem prior to the 17<sup>th</sup> when state legislatures could not agree on who should represent them.

Many on the Left will also fight the idea. Some worry that repealing the 17<sup>th</sup> will lead to much stronger republican control of the Senate. With 68 percent of the 98 partisan *state* legislative chambers in the U.S. [now controlled by Republicans](#),<sup>10</sup> it seems likely they are right -- at the moment. But remember, only a third of Senators are elected each two years; the composition of Republican vs Democrat control of state legislatures could change dramatically over the next six years.

If you would like to register your opinion on this matter, go to [debate.org](#),<sup>11</sup> where you'll find an online anonymous poll. When I registered my vote, 60% of respondents had said “Yes” to repeal, while 40% had said “No.”

In conclusion, just as the American people recognized their error in enacting prohibition, and correcting that error, they will, hopefully, one day realize their error in disrupting the Framers' plan for a balance of power in the Congress – and repeal the 17<sup>th</sup> Amendment. If you agree the 17<sup>th</sup> should be repealed, if you would like to [restore true federalism](#),<sup>12</sup> speak with your state legislators.

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<sup>8</sup> [https://en.wikipedia.org/wiki/Zell\\_Miller](https://en.wikipedia.org/wiki/Zell_Miller)

<sup>9</sup> <https://mises.org/blog/repealing-17th-amendment-wont-fix-Senate>

<sup>10</sup> <http://www.cnsnews.com/news/article/barbara-hollingsworth/after-winning-7-more-seats-gop-dominance-state-legislatures-all>

<sup>11</sup> <http://www.debate.org/opinions/should-the-u-s-repeal-the-17th-amendment>

<sup>12</sup> <http://www.restorefederalism.org/>

