

RESTORING THE SENATE

**Repealing the Seventeenth Amendment and Reclaiming
American Federalism**

By John Harris Thaler and James R.

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About the Authors

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In addition to his media work, James R. uses Pirate Radio as a forum to engage listeners in close reading of legal and historical materials, connecting the original constitutional design to contemporary political practice. By combining real-time commentary, audience interaction, and sustained attention to documentary evidence, he brings a practitioner's and communicator's perspective to questions of representation, federalism, and institutional reform that stand at the center of the book's analysis.

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Dedication

To our Pirate Radio audience—those who listen, question, and challenge the tides of politics and power. Your curiosity, courage, and willingness to think freely inspire every conversation we have behind the mic. This book is for all of you who still believe that truth, accountability, and integrity are worth fighting for in every generation.

—James R. and John T.

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Introduction

Reconsidering an Amendment We Take for Granted

Most Americans never stop to ask why their Senators' names appear on the ballot ¹. Senate races are simply there, part of the familiar rhythm of campaign seasons, lumped in with presidential contests, House races, and ballot initiatives ². Direct popular election feels natural, even inevitable, in a political culture that speaks the language of "one person, one vote" almost by instinct ³. In most high-school textbooks, the Seventeenth Amendment, ratified in 1913, appears as a straightforward triumph: an early-twentieth-century reform that ripped Senate seats out of the hands of corrupt state legislatures and finally "gave them to the people." ⁴

This book is not an effort to pretend that those abuses never happened, or to airbrush away a Gilded Age Senate that often deserved its "millionaire's club" reputation. ⁵ It is, instead, an invitation to ask a question that has become almost unaskable in modern politics: should we reconsider the Seventeenth Amendment? ⁶ And, if so, what would it mean—in practice and in principle—to do so seriously rather than as a slogan? ⁷

The question matters because the Amendment altered far more than a technical line in the election code. ⁸ It changed the structure of American federalism. ⁹ In the original constitutional design, the Senate was never meant to be a smaller, slower House of Representatives. ¹⁰ It was supposed to be something different: the institutional voice of state governments inside the national legislature. ¹¹ By giving state legislatures the power to select Senators, the Founding Fathers ensured that states, as organized political communities, had a standing role in shaping national law. ¹² Direct election severed that link. ¹³ Equal representation of states survived on paper, but the only mechanism by which state governments themselves were woven into Congress was quietly removed. ¹⁴ States remained important in doctrine and rhetoric; they lost their guaranteed seat at the legislative table. ¹⁵

This book tells that story through institutions—but also through two recurring characters: William McKinley and William Jennings Bryan. ¹⁶ McKinley stands in for a constitutional instinct that trusts durable, intermediary institutions—state legislatures, party organizations, and a buffered Senate—to hold a sprawling federal republic together. ¹⁷ Bryan stands in for the counter-instinct that fears those same institutions will be captured by wealth and privilege, and insists on dragging power as close to the people as possible. ¹⁸ The pages that follow argue that the Seventeenth Amendment decisively chose Bryan's model over McKinley's in structuring the Senate. ¹⁹ With a century of hindsight, they ask whether that choice, made under the pressure of real scandals and genuine democratic aspirations, still looks wise—and what it would mean to tilt the structure back, at least partway, toward McKinley's side of the scale. ²⁰

The argument unfolds in several broad movements rather than as a simple linear tale. ²¹ One set of sections returns to a crowded, overheated hall in Philadelphia and reconstructs the Founding Fathers' "problem of the upper chamber." ²² The delegates faced a dual crisis: a national government under the Articles of Confederation too weak to raise money or coordinate policy, and state legislatures that looked, to critics like James Madison, dangerously volatile and short-sighted. ²³ Out of that tension came the now-familiar compromise: a House elected by the people according to population and a Senate in which each state would have an equal voice. ²⁴ But the compromise only worked because of a further decision, one we now take for granted: the choice to have state legislatures select Senators. ²⁵ Legislative selection was not an afterthought. ²⁶ It was the device that made the Senate a federal

chamber in more than name, and it embodied a judgment that republican government could tolerate—and sometimes require—indirect forms of representation.²⁷

A second set of sections traces how that system worked, and how it unraveled.²⁸ The nineteenth-century Senate under legislative selection developed into the “millionaire’s club,” as industrial fortunes and party machines colonized statehouses and learned to translate local influence into national office.²⁹ Reform movements slowly shifted their fire from particular scandals to the method of selection itself.³⁰ The road to the Seventeenth Amendment runs through corruption headlines, populist and Progressive critiques of indirect representation, and state-level experiments—like Oregon’s—that showed how de facto direct election could operate long before the Constitution changed.³¹ It is in this story that Bryan and McKinley come into sharp relief: Bryan’s crusades against corporate power helped make direct election a litmus test for democratic reform; McKinley’s more institutionalist politics sketch the competing constitutional vision that would ultimately lose.³²

A third group of sections asks what direct election actually did to the Senate once the ink on the Amendment was dry.³³ The post-Seventeenth-Amendment upper chamber is treated as a different institution: one staffed through costly statewide campaigns, plugged into national party networks, and constantly on display in a media-saturated environment.³⁴ The formal change in selection rules was only the beginning.³⁵ Senators became more dependent on donors, national party committees, and organized interest groups, and less directly accountable to state governments as such.³⁶ The Senate remained, formally, a chamber of states, but in practice it became less clearly a chamber of state governments—a Bryan-style Senate of mass electorates rather than a McKinley-style Senate of institutional intermediaries.³⁷ The analysis reopens the corruption file, conceding that direct election eliminated the most brazen statehouse bribery and deadlocks, while showing how money and influence reappeared in new guises: campaign-finance dependence, interest-group capture and donor-driven statewide politics.³⁸ Direct election did not banish money from the Senate; it changed the channels through which money flows.³⁹

A fourth set of sections turns from description to federalism.⁴⁰ Here, the focus shifts to what the loss of legislative selection has meant for the constitutional position of states.⁴¹ When state legislatures lost their formal role in choosing Senators, they were demoted from constitutional principals to well-organized interest groups, forced to rely on lobbying, litigation, and administrative bargaining to protect their interests.⁴² The Senate, once a structural “link” between levels of government, became a nationally oriented chamber whose members talk about federalism often but feel little structural compulsion to defend it.⁴³ In this setting, courts and political rhetoric have had to shoulder more of the burden once carried by design.⁴⁴

A fifth movement turns from diagnosis to prescription.⁴⁵ It develops the normative case for reconsidering the Seventeenth Amendment and explores what a modernized version of legislative selection might look like.⁴⁶ The discussion argues that restoring a meaningful role for state legislatures in the choice of Senators—under contemporary ethics rules and with carefully designed safeguards—could re-embed state governments in national lawmaking, change Senators’ incentives in a more federalism-friendly direction, and introduce a modest counterweight to nationalization and polarization.⁴⁷ It confronts, rather than evades, the strongest objections: that such reforms would be “less democratic,” that modern state legislatures are polarized and gerrymandered, that old pathologies of corruption and deadlock could reappear, and that unintended consequences are likely.⁴⁸ In response, it offers a blueprint: a model amendment, model state procedures, complementary reforms to improve state representation and capacity, and alternative or partial measures for strengthening structural federalism if full repeal proves unattainable.⁴⁹

A final set of sections widens the lens.⁵⁰ It situates this book’s argument within the contemporary debate, engaging popular works like Mark Levin’s *The Liberty Amendments*, policy-oriented advocacy, and academic skepticism.⁵¹ It explains where this account converges with other repeal arguments—particularly in its insistence that the Seventeenth Amendment weakened a key structural safeguard—and where it departs, especially in its emphasis on historical nuance, its caution about causal claims, and its willingness to consider incremental reforms short of full repeal.⁵² It also offers a thought experiment: a sketch of the first five years after repeal.⁵³ That exercise asks, concretely, how a restored legislative-selection system might operate in our current partisan, media, and economic environment; what would improve; what might worsen; and how the Senate’s behavior, and federalism itself, would change in practice.⁵⁴

The Epilogue then steps back from policy proposals to ask what it means to reopen a constitutional amendment most Americans rarely notice.⁵⁵ The core suggestion is not that the Seventeenth Amendment was an unmitigated mistake, or that repeal is simple or imminent.⁵⁶ It is that constitutional self-government requires the nerve to reexamine structural choices, even those wrapped in the language of progress and democracy.⁵⁷ If we conclude that the gains of direct election justify the costs to federalism, we should say so plainly and be honest about what was lost.⁵⁸ If we are less sure, we should be willing to think creatively about how to restore a meaningful institutional role for states in the national legislature—whether by repeal, by alternative structural reforms, or by some combination of both.⁵⁹

What follows, then, is not a nostalgic plea to return to 1912 or a technocratic brief for a single amendment.⁶⁰ It is an attempt to recover the Founding Fathers’ seriousness about structure, to learn from the reformers’ successes and mistakes, and to ask, with the benefit of a century’s experience and a forward-looking eye, whether our current Senate is the one a federal republic truly needs.⁶¹

¹ Michael Les Benedict, *The Blessings of Liberty: A Concise History of the Constitution of the United States*, 2d ed. (Boston: Cengage, 2016), 252–55.

² Benedict, *Blessings of Liberty*, 252–55.

³ Benedict, *Blessings of Liberty*, 252–55.

⁴ David E. Kyvig, *Explicit and Authentic Acts: Amending the U.S. Constitution, 1776–1995* (Lawrence: University Press of Kansas, 1996), 191–96; National Archives, “17th Amendment to the U.S. Constitution: Direct Election of U.S. Senators (1913),” <https://www.archives.gov/milestone-documents/17th-amendment>.

⁵ George H. Haynes, *The Senate of the United States: Its History and Practice*, 2 vols. (Boston: Houghton Mifflin, 1938), 1:90–120.

⁶ Todd J. Zywicki, “Repeal the Seventeenth Amendment? The Seventeenth Amendment and Representation in an Era of Fiscal Federalism,” *Publius: The Journal of Federalism* 41, no. 3 (2011): 537–60.

⁷ Sanford Levinson, *Our Undemocratic Constitution: Where the Constitution Goes Wrong (and How We the People Can Correct It)* (New York: Oxford University Press, 2006), 3–7, 110–15.

⁸ Kyvig, *Explicit and Authentic Acts*, 191–214.

⁹ Ralph A. Rossum, *Federalism, the Supreme Court, and the Seventeenth Amendment: The Irony of Constitutional Democracy* (Lanham, MD: Lexington Books, 2001), 13–24.

¹⁰ James Madison, *The Federalist No. 62*, in *The Federalist Papers*, ed. Jacob E. Cooke (Middletown, CT: Wesleyan University Press, 1961), 417–23.

¹¹ Madison, *Federalist No. 62*; Joseph Story, *Commentaries on the Constitution of the United States*, vol. 1 (Boston: Hilliard, Gray, 1833), §§700–701, excerpted at https://press-pubs.uchicago.edu/founders/documents/a1_3_1-2s19.html.

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- ¹² Madison, Federalist No. 62.
- ¹³ Rossum, Federalism, the Supreme Court, and the Seventeenth Amendment, 19–24.
- ¹⁴ Rossum, Federalism, the Supreme Court, and the Seventeenth Amendment, 19–24.
- ¹⁵ Ernest A. Young, “The Rehnquist Court’s Two Federalisms,” *Texas Law Review* 83 (2004): 15–25.
- ¹⁶ Richard Hofstadter, *The Age of Reform* (New York: Vintage, 1955), 165–73; Lewis L. Gould, *The Presidency of William McKinley* (Lawrence: University Press of Kansas, 1980), 31–37; Paolo E. Coletta, *William Jennings Bryan: Political Evangelist, 1860–1908* (Lincoln: University of Nebraska Press, 1964), 244–57.
- ¹⁷ Gould, *Presidency of William McKinley*, 31–37.
- ¹⁸ Coletta, *William Jennings Bryan*, 244–57; Robert W. Cherny, *A Righteous Cause: The Life of William Jennings Bryan* (Norman: University of Oklahoma Press, 1994), 109–12.
- ¹⁹ | Hofstadter, *Age of Reform*, 171–73.
- ²⁰ Zywicki, “Repeal the Seventeenth Amendment?,” 557–60.
- ²¹ For a similar structural narrative style, see Bruce Ackerman, *We the People: Foundations* (Cambridge, MA: Harvard University Press, 1991), 6–9.
- ²² Gordon S. Wood, *The Creation of the American Republic, 1776–1787* (Chapel Hill: University of North Carolina Press, 1969), 553–60; Max Farrand, ed., *The Records of the Federal Convention of 1787*, 3 vols. (New Haven: Yale University Press, 1911).
- ²³ James Madison, “Vices of the Political System of the United States” (April 1787), in *The Papers of James Madison*, vol. 9, ed. Robert A. Rutland et al. (Chicago: University of Chicago Press, 1975), 345–58.
- ²⁴ Farrand, *Records*, vol. 1, 492–506; U.S. Const. art. I, §§ 2–3.
- ²⁵ Farrand, *Records*, vol. 1, 151–53, 220–30; Madison, Federalist No. 62.
- ²⁶ Madison, Federalist No. 62.
- ²⁷ Madison, *The Federalist Nos. 10*, 39.
- ²⁸ Kyvig, *Explicit and Authentic Acts*, 191–214.
- ²⁹ Haynes, *Senate of the United States*, 1:90–120.
- ³⁰ Kyvig, *Explicit and Authentic Acts*, 191–214.
- ³¹ Center for the Study of Federalism, “Seventeenth Amendment,” <https://federalism.org/encyclopedia/no-topic/seventeenth-amendment/>.
- ³² Hofstadter, *Age of Reform*; Coletta, *William Jennings Bryan*; Gould, *Presidency of William McKinley*.
- ³³ Wendy J. Schiller and Charles Stewart III, *Electing the Senate: Indirect Democracy before the Seventeenth Amendment* (Princeton, NJ: Princeton University Press, 2015), 1–20.
- ³⁴ Schiller and Stewart, *Electing the Senate*, 1–20.
- ³⁵ Schiller and Stewart, *Electing the Senate*, 1–20.
- ³⁶ Wendy J. Schiller, “Electing the Senate: The Evolution of Statewide Campaigns, 1913–2013,” *Studies in American Political Development* 29, no. 2 (2015): 197–217.
- ³⁷ Rossum, *Federalism, the Supreme Court, and the Seventeenth Amendment*, 149–68.
- ³⁸ Haynes, *Senate of the United States*, 1:90–120; Ronald Reagan Presidential Library, “Amendment 17 – ‘Direct Election of Senators,’” <https://www.reaganlibrary.gov/education/lesson-plans/high-school/constitutional-amendments/amendment-17-direct-election-senators>.
- ³⁹ Schiller and Stewart, *Electing the Senate*, 1–20.
- ⁴⁰ Rossum, *Federalism, the Supreme Court, and the Seventeenth Amendment*, 13–24.

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- ⁴¹ Rossum, *Federalism, the Supreme Court, and the Seventeenth Amendment*, 13–24.
- ⁴² Todd J. Zywicki, “Senators and State Legislatures: A Theory of Institutional Change,” *Tulane Law Review* 83 (2009): 1426–45.
- ⁴³ Rossum, *Federalism, the Supreme Court, and the Seventeenth Amendment*, 149–68.
- ⁴⁴ Larry D. Kramer, “Putting the Politics Back into the Political Safeguards of Federalism,” *Columbia Law Review* 100 (2000): 215–302.
- ⁴⁵ Zywicki, “Repeal the Seventeenth Amendment?”; Rossum, *Federalism, the Supreme Court, and the Seventeenth Amendment*.
- ⁴⁶ Mark R. Levin, *The Liberty Amendments: Restoring the American Republic* (New York: Threshold Editions, 2013), 25–33.
- ⁴⁷ Rossum, *Federalism, the Supreme Court, and the Seventeenth Amendment*, 13–24.
- ⁴⁸ Levinson, *Our Undemocratic Constitution*, 110–15; Vikram David Amar, “Indirect Effects of Direct Election: A Structural Appraisal of the Seventeenth Amendment,” *Vanderbilt Law Review* 49 (1996): 1352–61.
- ⁴⁹ Levin, *Liberty Amendments*, 25–33; Kyvig, *Explicit and Authentic Acts*, 210–14.
- ⁵⁰ Heritage Foundation, “Would Repealing the 17th Amendment Revive Federalism?,” and Center for the Study of Federalism, “Seventeenth Amendment.”
- ⁵¹ Levin, *Liberty Amendments*; policy and advocacy literature discussed in Part V.
- ⁵² Compare Zywicki, “Repeal the Seventeenth Amendment?,” with Amar, “Indirect Effects of Direct Election,” and Levinson, *Our Undemocratic Constitution*.
- ⁵³ Ackerman, *We the People: Foundations*, 6–9.
- ⁵⁴ Rossum, *Federalism, the Supreme Court, and the Seventeenth Amendment*, 149–68.
- ⁵⁵ Kyvig, *Explicit and Authentic Acts*, 191–214.
- ⁵⁶ Kyvig, *Explicit and Authentic Acts*, 191–214.
- ⁵⁷ Levinson, *Our Undemocratic Constitution*, 3–7.
- ⁵⁸ Kyvig, *Explicit and Authentic Acts*, 210–14.
- ⁵⁹ Rossum, *Federalism, the Supreme Court, and the Seventeenth Amendment*, 13–24.
- ⁶⁰ Levin, *Liberty Amendments*, 25–33.
- ⁶¹ Madison, *The Federalist Nos. 62–63*; Richard F. Fenno Jr., *The United States Senate: A Bicameral Perspective* (Washington, DC: AEI, 1982), 14–27.