

THE PROPER ROLE OF THE SENATE

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The Framers were wise to design a second house. The original version of the Constitution proposed a Senate that was elected by the House so that it still retained an indirectly majoritarian character.¹ But, of course, the Great Compromise between the large and the small states brought today's Senate into being as the price of having the Constitution.²

It is important to remember that the Founders were suspicious of democracy.³ James Madison was against having a Senate elected by state legislatures.⁴ In fact, he wanted to have a Council of Revision that would have brought together aspects of the national government to continuously exercise not just judicial review, but policy review over all the acts of the state legislatures.⁵

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1. The Virginia Plan, presented to the Constitutional Convention on May 29 by Edmund Randolph, stated, "[Resolved,] that the members of the second branch of the National Legislature ought to be elected by those of the first." THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 20 (Max Farrand ed., 1911) [hereinafter THE RECORDS].

2. *See id.* at 14.

3. For example, Edmund Randolph observed that the object of the new constitution was to "provide a cure for the evils under which the U.S. laboured," and "that in tracing these evils to their origin every man had found it in the turbulence and follies of democracy." *Id.* at 51.

4. *See id.* at 154 (James Madison, arguing against the election of senators by state legislatures).

5. *See id.* at 138–39.

Indeed, Madison and the other leaders of the Constitutional Convention and the ratification debates had come together because they thought that democracy had gone too far in the states.⁶ You might recall James Madison wrote a memo right before the Constitutional Convention called “The Vices of the Political Systems of the United States.”⁷ He did not call it a memo, but James Madison would have been an inveterate memo writer today. We would have been sick of getting all of his emails.

In that memo, he wrote an analysis of what had gone wrong during the Critical Period between the Revolution and the Constitution.⁸ That diagnosis was excessive democracy.⁹ The democracies that existed under the state constitutions looked very much like governments with no upper house, other than an upper house controlled by the lower house;¹⁰ governments with a weakened Executive, again, controlled by the lower house;¹¹ and governments that looked much more like parliamentary democracies as we see them in Western Europe.¹² It is no accident, then, that not just the Senate but many aspects of the Constitution have this anti-democratic feature, or at least have the goal of trying to channel and limit democracy.¹³

6. See, e.g., James Madison, *Vices of the Political Systems of the United States*, in 2 THE WRITINGS OF JAMES MADISON 361, 365–70 (Gaillard Hunt ed., 1901); THE RECORDS, *supra* note 1, at 27 (Edmund Randolph, arguing, “None of the constitutions have provided sufficient checks against [] democracy.”); *id.* at 48 (Elbridge Gerry, suggesting “[t]he evils we experience flow from the excess of democracy.”).

7. Madison, *supra* note 6, at 365–70.

8. See generally Madison, *supra* note 6.

9. See THE RECORDS, *supra* note 1, at 48.

10. See William Clarence Webster, *Comparative Study of the State Constitutions of the American Revolution*, 9 ANNALS AM. ACAD. POL. & SOC. SCI. 64, 74 (1897); VT. CONST. of 1777, ch. II, §§ 2, 7–8; GA. CONST. of 1776, art. II; PA. CONST. of 1776, § 2.

11. See Webster, *supra* note 10, at 82.

12. See, e.g., *Parliament's Authority*, U.K. PARLIAMENT, <https://www.parliament.uk/about/how/sovereignty/> [<https://perma.cc/Q477-365Z>].

13. See ROBERT A. DAHL, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION? 15–20 (2d ed. 2003) (listing various undemocratic provisions in the Constitution).

So if Democrats have objections to the Senate, they also ought to have objections to having House seats allocated by states.¹⁴ They ought to have objections to the judiciary and judicial review and the Electoral College, and so on.¹⁵ In fact, they should disagree with the idea of having power divided between a federal and state government at all and wonder why we don't have a system more like France or Japan where all power just flows from a singular national government.¹⁶ And then what we really have is just decentralized administrative units rather than semi-sovereign states.

One of the questions is, "Is it really worth undoing all that?" It is hard to say what the consequences would have been if we had not had a Senate or if we had not had a Senate where every state had two seats. The best you can do, I think, is compare and look at what happened to other countries that have adopted much more democratic or majoritarian systems or ones without a non-democratic branch of the legislature. And the best ones you can look at might be Western Europe or Japan. You could look at countries like the United Kingdom, France, Germany, Italy—countries which are much more democratic in their design than ours¹⁷—and ask, in the last one hundred years or so, have their outcomes consistently been better?

Regardless of whether it is the states that are there or some other non-democratic means of selection, the Senate has the effect of

14. See Saikrishna Prakash, *More Democracy, Less Constitution*, 55 *DRAKE L. REV.* 899, 907 ("Because House seats are apportioned by state, the people of some states have a much larger say in the election of representatives.").

15. See DAHL, *supra* note 13, at 15–20.

16. See Jun Iio, *Policy analysis and the policy process in Japanese government*, in *POLICY ANALYSIS IN JAPAN* 91, 91 (2015) ("Japan is a unitary state, not federal."); Nicolas Marie Kublicki, *An Overview of the French Legal System from an American Perspective*, 12 *B.U. INT'L L.J.* 57, 59 (1994) ("France is composed of a single national government.").

17. For various democratic constitutional provisions not found in the United States Constitution, see, for example, Art. 75 *COSTITUZIONE* [COST.] (It.) (allowing for national referenda to repeal laws when requested by a sufficient number of citizens), and 1958 *CONST.* 3, 11 (Fr.) (permitting national referenda). See also DAHL, *supra* note 13, at 188 (noting that Italy, Germany, and France all have alternatives to the first-past-the-post method of electing representatives found in the United States).

slowing down the ability of the United States to adopt public policies.¹⁸ Some might say that adds to greater deliberation.¹⁹ Other people might say it also allows entrenched interests of the status quo to stay in effect—that there is a bias against change.²⁰

But is rapid change so good when you look at what happened over the last one hundred years in Western Europe? The Senate may prevent, for example, quick action for public policy problems, but it also might prevent the adoption of wild schemes and bad ideas. You might say that is what happened in England in the last fifty or sixty years with their swings between nationalization, privatization, and free markets, back and forth, back and forth.²¹ Does that lead to better public policy? Our Constitution is a risk-averse decision-making system of which the Senate is a crucial part.²²

That brings me to my second point: the Senate performs a number of functions that are not about representing the states. I would not say, based on voting patterns, that the modern Senate really represents the institutional interests of the states. It represents what the

18. See Tara Leigh Grove, *The Structural Safeguards of Federal Jurisdiction*, 124 HARV. L. REV. 869, 899, 915 (2011) (“[T]he Senate’s design ensures that it is slower to respond to changes in the political winds than the House.”).

19. See, e.g., Frances E. Lee, *Senate Deliberation and the Future of Congressional Power*, 43 PS: POL. SCI. & POL. 227, 228 (2010) (noting that “the dominant norm now is the belief that the Senate’s supermajority requirements are what make the body uniquely valuable”); *Institution: Party Division*, UNITED STATES SENATE, <https://www.senate.gov/history/origins.htm> [<https://perma.cc/5VMZ-6PRC>] (“Known as the ‘the world’s greatest deliberative body,’ the Senate has been a forum for free debate and the protection of political minorities.”).

20. See, e.g., Lee, *supra* note 19, at 227 (suggesting that “[t]he need for broad consensus as a prerequisite for Senate action is the most serious institutional obstacle to national policymaking”); Matthew Yglesias, *American democracy’s Senate problem, explained*, VOX (Dec. 17, 2019), <https://www.vox.com/policy-and-politics/2019/12/17/21011079/senate-bias-2020-data-for-progress> [<https://perma.cc/AE9W-822U>].

21. See Cento G. Veljanovski, *Privatization in Britain—The Institutional and Constitutional Issues*, 71 MARQ. L. REV. 558, 560–66 (1988) (providing a detailed history of British nationalization and privatization from the 1940s to the 1990s); Tim Harford, *The pendulum swings against privitisation*, FIN. TIMES (Sept. 29, 2017), <https://www.ft.com/content/cb769098-a443-11e7-b797-b61809486fe2> [<https://perma.cc/YDT3-X3DT>].

22. See JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 33–80 (2013) (discussing the desirability of supermajoritarian rules as a form of risk reduction and such rules’ expression in the United States Constitution).

constituents in those states happen to want now, and, as a result, magnifies the current political interests of people who live in different geographic locations rather than the institutional interests of the states.²³

As far as I can tell, you do not see voting patterns where small states gang up on the bigger states and vote as a group. I think you probably see that the states just vote according to the partisan control of their state governments, and that you are starting to see groupings now where the states on the coasts seem to vote together and the states in the middle of the country tend to vote together.

But the Senate also plays an important role in other areas, and this is where the Senate's original design before the Great Compromise is still part of the Constitution—the Senate as a council of state.²⁴ The Senate is the second house of the legislature, and it also has the advice and consent function for judges,²⁵ for cabinet officers,²⁶ and for the ratification of treaties.²⁷ Additionally, the Senate has, as we just saw for the third time in history, the ability to conduct impeachment trials,²⁸ and it has a veto over constitutional amendments.²⁹ These are important functions that I think we should not forget.

When Thomas Jefferson returned from his post as ambassador to France, he had missed the drafting and ratification of the Constitution.³⁰ The story goes that Jefferson asked George Washington,

23. See DAVID E. KYVIG, *EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION 1776–1995*, at 214 (1997) (noting that the Seventeenth Amendment “rendered the Senate more directly responsive to the public”).

24. See John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1369 (1997) (“The Framers intended the Senate to constitute a sort of privy council that would safeguard the interests of the nation as a whole.”).

25. U.S. CONST. art. II, § 2, cl. 2.

26. *Id.*

27. *Id.*

28. U.S. CONST. art. I, § 3, cl. 6.; see also Peter Baker, *Impeachment Trial Updates: Senate Acquits Trump, Ending Historic Trial*, N.Y. TIMES (Feb. 6, 2020, 1:59 AM), <https://www.nytimes.com/2020/02/05/us/politics/impeachment-vote.html> [<https://nyti.ms/2SrhZAS>].

29. U.S. CONST. art. I, § 7, cl. 1.

30. Lawrence S. Kaplan, *Jefferson and the Constitution: The View from Paris, 1786–89*, 11 DIPLOMATIC HIST. 321, 321 (1987).

“What’s the point of the Senate?”³¹ Jefferson was drinking a cup of coffee at the time, and poured a little bit of coffee into the saucer, prompting Washington to ask why.³² “To cool it; my throat is not made of brass,” Jefferson replied. Responding to his question, Washington said, “Even so, we pour our legislation into the senatorial saucer to cool it.”³³

The Senate plays that role in many areas throughout our government. So it is not a mistake that the Senate is involved in every major decision that our government makes, in contrast with the House, which does not participate in the executive functions of the federal government.³⁴ It is there to slow down and cool things, hopefully leading to more deliberation and compromise.³⁵

Then the interesting question is, if we were to sit down and think about it now, should we make it two seats for every state? Should we think about other ways of making the Senate more proportional, other than by population?

I would not favor going this route, but there are other countries, such as Italy, that have upper houses where a distinguished citizen can be made a senator for life.³⁶ Italy is not the government to mimic right now for many reasons, but if you are going to open it up for discussion, you could say, well, does it have to be states? Could you

31. See MONCURE DANIEL CONWAY, *REPUBLICAN SUPERSTITIONS AS ILLUSTRATED IN THE POLITICAL HISTORY OF AMERICA* 47–48 (1872) (recounting this apocryphal conversation).

32. *Id.*

33. *Id.*

34. See U.S. CONST. art. II, § 2, cl. 2 (listing executive functions in which the Senate but not the House participates); THE FEDERALIST NO. 62, at 376 (James Madison) (Clinton Rossiter ed., 2003); THE FEDERALIST NO. 65, at 394 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

35. See THE FEDERALIST NO. 62, *supra* note 34, at 377 (“The necessity of a senate is not less indicated by the propensity of all single and numerous assemblies to yield to the impulse of sudden and violent passions, and to be seduced by factious leaders into intemperate and pernicious resolutions.”); THE FEDERALIST NO. 63, at 382 (James Madison) (Clinton Rossiter ed., 2003) (“I shall not scruple to add that such an institution may be sometimes necessary as a defense to the people against their own temporary errors and delusions.”).

36. Art. 59 COSTITUZIONE [COST.] (It.); see also THE FEDERALIST NO. 63, *supra* note 35, at 383 (noting that Sparta, Rome, and Carthage had senators for life).

have different interests represented in the same house, similar to what constitutions in new countries have?³⁷ I tend to think these would not be great ideas, but it is an interesting question to pursue in addition to whether each state should have two votes.

Indeed, I would tend to agree that the original Constitution is rather spartan and permits a fairly large number of arrangements and outcomes. Using the administrative state, the New Deal revolution of 1937 imposed homogenized nationwide legislation and regulatory schemes.³⁸ I think the governing structure of the 1930s is growing more obsolete in terms of the new kind of world and economy that we have. We have a national system that evolved radically to regulate an economy characterized by large employers, like U.S. Steel, and large unions and workforces are still organized along mass production lines.³⁹ I think our economy is changing very quickly because of the information revolution.⁴⁰

It is not apparent to me that the revolution of 1937 should continue. We should rethink whether we should return back to original principles, or whether there are other systems that might better govern society and an increasingly decentralized economy.

The interesting thing is that the Senate is going to be a roadblock to all of that because, even though the Senate was supposed to represent the states, it really just does increase deliberation and slow

37. *E.g.*, 1994 CONST. (Belg.) art 67; 1958 CONST. art. 24 (Fr.); *see also* Régis Dandoy et al., *The New Belgian Senate. A (Dis)Continued Evolution of Federalism in Belgium?*, 51 REPRESENTATION 327, 327 (2015).

38. *See* John C. Yoo, *Franklin Roosevelt and Presidential Power*, 21 CHAP. L. REV. 205, 206, 222 (2018).

39. *See id.* at 206 (suggesting that the New Deal “radically shifted the balance of power among the three branches”); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 447–48 (1987).

40. *See* G.B. Reschenthaler & Fred Thompson, *The Information Revolution and the New Public Management*, 6 J. PUB. ADMIN. RES. & THEORY 125, 126 (1996) (“It would be surprising, indeed, if the . . . information revolution, did not ultimately effect changes of a comparable magnitude in the state and its institutions.”); Joseph E. Stiglitz, *Information and the Change in the Paradigm in Economics*, 92 AM. ECON. REV. 460, 460 (2002).

down change.⁴¹ And so to the extent we do want to change the government in whatever direction, because it no longer fits the economy and society we have, the Senate will prevent change, just because it is so hard to overcome the filibuster or to get any legislation through the Senate.

If you wanted to dismantle the administrative state, for example, and return the government towards classical liberal forms, it is going to be very hard to do that through legislation in the Senate. To ask the Senate to repeal aspects of government organization, to ask it to take back more authority from the agencies, is going to be extremely difficult just because of the setup of the Senate and the way interest group politics work.

You could do it, I think, through the courts, but the courts can only get you so far. Suppose the Supreme Court does take up the challenge in *Gundy*⁴² and tries to articulate some kind of nondelegation doctrine. I still think the hard work, the nitty gritty of reorganizing the administrative state, is still going to be up to Congress. The courts aren't going to do it for Congress. The Senate will stand as an obstacle to such radical change.

Nevertheless, I am surprised many people are so pessimistic about the possibility of change.⁴³ Change could be political, rather than formal. It reminds me of the national popular vote initiatives that some states are pushing to try to get around the Electoral College.⁴⁴ Suppose you had Senators that ran on a platform such as this

41. See THE FEDERALIST NO. 62, at 376 (James Madison) (Clinton Rossiter ed., 2003) (“[T]he 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.”).

42. *Gundy v. United States*, 139 S. Ct. 2116, 2131 (2019) (Gorsuch, J., dissenting) (calling for a revival of the non-delegation doctrine).

43. See, e.g., Clyde Wayne Crews Jr., *What If The Administrative State Cannot Be Reformed?*, FORBES (May 13, 2019, 9:38 AM), <https://www.forbes.com/sites/waynecrews/2019/05/13/what-if-the-administrative-state-cannot-be-reformed/> [https://perma.cc/LN8B-EYWB]; Lee, *supra* note 19, at 227; Yglesias, *supra* note 20.

44. See THOMAS H. NEALE, CONG. RSCH. SERV., R43823, THE NATIONAL POPULAR VOTE (NPV) INITIATIVE: DIRECT ELECTION OF PRESIDENT BY INTERSTATE COMPACT 9 (2019) (noting that fifteen states and the District of Columbia, accounting for 196 electoral votes, have adopted national popular vote initiatives).

and said, “I will, as Senator, vote to approve anything the House decides to do because I do not like the anti-democratic features of the Senate.” And over time, you could see the Senate just becoming a rubber stamp, much in the way that the House of Lords in England has become more ceremonial.⁴⁵

I am not convinced that if you put such change up to a vote of the national population—the idea of getting rid of the Senate or even changing the two-senator rule—it would pass. I think a lot of people in the country are not ready to radically alter the rules of the game.

You could achieve this kind of change within constitutional rules. But I just do not really sense, aside from odd claims by people running for various presidential offices who do not get through even one or two states of the primaries,⁴⁶ a lot of appetite for serious structural change. If there were, people could do it within the constitutional rules as they exist now.

45. See Walton Hamilton, *Review*, 52 *YALE L.J.* 186, 187 (1942) (reviewing HENRY HAZLITT, *A NEW CONSTITUTION NOW* (1942)) (“The House of Lords came into its decadent political role by way of a series of dramatic incidents.”); Justin McCarthy, M.P., *The Useless House of Lords*, 157 *THE N. AM. REV.* 215, 216 (1893).

46. See Scott Detrow, *Democratic Candidates Embrace the Risk of Radical Ideas*, NPR (March 20, 2019, 1:37 PM), <https://www.npr.org/2019/03/20/705131248/democratic-candidates-embrace-the-risk-of-radical-ideas> [<https://perma.cc/H4EG-HP35>] (highlighting the policy positions of Elizabeth Warren and Pete Buttigieg, which include abolishing the Electoral College, eliminating the Senate filibuster, and providing reparations).