

The Breakfast Club

Constitutional Minute for 27 July 2021

April 8, 1913 – The Day Federalism Died

Part of the genius of the U.S. Constitution lay in its balance of power. Each branch of government was given sufficient power and authority to carry out its given responsibilities -- in the case of the Legislative Branch, even the explicit power “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers” -- but no one branch would *completely* dominate the others (although Congress was given power sufficient to call it “The First Branch”).¹ For example: Congress can impeach the President and Judges, the Courts, on the other hand, can strike down unconstitutional laws of Congress; the President controls the military and appoints senior officers, etc. These various checks and balances between the three branches are regularly touted as one of the success stories of the Constitution² and a feature instrumental in “keeping” the republic. However, few today speak of or even remember that there was another “balance of power” built into the original Constitution: a balance between the states and the national government.

During the Articles of Confederation period, the document’s chief defect was the disparate power of the states when compared with the Congress. Congress lacked the power to get anything of substance done, at least not in a timely and efficient manner. Yet even as they realized that some shedding of power was necessary, the states were not about to let the pendulum swing very far in the other direction: an overly-powerful national government simply would not do.

One significant way the states retained a modicum of control over the national government was through the Senate. *“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.”*

A Senator who thus owed his job (and livelihood) to his state legislature was not about to let legislation pass in the Senate that was not in the best interest of his state. Doing so would guarantee a swift ticket home, perhaps passing his replacement in a carriage going the opposite direction.

This system worked well, quite well for about 70 years.

But there gradually arose a “feeling” that some senatorial elections/selections in the state legislatures were being “bought and sold.” Between 1857 and 1900, Congress investigated three elections over alleged corruption. In 1900, the election of Montana Senator William A. Clark was voided after the Senate concluded that he had “purchased” eight of his fifteen votes in the legislature.

Electoral deadlocks were another issue. Some states just couldn’t seem to get their Senators appointed or replaced. One of Delaware’s Senate seats went unfilled from 1899 until 1903.

¹ See: *Congress: The First Branch*, by Benjamin Ginsberg and Kathryn Wagner Hill, Yale University Press, 2019.

² <https://www.newsweek.com/celebrating-our-constitutions-birth-what-makes-it-work-opinion-1531754>

By 1910, 31 state legislatures had passed resolutions calling on Congress to pass a constitutional amendment allowing for direct election of Senators, and in the same year several Republican Senators who were opposed to such reform were voted out of office by their Legislatures, acting as a "wake-up call" to the Senate. Twenty-seven of the 31 states had also called for a constitutional convention on the issue, only 4 shy of the threshold that would require Congress to act. To avoid a "rogue convention", in which unexpected or damaging amendments could be proposed, a resolution to require direct elections of Senators was finally passed by Congress on May 13, 1912. Within a year it had been ratified by three-quarters of the states, and was declared part of the Constitution by Secretary of State William Jennings Bryan on May 31, 1913, two months after President Woodrow Wilson took office.

The 17th Amendment has been cheered by the Left as a victory for populism and democracy, and decried by the Right as a loss for states' rights (The Death of Federalism!). I can think of no finer example of "shooting yourself in the (political) foot." For the states to actually ask for this change seems incredibly near-sighted. Much of the encroachment by the Federal Government on areas of policy traditionally administered by the states can, I believe, be traced to this Amendment. Madison believed (naively, in my view) that "[A]mbitious encroachments of the federal government, on the authority of the State governments, would not excite the opposition of a single State, or of a few States only. They would be signals of general alarm." His use of "general alarm" suggests he may have even thought the people themselves would rise up to voice their opposition. This presumes that the people have sufficient knowledge of the states' rights under the Constitution to actually recognize encroachment as such. On the other hand, even when 60% of American do recognize encroachment (i.e. Obamacare), "The People's Congress" enacts it anyway. I'm quite certain Obamacare would not have passed a pre-17th Amendment Senate!

How about repealing the 17th? Whole [websites](#) are now [devoted](#) to it; then-Georgia Senator Zell Miller famously and repeatedly [called for its repeal](#) on the Senate floor. A brief look at who today supports repeal and who opposes it reveals much; in support of repeal are the [various Tea Party organizations](#), [National Review magazine](#) and others on the Right; opposed sit, predictably enough, [The LA Times](#), [Rachel Maddow](#), and [other liberal organizations, some even eager to throw the "R"-word into the argument](#). [Solon magazine](#) called the repeal movement "The surprising Republican movement to strip voters of their right to elect senators." Seeing that they willingly threw away their voice in the Congress, my sympathy for the states is limited, but I wholeheartedly support repeal.

What can you do? There is more to this story than I've summarized here; you can become better educated. I recommend *The 1913 Solution: How the 17th Amendment is Destroying the United States of America*, by H R Stuart. Mark Levin's *Liberty Amendments* also covers the topic. I've stopped recommending Wikipedia for any topic with a political bent, the website has become dominated by Progressives.³ Second, learn more about [the Article V process](#).

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³ <https://thecritic.co.uk/the-left-wing-bias-of-wikipedia/>