



17th amendment, apushistory, 12 Oct 2010, flickr.

Taking Back the Constitution - Part 9 - Repeal the 17th

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What is the 17th?

The 17th amendment replaced the election of senators by each state's legislature with direct election by the state's citizens:

Amendment XVII:

Passed by Congress May 13, 1912. Ratified April 8, 1913.

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.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

This amendment modified the prior constitutional rule in Article I, Section 3,ⁱ that gave each state legislature the responsibility for electing their two senators. It gave each senator a six year term, made provision for vacancies, and divided senators into classes so that one-third stood for election every two years.

The United States is a Republic

To properly discuss the 17th, remember the United States is not a democracy! It is a republic that uses democratic procedures to rotate our (hopefully) best citizens through public office. Our founders understood the dangers of democracy and structured their new government with each piece selected in a different manner and given limited powers so that they would serve as a check on the others.ⁱⁱ All the factors that led our founders to choose the legislative method for selecting Senators are much too lengthy to include in this short column. However, they were intended to produce a body less subject to the temporary errors and delusions of the populace than the House of Representatives. As James Madison said in describing selection by state legislatures, “It is recommended by the double advantage of favoring a select appointment, and of giving to the State governments such an agency in the formation of the federal government as must secure the authority of the former, and may form a convenient link between the two systems.”ⁱⁱⁱ

Justifying the distancing of Senatorial selection from the citizen, Madison mentioned “What bitter anguish would not the people of Athens have often escaped if their government had contained so provident a safeguard against the tyranny of their own passions? Popular liberty might then have escaped the indelible reproach of decreeing to the same citizens the hemlock on one day and statues on the next.”^{iv}

Justifications for the 17th based on an increase in direct democracy merely display an ignorance of our founders’ sophisticated knowledge of practical governance, or worse, actively seek to impose tyranny on our citizens.^v

Why repeal the 17th?

The possible repeal of the 17th has gotten some attention in recent years as the federal government has steadily encroached on areas formerly considered a state prerogative. With the Senators now representing the people of a state, rather than the government of a state, the ability of a state to stop legislation that ignores interests peculiar to it is significantly reduced.

The 17th was passed with the expectation that it would:

- 1) reduce corruption of state law lawmakers, and potential Senators,
- 2) avoid gaps in representation due to legislative gridlock, and
- 3) avoid swamping state issues under federal issues in the election of state legislators.

The 17th had several unfortunate effects that were inadequately appreciated at the time of passage:

- 1) it virtually eliminated state input into federal lawmaking, and
- 2) it made a government that is closer to the people, and responsible for most laws, relatively weaker.

Former Congressman Ron Paul mentions that the 17th “undermined the principal importance of the states.”^{vi} Recently, a constitutional law student mentioned to me that he felt that the states were redundant, and, within 50 years, could easily be replaced by local administrative offices of the federal government.

Corruption

Corruption was one of the principal justifications advanced for ratifying the 17th. After the civil war, vote purchasing was used to elect some senators. But the first reported case of bribery in the election of a senator did not occur until 1872. Between that time and the ratification of the 17th, 15 elections were alleged to be corrupt.^{vii} Not too bad for a period in which over 600 senatorial elections took place!

In retrospect, the increase in corruption appears to parallel changes to make the election of senator a popular contest for the public. Primaries for senator were gradually held in more states as well as canvassing to assure the popularity of the eventual senator. By the time the 17th was passed nearly 2/3 of the sitting senators had arrived via a statewide primary. Small wonder that the Senate easily achieved the required 2/3 vote. Facing the same electorate in the general election was less daunting than leaving election up to the legislature.

The 17th was sold by those who believed it would reduce corruption. Looking back from the present, that promise has a distinctly hollow ring. In an era when campaign expenses and “campaign contributions” have become vastly greater and favors solicited more expensive to the public purse, the corruption of the early populist era is picayune. Senators taking advantage of young ladies willing to spread their legs for the powerful have become a badge of virility rather than to deny re-election. Even charges relating to killing a young lady can now be bought off, and the Senator even re-elected.^{viii}

From the standpoint of reducing corruption, the 17th certainly disappointed its optimistic supporters. It was a failure.

In the suggested replacement for the 17th below, a new procedure is employed to reduce corruption of legislators. By maintaining absolute secrecy about which candidate for whom each legislator actually votes, there is no way of detecting if a bribe worked or if one voted the party line.

Deadlock

Between 1891 and 1905, 46 elections were deadlocked, in 20 different states. In an extreme case a Delaware Senate seat went unfilled from 1899 to 1904. It often was a fight between the two bodies of a bicameral legislature.

In the suggested amendment below, deadlocks are prevented by requiring:

- 1) a continuous session,
- 2) legislative submission of their candidates with first and second most votes to the electorate,
- 3) the use of the governor to break ties,
- 4) the absolute secrecy of the voting (even from other legislators), and
- 5) the prohibition on discussion.

Making State elections about national issues

The tendency to judge local candidates on their support for specific senatorial candidates will be significantly reduced under the scheme below since the voter has no way of knowing who his candidate will actually favor.

State senators may become a U.S. Senator. Voters may wish to quiz them on national issues as well as state issues, but because they are only one possibility among all the state senators, the interest in state issues should dominate. Since the actual candidates will be selected in secret, voters are likely to emphasize general philosophy and character. Knowing that they will get the final choice between the top two candidates may shift much of the voter interest to the general election.

Reconnecting the states to the federal government

Our founders felt that having Senators beholden to state legislatures gave the states an avenue of connection to the federal government by which they could stop ill considered initiatives. Current citizens who are concerned about the never-ending movement of power away from the states feel that the repeal of the 17th would help stop this transfer of power to the government entity farthest from the citizen. They can easily cite the many federal departments and agencies that have grown up in clear violation of a plain reading of the Constitution. With virtually no enforcement power the states may wave the 10th amendment^{ix} all the want, only to have their protests largely ignored.

James Madison had claimed “there is a great probability that such a declaration [the 10th Amendment] in the federal system would be enforced; because the state legislatures will jealously and closely watch the operations of this government, and be able to resist with more effect every assumption of power than any other power on earth can do; and the greatest opponents to a federal government admit the state legislatures to be sure guardians of the people's liberty.”^x Madison would not be justified in claiming the state legislatures could

effectively resist if those same legislatures had been gelded by the 17th. Now with the 17th in place, neither the individual nor his legislature has sufficient power in the federal government to resist encroachments on the rights of the individual or the states.

Under the new rules detailed in the proposal below, the senators would likely have experience as state senators prior to representing their state in the U.S. Senate. Therefore they have existing political connections to their state and its political apparatus and can be expected to retain sympathies for their state's issues. Should they desire a second term, they also are dependent on the state's legislators to nominate them for that extension.

Strengthening the position of the states

Over time, the connection of the states to the federal government through the senators may ease excessive federal control and return the states toward their traditional role as the body most interested in the welfare of their citizens. This return of control of functions to the states will not come easy, but at least getting rid of the 17th means state governments are no longer cut out of many important decisions.

Experience and character

The new election procedure limits candidates to those already elected to the state senate. This insures a politically experienced candidate who has been vetted by his/her local voters. It also narrows the field to candidates having a real connection to state government.

Hopefully, this will eliminate the inexperienced candidate who might attempt to "buy" a senate seat through superior advertising and heavy campaign expenditures.

Since senatorial candidates will likely be personally known to fellow legislators, experience and character can be much more closely evaluated.

The two candidates who reach the general election will have received personal vetting that only comes from close working relationships.

Why bother with the repeal?

One must realistically appraise the chance of repealing the 17th as extremely low. It is popular and the considerations the founders made are probably too sophisticated to drive a popular repeal effort.

Never-the-less, I feel stronger states are important in preserving some liberty for the individual citizen. Rather than a one-size-fits-all approach to government, our "fifty laboratories of democracy" give us multiple examples of what works, and what doesn't work. It also provides the tax competition that keeps a state from destroying more businesses with ever more onerous exactions. After 220 years our states may be weakened, but still have significance in the minds of our citizens and have lively and individual political identities.^{xi}

The Constitution partially knit together a bunch of sovereign states each of which had been responsible for agreements with other countries. The national Senate was assigned the responsibility of advising the President and ratifying such treaties as he might negotiate. This requirement of legislative agreement was a direct transference of this responsibility from the states and so it was natural to assign it to a body responsible to the state legislature. Once the Senate was no longer responsible to the state legislatures, this power could just as logically be assigned to the House of Representatives or to a combination of both houses as is required for constitutional amendments.

A replacement for the 17th

Amendment Number _____

The Senate of the United States shall be composed of two Senators from each State, elected for 6 years; and each Senator shall have one Vote.

Two candidates for election as United States Senators shall be placed on each State's general election ballot by the full legislature of that State. That ballot shall also contain a third entry labeled "None of the above". Any candidate receiving fewer votes than "None of the above" shall be permanently barred from seeking the office of Senator. If "None of the above" gets more votes than either candidate, both are disqualified and the legislature shall place other candidates on the ballot and a special election held to fill the vacancy as soon as possible.

The legislature, assembled as a single body, with at least 4 days notice, but within 60 days of the election, shall select the candidates for the ballot in a single continuous session. All legislators assembled with the governor present, shall be sworn (or affirm) to keep the proceedings and their votes secret. The presiding officer shall be the presiding officer of the most numerous branch of the state legislature and each legislator present shall have one vote. Candidates for the position of United States Senator shall consist of all legislators who are current members of the least numerous legislative body (known hereafter as Senators) plus any U.S. Senator whose term is expiring and wishes to be nominated for another term. State senators who have submitted a statement of withdrawal to the presiding officer will be removed unless this will leave fewer than two candidates. With no further discussion, the assembled legislators shall take as many votes as necessary to reduce the list to the final two candidates for the general election ballot eliminating those with the least votes after each round. In case a tie vote removes either of the last two candidates the governor shall supply the deciding vote. The presiding officer shall announce to the public the names of the two candidates, but no votes or details of the proceeding.

The candidate elected to the U.S. Senate shall select a replacement to complete his term as a state senator.

When vacancies happen in the representation of any State in the Senate, the governor of such State shall select from that state's current senators a temporary replacement to serve until the next bi-annual election. When an election has been held, according to the paragraphs two and three above, the new senator shall serve to fill out any term to which the original senator was elected.

The seventeenth article of amendment to the Constitution of the United States is hereby repealed. The terms of current senators shall expire as scheduled before ratification of this amendment.

ⁱ **Article I, Section 3, paragraphs 1 & 2:**

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.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

ⁱⁱ James Madison in his notes on the Constitutional convention says that when Edmund Randolph mentioned that their chief purpose was to check “the turbulence and follies of democracy,” there was no dissent. For this and many other citations see the superb essay by C. H. Hoebeke called *The Failure of the Seventeenth Amendment* in *Humanitas*, Volume IX, No. 2. Available on the web at: <http://www.nhinet.org/hoebeke.htm>.

ⁱⁱⁱ Quote is from *Federalist 62*, (James Madison), Reading *Federalist 62* and *63* on the Senate and counterpoising it to the arguments of the proponents of the 17th, one is struck by a serious degradation in the sophistication of political discourse. Our technology might have come a long way from the quill pens of our founders, but their level of understanding of political affairs is seldom reached in modern political discourse.

^{iv} Quote is from *Federalist 63*, (James Madison).

^v Some folks have objected to repeal of the 17th asserting, “America, we are told from a young age, is all about democracy, and democracy is all about choosing whom you want to be your representative and holding them accountable.” http://www.salon.com/2012/08/16/repeal_the_17th_amendment/

^{vi} <http://www.politico.com/story/2013/11/ken-cuccinelli-ron-paul-urges-nullification-virginia-governor-2013-election-99358.html>.

^{vii} C. H. Hoebeke has an excellent extended essay on *The Failure of the Seventeenth Amendment* in *Humanitas*, Volume IX, No. 2. The next few paragraphs borrow extensively from his research. Available on the web at: <http://www.nhinet.org/hoebeke.htm>

^{viii} http://en.wikipedia.org/wiki/Chappaquiddick_incident

^{ix} **Amendment 10.**

The powers not delegated to the United States by the Constitution, nor prohibited to it by the States, are reserved to the States respectively, or to the people.

^x James Madison speech in Congress on 08 June 1789. He was proposing what became the first 10 amendments (The Bill of Rights). This portion of his speech defended the inclusion of the 10th amendment even though enforcement of similar provisions at the state level was far from perfect. He had every reason to expect the states would use their power over the federal government to insist on their control over rights that had not been enumerated. http://www.constitution.org/jm/17890608_removal.txt

^{xi} Sitting at the dinner table recently with students from Germany and Norway, they reminded me that Americans when visiting in foreign lands nearly always identify themselves with their state. For example if in America you ask someone from Germany where he is from, he will reply “Germany.” If in Europe you ask an American where he is from he will reply with the name of his state. I’ve got to agree with my guests, that personally I always identify with the state in which I am currently living.