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BEYOND THE SHELL AND HUSK OF HISTORY: THE HISTORY OF THE SEVENTEENTH AMENDMENT AND ITS IMPLICATIONS FOR CURRENT REFORM PROPOSALS

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> It is thus with all those who, attending only to the shell and husk of history, think they are waging war with intolerance, pride, and cruelty, whilst, under color of abhorring the ill principles of antiquated parties, they are authorizing and feeding the same odious vices in different factions, and perhaps in worse.[2]

In recent years there has been a resurgence of interest in federalism and its role in the American constitutional system. Scholars,[3] judges,[4] and politicians[5]

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[2]EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 163 (Thomas H.D. Maloney ed., 1988).

[3]*See, e.g.*, Symposium, on *Major Issues in Federalism Theoretical and Constitutional Issues*, 38 ARIZ. L. REV. 793 (1996); *see also* Symposium on *The Law and Economics of Federalism*, 82 MINN. L. REV. 249 (1997); Symposium on *Federalism in the 21st Century*, 45 U. KAN. L. REV. 971 (1997); Symposium on *The New Federalism After United States v. Lopez*, 46 CASE W. RES. L. REV. 635 (1996); Symposium on *New Frontiers of Federalism*, 13 GA. STATE U. L. REV. 923 (1997).

[4]*See, e.g.*, Printz v. United States, 117 U.S. 2365 (1997); United States v. Lopez, 514 U.S. 549 (1995).

[5]For instance, it was widely reported that Bob Dole carried a copy of the Tenth Amendment with him throughout the 1996 Presidential Election and that he often read from it during the campaign. *See* Akhil Reed Amar, *Kentucky and the Constitution: Lessons*

alike have expressed a renewed interest in and appreciation for the beneficial role played by federalism in the American system and have mourned its erosion during this century.

One consequence of this renewal of interest in federalism, has been a reexamination of the history and consequences of the Seventeenth Amendment. The Seventeenth Amendment, ratified in 1913, provides for direct election of United States Senators by the people.[6] Prior to the Seventeenth Amendment, United States Senators were chosen by the respective state legislatures.[7] This renewed interest in the Seventeenth Amendment has recently spawned a great deal of research which has thoroughly explored the critical role played by the initial Senate structure in preserving state sovereignty and the structure of federalism.[8]

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from the 1790's for the 1990's, 85 KY. L.J. 1, 4-5 (1996-97) (citing *Dole Uses Senate to Campaign, GOP Leader Stakes Out Differences with Clinton*, CINCINNATI POST, Mar. 21, 1996, at A5). The revitalization of federalism was also a key theme of the Republican Party's "Contract with America" during the 1994 elections. *See generally* Peter A. Lauricella, *The Real "Contract with America": The Original Intent of the Tenth Amendment and the Commerce Clause*, 60 ALB. L. REV. 1377 (1997).

[6]In relevant part, the Seventeenth Amendment provides:

> 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.

U.S. CONST. Amend. XVII.

The following states voted to ratify the Seventeenth Amendment (listed in alphabetical order): Arizona, Arkansas, California, Colorado, Connecticut, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana (ratified after the issuance of the proclamation), Maine, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, south Dakota, Tennessee, Texas, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. CONGRESSIONAL QUARTERLY INC., GUIDE TO CONGRESS (3d ed. 1982).

The following states did not vote to ratify: Alabama, Florida, Georgia, Kentucky, Maryland, Mississippi, Rhode Island, South Carolina, and Virginia. *Id.* Delaware and Utah affirmatively voted against ratification. C.H. HOEBEKE, THE ROAD TO MASS DEMOCRACY: ORIGINAL INTENT AND THE SEVENTEENTH AMENDMENT 189 (1995).

Alaska and Hawaii were not yet states.

[7]Prior to the Seventeenth Amendment, the Constitution provided: "[t]he 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." U.S. CONST. art. I, § 3, cl. 1 (amended 1913).

[8]There have been several articles and books in the past few years written on the Seventeenth Amendment. *See generally* HOEBEKE, *supra* note 6; BRUCE FEIN, THE FEDERALIST TODAY (1987); Vikram David Amar, *Indirect Effects of Direct Election: A Structural Examination of the Seventeenth Amendment*, 49 VAND. L. REV. 1347 (1996) [hereinafter Amar, *Seventeenth*]; Vik D. Amar, *The Senate and the Constitution*, 97 YALE L.J. 1111 (1988) [hereinafter Amar, *Senate*]; Jay S. Bybee, *Ulysses At the Mast: Democracy, Federalism, and the Sirens' Song of the Seventeenth Amendment*, 91 NW. U.L. REV. 500 (1997); Laura E. Little, *An Excursion into the Uncharted Waters of the Seventeenth Amendment*, 64

Despite this large volume of research, however, there still remains an incomplete understanding of the full institutional role played by the Senate in the original constitutional structure. More importantly, there also remains a failure to comprehend and explain the full variety of forces which led to the passage of the Seventeenth Amendment in 1913. Commentators have been remarkably willing to take at face value the conventional rationales asserted for the Seventeenth Amendment at the time of its passage. A closer examination of these purported reasons, however, shows them to be incomplete. The full story of the Seventeenth Amendment cannot be understood without examining the role of special interests seeking a more aggressive role by the federal government in passing legislation designed to redistribute wealth to those special interests. Moreover, while some commentators advocate sensible reforms designed to recapture some of the institutional benefits lost with the Seventeenth Amendment, the failure to fully comprehend the causes of the Seventeenth Amendment and its critical role in American constitutional history has led other commentators to advocate reforms which would exacerbate the problems already caused , at least in part, by the Seventeenth Amendment.

The purpose of this article is to review and synthesize the lessons of recent Seventeenth Amendment scholarship and how these lessons apply to current reform proposals. Part I discusses the emerging understanding of the integral and multifaceted role played by the Senate in the original constitutional structure. Part II further reviews and critiques the traditional explanations which have been offered for the Seventeenth Amendment, and demonstrates their failure to explain the passage of the Seventeenth Amendment. Part III discusses an alternative explanation for the Seventeenth Amendment rooted in a public choice analysis of constitutional change, one which largely has been ignored by commentators. Part IV examines several recent proposals for constitutional reform which either directly or indirectly affect the Senate, and illustrates the wisdom of these proposals in light of the Seventeenth Amendment. Part V presents concluding thoughts.

TEMP. L. REV. 629 (1991); Virginia M. McInerney, *Federalism and the Seventeenth Amendment*, 7 J. CHRISTIAN JURIS. 153 (1988); Todd J. Zywicki, *Senators and Special Interests: A Public Choice Analysis of the Seventeenth Amendment*, 73 OR. L. REV. 1007 (1994) [hereinafter Zywicki, *Senators*]; Roger G. Brooks, Comment, *Garcia, The Seventeenth Amendment, and the Role of the Supreme Court in Defending Federalism*, 10 HARV. J.L. & PUB. POL'Y 189 (1987); Kris W. Kobach, Note, *Rethinking Article V: Term Limits and the Seventeenth And Nineteenth Amendments*, 103 YALE L.J. 1971 (1994); Todd J. Zywicki, *C.H. Hoebeke, The Road to Mass Democracy: Original Intent and the Seventeenth Amendment*, 1 INDEPENDENT REVIEW 439 (1997) (hereinafter, Zywicki, *Book Review*). The "modern era" of Seventeenth Amendment scholarship can most accurately be dated to an article by William H. Riker in 1955. *See* William H. Riker, *The Senate and American Federalism*, 49 AM. POL. SCI. REV. 452 (1955).

II. THE ORIGINAL SENATE

The United States Senate was originally designed to accomplish two purposes.[9] First, it was to provide an *institutional* role under the Constitution, serving as an integral element of both federalism and bicameralism under the Constitution. Second, it was to provide an *anti-democratic* role under the Constitution, an American version of the English House of Lords designed to check the democratic excesses of the House of Representatives through the election of men of wealth, ability, and judgment.

A. Institutional Role of the Senate

As originally designed, appointment of U.S. Senators by state legislatures was to provide an important structural role under the Constitution. In particular, the appointment of Senators by state legislatures was integral to the "twin structural pillars of the Constitution: federalism and the separation of powers."[10] As such, election of Senators by state legislatures was one of the critical "auxiliary precautions" designed to protect the sovereignty of the several states and the public good against subversion by special interests.[11]

1. Federalism

The primary institutional role played by the original Senate was to protect the structure of federalism and state sovereignty, in response to concerns by antifederalists and the public that an omnipotent federal government would swallow-up the state governments.[12] Appointment of Senators by state legislatures gave the states a constituent role in the national government and a means to protect themselves from laws emanating from Washington designed to subvert state sovereignty and independence. Although there were other provisions elsewhere in the Constitution which were designed to protect state

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[9]Madison averred to this dual purpose of the Senate in THE FEDERALIST NO. 62, where he observed that appointment of Senators by the state legislatures was "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." THE FEDERALIST NO. 62, at 377 (James Madison) (Clinton Rossiter ed., 1961). *See also* HOEBEKE, *supra* note 6, at 17 (noting "two-fold purpose of the original method of Senate elections"); Fein, *supra* note 8, at 17.

[10]Zywicki, *Senators*, *supra* note 8, at 1009. *See also* Frank H. Easterbrook, *The State of Madison's Vision of the State: A Public Choice Perspective*, 107 HARV. L. REV. 1328, 1332-33 (1994) (observing that providing for "different electors (the people for members of the House, state legislatures for senators, the electoral college for the President)" was among the several methods of "fragmentation" pursued in the Constitution to thwart special interests and protect the public good).

[11]*See generally* THE FEDERALIST NO. 51 (James Madison) (Clinton Rossiter ed., 1961). *See also* THE FEDERALIST NO. 52, at 322 (James Madison) (Clinton Rossiter ed., 1961) ("A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.").

[12]*See* Zywicki, *Senators*, *supra* note 8, at 1034; Amar, *Senate*, *supra* note 8, at 1116.

authority, such as the commerce and republican guarantee clauses,[13] these provisions were seen as little more than "parchment barriers" which could be easily overridden by an oppressive federal government acting in alliance with federal courts who refused to enforce the limitations imposed on the federal government by those constitutional restrictions.[14] Rather than trusting to such "parchment barriers" and the whims of federal judges and federal officers to protect the states from federal encroachment, Madison thought it prudent instead to "contriv[e] the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places."[15] "Ambition," was to "counteract ambition. The interest of the man must be connected with the constitutional rights of the place."[16] The election of Senators by state legislatures was such an institution, as it would "giv[e] to the [s]tate governments such an agency in the formation of the federal government, as must secure the authority of the former; and [would] form a convenient link between the two systems."[17] Even Hamilton recognized the necessity of giving the states an institutional part in the constitutional system, observing:

> So far as that construction [election of Senators by state legislatures] may expose the Union to the possibility of injury from the State legislatures, it is an evil; but it is an evil which could not have been avoided without excluding the States, in their political capacities, wholly from a place in the organization of the national government. If this had been done it would doubtless have been interpreted into an

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[13] *See* Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387 (1987); Deborah Jones Meritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1 (1988); Todd J. Zywicki, *Federal Judicial Review of State Ballot Access Laws: Escape from the Political Thicket*, 20 T. MARSHALL L. REV. 87, 97-101 (1994) [hereinafter Zywicki, *Ballot Access Regulations*]. Of course, the eventual addition of the Tenth and Eleventh Amendments also provide other examples of such "paper rights" designed to protect the states from federal encroachment. Although the Supreme Court has recently reasserted the integrity of the Eleventh Amendment, *see* Seminole Tribe of Fla. v. Florida, 116 S. Ct. 1114 (1996), it is of limited use in enforcing the demarcations of legislative power between the state and federal governments. The Tenth Amendment, of course, was declared to have no judicially-enforceable constitutional content in Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985). Even if *Garcia* is overruled, it would place little limit on congressional power with respect to federalism.

[14] *See* THE FEDERALIST NO. 48, at 308 (James Madison) (Clinton Rossiter ed. 1961) (noting that mere "parchment barriers" would be insufficient to offset the countervailing force of "the encroaching spirit of power"). *See also* Brooks, *supra* note 8, at 194 (noting that the Framers reliance on institutional mechanisms to limit political authority "flowed naturally from the Eighteenth Century liberal distrust of authority and reliance on institutional checks to prevent the aggrandizement of power").

[15] THE FEDERALIST NO. 51, at 320 (James Madison) (Clinton Rossiter ed. 1961).

[16] *Id.* at 322.

[17] THE FEDERALIST NO. 62, at 416 (James Madison) (Jacob E. Cook ed. 1961).

> entire dereliction of the federal principle, and would certainly have deprived the State governments of that absolute safeguard which they will enjoy under this provision.[18]

The critical role of a Senate elected by state legislatures in preserving federalism and the integrity of the state governments was echoed in the state ratifying conventions. For instance Anti-Federalist John Dickinson noted that election by state legislatures would "produce that collision between the different authorities which should be wished for in order to check each other."[19] Fellow Anti-Federalist George Mason also feared that without adequate protection "the national Legislature [would] swallow up the legislatures of the States. The protection from this occurrence [would] be the securing to the state legislatures the choice of the senators of the United States."[20]

In light of this widespread and almost universal support[21] for the concept of electing Senators by state legislatures, it was appropriate for Madison to conclude that "[a]mong the various modes which might have been devised for constituting this branch of the government, that which has been proposed by the convention [election by state legislatures] is probably the most congenial with the public opinion."[22]

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[18] THE FEDERALIST NO. 59, at 364 (Alexander Hamilton) (Clinton Rossiter ed. 1961). *See also* JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 74 (1966) (statement of Roger Sherman "If it were in view to abolish the State [governments] the elections ought to be by the people. If the State [governments] are to be continued, it is necessary in order to preserve harmony between the Nation and State [governments] that the elections to the former [should] be made by the latter."); McInerney, *supra* note 8, at 158 (noting that Hamilton "acknowledged . . . that potential dangers [of state participation in the national government] were slight when compared to the obvious debilitating effects of denying the state a direct voice in the national government").

[19] DEBATES IN THE FEDERAL CONVENTION OF 1787, S. DOC. NO. 404, 57th Cong., 1st Sess. 6 (1902) (statement by John Dickinson).

[20] DEBATES IN THE FEDERAL CONVENTION OF 1787, S. DOC. NO. 404, 57th Cong., 1st Sess. 10 (1902) (statement by George Mason).

[21] The election of Senators by state legislatures was carried by a ten vote majority of the state delegations represented at the Constitutional Convention. DEBATES IN THE FEDERAL CONVENTION OF 1787, S. DOC. NO. 404, 57th Cong., 1st Sess. 8 (1902). Pennsylvania's James Wilson favored election of the Senate by popular vote, but his proposal was rejected ten to one in a straw poll of the convention. *Id.* Delaware's George Reed favored appointment of the Senate by the President: HOEBEKE, *supra* note 6, at 44. Hamilton wanted Senators chosen for life by a college of electors. *See id.* None of these proposals received significant support.

[22] *See generally* THE FEDERALIST NO. 62 (James Madison) (Clinton Rossiter ed., 1961). *See also* 1 GEORGE H. HAYNES, THE SENATE OF THE UNITED STATES: ITS HISTORY AND PRACTICE 35 (1938) [hereinafter 1 HAYNES, SENATE] ("[t]he election of senators by state legislatures - the provision which later was to arouse greatest antagonism -was passed over [in the Federalist Papers] with a single laudatory paragraph, characterizing it as the mode 'probably most congenial with public opinion' - as beyond question it then was."); GEORGE H. HAYNES, THE ELECTION OF SENATORS 8 (1906) [hereinafter HAYNES, ELECTION].

As originally constituted, therefore, the role of the Senate was to be distinguished from that of the House, in that a Senator served as "an ambassador of the State to the nation while the [House] representative was simply a member of his branch of congress and not in any way subject to other authority than that of his constituents and the nation as a whole."[23] The Senate was designed to represent the states, as states in the federal government,[24] and the constituency for U.S. Senators was the state legislatures, *not* the populace of the state.[25] By providing for election by state legislatures, the Senate carried out the role formerly performed by delegates to the Continental and Confederation Congresses of representing the interests of their states to the general government.[26]

The primary mechanism for enforcing the Senator-state legislature agency relationship established by the Constitution, was through the mechanism of "instruction."[27] "Under this practice, state legislatures told senators how to vote on particular legislative items."[28] Moreover, it was clearly understood at the time the Constitution was ratified that it was appropriate for state legislatures to instruct Senators on how to vote in the Senate.[29] The special role of Senators as the agents of state legislatures was reflected in the differing practices regarding instruction between the House and the Senate, "[s]tate legislators . . . sought only to instruct their senators; they would only advise the state's delegation in the House of Representatives of their views."[30] As Riker concludes, nearly every delegate at the Constitutional Convention "anticipated that the Senate would protect state rights; and it is hard to visualize any

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[23] William E. Dodd, *The Principle of Instructing United States Senators*, 1 S. ATLANTIC Q. 326, 327 (1902).

[24] *See* McInerney, *supra* note 8, at 156-58. *But see* Terry Smith, *Rediscoverning the Sovereignty of the People: The Case for Senate Districts*, 75 N.C.L. REV. 1, 33 (1996) (arguing that the Senate was not intended to represent the states as sovereign entities).

[25] *See* Kenneth Bresler, *Rediscovering the Right to Instruct Legislators*, 26 NEW ENG. L. REV. 355, 365 (1991).

[26] RICHARD B. BERNSTEIN & JEROME AGEL, AMENDING AMERICA: IF WE LOVE THE CONSTITUTION SO MUCH, WHY DO WE KEEP TRYING TO CHANGE IT? 122 (1993).

[27] *See* Riker, *supra* note 8, at 455 ("next to the method of election itself, [instructions was] the main avenue through which state legislatures pushed themselves into national affairs").

[28] Zywicki, *Senators*, *supra* note 8, at 1036.

[29] *See* 2 ANNALS OF CONG. 1904 (Jan. 10, 1791) (remarks of James Madison). *See also* Bybee, *supra* note 8, at 524-28 (discussing the practice of instruction in early Senate debates).

[30] Bybee, *supra* note 8, at 518-19. *See also*, JOHN C. CALHOUN, *A Discourse on the Constitution and Goverment of the United States (1853), reprinted in* UNION AND LIBERTY: THE POLITICAL PHILOSOPHY OF JOHN C. CALHOUN 79 170 (Ross M. Lenol ed., 1992) (state may instruct[] its Senators in Congress, and request[] its members of the House of Representatives" to oppose some measure in Congress).

practical system of protection that did not include the doctrine of instructions."[31]

Despite the widespread acceptance of the doctrine of instructions and its necessity to the constitutional scheme established in 1789, as an institutional mechanism for state legislative control the practice of "instruction" provided only an imperfect check on a Senator's independence and rendered him a sometimes unreliable agent of state legislative control. The primary problem was not with the enunciation of instructions by state legislatures, but with devising an effective sanction to punish wayward Senators who refused to heed instructions.[32] For a time, forced resignations and a refusal to reelect the Senator to a new term were moderately effective mechanisms for forcing compliance with instructions, but they too had inherent limitations.[33] Over time, however, even these mechanisms lessened in effectiveness and importance.

The primary enforcement mechanism that was lacking was the power of recall. Prior to the Constitution, the power of instruction was joined with the power of recall, meaning the instructing party could recall its agent and replace him with somebody else.[34] The Articles of Confederation had specifically guaranteed state legislatures the power to recall some or all of its delegates at any time and for any reason.[35] During the debates over the ratification of the Constitution, the Anti-Federalists stressed the absence of the recall power as a critical flaw with the Constitution.[36] Nonetheless, the Constitution passed without such a right of recall being added to the Constitution. As a result, over time the practice of instruction atrophied through lack of an effective mechanism for enforcement.

Nonetheless, instruction and the remaining enforcement mechanisms such as refusal to reelect and forced resignations provided state legislatures with some measure of control over Senators. As one observer has noted, "[t]he power to elect is the power to control."[37] Although there has been no thorough study

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[31] Riker, *supra* note 8, at 456. *But see* David P. Currie, *The Constitution in Congress: The First Congress and the Structure of Government*, 1789-1791; 2 U. CHI. L. SCH. ROUNDTABLE 161, 172-73 (expressing the more ambivalent position that "it was entirely plausible to argue that state election of Senators had been designed to preserve the tradition of a state check upon federal action - even though the significant provision of the Article permitting the states to recall their delegates had been conspicuously omitted from the new Constitution").

[32] *See* Riker, *supra* note 8, at 457.

[33] *See id.* at 457-61. *See* Bybee, *supra* note 8, at 519 (the refusal to reelect was an imperfect mechanism for enforcing compliance with instructions because "there was no contemporaneous means for compelling senators to obey instructions").

[34] *See* Riker, *supra* note 8, at 456.

[35] *See* Bybee, *supra* note 8, at 528.

[36] *Id.* at 528-30.

[37] John E. Dumont, Note, *State Immunity from Federal Regulation*, 31 DUQ. L. REV. 391, 400 (1993). *See also* Douglas Laycock, *Notes on the Role of Judicial Review, The Expansion of*

of the extent to which Senators actually acted to protect the prerogatives of state legislatures from infringement by the federal government, statistical[38] and anecdotal evidence suggests that the Senate played an active role in preserving the sovereignty and independent sphere of action of state governments.[39] Rather than delegating lawmaking authority to Washington, state legislators insisted on keeping authority close to home, so as to build their own political authority and to receive the political benefits of rewarding local special interests.[40] As a result, the long term size of the federal government remained fairly stable and relatively small in scale during the pre-Seventeenth Amendment era.[41] Although the federal government grew substantially in size in response to particular crises, most notably wars, it returned to its long-term stable pattern following the abatement of the crisis.[42] The "ratchet effect" of federal intervention persisting after the dissipation of the crisis which purportedly spawned it, was absent from American history until 1913.[43]

Conventional wisdom states that the New Deal commenced a radical shift in the scope of the federal government. In fact, the growth in the federal government began almost immediately after the passage of the Progressive Era amendments. While the scope of the federal government expanded to meet the exigencies of World War I, it simply never returned to its prewar status.[44]

Federal Power, and the Structure of Constitutional Rights, 99 YALE L.J. 1711, 1737 (1990) ("It is hard to imagine that a senator so elected could defy his legislature on a matter important to it.").

[38] *See* JEREMY ATACK & PETER PASSELL, A NEW ECONOMIC VIEW OF AMERICAN HISTORY FROM COLONIAL TIMES TO 1940 670 (2d ed. 1991) (showing increase in federal spending relative to state and local spending beginning in 1913 and continuing on a general upward trend thereafter).

[39] *See* Brooks, *supra* note 8, at 193 n.27 (noting the role of the pre-Amendment Senate in preventing the application of the Bill of Rights to the states until the Civil War). As Douglas Laycock notes, "[i]t is hard to know the size of this effect." Laycock, *supra* note 37, at 1737.

[40] Zywicki, *Senators*, *supra* note 8, at 1038.

[41] *See* Thomas E. Borcherding, *One Hundred Years of Public Spending, 1870-1970, in* BUDGETS AND BUREAUCRATS: THE SOURCES OF GOVERNMENT GROWTH 19, 19-44 (Thomas E. Borcherding ed., 1977); Randall G. Holcombe, *The Growth of the Federal Government in the 1920's*, 16 CATO J. 175 (1996). ("The relatively small size of the federal government before World War I shows that it exhibited minimal growth in the 19th century, in stark contrast with its tremendous growth in the 20th century.").

[42] *See* Roger E. Meiners, *Economic Considerations in History: Theory and a Little Practice, in* ECONOMIC IMPERIALISM 79, 93 (Gerard Radnitzky & Peter Bernholz eds., 1987). *See also* ATACK & PASSELL, *supra* note 38, at 653; Holcombe, *supra* note 41, at 175.

[43] *See* Zywicki, *Senators*, *supra* note 8, at 1037; Holcombe, *supra* note 41, at 175 ("[T]he most notable characteristic of . . . government growth is not the peaks that are associated with wars, but the steady growth throughout the 20th century, in stark contrast to the absence of growth in the 19th century."). The term "ratchet effect" was coined by Robert Higgs to describe this phenomenon. ROBERT HIGGS, CRISIS AND LEVIATHAN: CRITICAL EPISODES IN THE GROWTH OF AMERICAN GOVERNMENT 30 (1987).

> [I]n dozens of laws passed and decrees issued, the 1920's proved to be anything but a return to the America of the first decade of the century. In national projects of reclamation, in agriculture, in educational assistance to the states and cities, in social work for the indigent and in investigations of central-planning possibilities, the federal government often came closer in the twenties to the Wilson War state than to anything that had preceded it in American history.[45]

The New Deal simply confirmed the constitutional revolution which had already transpired.[46] Benjamin Anderson even goes so far as to date the beginning of the New Deal to 1924 with the introduction of the McNary-Havgen bill designed to protect farmers from foreign competition.[47]

Following the Seventeenth Amendment, however, the situation changed. "Once senators were no longer accountable to and constrained by state legislatures . . . senators almost always found it in their own interest to procure federal legislation, even to the detriment of state control of traditional state functions."[48] The 1920s showed for the first time federal intervention in traditional state functions, and the first use of federal grants to the states - along with accompanying federal control.[49] Moreover, the state governments have more and more been downgraded from independent policy-making bodies to mere instrumentalities of the federal government.[50] Compared to the current state of affairs, it is worthwhile to note that there is no evidence that such a relationship between the state and federal governments prevailed during the nineteenth century. Indeed, it is inconceivable that a Senator during the pre-Seventeenth Amendment era would vote for an "unfunded federal mandate," thereby requiring state legislatures to raise taxes and spend money on projects they did not devise and for which they receive no political benefit.[51]

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[44] ROBERT NISBET, THE PRESENT AGE: PROGRESS AND ANARCHY IN MODERN AMERICA 48 (1988).

[45] *Id.* at 49.

[46] *Id.* at 48; Holcombe, *supra* note 41, at 177.

[47] BENJAMIN M. ANDERSON, ECONOMICS AND THE PUBLIC WELFARE 125-27 (1979).

[48] Bybee, *supra* note 8, at 535-36. *See also* Fernando R. Laguarda, Note, *Federalism Myth: States as Laboratories of Health Care Reform*, 82 GEO. L.J. 159, 164 (1993); Steven G. Calabresi, *"A Government of Limited and Enumerated Powers": In Defense of United States v. Lopez*, 94 MICH. L. REV. 752, 795-96 (1995) (observing "the powerful personal stake that members of Congress always will have in expanding national power. Every increase in national power and money is an increase in the size of the pool of resources or 'pork' that the federal government gets to hand out.").

[49] Holcombe, *supra* note 41, at 187.

[50] *See* Amar, *Seventeenth*, *supra* note 8, at 1349.

[51] *See* Zywicki, *Senators*, *supra* note 8, at 1034; *see also* Amar, *Seventeenth*, *supra* note 8, at 1349; HOEBEKE, *supra* note 6, at 192.

2. Bicameralism

The second institutional role played by the original Senate was its contribution to bicameralism. The role of the Senate in bicameralism and federalism overlap in many ways, which may explain the relative lack of scholarly attention to bicameralism as a separate concern. Nonetheless, they are distinguishable. Federalism deals with the allocation of power between the state and federal governments. Bicameralism, by contrast, is concerned with the *type* of legislation passed by the federal government. The election of Senators by state legislatures was not intended solely to preserve federalism and state autonomy. Election of Senators by state legislatures was also intended to "restrain the power of factions to divert the power of the federal government towards private ends."[52] The effect of bicameralism was to establish two legislative houses with members accountable to distinct constituencies. "Before taking effect, legislation would have to be ratified by two independent power sources: the people's representatives in the House and the state legislatures' agents in the Senate."[53] By making the House and Senate accountable to different constituencies, the Framers sought to thwart special interests and ensure that legislation furthered the public good.[54] Thus, Madison wrote:

> In republican government, the legislative authority, necessarily predominates. The remedy for this inconveniency is, to divide the legislature into different branches; and to render them by different modes of election, and different principles of action, as little connected with each other, as the nature of their common functions and their common dependencies on the society, will admit.[55]

Different constituencies for the two houses protect the public by ensuring that legislation represents the views of at least a majority of the populace. This limits the ability of special interests, or "factions," to pervert the legislative process:

> Another advantage accruing from . . . the constitution of the senate is, the additional impediment it must prove against improper acts of legislation. No law or resolution can now be passed without the concurrence first of a majority of the people, and then of a majority of the States. It must be acknowledged that this complicated check on legislation may in some instances be injurious as well as beneficial; . . .

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[52] Zywicki, *Senators*, *supra* note 8, at 1034.

[53] *Id.* *See also* McInerney, *supra* note 8, at 158.

[54] *See* THE FEDERALIST NO. 10 (James Madison) (Clinton Rossiter ed., 1961); HOEBEKE, *supra* note 6, at 17.

[55] THE FEDERALIST NO. 51 (James Madison) (Clinton Rossiter ed., 1961). *See also* Edmund Burke, *Reflections on the Revolution in France*, *in* 8 THE WRITINGS AND SPEECHES OF EDMUND BURKE 53, 110 (Paul Langford ed., 1989) (noting the importance of the tricameral system of the Estates General in pre-Revolution France in preserving ordered liberty).

> [but] as the facility and excess of law-making seem to be the diseases to which our governments are most liable, it is not impossible that this part of the constitution may be more convenient in practice than it appears to many in contemplation.[56]

Requiring the consent of a second house "distinct from, and dividing the power with, [the] first . . . [would] double[] the security to the people, by requiring the concurrence of two distinct bodies in schemes of usurpation or perfidy."[57]

As Saul Levmore has demonstrated, simply requiring two houses of a legislative body can, in itself, provide an important check on special interest legislation and ensure that legislation furthers the public good.[58] As Levmore has stated it, sometimes "two decisions are better than one." Thus, simply requiring two legislative bodies to assent to legislation provides a procedural check which will tend to frustrate special interests and further the public good.

Bicameralism under the initial Constitution, however, provided a heightened check against special interest legislation by further requiring the assent of two distinct *constituencies* for the two houses.[59] Delegate Pierce from Georgia, for instance, understood that the House would be elected by the people and the Senate by the States, "by which means the Citizens of the States would be represented both *individually* and *collectively*."[60] The different constituencies represented in the two houses would check one another, thereby mitigating the possibility of sacrifice of the public good to individual ambition or special interests.[61]

Most recent commentators have not recognized the importance to bicameralism of the representation of different constituencies in the two houses, and how this serves to protect the public against special interests. Bicameralism makes the passage of legislation by one house contingent on approval by the second house before it becomes law. Thus, a special interest group seeking preferential legislation will have to put together a winning

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[56] *See generally* THE FEDERALIST NO. 62 (James Madison) (Clinton Rossiter ed., 1961).

[57] *Id.*

[58] Saul Levmore, *Bicameralism: When are Two Decisions Better Than One?*, 12 INT'L REV. L. & ECON. 145 (1992), *reprinted in* MAXWELL L. STEARNS, PUBLIC CHOICE AND PUBLIC LAW: READINGS AND COMMENTARY 375 (1997) (arguing that bicameralism is similar to a rule of supermajoritarianism, which tends to frustrate special interest capture of the legislative process).

[59] *See* 4 JONATHAN ELLIOTT, THE DEBATES OF THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 257 (1836) (statement of Charles Cotseworth Pinckney); *see also* 1 THE RECORDS OF THE CONSTITUTIONAL CONVENTION 254 (Max Farrand ed., 1911) (statement of James Wilson).

[60] JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 78 (1984). *See also id.* at 82 (statement of Williamson) ("The different modes of representation in the different branches will serve as a mutual check."); McInerney, *supra* note 8, at 159.

[61] *See* McInerney, *supra* note 8, at 160.

coalition in *both* houses. The mere transaction costs of putting together two distinct winning coalitions will make it difficult to accomplish this goal.

But these costs will increase further if the two houses are drawn from different constituencies. If the winning legislative "coalition in one house overlaps" with that of the second house, it will be easier to put together two winning coalitions than if there is minimal or no overlap. Thus, reducing the amount of overlap in the constituencies will make it more difficult to pass special interest legislation, and consequently will ensure that there is widespread support for the legislation.[62] Although the importance of drawing the two houses from different constituencies is often overlooked today, it was not so obscure during the eighteenth and nineteenth centuries. Justice Story, for instance, recognized this point, writing:

> If each branch is substantially framed upon the same plan, the advantages of the division are shadowy and imaginative; the visions and speculations of the brain, and not the waking thoughts of statesmen, or patriots. It may be safely asserted, that for all the purposes of liberty, and security, of stable laws, and of solid institutions, of personal rights, and of the protection of property, a single branch is quite as good as two, *if their composition is the same, and their spirits and impulses the same.*[63]

To illustrate this point, consider the following example. Suppose that rather than having "upper" and "lower" houses in the legislature, one house was constituted solely of representatives from states east of the Mississippi River, and the second house was constituted of representatives from states west of the Mississippi River. Under such a system, legislation would be passed only if tended to favor both sections of the country, or more generally, the country as a whole.[64] In comparison, if there was a perfect overlap between the two houses of a bicameral legislature, then the winning coalition in the first house

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[62] *See* Zywicki, *Senators*, *supra* note 8, at 1031-32. *See also* HOEBEKE, *supra* note 6, at 128; Lynn A. Baker, *"They the People": A Comment on U.S. Term Limits, Inc. v. Thornton*, 38 ARIZ. L. REV. 859, 864 & n.18 (1996) ("The addition of a second chamber will likely increase the proportion of voters necessary to pass legislation by a representative body. The proportion of voters necessary for passage is further likely to increase as the diversity of the jurisdictions from which the members of the two chambers are elected increases.").

[63] 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 179 (Thomas Cooley ed., 1833).

[64] Indeed, it was this rationale that underlay John C. Calhoun's proposal for a "joint executive," with one president drawn from the North and one from the South. Calhoun recognized that requiring separate consent independently from both regions of the country would tend to ensure that national legislation favored the entire country, and not just the interests of one portion of the country. JOHN C. CALHOUN, A DISQUISITION ON GOVERNMENT (1953).

could easily be replicated in the second house, thereby undermining the purpose of bicameralism in protecting the public from special interests.[65]

There is significant empirical evidence that requiring the consent of the two houses drawn from two distinct constituencies served to thwart special interest legislation on the national level during the pre-Seventeenth Amendment era.[66] In general, the activities of the federal government prior to the Seventeenth Amendment were confined to the provision of "public goods," such as defense and international relations.[67] Redistributive activity to special-interest groups was virtually nonexistent at the federal level.[68] Changing the method by which the Senate was elected undermined the check that bicameralism provided against special interest legislation. Thus, not only was there steady growth in the size of the federal government in the 1920s, but this growth was driven by special interest legislation.[69]

The New Deal, of course, accelerated ths trend toward capture of the federal government by special interests.[70] Thus, the New Deal "changed the scale of federal programs when compared to the 1920s, but it did not change the underlying philosophy" that had a role to play in providing economic assistance to a subset of the U.S. population.[71] This change has led Judge Easterbrook to accurately observe that, "[P]rivate interest legislation is common today, much more so than in 1787, and more common at the national level than among the states."[72]

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[65] *See* Zywicki, *Senators*, *supra* note 8, at 1031. In fact, if only a bare majority of a house's representatives is needed to pass legislation, and each representative in the governing majority needs just over one-half of the voters in his district, then, in theory, one-quarter of the voters (i.e., one-half of the voters in one-half of the districts) could control the elected legislature. *See* JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY 233-35 (1962). Lynn Baker contends that the twenty-five percent figure applies only to a unicameral legislature. Baker, *supra* note 62, at 864 & n.18. According to Baker, however, legislation could be passed by a bicameral legislature divided into districts with as little as thirty-one percent of the voters. *Id.* at 864.

[66] *See* Zywicki, *Senators*, *supra* note 8, at 1037 (noting that federal redistributive activity to special interests was extremely limited prior to the Seventeenth Amendment). In addition, the years preceding the Seventeenth Amendment "[s]pecial interest legislation frequently passed the House, only to stall in the Senate." *Id.* at 1040.

[67] *See* HIGGS, *supra* note 43, at 114.

[68] *Id.* at 26.

[69] Holcombe, *supra* note 41, at 178.

[70] Gary M. Anderson & Robert D. Tollison, *Congressional Influence and Patterns of New Deal Spending, 1933-1939*, 34 J. LAW & ECON. 161 (1991).

[71] Holcombe, *supra* note 41, at 190.

[72] *See* Easterbrook, *supra* note 10, at 1334.

B. Anti-Democratic Role of the Senate

In addition to the institutional role played by the original Senate in preserving federalism and as an integral element of bicameralism, the original Senate was also designed to be an anti-democratic body, patterned after the British House of Lords, and filled with the "better men" of society.[73] As opposed to the more populist House members, Senators were supposed to be men of "substance" who would "contribute a wise and stable voice in national deliberation, controlling the rapid swings expected of the House of Representatives."[74] The Senate would function "with more coolness, with more system, and with more wisdom, than the popular branch," because its members would be drawn from the elite of society and as a result of its longer term and insulation from direct public pressure.[75]

Moreover, there is some evidence that in fact the method of electing Senators did in fact result in that house being filled with a higher quality of man than the lower house. Alexis de Tocqueville, for instance, concluded that the Senate was filled with a higher quality of man than the House.[76] The Senate, he observed, contained "a large proportion of the famous men of America. There is scarcely a man to be seen there whose name does not recall some recent claim to fame. They are eloquent advocates, distinguished generals, wise magistrates, and noted statesmen."[77] English noblewoman Harriet Martineau is reported to have similarly "confessed to having seen no assembly of hered- itary dignitaries whom she considered 'half so imposing as this collection of stout-soled, full-grown, original men, brought together . . . to work out the will of their diverse constituencies.'"[78] Even George Haynes, a leading advocate of the Seventeenth Amendment at the time, admitted that "the Senate attained its highest prestige" during the period that its members were chosen by state legislatures.[79] Moreover, Tocqueville attributed this difference in character to the indirect method of election of the Senate: "I can see only one fact to explain

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[73] *See* Zywicki, *Book Review*, *supra* note 8, at 439.

[74] Brooks, *supra* note 8, at 195 & n.36. Thus, consistent with this goal, the minimum age for Senators is higher than that of House members, thereby attempting to fill the Senate with older, wiser, and more experienced individuals. *See* Amar, *Senate*, *supra* note 8, at 1119.

[75] GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 553 (1969). Given the widespread view among the delegates to the Convention that the Senate was to serve the "double advantage" of an institutional purpose and to draw "better men," Professor Amar's characterization of this rationale as a "secondary (and less oft-invoked) justification" seems questionable. *See* Amar, *Seventeenth*, *supra* note 8, at 1353.

[76] *See* McInerney, *supra* note 8, at 163.

[77] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 200-01 (J. Mayer ed., 1966).

[78] HOEBEKE, *supra* note 6, at 54 (quoting 1 HARRIET MARTINEAU, RETROSPECT OF WESTERN TRAVELS 301-02 (1969)).

[79] 1 HAYNES, SENATE, *supra* note 22, at 85.

it: The election which produces the House of Representatives is direct, whereas the Senate is subject to election in two stages. All citizens together appoint the legislature of each state, and then the federal Constitution turns each of these legislatures into electoral bodies that return the members of the Senate."[80]

A further benefit of election of Senators by state legislatures was the flexibility it afforded to the best statesmen to move in and out of the Senate. Because of the relatively small size of state legislatures as an electoral body, and the intimate familiarity they had with all potential Senate candidates, leading statesmen had an opportunity to move in and out of the Senate according to the needs of the country and his state. In 1845, for example, South Carolina called John C. Calhoun out of retirement to cure the "incompetency of [its] two Senators"—George McDuffie who was ill, and Daniel E. Huger who was inexperienced—and to lead the debate against President Polk's hawkish attitude towards Britain over Oregon.[81] Recognizing the need for Calhoun's leadership in the Senate, Huger voluntarily stepped aside to allow Calhoun to fill his seat. Calhoun's contemporaries in the "Great Triumvirate," Henry Clay[82] and Daniel Webster,[83] similarly moved in and out of the Senate as circumstances and national needs warranted.

This anecdotal evidence is supported by Vik Amar's observation that prior to the Seventeenth Amendment it was substantially more common for a sitting Senator to resign his Senate seat to serve for some time in the executive branch.[84] As Amar observes, "[a] particular kind of deal - by which a Senator would leave the Senate to serve in a presidential administration only to be returned to the Senate when another opening was available - would be a win-win situation for the Senator and her State."[85] This sort of deal, however, "depends on the relative stability, predictability, and small size of state legislatures."[86] With direct election, however, it will be more difficult for a Senator to predict whether the electorate will return him to his seat after his executive branch service. As a result, Senators will be more reluctant to leave the Senate to serve a term in the executive branch, reducing the number of these "win-win" situations.[87] Amar notes that a cursory historical examination

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[80] TOCQUEVILLE, *supra* note 77, at 201.

[81] MERRILL D. PETERSON, THE GREAT TRIUMVIRATE: WEBSTER, CLAY, AND CALHOUN 414 (1987).

[82] *Id.* at 200, 449-52.

[83] *Id.* at 155-56, 369.

[84] Amar, *Seventeenth*, *supra* note 8, at 1357-59. In fact, Amar notes that both Webster and Calhoun served in the Senate both prior to and after serving a stint as Secretaries of State and of War. *Id.* at 1359.

[85] *Id.* at 1357.

[86] *Id.*

[87] *Id.* at 1358.

suggests that, in fact, Senate-executive branch rotation was more common prior to the Seventeenth Amendment than subsequently.[88]

The role of the Senate as an anti-democratic bastion manned by the elite of society is advanced by C.H. Hoebeke. Hoebeke contends that the Framers' distrust of popular government provided the primary motive force for indirect election of Senators. Election of Senators by state legislatures was not designed merely to "defend[] the rights of states, per se, but . . . [as] a means of establishing what has been called a 'natural' aristocracy, an agency which would fulfill a function similar to that of the [British House of] Lords in checking the runaway tendencies of popular rule, but which at the same time would remain a non-hereditary body."[89] Thus, Hoebeke asserts that although the election of Senators by state legislatures "could . . . be justified on the grounds of states' rights, . . . that was certainly not the primary consideration."[90] As Hoebeke concludes:

> To lay too fine a point on an ideological attachment to states' rights is to overlook other crucial aspects of the Senate's composition - such as the deliberate exclusion of provisions for state recall, or for that matter, the implementation of six-year terms - which suggest that Senate actions were ideally to be as free from state coercion as they would from popular whims.[91]

Election of Senators by the small and knowledgeable electoral body of the state legislatures was also seen as necessary to further the purpose of the Senate as a deliberative body. Hoebeke also states:

> Because the uninhibited discussions for which it was intended required a smaller membership, which in turn entailed broader, state-wide constituencies, popular election was ruled out, even in those days of sparse population, as a mockery of the true principles of representation. Candidates would have too little acquaintance with any but the largest or most vocal interests.[92]

The Framers' distrust of democracy seems anachronistic to our modern sensibilities. As a result, there is a tendency to discount the anti-democratic impulses of the Framers in providing for indirect election of the Senate, and concentrate solely on the institutional role played by the Senate in the scheme of federalism and bicameralism. But, even if the primary purpose of the Senate was to further these structural goals, it must be recognized that a major secondary reason was to include an anti-democratic check in the government.

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[88] *Id.* at 1358-59.

[89] HOEBEKE, *supra* note 6, at 45.

[90] *Id.*

[91] *Id.*

[92] *Id.* at 17.

Although anti-democratic impulses was one of the purposes animating the decision to have state legislatures elect Senators, Hoebeke concludes that this concept was flawed from the outset. After all, it was the democratic excesses of the state legislatures under the Articles of Confederation which led to the calling of the Constitutional Convention in the first place.[93] Following the adoption of the Constitution, the states again returned to their democratic tendencies, quickly adopting measures which were far more democratic than any innovations suggested on the national level.[94] Thus, Hoebeke calls the institution of electing Senators by state legislatures an "anomalous counterweight": entrusting to the most democratic bodies in the country, the state legislatures, the responsibility of electing an "aristocratic" body, the U.S. Senate, was doomed to failure from the outset, a flaw which quickly became manifest as state legislatures soon abandoned their electoral duty to the public through various means such as direct primaries and other democratic means.[95]

III. THE CAUSES OF THE SEVENTEENTH AMENDMENT

As should now be evident, there has been a great deal of valuable research in recent years which has helped to explain why the Constitution originally provided for election of Senators by state legislatures. Most efforts to explain why this system was abandoned in favor of direct election, however, have not been so successful. This Part discusses the two conventional models which have been advanced to explain the passage of the Seventeenth Amendment. Although there is undeniably some truth in each of them, neither of them standing alone, nor both of them combined, provide an adequate explanation for the passage of the Seventeenth Amendment in 1913.

As noted above, there was near-universal support for election of Senators by state legislatures both at the Constitutional Convention and in the state ratification conventions.[96] Although there were weak efforts in favor of direct election of Senators as early as the 1820s, this widespread support for the original constitutional scheme remained intact for a century.[97] Beginning in the 1870s, however, calls for direct election began in earnest.[98] Sometime thereafter, these state-by-state demands for direct election were converted into a movement for a national constitutional amendment. What explains this

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[93] *Id.* at 45. ("The lack of national authority, not the excess of it, brought them to the convention.").

[94] HOEBEKE, *supra* note 6, at 62-71.

[95] *See* Smith, *supra* note 24, at 26.

[96] *See supra* notes 63 - 85 and accompanying text.

[97] *See* Kobach, *supra* note 8, at 1976 & n.21.

[98] *See* Brooks, *supra* note 8, at 206 (noting that "demand for popular election was 'quite negligible' before the 1870's") (quoting M.A. MUSMANNO, PROPOSED AMENDMENT TO THE CONSTITUTION, H.R. DOC. NO. 551, at 216 (1928)).

sudden conversion of support for indirect election into a nationwide movement which culminated in a successful constitutional amendment?

I have argued elsewhere that the explanations for causes of the Seventeenth Amendment can be usefully classified into two basic models: "external" and "internal" explanations.[99] Neither is logically exclusive of the other, and they are often discussed as cumulative reasons animating the Seventeenth Amendment.

The external model views the Seventeenth Amendment as one small element in the larger Progressive Movement of the late nineteenth and early twentieth centuries. Advocates of the external model see the Seventeenth Movement as rooted in the same forces which underlay the entirety of the Progressive Movement, its legislative accomplishments, and governmental reforms.[100]

An alternative explanation is provided by the internal model of the Seventeenth Amendment. Internal explanations largely ignore the greater context of Progressivism and focus instead on the problems and concerns unique to the election of Senators. The internal model "view[s] direct election as a pragmatic response to a perceived inability of state legislatures to perform their electoral function."[101] The primary impetus underlying direct election, therefore, was a perception that election of Senators by state legislatures was marked by "corruption, irresponsibility, unresponsiveness to public demands, and back-room dealing."[102] Popular election, in this view, was not an ideological issue but rather a necessary solution to the problems created by election by state legislatures.

Although I have discussed both of these models previously, both explanations continue to appear unreflectively in recent scholarship, thus it is worthwhile to reevaluate their explanatory power in light of this new research. Moreover, the continued persistence of incomplete or erroneous explanations for the causes of the Seventeenth Amendment has led to ill-considered proposals for further political and constitutional reforms which would exacerbate the problems which have resulted from the adoption of the Seventeenth Amendment.[103] A fuller understanding of the causes of the Seventeenth Amendment is necessary to formulate prudent recommendations for constitutional and political changes.

A. External Explanations

External models see the Seventeenth Amendment as an outgrowth of the Progressive Movement and as explainable by the same forces which explain

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[99] *See* Zywicki, *Senators*, *supra* note 8, at 1015-16.

[100] *See id.* at 1015.

[101] *Id.* at 1016.

[102] *Id.*

[103] Several of these proposals, along with some positive recommendations, are considered *infra* at notes 292 - 360 and accompanying text.

the Progressive Movement. Thus, it is generally treated as just one element of the greater Progressive Movement, "a detail of 'historical progress' . . . in a beneficial process of change."[104]

As carried forward into present scholarship, the unrevised history of the Progressive Movement is rooted in the view of the Progressive Movement as a largely successful attempt to wrest control of the government from the wealthy and powerful, and to transfer it to "the people" who could then use the government as an instrument of positive social change.[105] The primary means by which these reforms were come about was through increased democracy, which would give the masses of the populace a means to protect themselves from the rich and powerful who had increasingly come to control social, political, and economic power in the post-Civil War period.[106] Thus, as Hoebeke sums up the Progressive mindset:

> The direct election of senators was also seen as a necessary revision to maintain the original constitutional principles against the social and economic transformations of the post-Civil War Era. Huge concentrations of business, capital and labor had diminished the significance of the individual and rendered him voiceless in many of the decisions which affected his daily existence. To restore control to the ordinary citizen, he needed to be invested with more direct methods of governing. Here, the Seventeenth Amendment was part of a sweeping reform movement that brought direct popular legislation in the form of the initiative and the referendum in many states, and in still others, an opportunity to remove unpopular officials by means of the direct recall election.[107]

The Progressive Movement's belief in the redemptive powers of direct democracy is also reflected in its agitation for other forms of direct democracy, such as the initiative, referendum, and election of judges.[108] Progressives

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[104] Meiners, *supra* note 42, at 93. *See also* HOEBEKE, *supra* note 6, at 18 (noting that "the direct election of U.S. Senators has engendered very little commentary in the historiography of either the Constitution or of the Progressive Era. It has been somewhat summarily adjudged a closed case."); Ronald D. Rotunda & Stephen J. Safranek, *An Essay on Term Limits and a Call for a Constitutional Convention*, 80 MARQ. L. REV. 227, 233-34 (1996).

[105] *See, e.g.*, Daniel M. Warner, *Direct Democracy: The Right of the People to Make Fools of Themselves; The Use and Abuse of Initiative and Referendum, A Local Government Perspective*, 19 SEATTLE U.L. REV. 47, 51 (1995).

[106] *See* HOEBEKE, *supra* note 6, at 18. *See also* McInerney, *supra* note 8, at 166.

[107] HOEBEKE, *supra* note 6, at 18.

[108] *See* Smith, *supra* note 24, at 39.

> The Seventeenth Amendment is one of several democratic innovations in government achieved by the Progressive Movement. Like the advent of the referendum, the initiative, and the recall election, the movement for the direct election of Senators was predicated, at least ostensibly, on the view that large concentrations of business, capital and labor

thought direct election would "eradicate" the evils which resulted from election of Senators by state legislatures - it was "to act as a democratic vaccine to immunize the Senate from corrupt and ineffective representation."[109]

The accuracy of this traditional story of Progressivism, however, has fallen into question in recent years. Beginning with the pathbreaking work of Gabriel Kolko, historians have examined and substantially debunked the conventional explanation for the motives of the Progressives and Progressivism.[110] The fundamental characteristic of the Progressive Movement was not a desire to aid those suffering economic privation, but a tendency for interest groups of all kinds to demand that the government transfer wealth to them.[111] Thus, the "conventional tale" of the Progressive movement as believers in democracy and public-spirited regulatory reforms is now called "a tale that hardly anyone still unqualifiedly accepts."[112] In light of this substantial revision in the understanding of the Progressive Movement, it is surprising that scholars would continue to "unqualifiedly accept[]" the Progressive story of the Seventeenth Amendment.

Indeed, this unqualified acceptance is especially surprising in light of the widely-recognized failure of the Seventeenth Amendment to achieve the goals which it was supposedly designed to accomplish. There is widespread recognition in the literature that one important effect of the Seventeenth Amendment has been to increase the role of political organization and money in the election of Senators.[113] As Hoebeke observes, "[T]he more democratization of the electoral process, the more attention - in the form of organization and money - would have to be devoted. The range of interests in any one state were usually too broad to make direct appeals without a well financed structure of coordination."[114]

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had marginalized the voice of the individual citizen in the political process.

For instance, in 1911 Senator Owen of Oklahoma proposed an amendment to establish election and recall of federal judges, observing that thirty-four State elected judges popularly, and that no state had life appointments without recall. *See* Brooks, *supra* note 8, at 203 (citing ROBERT OWEN, ELECTION AND RECALL OF FEDERAL JUDGES, S. DOC. NO. 99, at 3-5 (1st Sess. 1911)).

[109]Little, *supra* note 8, at 639.

[110]*See, e.g.*, GABRIEL KOLKO, THE TRIUMPH OF CONSERVATISM: A REINTERPRETATION OF AMERICAN HISTORY, 1900-1916 (1963).

[111]*See* HIGGS, *supra* note 43, at 113-14. *See also* HOEBEKE, *supra* note 6, at 151 ("[T]he struggle for direct elections was not, as it has been so often characterized, a contest between the henchman of plutocracy and the defenders of pious labor.").

[112]ATACK & PASSELL, *supra* note 38, at 657.

[113]*See* HOEBEKE, *supra* note 6, at 105-06; Amar, *Seventeenth*, *supra* note 8, at 1404; Amar, *Senate*, *supra* note 8, at 1129-1130; Smith, *supra* note 24, at 65 ("direct election may exacerbate the already troubling problem of private interest group pressures").

[114]HOEBEKE, *supra* note 6, at 105-06.

Thus, it was completely predictable and foreseeable that a movement to direct election on a state-wide level would increase the role of political organization and money in Senate elections. Despite the inevitability of this development, Professor Terry Smith nonetheless concludes, "To a degree that Progressives could not possibly imagined, money now dominates Senate races."[115] Perhaps more intriguing is Smith's related observation that Hoebeke's observations provide a

> practical explanation for the post-ratification practice of at-large elections that is *divorced from issues of original intent*: power. The promoters of the Amendment within the states - party bosses and organizations, large corporations and United States Senators themselves - tended to be entities with *statewide* power and resources sufficient to mobilize statewide campaigns . . . . Thus, [the emphasis on money and organization that resulted from the Seventeenth Amendment] can be explained as a function of which interests were the most powerful at the time of the Seventeenth Amendment's adoption rather than a product of constitutional deliberation.[116]

Puzzlingly, Smith observes that although party bosses, corporations, and Senators themselves promoted the Seventeenth Amendment and prospered under the post-Amendment electoral regime, but this reality remains "divorced from issues of original intent." This conclusion seems questionable given the premise.

Professor Smith, however, is not alone in his conclusion that the increased importance of money and organization merely was an unintended consequence of the movement to direct election. Thus, in a similar vein, another commentator has characterized it as "a somewhat ironic outcome" that the need "to raise large amounts of money to campaign for many votes [has] facilitate[d] private interest group access to the federal government," thereby defeating the supposed intent of the Progressives in "reacting *against* the private interest group dominance in the state government."[117]

Given, however, that an increased emphasis on money and organization were the foreseeable results of the Seventeenth Amendment - and the groups identified by Smith clearly recognized the benefits to them of direct election - I respectfully disagree with the conclusion that these realities are irrelevant to the original intent of the Seventeenth Amendment, and not part of the "consti-

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[115]Smith, *supra* note 24, at 65-66.

[116]*Id.* at 65 & n.328.

[117]Amar, *Senate*, *supra* note 8, at 1129-30; *see also* Amar, *Seventeenth*, *supra* note 8, at 1404 ("By requiring senatorial candidates to raise large amounts of money to campaign for many votes, the Seventeenth Amendment may facilitate private interest group access to the federal government. If direct election actually has this effect, it is a somewhat ironic outcome, given that the Progressives of 1913 were reacting against the private interest group dominance in the state government.").

tutional deliberation."[118] It seems more plausible to conclude it was *precisely because* these results were foreseeable those groups favored the adoption of the Seventeenth Amendment and subsequent history was borne out the accuracy of their foresight.[119]

Advocates of the Progressive Model also continue to insist that direct election was intended as a means to break the power of urban machines and party bosses.[120]

This argument, however, flies in the face of common sense. If the bosses and machines were so powerful, how could the disparate public expect to accomplish political reforms which limited that power? How could the machines be so powerful, but yet fail to stop a political movement of the dispersed and unorganized public? As Hoebeke observes, "[c]onventional interpretation tends to portray grass-roots uprisings overthrowing the abusers of power, when in actuality those most clamorous for constitutional change have, as often as not, been those already in possession of political influence."[121]

More importantly, it also flies in the face of historical evidence. The urban machines did not oppose the passage of the Seventeenth Amendment, as Progressive theory would predict. Rather, machines actively *supported* passage of the Seventeenth Amendment, because popular election would increase their power by putting a premium on their unique power to organize and deliver voting blocks.[122] Indeed, Hoebeke concludes that the movement to direct election actually substantially increased the influence and power of machines over politics, as they were the only organizations who could organize the masses of voters necessary to win popular elections.[123]

The conventional Progressive story also advances the view that direct election was a means to cleanse the Senate of wealthy individuals beholden to special interests, and to replace them with more representative members who

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[118] *See* Lynn A. Baker & Samuel H. Dinkin, *The Senate: An Institution Whose Time Has Gone?*, 13 J. L. & POLITICS 21, 86 (1997) (suggesting that the historical record of debates can tell us the reasons that were explicitly given for Seventeenth amendment, but public choice theory examines whether the consent ultimately given by the various states can be explained within the confines of interest group theory's rational actor model).

[119] *See* HOEBEKE, *supra* note 6, at 24 (noting that the "popular rhetoric" [of the reformers of the Progressive Era] often belied a shrewd ability to defend their personal power").

[120] *See* Ronald D. Rotunda, *The Aftermath of Thornton*, 13 CONST. COMMENT. 201, 207 (1996) (stating that "corrupt political bosses, who could not win an election by the public at large, could more easily win an election by the state legislatures").

[121] HOEBEKE, *supra* note 6, at 23.

[122] *See* John D. Buenker, *The Urban Political Machine and the Seventeenth Amendment*, 56 J. AM. HIST. 305, 320 (1969). Direct election also made it possible for urban machines to circumvent the dominance of rural interests in state legislatures. *See id.*

[123] *See* HOEBEKE, *supra* note 6, at 104. "The real creator of permanent political machinery was the democratic revolution of the first half of the nineteenth century." *Id.* at 58.

would look out for ordinary citizens and the public at large.[124] The Senate had become "a sort of aristocratic body - too far removed from the people, beyond their reach and with no especial interest in their welfare."[125] This argument, however, is also rebutted by the facts surrounding the Seventeenth Amendment.

Far from a wholesale purging of old Senators and replacing them with new Senators, there was virtually no change in membership in the Senate following the adoption of direct election.[126] When the first direct elections were held in 1914, all of the twenty-five senators running for re-election were returned to the Senate.[127] These observations cast into doubt Kobach's dubious and somewhat overblown conclusion that "senators who had successfully attained office through masterful maneuvering among state political hacks were disinclined to see if they could do as well stumping before the voters."[128]

It also appears that advocates of the Seventeenth Amendment were aware of the negative consequences it would have for the constitutional structure, but actively misled the public about the changes the Amendment would bring. Thus, as Smith writes, "in an effort to soft-pedal the magnitude of their proposed change, supporters of the [Seventeenth Amendment] mischaracterized the history of the Senate in a way that obscured the Amendment's potential ramifications for the representation of states in the national government."[129] Moreover, it simply defies logic for the advocates of direct election to persist in the view that such an innovation would have no consequences for the traditional view of the Senate as a representative of the state as a sovereign entity.[130] Smith concludes that "[t]he [advocates of direct election] could not have it both ways: they could not provide for the direct election of Senators and simultaneously claim that the Senate would continue to represent states in their political capacity."[131]

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[124] *See id.* at 99; Amar, *Seventeenth*, *supra* note 8, at 1353; Little, *supra* note 8, at 639.

[125] S. REP. NO. 530, 54th Cong., 1st Sess. 10 (1896). *See also* Bybee, *supra* note 8, at 544.

[126] *See* Amar, *Senate*, *supra* note 8, at 1129.

[127] *See* HOEBEKE, *supra* note 6, at 190; ALAN I. ABRAMOWITZ & JEFFREY A. SEGAL, SENATE ELECTIONS 25 (1992). Two candidates also were defeated for renomination. HOEBEKE, *supra* note 6, at 190. *See also* HOEBEKE, *supra* note 6, at 190:

> In the great enthusiasm for this advance of popular rule, no one seemed to notice that those same political bodies that had been charged with representing "the interests" had themselves engineered the change. Not surprisingly, there was no substial overthrow of the "Bosses" when the first direct elections were held in 1914.

[128] Kobach, *supra* note 8, at 1976.

[129] Smith, *supra* note 24, at 23.

[130] *See* Currie, *supra* note 31, at 173; Smith, *supra* note 24, at 40.

[131] Smith, *supra* note 24, at 40. *See also* Bybee, *supra* note 8, at 547.

The strongest argument advanced by the modern-day Progressives is that it is irrelevant whether the movement towards democracy was wise or foolish, because by the time the Seventeenth Amendment was adopted, direct election of Senators was already a *fait accomplis*. In particular, it is argued that the eventual passage of the seventeenth Amendment represents a kind of *de facto*, quasi-Constitutional Convention, and that its passage merely ratified democratic developments which had been taking place on the states for many years. To understand this argument - and its flaws - it is necessary to review the events which culminated in the adoption of the Seventeenth Amendment.

As noted, there was a virtual consensus at the time of the ratification of the original Constitution that the Senate should be elected by state legislatures. Prior to the Civil War, occasional efforts were undertaken to amend the Constitution to provide for direct election Senators, none of which met with any success.[132] In the decades following the Civil War, however, interest in direct election began to rise, especially in the House, and proposals for direct election became more frequent.[133] Finally, in 1892 the first proposal reached the House floor.[134] Unsurprisingly, during this period, direct election proposals met with less support in the Senate.[135]

Finding only mixed support for direct election in Washington, the advocates of direct election took their case to the people of the respective states. Starting in 1901, various states passed resolutions calling for a national convention under Article V of the Constitution[136] to propose an amendment providing for direct election of Senators. This campaign for a national convention was unsuccessful, as have been every such campaign in American history.[137]

Finding both avenues of constitutional change foreclosed, the advocates of direct election began working in the states for greater popular control over Senate elections. The earliest means for permitting direct public participation in Senate elections was with the concept of the public canvass.[138] Under the

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[132] *See* Bybee, *supra* note 8, at 536; Kobach, *supra* note 8, at 1976 & n.21.

[133] *See* Kobach, *supra* note 8, at 1976 & n.21.

[134] *Id.*

[135] *Id.* (noting that between 1893 and 1902 the House five times passed a constitutional amendment by the necessary two-thirds vote, only to have the proposal die in Senate committee); Bybee, *supra* note 8, at 537-38.

[136] Under Article V of the Constitution, constitutional amendments can be initiated in two different ways: proposal by two-thirds of both houses of Congress or proposal by a national convention called by two-thirds of the state legislatures. U.S. CONST. art. V. After the proposal of the amendment by either of these methods, the amendment must be ratified by either the state legislatures or by conventions in three-fourths of the states. *Id.*

[137] *See* Kobach, *supra* note 8, at 1977.

[138] Riker dates the first public canvass as occurring in Mississippi in 1834, but did not become widespread or institutionalized until the Lincoln-Douglas campaign of 1858. *See* Riker, *supra* note 8, at 463-64; Brooks, *supra* note 8, at 207.

public canvass, the rival candidates barnstormed the state seeking support for their respective parties in the state legislatures, as the governing majority in the state legislature would determine which candidate would be sent to Washington as U.S. Senator. Although the public canvass initiated moves towards greater popular participation in Senate elections, it was generally adopted only in states where the parties were evenly balanced and competitive.[139] In noncompetitive states dominated by just one party, such as with the Republican stranglehold in Massachusetts, there was no canvass and the legislature retained sole control over Senate elections.[140]

Beginning in 1888, the relatively informal system of public canvasses evolved into direct party primaries.[141] By 1910, forty-four of the forty-six states had primary election laws and twenty-eight of those provided for the nomination of party candidates for the Senate at the party primary.[142] Through this mechanism, the legislators of the various parties generally agreed to support the Senate candidate nominated by the party primary. But party primaries only determined which candidate would be nominated by the party, the Senator actually elected by the state legislature was dependent on which party controlled the state legislature.[143]

Finally, with the advent of the so-called "Oregon system," the people were able to vote directly for Senate candidates in substance, even if not in form. The Oregon system expanded on the direct party primary by providing for a test of popular sentiment at the November general elections between the party nominees. In turn, the state legislators promised to support the winner of this straw poll, regardless of the party affiliation of the winning candidate.[144] Indeed, in 1909 the Republican dominated Oregon legislature actually elected a Democrat because he had won such a straw poll in the preceding election.[145]

Between 1905 and 1908, the Oregon system was adopted in fifteen states, and by the end of 1908 twenty-eight states had some mechanism in place by which Senators were effectively popularly elected.[146] In addition, nine other states had measures other than direct primaries enabled popular input in the selection of Senators.[147] Subsequently, Oregon, Nebraska, and Nevada adopt-

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[139] *See* Riker, *supra* note 8, at 464.

[140] *Id.*

[141] *See* BERNSTEIN & AGEL, *supra* note 26, at 125; Riker, *supra* note 8, at 466; Brooks, *supra* note 8, at 207.

[142] *See* Riker, *supra* note 8, at 466; Brooks, *supra* note 8, at 207.

[143] *See* Kobach, *supra* note 8, at 1977-78; Brooks, *supra* note 8, at 208.

[144] *See* Riker, *supra* note 8, at 466; BERNSTEIN & AGEL, *supra* note 26, at 125-26.

[145] *See* Riker, *supra* note 8, at 466; Brooks, *supra* note 8, at 208.

[146] *See* Kobach, *supra* note 8, at 1978-79.

[147] *Id.* at 1979 n.34 (citing 45 CONG. REC. 7109-20 (1910)(statement of Senator Owen));

ed state constitutional amendments which required the legislature to elect the people's choice.[148]

Thus, during the period preceding the adoption of the Seventeenth Amendment, there was increasing popular participation in the process of electing U.S. Senators. The conventional conclusion drawn from this story is that the adoption of the Seventeenth Amendment "simply universalized a situation which a majority of state legislatures had already created."[149] The Seventeenth Amendment did nothing more than formalize and make uniform the electoral practices of most of the states. As such, it was the inevitable culmination of this state-by-state reform and consistent with the Progressive wave sweeping the country.[150]

But the conclusion that the Seventeenth Amendment was inevitable does not follow from the facts presented. There are several problems with the conventional story of the Seventeenth Amendment.

Although many states had adopted direct primaries, several other states had adopted different practices, or less decisive measures for popular participation.[151] Indeed, several states had rejected direct democracy completely and had continued to allow the state legislatures full discretion to elect Senators.[152] Thus, the people of the various states were achieving popular control over Senate elections, and were doing so through a process of gradual reform and in light of the needs and history of the state political institutions.

Brooks, *supra* note 8, at 208.

[148] *See* Riker, *supra* note 8, at 466-67.

[149] *Id.* at 468. *See* BERNSTEIN & AGEL, *supra* note 26, at 128 ("[T]he growing popularity of primary elections even before the Amendment rendered it an open question whether the Seventeenth merely codified in law a development - the democratization of the Senate - that already was settled fact."). Professor Smith argues that the states' adoption of various means of public participation in electing Senators belies the argument that the Senate was initially intended to preserve the sovereignty of the states. *See* Smith, *supra* note 24, at 37-38. This argument ignores, however, that state control over the conduct of its elections (e.g., a state's decision to allow popular vote) is as critical of an element of state sovereignty as the election of Senators by the states. *See* Todd J. Zywicki, BALLOT ACCESS REGULATIONS, *supra* note 13, at 105-07.

[150] *See* Kobach, *supra* note 8, at 1979.

> Through incremental state action, the structure of the Senate had been transformed. Consequently, enough senatorial support existed to etch into the formal constitutional text what was already a reality in nearly two-thirds of the forty-six states. All that remained were the final two stages - congressional proposition and state ratification - which would convert this incremental amendment into a normal constitutional amendment and impose it uniformly across the country.

Id.

[151] *See supra* note 136, and accompanying text (noting that nine states had provided for popular participation but not direct or binding primaries).

[152] *See* 1 HAYNES, *Senate, supra* note 22, at 104 (observing that in the 1910 elections, fourteen out of the thirty senators had been chosen by some form of direct election).

Moreover, there was little correlation between support for the Seventeenth Amendment and whether a state had adopted direct election unilaterally. For instance, southern states adopted direct election via state primaries relatively early on, but they did not vote in favor of a federal constitutional amendment to accomplish the same end.[153]

The unsolved puzzle for the advocates of the Progressive model, therefore, is to explain why the voters in one state cared how the voters in another state elected their Senators. After all, Senators are elected by the people of a particular state. The effect of a national constitutional amendment is to impose a uniform method of Senate election on *all* states—including those states which did *not* vote to ratify it or even voted against ratification.[154] The effect of the Seventeenth Amendment, therefore, was to give voters in Oregon the power to impose their preferred method of election on the constitutionally conservative voters in places like Utah and Delaware. It is not obvious how the principles of democracy and popular government are advanced by allowing some states to override the freely-chosen political institutions of another state. Moreover, the Progressives have provided no explanation for why voters would care about the system used for electing Senators in other states.

Further doubt is cast upon the Progressive story in that the Seventeenth Amendment represents the *only* progressive institutional innovation adopted on the federal level. For instance, such democratic innovations such as the initiative and referendum were becoming increasingly popular on the state level during this period.[155] "[D]irect election of U.S. senators was to be the leading edge of a movement to bring to the federal government the democratic changes occurring on the state level, such as recall, referendum, and judicial elections. But nothing of the sort ever happened. There is no national recall, referendum, or election of federal judges; just direct election of senators."[156] Nonetheless, the support for these democratic innovations at the federal level were relatively insignificant and short-lived.[157] Similarly, by 1911 thirty-four states (a significantly larger number than had adopted direct election of Senators) had provided for popular election of judges, and all others had at least provided for some method of recall.[158] Assaults on the federal judiciary, however, paled in comparison to the long-lasting and intense effort on behalf of direct election of Senators. The Progressives have provided no explanation for why direct election of Senators provided the *sole* accomplishment during

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[153]Zywicki, *Senators*, *supra* note 8, at 1026.

[154]*See supra* note 5 (listing states that did not vote to ratify the Seventeenth Amendment).

[155]*See* Brooks, *supra* note 8, at 202-03.

[156]Zywicki, *Book Review*, *supra* note 8, at 441.

[157]*See* Brooks, *supra* note 8, at 202-03.

[158]*Id.* at 203.

this time in comparison to the lack of success on introducing other democratic reforms to the federal government.[159]

The failure to explain the unique success of the Seventeenth Amendment is made even more glaring by the reality that it was the reform that was *least* necessary - precisely *because* of the great successes of introducing democratic reform at the state level. In one form or another, most states had already added democratic elements to their system for electing Senators; as a result, the Seventeenth Amendment was largely superfluous. It is difficult for the Progressives to explain why this largely superfluous amendment secured ratification, whereas more "needed" reforms, such as judicial election and national initiative and referendum, were non-starters.

A final failing in the Progressive explanation for the Seventeenth Amendment is its inability to provide an explanation for the different fates of the Presidential Electoral College and election of Senators. Article II, Section 1, established an indirect method for electing the President, "Each State shall appoint, in such manner as the legislature thereof may direct, a number of electors . . . ."[160] Relatively early in the nation's history this method of indirect election was effectively converted into direct election, as the populace voted directly for their preferred candidate and the electors pledge to support particular candidates.[161] Moreover, this conversion of the Electoral College into an instrument of direct democracy took place *without* a formal constitutional amendment.

History suggests that at the time of the Seventeenth Amendment, the role of state legislatures in electing U.S. Senators may have been headed the way of the Electoral College. Nonetheless, a constitutional amendment was passed to formalize popular election of Senators whereas the Electoral College has retained the form of indirect election. The disparate treatment given to these two methods of indirect election provides a serious challenge to the Progressive explanation for the Seventeenth Amendment.

In summary, therefore, many arguments have been advanced over time which purport to demonstrate that the Seventeenth Amendment was a part of the general democratic trend which swept the country during the Progressive Era. The Progressive explanation for the Seventeenth Amendment, however, is incomplete and cannot fully explain many elements of the Seventeenth Amendment.

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[159]The Nineteenth Amendment was also a clear accomplishment of Progressivism and consistent with democracy. Nonetheless, it merely altered the make-up of the electorate, it was not a democratic reform of existing political *institutions* in the same way as direct election of Senators and the other reforms discussed. The public choice rationales underlying the passage of the Nineteenth Amendment are discussed in Donald J. Boudreaux & A.C. Pritchard, *Rewriting the Constitution: An Economic Analysis of the Constitutional Amendment Process*, 62 FORDHAM L. REV. 111 (1993).

[160]U.S. CONST. art. II § 1.

[161]Zywicki, *Senators*, *supra* note 8, at 1025-26.

B. Internal Explanations

A second class of explanations for the Seventeenth Amendment can be loosely grouped under the heading of "internal explanations." Internal models analyze the Seventeenth Amendment as an independent political event, with causes independent from those of the larger Progressive Movement.[162] The fact that the timing of the Seventeenth Amendment coincided with the Progressive Era is merely that, a coincidence. In this view, the Seventeenth Amendment does not reflect any sort of ideological commitment to democracy or faith in the people to vote wisely. Rather, it represents nothing more than a pragmatic response to perceived inefficiencies in the traditional electoral system.[163] Put more bluntly, the state legislatures had made such a mess of Senate elections, through corruption and infighting, that election by the people would have to be an improvement.[164] As one observer remarked, "[t]he change [to direct election] was due to [a] determination to take the matter out of the hands of the Legislature rather than to an inclination on the part of the people themselves to make their own selection."[165] In other words, "[d]irect election resulted from the default of state legislatures, not from the determination of Progressive reformers."[166]

There are three basic elements of the typical internal explanation for the Seventeenth Amendment.[167] First, it is argued that there was widespread bribery and corruption in Senate elections in the years leading up to Seventeenth Amendment and that direct election was seen as the only effective cure for these ills.[168] Second, there were an excessive number of "deadlocks" in state legislatures which prevented vacant Senate seats from being filled in a timely fashion.[169] Third, there was a "feeling that state legislators were spending too much time on the "national" matter of senatorial selection, thus leaving local matters untended.[170] Although each of these explanations have some surface plausibility, closer examination shows each of them to be insufficient to explain the Seventeenth Amendment.

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[162] *See, e.g.*, 1 HAYNES, SENATE, *supra* note 22, at 95; *see also* R. CAPLAN, CONSTITUTIONAL BRINKMANSHIP: AMENDING THE CONSTITUTION BY NATIONAL CONVENTION 61-65 (1988); Laycock, *supra* note 37 at 1737 ("legislative deadlocks and corruption in the choice of senators had become a scandal").

[163] *See* Zywicki, *Senators*, *supra* note 8, at 1021.

[164] *See* BERNSTEIN & AGEL, *supra* note 26, at 121-23.

[165] Zywicki, *Senators*, *supra* note 8, at 1021 (quoting ALLEN H. EATON, THE OREGON SYSTEM: THE STORY OF DIRECT LEGISLATION IN OREGON 92 (1912)).

[166] Zywicki, *Senators*, *supra* note 8, at 1021.

[167] *See* Amar, *Seventeenth*, *supra* note 8, at 1353; Little, *supra* note 8, at 639.

[168] Amar, *Seventeenth*, *supra* note 8, at 1353.

[169] *Id.*

[170] *Id.*

1. Corruption and Bribery

First, it is argued that during the years leading up to the adoption of the Seventeenth Amendment bribery and corruption in Senate elections became commonplace, and the only viable solution to this problem was popular election of Senators by the people.[171] Neither of the elements of this argument, however, withstand closer scrutiny.

During the first seventy years that the Constitution was in force, the Senate investigated only one case of election bribery.[172] The next thirty-five years, however, saw nine such cases.[173] Proponents of direct election argued that election of Senators by state legislatures was prone to corruption and bribery because of the concentration of selection power in the hands of the relatively small number of electors in the state legislature.[174] Direct election would solve this problem by "mak[ing] corruption of [Senatorial] election impossible, by distributing the vote to more people than could possibly be bought."[175] Moreover, it was argued that the people were more virtuous than state legislatures and would choose more independently and wisely than the legislatures who labored under the thumb of nefarious party bosses.[176]

There are several problems with this argument. It does not distinguish between situations where the state legislatures *actually* elected the Senator, as opposed to merely rubber-stamping a selection made by the people.[177] Where public participation was already in place, this argument obviously would not apply. This argument also ignores that many of these accusations of bribery were unfounded, as established by subsequent investigation.[178] Of the 1,180

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[171] *See* Brooks, *supra* note 8, at 200 ("Corruption, of both state legislators and senators, was the greatest evil blamed on the system of indirect election."); Little, *supra* note 8, at 640.

> The legislative history of the Seventeenth Amendment is replete with discussion of corruption, bribery, and inadequate representation resulting from the prior system of selecting Senators. Significantly, the legislative history also reflects the abiding belief of those who debated and passed the Amendment that these evils of corruption, bribery, and inadequate representation were fostered by - and in fact were the direct product of selecting Senators by state legislatures.

[172] *See* 1 HAYNES, SENATE, *supra* note 22, at 91.

[173] 1 ROBERT C. BYRD, THE SENATE, 1789-1989, at 393 (1988); HOEBEKE, *supra* note 6, at 91 (noting that until 1872 there had been only one proven instance of bribery of state legislatures; but that there were fifteen such efforts in the next thirty years).

[174] Little, *supra* note 8, at 641.

[175] Brooks, *supra* note 8, at 200.

[176] *See* Little, *supra* note 8, at 640-41.

[177] *See* HOEBEKE, *supra* note 6, at 93.

[178] *See* Bybee, *supra* note 8, at 539 (noting that "[w]hatever the general impressions, members of Congress cited very specifics in support of their claims of bribery and corruption").

senators elected from 1789 to 1909, only fifteen were contested due to allegations of corruption, and only seven were actually denied their seats.[179] Corruption was proved to be present in approximately one-half of one percent of the elections during that period.

Even if bribery and corruption was actually a problem, it is doubtful that it was sufficiently widespread to warrant a constitutional amendment abolishing indirect election, rather than a more narrow reform aimed more directly at the problem.[180] Moreover, there was no evidence then nor since that popular election would be more immune to bribery and corruption than election by the state legislatures. As Bybee concludes, "[t]he proponents of the Amendment had brought forth evidence of corruption, but they had failed to show that it resulted from the structure of the present mode of election and that structural change in the mode of election would cure the problem. If the people had proven so notoriously inept in electing state legislators, what made us think they would prove more capable of electing U.S. senators?"[181]

One important consequence of the shift to direct election was to increase the need for money and organization to run expensive state-wide races and to mobilize massive numbers of voters.[182] In turn, this has required Senators to supplicate themselves to special interests in the quest for money and power.[183] Thus, the movement to direct election may have had results more apparent than real, as direct bribery was merely converted into indirect "bribery" through need to raise campaign funds and solicit votes directly. Indeed, as a result of these forces, direct election may have had the perverse result of increasing the influence of special interests over Senators and the political process.[184]

Finally, there is no indication that the shift to direct election did anything to eliminate or even reduce corruption in Senate elections.[185] Indeed, there was little reason even among contemporaries to suspect that direct election would have the effect of reducing corruption, as challenged elections and accusations of electoral wrongdoing were significantly more common in House elections than in the Senate.[186] Thus a commentator writing nine years *after* the adoption

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[179] HOEBEKE, *supra* note 6, at 179-80.

[180] *See* Bybee, *supra* note 8, at 540.

[181] *Id.* at 540-41; *see also* McInerney, *supra* note 8, at 183 ("the existing method of election neither produced nor provoked corruption").

[182] Bybee, *supra* note 8, at 541.

[183] *See* Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 79 (1985).

[184] Bybee, *supra* note 8, at 541.

[185] *See* McInerney, *supra* note 8, at 183.

[186] *See* HOEBEKE, *supra* note 6, at 96 (noting that from 1789 to 1907 there were 382 electoral contests in the House, most of which resulted from partisan politics).

of the Seventeenth Amendment noted that "fraud in elections is occurring in nearly every state" and that "the amendment has failed its purpose."[187]

2. Deadlocks

A second internal argument for direct election was the delay and deadlock in the election process as carried out by the state legislatures. During the years leading up to the Seventeenth Amendment there was perceived to be an increase in the number of electoral "deadlocks": situations where a senator was elected only after great time and effort, or no one was elected at all.[188] Between 1891 and 1905, there were forty-six deadlocks across twenty states.[189] As a result of these deadlocks, a state would be without a Senator for all or part of a Senate session. These deadlocks undermined the deliberative function of the Senate and prevented the Senate from carrying out its constitutional responsibilities.[190] Proponents argued that the frequency of these deadlocks proved that the state legislatures were unsuited to carry out their constitutional duties of electing Senators, and that the power should be turned over to the people.[191] This argument, however, was also flawed in several ways.

The volume and ferocity of the complaints about deadlocks obscured the reality of the situation, which was that deadlocks were exceptional, and that the great majority of Senate elections were conducted without incident.[192] Moreover, concentrating on the number of deadlocks rather than the number of successful elections conceals the dynamics of the electoral process over time. In the fifteen year span where the number of deadlocks supposedly became "intolerable," only thirteen states deadlocked more than once and only six states twice or more.[193] In most states, it took only one or two deadlocks for the legislature to learn not to repeat the process again.[194] In addition, many of the

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[187] *See* Thomas Shelton, *The Sin of "Experimenting" With the Constitution*, 94 CENT. 147 (1922).

[188] Zywicki, *Senators*, *supra* note 8, at 1022.

[189] *Id.* (listing deadlocks).

[190] *See* Bybee, *supra* note 8, at 543; Brooks, *supra* note 8, at 201.

[191] *See* 1 HAYNES, SENATE, *supra* note 22, at 95.

> Experiences such as these, exceptional though they were, nevertheless became so frequent and so widespread that they gave rise to a determined movement which no longer contented itself with attempts to correct obvious defects in the law by which Congress had regulated the election of Senators, but which demanded that these elections be taken from the legislatures and be placed directly in the hands of the people.

Bybee, *supra* note 8, at 543.

[192] HOEBEKE, *supra* note 6, at 179 (noting that "[d]eadlocks and corrupt elections . . . did not occur nearly as frequently as the newspapers insinuated").

[193] Zywicki, *Senators*, *supra* note 8, at 1024.

[194] *Id.*

states with repeated deadlocks were newly-admitted western states with inexperienced legislatures, weak party discipline, and successful third-party movements.[195] As western legislators gained experienced with Senate elections, deadlocks became less frequent. As one historian has written of the Utah deadlocks of 1897 and 1899, "[t]he struggle of 1897, and the failure of 1899, seemed to be a good teaching experience and Utah's legislature never again failed to elect a senator so long as it had that responsibility."[196]

The importance of deadlocks as a proximate cause of the Seventeenth Amendment is also questioned by the lack of correlation between the states that experienced deadlocks, where presumably frustration with deadlocks would be greatest, and those states which voted to ratify the Seventeenth Amendment.[197] Delaware, which affirmatively voted to *reject* the Seventeenth Amendment, suffered seven deadlocks in ten years, including five that resulted in vacant seats. Florida suffered two deadlocks, Kentucky one, Utah two, and Maryland three, yet none of those states voted to ratify the Seventeenth Amendment. Louisiana suffered two deadlocks but did not vote to ratify until after the amendment had already passed. By contrast, few of the states which voted for the Seventeenth Amendment actually suffered any deadlocks. In light of this record, it is difficult to sustain the argument that the Seventeenth Amendment was a response to the problem of deadlocks.

Moreover, deadlocks simply were not the result of the constitutional provision providing for legislative election; hence, it did not follow that direct election was necessary to resolve the problem. Indeed, the "deadlocks" explanation is really no explanation at all, as it fails to address the fundamental question of *why* the deadlocks were occurring. State legislatures successfully elected Senators for over a century; why did they suddenly become incapable of competently doing so?[198] Without knowing the cause for the increased number of deadlocks, it is impossible to determine whether direct election was the appropriate solution to the problem.[199]

The real problem was a law which had been passed in 1866 which had required that Senators be elected by a majority of the state legislatures.[200] Majority votes were difficult to come by in states with evenly-balanced party competition and third-parties who could prevent either of the dominant parties

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[195] *See* Stewart L. Grow, *Utah's Senatorial Election of 1899: The Election that Failed*, 39 UTAH HIST. Q. 30, 38 (1971).

[196] *Id.*

[197] Zywicki, *Senators*, *supra* note 8, at 1024.

[198] *Id.*

[199] *Id.*

[200] *See* HOEBEKE, *supra* note 6, at 90-91; Bybee, *supra* note 8, at 543. Bybee notes that this law had been passed in response to the election of John Stockton of New Jersey, who had been elected by a mere plurality. The Senate voted to exclude Stockton, and then passed the law requiring election by majority vote. *See* Bybee, *supra* note 8, at 536-37.

from receiving a majority in the state legislature.[201] Amending this 1866 statute to permit election by plurality or requiring run-offs would have solved the deadlock problem without the need for a constitutional amendment.[202] Ironically, the Seventeenth Amendment does *not* require election of Senators by majority vote. Moreover, the shift to direct election made it even more likely that no candidate would receive a majority than had election by the state legislatures.[203]

Nor was there any reason to believe in the abstract that direct election would solve the deadlock problem, as opposed to elimination of the majority requirement. In fact, the *worst* deadlock problems arose where election of Senators had already effectively been surrendered to popular will.[204] Delaware, for instance, had only one representative in the Senate from 1899 to 1901, and none from 1901 to 1903. These two elections also happened to be the first two elections under which Delaware had implemented the legislative primary.[205] As Hoebeke stated, "[t]he Missouri legislators were under similar constraints in 1905, when the struggle over a Senate seat erupted into a fist fight on the floor of the assembly."[206] In both situations, the deadlock was caused by the inability of the legislators to abandon their promise to vote for the candidates for whom they were pledged. As a result, no candidate was able to secure a majority and deadlocks resulted.

3. Effect on State Legislatures

The flip-side of the argument that deadlocks prejudiced the Senate and the execution of its constitutional duties, was the argument that the burden of electing Senators had a distracting effect on state legislatures which prevented them from effecting the state's legislative business. It was argued that direct election of Senators would create a separation between state and federal officers and duties which would permit the state legislatures to carry out their business without being distracted by the need to elect Senators. In addition, "there was a general sense that the election of U.S. senators had overwhelmed

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[201] HOEBEKE, *supra* note 6, at 89 (deadlocks most common when the two parties were closely balanced, and especially if the majority party had its own internal factions). *See also* Bybee, *supra* note 8, at 543-44; Zywicki, *Senators*, *supra* note 8, at 1025; Brooks, *supra* note 8, at 201.

[202] Bybee, *supra* note 8, at 543-44; Zywicki, *Senators*, *supra* note 8, at 1025.

[203] Bybee, *supra* note 8, at 544. This is because it is more likely that a small third-party would probably be more likely to be able to prevent a majority vote in a direct election where receiving two or three percent of the vote might be sufficient to prevent one candidate from winning, than it is that such a small third party would actually elect a sufficient number of state legislators to provide the balance in an election by state legislatures.

[204] HOEBEKE, *supra* note 6, at 89-90.

[205] *Id.* at 90.

[206] *Id.*

local issues, that state legislators were often selected for the purpose of choosing a U.S. senator."[207] This argument for the distracting influence of Senate elections on state politics also is questionable.

First, in giving the responsibility to state legislatures to elect Senators, the Framers surely must have anticipated that there would be *some* interference with state business as a result of the time and effort to make an educated election, and that voting for U.S. Senators would be a factor in state legislative elections. Thus, there was no *change* in circumstances which would explain a change in popular sentiment.

Second, as just noted, most senate elections were made without incident. To the extent that most elections were routine, they would have had little disruptive effect on state legislative business.

Third, where deadlocks did in fact occur, they usually provided little distraction from the legislature's state business. As Hoebeke noted, "[a]lthough press accounts often gave the impression that these deadlocks brought all legislative business to a standstill, the truth was that most legislatures took one vote at the beginning of each day and continued with their normal affairs."[208] Thus, the degree of distraction has probably been overstated, and does not seem sufficient to explain the adoption of the Seventeenth Amendment.

III. A PUBLIC CHOICE ANALYSIS OF THE SEVENTEENTH AMENDMENT

None of the conventional explanations discussed provide an adequate explanation for the passage of the Seventeenth Amendment. External explanations describe the Seventeenth Amendment as merely an outgrowth of the Progressive Movement and an ideological commitment to democratic principles as an end in themselves, as well as a means to more efficient and responsive government. As noted, however, the very parties against whom the Seventeenth Amendment was supposedly aimed - corporations and political machines - in fact actively *supported* the Seventeenth Amendment. Moreover, direct election had no effect on the membership of the Senate. In fact, it has been generally noted that the Seventeenth Amendment had the result of *increasing* the importance of special interest money and organization in Senate elections, a result deemed to be "ironic" by believers in the Progressive model.[209]

Internal explanations focus on perceived problems in the way in which the state legislatures were *actually* electing Senators. Thus, it was not an ideological commitment to democracy *per se* which underlay the movement for direct election, but just disgruntlement with the way in which the state legislatures actually carried out their duties. As noted, however, this argument is also flawed, as it overstates the depth of the problem and also provides no

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[207] Bybee, *supra* note 8, at 543.

[208] HOEBEKE, *supra* note 6, at 89.

[209] *See supra* at notes 104-60 and accompanying text.

explanation for the underlying causes which gave rise to the problems which actually were occurring.[210]

This Part develops a public choice model of the causes of the Seventeenth Amendment. The model, along with empirical tests which tend to support its validity, have been presented in a more detailed form elsewhere.[211] Far from seeing as "ironic" the increased power of special interests in post-Amendment Senate elections, this public choice model views the increased power of special interests as the *purpose* of the Seventeenth Amendment. Similarly, rather than viewing the fact that special interests benefited from the Seventeenth Amendment as a reality "divorced from issues of original intent,"[212] the public choice model suggests that transferring wealth to those interests in fact *was* the "original intent" of the Seventeenth Amendment.

It is critical to understand the causes of the Seventeenth Amendment for several reasons. Understanding the causes of the Seventeenth Amendment assists in understanding the results and implications that it has had for the American political and constitutional system. Understanding the causes of the Seventeenth Amendment helps us to "know where to look": to enable us to focus on the intended to consequences of the Amendment and to evaluate the propriety of those ends and whether they have actually come about. Understanding the causes and results of the Seventeenth Amendment also sheds light on several current reform proposals.

Applying the insights of public choice theory it is possible to construct a model which does not ignore the so-called "ironies" and "unforeseen consequences" of the Seventeenth Amendment. A public choice model of the Seventeenth Amendment begins with the proposition that those consequences were *not* ironic nor unforeseeable at all, but were rather predictable and intended consequences of the Seventeenth Amendment. Moreover, public choice theory can further explain why the direct election of Senators took the form of an amendment to the federal Constitution, rather than as a state-by-state legislative reform.

There are several different models of the political process which are commonly referred to as "public choice."[213] In a public choice model of the legislative process, the lawmaking process can be viewed as a market in which legal rules are designed according to the desires of the individual or group that values them most, as measured by willingness and ability to pay.[214] "The currency used for payment comes in the form of political support for politicians, bureaucrats, and other political actors who 'essentially act like

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[210] *See supra* at notes 161-208 and accompanying text.

[211] *See* Zywicki, *Senators*, *supra* note 8, at 1026-1055.

[212] *See supra* note 116 and accompanying text.

[213] *See* MAXWELL L. STEARNS, PUBLIC CHOICE & PUBLIC LAW: READINGS & COMMENTARY xvii-xxv (1997).

[214] Jonathon R. Macey, *Competing Economic Views of the Constitution*, 56 GEO. WASH. L. REV. 50, 62-63 (1987).

brokers in a private contest - they pair demanders and suppliers of legislation.'"[215] In an electorate of millions of voters, most individuals lack the incentive to study the issues and vote.[216] This "rational ignorance"[217] allows well-organized interest groups to use the political process to transfer wealth from the dispersed public to themselves.[218] Powerful special interests receive government favors and wealth transfers; politicians receive, in return, votes, money, and reelection.

Most favorable legislation, however, does not provide a single lump-sum payment to an interest group.[219] Rather, the benefits of legislation are meted out to the favored group over time. For instance, licensing laws that limit entry into a profession provide some benefit each year to members of the protected class. As a result, the total amount of wealth transferred to the favored groups will be a function of both the total potential amount of wealth transferred and the expected life of the stream of payments resulting from the beneficial legislation. Innovations that increase the lifespan of the legislation and make it more difficult to repeal raise the durability of legislation. As durability rises, the amount of the potential wealth transfer also rises. The economic rents resulting from legislation create potential gains from trade that can be shared between the interest group and the politicians delivering the favorable legislation. A "contract" is formed between the legislator and the interest group: The legislator promises his support for the bill; the interest group promises its support for the legislator.

Constitutions serve two functions, one similar to that of legislation and one distinct from that of legislation. First, constitutional amendments can be seen as merely a more permanent form of legislation designed to transfer wealth to favored interest groups.[220] In general it is more difficult to amend a constitution than it is merely to pass or repeal legislation because usually there are different and substantial procedural hurdles that must be cleared to enact a constitutional change.[221] Thus, while this makes it more difficult to enact a constitutional change than legislation, it also increases the permanence of the provision once enacted, as it is also more difficult to repeal.

But constitutions play a second, unique, role. Constitutions also establish the playing field on which interest groups compete for beneficial legislation. As

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[215] *Id.* at 62 (quoting Robert D. Tollison, *Public Choice and Legislation*, 74 VA. L. REV. 339, 343 (1988)).

[216] ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY 260-76 (1957).

[217] *See* DENNIS C. MUELLER, PUBLIC CHOICE II 205-06 (1989).

[218] *See* MANCUR OLSON, JR., THE LOGIC OF COLLECTIVE ACTION 53-57 (1965).

[219] RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 526 (4th ed. 1992).

[220] *See* Boudreaux & Pritchard, *supra* note 159, at 115-23; Zywicki, *Senators*, *supra* note 8, at 1011.

[221] For instance, the Constitution can be amended only by approval of two-thirds of both houses of Congress and three-fourths of the states. U.S. CONST. art. V.

Jonathon R. Macey noted, "[c]onstitutions, in establishing the structure of government, establish the procedures that interest groups must follow in order to obtain passage of the laws they favor."[222] This category includes such structural provisions such as bicameralism, the executive veto, and judicial review.

Both of these views of the role of constitutions are relevant to understanding the passage of the Seventeenth Amendment. Interest groups, particularly agrarian and other western interests, supported the Seventeenth Amendment because it enacted a uniform change in the rules for electing Senators, and did so in a way that would be difficult to overturn once implemented. Interest groups also desired the Seventeenth Amendment because of the changes it would make on the "playing field" for legislation, particularly the negative consequences it would have for bicameralism, federalism, and monitoring of these wealth transfers. Thus, "[w]hile demands for legislation probably did not change with the passage of the Seventeenth Amendment, the ability of senators and the entire federal government to supply the legislation demanded did."[223]

A. Seventeenth Amendment and the Drive for Uniformity

The public choice model of the Seventeenth Amendment provides an explanation for why the push for popular election took the form of a national movement for an amendment to the federal Constitution, rather than remaining a state-by-state reform movement. As discussed above, operating on a state-by-state basis, the advocates of direct election were remarkably successful in accomplishing their agenda. Other states, however, eschewed these innovations, suggesting that a diversity of opinion existed as to the desire for direct election. Moreover, it is difficult to argue that democratic principles are advanced by allowing some states to overrule the freely-chosen political decisions of those living in other states.[224]

This incongruity suggests that there must be some other explanation for the desire of some states to impose their preferences for democracy on those electing Senators in other states. One explanation provided by the public choice model of the Seventeenth Amendment is rooted in differences in seniority created by the heterogeneous methods of election used throughout the country. Relative difference among states in the seniority of their delegations produce differences in power. More senior delegations have greater influence because of their increased status on committees, greater reliability in maintaining contracts with special interests, and greater ability to enter into logrolling agreements with other legislators.[225]

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[222] Macey, *supra* note 214, at 72; *see also* BUCHANAN & TULLOCK, *supra* note 65, at 119-262 (distinguishing between constitutional rule-making and legislation).

[223] Zywicki, *Senators*, *supra* note 8, at 1011-12.

[224] *See* Zywicki, *Ballot Access Regulations*, *supra* note 13, at 105-07 (arguing that the right to control election procedure is a fundamental component of republican government).

[225] *See* Zywicki, *Senators*, *supra* note 8, at 1028-1031.

States with less-senior delegations, therefore, will be net losers to states with more-senior delegations in the struggle for federal money and power. Moreover, differences in state election processes may result in consistent differences in seniority: classes of permanent "winners" and "losers." If consistent inequalities in seniority result from using different electoral systems, then adoption of a uniform rule, such as direct election, will eliminate the relative differences in seniority. Removing institutions that give some states a comparative advantage in developing more-senior delegations levels the playing filed, allowing all states to compete equally.[226]

This type of permanent disparities in the seniority of Senate delegations existed during the years preceding the Seventeenth Amendment. "One-party southern states after the Civil War repeatedly [were able to] return the same senators to Washington, and as a result, were able to gather a disproportionate amount of federal funds."[227] "Politics in the western states, by comparison, were chaotic throughout the pre-Seventeenth Amendment period," making it difficult to create stable governing coalitions in the state legislatures who could repeatedly send the same Senator to Washington.[228] "As a result, there was a 'churning' in the Senate delegations [from western states]: each time a new coalition came to power, incumbent Senators were replaced by representatives of the new [governing] coalition."[229] Furthermore, this relative lack of seniority for western delegations was reflected in declining western influence in Washington, a declining share of federal funds going to those states, and an inability to effectively advocate the issues they cared about most, such as railroad regulation and tariff reform.[230] Moreover, western "Insurgent" Senators suffered a relative disadvantage compared to Eastern "Stalwarts" in securing appointment to powerful Senate committees.[231]

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[226] *Id.* at 1043.

[227] Zywicki, *Senators*, *supra* note 8, at 1043-44. *See also* DANIEL J. ELAZAR, AMERICAN FEDERALISM: A VIEW FROM THE STATES 139-40 (2d ed. 1972) (seniority of southern politicians allowed those states more than their share of benefits); Bybee, *supra* note 8, at 546; Samuel Kernell, *Toward Understanding 19th Century Congressional Careers: Ambition, Competition, & Rotation*, 21 AM. J. POL. SCI. 669, 676 (1977) (noting that southern states rotated state legislative seats, but not congressional seats).

[228] Zywicki, *Senators*, *supra* note 8, at 1043; George H. Haynes, *The Changing Senate*, 200 N. AM. REV. 222, 229-30 (1914).

[229] Zywicki, *Senators*, *supra* note 8, at 1043; E. Daniel Potts, *William Squire Kenyon and the Iowa Senatorial Election of 1911*, 38 ANNALS OF IOWA 206 (1966).

[230] Zywicki, *Senators*, *supra* note 8, at 1043-44.

[231] David Brady & David Epstein, *Intraparty Preferences, Heterogeneity, and the Origins of the Modern Congress: Progressive Reformers in the House and Senate*, 1890-1920, 13 J.L. ECON. & ORG. 26, 36, 44-45 (1997).

Western politicians saw direct election as a mechanism to alleviate this "economic discrimination against [their] region"[232] and to "balanc[e] the scales which had been weighed against agrarian interests."[233] As a result, the western states took a leading role in agitating for direct election of Senators.[234] It is critical to note, however, western politicians did *not* favor direct election purely because of an ideological commitment to democracy and popular government. Rather, westerners favored popular election primarily because they saw it as an instrument for increasing their influence in Washington and to enact policies designed to further their economic interests.

Western politicians believed an expansion of popular government would automatically weaken the influence of eastern corporate interests in politics, thereby strengthening the relative strength of the western states. For western politicians, "the direct election of senators promised to take control of the senate away from these interests and restore it to 'the people.' Implicit in this maneuver was the hope that it would relieve the economic discrimination against their region."[235] Moreover, the legislative goals of western politicians "were restricted and did not extend far beyond the narrow interests of [their] own region . . . . What interested [them] . . . were matters that directly affected their constituents, such as tariff revision and railroad regulation."[236] As a result, when western politicians "spoke of restoring control of the government to 'the people' through the 17th Amendment, implicitly [they] meant the people of [their states]."[237]

Empirical tests indicate that the move to direct election had the effect of rectifying the seniority imbalances that underlay the west's relative lack of political clout in Washington during the pre-Seventeenth Amendment period.[238] As a matter of statistics, prior to the Seventeenth Amendment, the average tenure of the Senate delegations from non-western states was significantly higher. Following the passage of the Seventeenth Amendment, however, this difference disappeared, suggesting direct election had the effect of eliminating the seniority gap which had disadvantaged the western

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[232] Larry J. Easterling, *Sen. Joseph L. Bristow and the Seventeenth Amendment*, 41 KAN. HIST. Q. 488, 501 (1975).

[233] *Id.* at 492.

[234] *See* HOEBEKE, *supra* note 6, at 144; Zywicki, *Senators*, *supra* note 8, at 1044; HAYNES, ELECTION, *supra* note 22, at 108-09.

[235] Easterling, *supra* note 232, at 492-93. *See also* HAYNES, ELECTION, *supra* note 22, at 510-11 ("Under direct elections, [western politicians] believed the people would elect senators who were free from the influence of the great corporate interests, and who would work to correct the economic imbalance that favored the commercial and industrial interests of the East over the agrarian interests of the Midwest." *Id.* at 510-11.

[236] Easterling, *supra* note 232, at 511.

[237] *Id.*

[238] Zywicki, *Senators*, *supra* note 8, at 1052-53.

states.[239] Presumably the elimination of seniority differences also eliminated "economic discrimination" against the region.

The public choice model also suggests a constitutional amendment implementing direct election was favored as a means to ensure a more stable reform than could be achieved through standard legislation.

B. Seventeenth Amendment and the Change in the Political Process

A second important effect of the Seventeenth Amendment was to change the "playing field" on which special interests sought economic benefits in several ways. First, the Seventeenth Amendment decreased the monitoring of Senators, thereby enabling them to supply more special interest legislation than previously. Second, the Seventeenth Amendment eliminated the state legislatures from the federal legislative process, undermining the protections of bicameralism and federalism. Third, direct election changed the playing field upon which special-interests sought legislation, by making it easier to lobby the national government directly and by increasing the overall seniority of the Senate, thereby increasing the durability of the "contracts" made between Senators and the special interests with whom the contracts were formed.

1. The Seventeenth Amendment Decreased Monitoring

The Seventeenth Amendment reduced the monitoring of behavior by Senators, thereby enabling Senators to sacrifice their constituents' concerns for their own desires and those of special-interest groups.[240] As compared to the dispersed public, state legislatures had both better ability and incentive to monitor Senators.[241] The move to direct election reduced both of these variables, thereby reducing the oversight of Senators and allowing them to pursue their own agendas at public expense.

As compared to the dispersed public, state legislatures had a superior ability to monitor the behavior of Senators. Because of their familiarity with government and law-making, members of state legislatures were in a better position than the dispersed public to gain access to important information, as well as to interpret information, and even to issue instructions to them when appropriate.[242] As John Jay observed in arguing for ratification of the Constitution, election of Senators by state legislatures had "vastly the advantage of elections by the people in their collective capacity, where the activity of party zeal, taking advantage of the supineness, the ignorance, and

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[239] *Id.*

[240] *Id.* at 1041.

[241] HOEBEKE, *supra* note 6, at 4 ("In large part such [voter] apathy stems from the fact that the private citizen has been asked to consider more issues and more details than he can possibly devote his time to; and I suspect also in part because he senses the insignificance of his individual ballot."); Zywicki, *Senators*, *supra* note 8, at 1041-42.

[242] Zywicki, *Senators*, *supra* note 8, at 1041. *See also* Bybee, *supra* note 8, at 518 (observing that state legislatures generally would be "knowledgeable in matters before Congress").

the hopes and fears of the unwary and interested, often places men in office by the votes of a small proportion of the electors."[243]

State legislators also had a greater incentive to monitor Senators than did the dispersed public. Because of the comparatively small size of state legislatures, each legislator had an incentive to monitor the Senator's behavior. As the author noted in a previous article, "[o]ne legislator in a body of forty legislators can have some practical control over a senator's behavior; one voter in a constituency of several million cannot."[244] Obviously, some collective action problems still remained for each state legislator to monitor Senatorial behavior. At the margin, however, we would expect to see significantly greater monitoring in a body of forty or fifty than in an electorate of millions. The incentive of one state legislator to monitoring Senators was admittedly small; but this small incentive to monitor is multiple times larger than the infinitesimal incentive for each member of the dispersed public to monitor Senators.[245]

Moreover, many members of the state legislature would have been expected to have strong personal reasons for monitoring Senator behavior, such as a desire for personal advancement (perhaps even to replace the incumbent Senator)[246] or because other political or party leaders had assigned them with the task.[247] For these members, monitoring of Senators would have been an inframarginal activity because they had adequate private incentives to do so, regardless of collective action problems. It is not clear that any members of the general public would have similarly strong inframarginal motives for monitoring.

This decrease in monitoring associated with the move to direct election was exacerbated by other changes in the electorate during the Progressive Era. The Progressive Era was a time of a massive expansion in the size of the electorate,

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[243] THE FEDERALIST NO. 64, at 432-33 (John Jay) (Jacob E. Cooke ed., 1961).

[244] Zywicki, *Senators*, *supra* note 8, at 1041. *See also* Easterbrook, *supra* note 10, at 1332 ("representatives, being fewer in number than the electorate as a whole, are more apt to conclude that their votes do matter and therefore to make the effort necessary to choose wisely").

[245] *See* HOEBEKE, *supra* note 6, at 73 ("After all, the extension of the voting power into higher echelons of governmental affairs reduced the significance of the individual vote: The higher the echelon, the more massive the constituency, and the less the importance of any one vote."); A.C. Pritchard & Todd J. Zywicki, Finding the Constitution: An Economic Analysis of Tradition's Role in Constitutional Interpretation (Jan. 20, 1998) (unpublished manuscript on file with author).

[246] *See* Bybee, *supra* note 8, at 559, 559 & nn.358-369.

[247] *See* James M. Buchanan, *An Economic Theory of Clubs*, 29 ECONOMICA 1 (1965). Buchanan observes that individuals can form private organizations in order to provide collective goods which otherwise might not be provided because of collective action and free-rider problems. Political parties would be expected to assign certain members to monitor Senatorial behavior, thereby providing those individuals with an adequate incentive to monitor. *Id.*

most notably with the extension of the franchise to women. Each influx of new voters caused a decrease in the marginal value of each individual's vote, furthering reducing the incentive to monitor Senator behavior.[248] Moreover, the demise of property qualifications and other limitations on the franchise meant that most new recipients tended to be poorly-educated recent immigrants who lacked knowledge of the political process.[249]

A further factor eroding the incentive of the public to monitor political behavior during the Progressive Era was rapid economic growth. During the Nineteenth Century, per capita Gross National Product increased by four percent annually.[250] As income increased, the opportunity cost to voters of spending time monitoring the political process also increased, leading to a reduction in monitoring activities.[251] In contrast to state legislators, who would have been unaffected by this income effect, private citizens would have found it increasingly expensive to spend time and energy monitoring politicians so as to prevent political plunder, when compared to more productive uses of their time. Finally, even if the public would have retained some incentive to monitor political behavior, their ability to exert control over Senators was reduced because the Seventeenth Amendment also signaled the final demise of the practice of Senatorial instruction.[252]

2. The Seventeenth Amendment Undermined Federalism and Bicameralism

The passage of the Seventeenth Amendment also had important structural implications for the constitutional system. It undermined federalism and thereby reduced the benefits conferred by the system of federalism. It also made the constituencies represented in the House and Senate more similar, thereby interfering with the purposes of bicameralism and eliminating the protections created by bicameralism in limiting special interest activity.

a. Federalism

Federalism is one of the critical constitutional values recognized in the text and structure of the federal Constitution. Federalism also serves many

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[248] *See* Boudreaux & Pritchard, *supra* note 159, at 143-44.

[249] *See* JOHN D. BUENKER, URBAN LIBERALISM AND PROGRESSIVE REFORM, 1-6 (1973); *see generally* Boudreaux & Pritchard, *supra* note 159.

[250] AMERICAN ECONOMIC GROWTH: AN ECONOMISTS' HISTORY OF THE UNITED STATES 168 (Lance E. Davis, et al., eds., 1972).

[251] *See* ROBERT E. MCCORMICK & ROBERT D. TOLLISON, POLITICIANS, LEGISLATION AND THE ECONOMY: AN INQUIRY INTO THE INTEREST GROUP THEORY OF GOVERNMENT 269 (1981). *See also* Zywicki, *Senators*, *supra* note 8, at 1042 & n.184 (discussing implications of McCormick and Tollison model).

[252] Bresler, *supra* note 25, at 365. *See also* Bybee, *supra* note 8, at 568 (noting that the only control the electorate has over Senators are elections every six years and [t]here is . . . no mechanism for the people to exercise any direct control over their senators in the interim").

functional purposes.[253] Most importantly, federalism limits the scope of coercive redistributive activity by permitting citizens to exit oppressive jurisdictions and settle in areas with lower redistributive activity costs.[254] It is relatively easy to move from one state to another in order to flee oppressive taxation. It is rarely practical for most people to leave the United States in order to achieve these same benefits. A related justification for federalism is the classic Tiebout model, which recognizes that by providing public goods through state and local governments, citizens can move among local communities in order to secure the mix of taxes and public goods which they prefer.[255]

Federalism has also been endorsed as a system for empowering multiple levels of government to deal with social problems through timely and effective regulation.[256] The Supreme Court has also frequently identified the states' role in checking federal power as a value of federalism.[257] And, of course, no discussion of the values of federalism would be complete without a recitation of Justice Brandeis's famous description of the states as "laborator[ies]" that "try novel social and economic experiments without risk to the rest of the country."[258] In other words, states can try different approaches to social problems, and in theory they can evaluate the results of these experiments, allowing successful experiments to spread while unsuccessful ones are rejected.[259]

The passage of the Seventeenth Amendment, however, undermined constitutional protection for federalism and watered-down its functional

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[253]Nelson Lund, *Federalism and Civil Liberties*, 45 U. KAN. L. REV. 1045, 1046 (1997); Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484 (1987).

[254]*See* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 52-53 (1990); POSNER, *supra* note 219, at 533; Easterbrook, *supra* note 10, at 1332-33.

[255]Gregory v. Ashcroft, 501 U.S. 452, 458 (1991); Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 418-24 (1956). *See also* DAVID L. SHAPIRO, FEDERALISM: A DIALOGUE 91-92 (1995); Deborah J. Merritt, *Federalism as Empowerment*, 47 FLA. L. REV. 541, 548 (1995) (describing "responsiveness" value of federalism). It is probably no coincidence that the public services which most people are most concerned about on a day to day basis and where rent-seeking activity is likely to be minimized - schools, police protection, fire protection, trash collection, etc. - are provided by local governments. By contrast, most federal programs present paradigmatic examples of runaway rent-seeking and inefficiency in provision of services.

[256]Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 499 (1995); Merritt, *supra* note 255, at 541.

[257]*See* United States v. Lopez, 514 U.S. 549 (1995) (Kennedy, J., concurring); New York v. United States, 505 U.S. 144, 181 (1992); *Gregory*, 501 U.S. at 458-59. *See also* Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 SUP. CT. REV. 341, 380-95.

[258]New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

[259]*See* Merritt, *supra* note 255, at 551; McConnell, *supra* note 253.

benefits.[260] As Bruce Fein observes, "the direct election of senators prescribed by the Seventeenth Amendment weakened the loyalty of the Senate to preserving the sinews of state governments."[261] Thus, it has been written that "[t]he Seventeenth Amendment . . . is the most drastic alteration in the system of federalism since the Civil War Amendments. The power to choose Senators long was a cherished prerogative of the state governments, and it shaped the character of the Senate and of national politics for generations."[262]

The post-Seventeenth Amendment era has been characterized by consistent encroachment of the federal government against the states.[263] It would be only a slight exaggeration to argue that the states exist at the mercy of the federal government. As Mike Leavitt, governor of the State of Utah, has recently written:

> State leaders have status only as lobbyists and special interest groups. The leaders go hat in hand, hoping and wishing that Congress will listen. There is no balance of power. States must accept whatever the Congress gives them. If states have any influence at all, it results only from the personal willingness of congressional leaders to pay attention. States have no tools, no rules, ensuring them an equal voice in the cutting of the pie or the selection of the pieces.[264]

Until recently, the states have been unable to rely on the Supreme Court for any protection against encroachment by the federal court. From 1937 until 1992 only one federal statue was declared unconstitutional on federalism grounds.[265] And that case, *National League of Cities v. Usery*,[266] was subsequently expressly overruled by *Garcia v. San Antonio Metro. Transit Authority*.[267]

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[260]David P. Currie, *The Constitution in Congress: The First Congress and the Structure of Government*, 1789-1791, 2 U. CHI. L. SCH. ROUNDTABLE 161, 173 (1995); David E. Engdahl, *The Spending Power*, 44 DUKE L.J. 1, 34 (1994); Jeffry Clay Clark, *The United States Proposal for a General Agreement on Trade in Services and its Preemption of Inconsistent State Law*, 15 B.C. INT'L & COMP. L. REV. 79, 104 (Seventeenth Amendment "toppled" with "one stroke, the balance between state and federal powers"); Jerry Frug, *Decentering Decentralization*, 60 U. CHI L. REV. 253, 297 & n.199 (1993).

[261]Fein, *supra* note 8, at 17.

[262]BERNSTEIN & AGEL, *supra* note 26, at 122. As Professor Bybee observes, however, the link between the Seventeenth Amendment and the demise of federalism is a "maddeningly difficult proposition to prove." Bybee, *supra* note 8, at 547.

[263]*See supra* notes 36-41 and accompanying text (discussing expansion of federal government relative to states in post-Seventeenth Amendment era).

[264]Mike Leavitt, *States Need New Weapons to Fight Intrusive Federal Actions*, 11 WASH. LEGAL FOUNDATION LEGAL BACKGROUNDER No. 20 at 2-3 (1996).

[265]Chemerinsky, *supra* note 256, at 502.

[266]National League of Cities v. Usery, 426 U.S. 833 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

This imbalance has been partially rectified in recent years as the Supreme Court has acted more aggressively in protecting the states against encroachment by the federal government[268] and enforcing limitations on the power of the federal government.[269] Despite these recent Supreme Court decisions, however, federalism remains a pale imitation of its pre-Seventeenth Amendment vigor.

By depriving the states of representation in the federal government, the Seventeenth Amendment also deprived the states of a check against the centralizing tendencies of the federal government. The Supreme Court's current tendency to scrutinize federal activity more carefully represents a reinvigoration of federalism only at the margins. Indeed, there is reason to believe that Congress could accomplish the identical results in *Lopez* and *Printz* through alternative constitutional bases.[270] Perhaps more instructive as to the health of federalism is not that the Supreme Court invalidated the federal legislation in those cases, but the extreme nature of the provisions in question and the ease by which Congress can circumvent the constitutional limitations laid down. In most situations, the states remain at the mercy of the federal government's graces and limited judicial protection.[271] Rather than a system of dual sovereignty and a robust federal system, the post-Seventeenth Amend-

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[267] Id.

[268] See, e.g., Printz v. United States, 117 S. Ct. 2365 (1997); New York v. United States, 505 U.S. 144 (1992).

[269] Lopez, 514 U.S. at 549; Seminole Tribe v. Florida, 116 S. Ct. 1114 (1996).

[270] For instance, it has been argued that the statute in Lopez could be reinstated through making express congressional fact-findings which would support an exercise of jurisdiction under the spending clause. *See* Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911, 1913-15 (1995). *See also* Deborah J. Merritt, *The Fuzzy Logic of Federalism*, 46 CASE W. RES. L. REV. 685, 692 (1996); Philip P. Frickey, *The Fool on the Hill: Congressional Findings, Constitutional Adjudication and United States v. Lopez*, 46 CASE W. RES. L. REV. 695 (1996). Justice Scalia's majority decision in *Printz* similarly suggests that the objectionable provision of the statute could be made constitutionally valid by being tied to a grant of federal funding or by being converted into a request for information from the state executive to the federal government. *See Printz*, 117 S. Ct. at 2375. *See* Lino A. Graglia, United States v. Lopez: *Judicial Review Under the Commerce Clause*, 74 TEX. L. REV. 719 (1996).

[271] *See* Graglia, *supra* note 270, at 770 (noting that the states are currently forced to rely on a national court to enforce limitations on national power); PHILIP B. KURLAND, WATERGATE AND THE CONSTITUTION 156-57 (1978) ("[T]hroughout our history, the Supreme Court has persistently and consistently acted as a centripetal force favoring, at almost every chance, the national authority over that of the states. It made substantial contributions to the ultimate demise of federalism."). *But see* Herbert Hovenkamp, *Judicial Restraint and Constitutional Federalism: The Supreme Court's Lopez and Seminole Tribe Decisions*, 96 COLUM. L. REV. 2213, 2247 (1996) (arguing that "[t]he balance between federal and state regulatory prerogatives is well maintained by ordinary political processes").

ment constitutional system reduces the protections of federalism in the Constitution to the mere "parchment barrier" which the Founders rejected.[272]

The demise in federalism is seen in other ways as well. For instance, the Constitution delegates to the Senate many of the shared powers which comprise the balance among the branches of the federal government.[273] For instance, the role of the Senate under the "advise and consent" clause had the effect of giving the states (through their Senators) an opportunity to ensure their interests were protected in the nominating process.[274]

Prior to the Seventeenth Amendment, the states also had a role in the constitutional amendment process which they now lack.[275] Under Article V, amendments can be originated in either of the congressional houses or through a constitutional convention. Under the pre-Seventeenth Amendment regime, the ability of the Senate to initiate a constitutional amendment gave the states an indirect role in the constitutional amendment process.[276] Following the Seventeenth Amendment, however, constitutional amendments could be proposed by the states only through the mechanism of a constitutional convention, a cumbersome and unreliable strategy which has never been successfully accomplished. There have been no constitutional conventions called pursuant to Article V, and Congress proposed all twenty-seven amendments that are now part of the Constitution.[277] Thus, the absence of a voice for the states in Congress and the practical impossibility of the convention option renders the states impotent for protecting themselves through the constitutional amendment process.

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[272]Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 16 (1988) ("The only constitutional provision that might have ensured some congressional representation for these institutional interests - the selection of senators by state legislatures was repealed in 1913.").

[273]For the definitive discussion of the impact of the Seventeenth Amendment on the Senate's performance of its constitutional responsibilities see Bybee, *supra* note 8, at 560-67.

[274]John B. Attanasio, *Federalism in the United States: Basic Elements and Chances for Survival*, 1995 ST. LOUIS-WARSAW TRANSATLANTIC L.J. 121, 125 (1995). Bybee notes that the practice of instruction provided an informal link between the states and the exercise of the Senate's advice and consent power. *See* Bybee, *supra* note 8, at 561. One commentator has argued that the movement to direct election may have made senators more sensitive to interest group manipulation of the judicial confirmation process. Albert P. Melone, *The Senate's Confirmation Role in Supreme Court Nominations and the Politics of Ideology Versus Impartiality*, 75 JUDICATURE 68, 73 (1991).

[275]*See* Part IV, *infra*, for a proposal to restore a role for the states in the constitutional amendment process.

[276]Bybee, *supra* note 8, at 565. Bybee notes that the power of instruction was frequently used by the states to force Senators to propose or support constitutional amendments. *Id.* at 565-66.

[277]Boudreaux & Pritchard, *supra* note 159, at 152 & n.201.

In fact, while Congress has proposed several constitutional amendments which limit state power,[278] "none of the proposed amendments have directly limited congressional power."[279] This comports with the framers' belief "that Congress would be reluctant to make proposals that would reduce its own powers."[280] This one-sided history of the constitutional amendment process suggests this avenue of constitutional amendment provides an unreliable basis for amendments designed to protect federalism against federal encroachment.

b. Bicameralism

Bicameralism constrains the ability of legislatures and special interests to enter into contracts designed to redistribute wealth to those special interests.[281] Bicameralism makes formation of special interest contracts by one house contingent on majority support in the other house as well. If the support of the winning coalition in one house overlaps with the other, bicameralism poses little obstacle to passage of legislation. If, however, the two houses are drawn from different constituencies, the logrolling coalitions necessary to generate passage in both houses become more complicated and requires the consent of a greater number of people, thereby reducing the number of contracts formed and the breadth of support for legislation actually enacted. Where overlap between the two houses is substantial, therefore, the goals of politicians and interest groups will be similar. For example, if identical districts elect an equal number of senators and representatives, the majority coalition supporting a bill in one house will mirror the majority in the other.

As constituency overlap between the two houses decreases, however, the constituencies represented in the two houses are more likely to differ and the goals of the two houses are more likely to disagree. In sum, a decrease in the similarity of representatives' constituencies increases the size of the group necessary to enact legislation.[282] Reducing the overlap of the constituencies of the two houses ensures that legislation reflects the wishes of more than a small minority.

The adoption of direct election of Senators had an obvious negative effect on bicameralism. As originally constituted, the House represented the people directly, but the Senate represented the state legislatures directly, and the people only indirectly. Thus, legislation had to cross two check points: first the people had to attest to the wisdom of the law, but then the state legislatures had to agree as well. After the Seventeenth Amendment, on the other hand, only the people had a say in reviewing the propriety of a bill. As a result, the

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[278] *See* U.S. CONST. amends. XIII, XIV, XVII, XX.

[279] Rotunda & Safranek, *supra* note 104, at 231.

[280] *Id.*

[281] This section draws from Zywicki, *Senators*, *supra* note 8, at 1031.

[282] BUCHANAN & TULLOCK, *supra* note 65, at 233-35; W. Mark Crain, *Cost and Output in the Legislative Firm*, 8 J. LEGAL STUD. 607, 612 (1979).

underlying constituencies represented in the two houses became more similar thereby making it easier for special interests to manipulate the machinery of government.[283] Although there might be differences in the relative sizes of the two constituencies (a Senate seat might be comprised of several House seats), this size differential provides little grounds for a bicameral system.

Moreover, as Hoebeke has demonstrated, direct election stripped the Senate of much of the purpose of being a counterweight to the passions of direct election. Whereas the Senate was intended to be a deliberative body for veteran statesmen, the movement to direct election reduced it to an overgrown appendage of its more popular sibling. While Senators remained somewhat more independent of popular passions because of their longer terms, their reliance on popular approval stripped them of some of the "cooling" function contemplated by the Founders.[284] Thus, not only was the difference in constituencies swept aside by the Seventeenth Amendment, but the difference in temperament was as well.

3. The Seventeenth Amendment Made Rent-Seeking Easier

a. National Economy and National Interest Groups

A further structural change caused by the Seventeenth Amendment was the change it created for the mechanism for enacting special interest legislation. By making it possible for special interests to lobby Senators directly, rather than having to proceed through the intermediary of the state legislatures, the Seventeenth Amendment reduced the costs of lobbying for wealth transfers.

This change in lobbying dynamics reflected a contemporaneous change in the structure of the American economy to a more national economy. The post-Civil War era saw a massive expansion in the scope of interstate commerce and a rise in the influence of national interest groups.[285] "The increased national wealth that accompanied the [development of] a national market also increased the gains available to any group that could tap into this wealth through the political process."[286] With the transition to a national economy, there came about an accompanying rise in the interstate nature of interest groups. "As markets shifted from local to state to national, the scope of political activity and its potential gains moved in the same direction."[287]

As Bernstein and Agel have written:

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[283] *See* Bybee, *supra* note 8, at 560 (noting that after the Seventeenth Amendment "[t]he Senate had become a smaller, more detached version of the House of Representatives."); Edwin Meese, III, *Preface to Examining Contemporary Political Institutions Through the Federalist Papers*, *in* Fein, *supra* note 8, at v, vi.

[284] THE FEDERALIST NO. 62 (James Madison) (Clinton Rossiter ed. 1961).

[285] *See* Easterbrook, *supra* note 10, at 1335-36.

[286] Zywicki, *Senators*, *supra* note 8, at 1039 (citing Easterbrook, *supra* note 10, at 1338).

[287] AMERICAN ECONOMIC GROWTH, *supra* note 250, at 649.

> The profound revolution wrought by the Civil War in virtually every aspect of American society reached into the Senate as well. The knitting together of a national economy and transportation system impelled by the war brought with it the rise of peacetime industries and economic organizations operating on a national scale. In turn, these enterprises exerted powerful influence on the nation's political life, seeking to block or divert government actions harmful to their interests.[288]

Because these national interest groups (such as labor unions and railroads) were dispersed across several states, it was quite cumbersome and expensive for them to have to lobbying multiple state legislatures in order to get the Senate consent to a piece of legislation.[289] Thus, as Hoebeke writes:

> [Corporate] influence before the adoption of the Seventeenth Amendment was much less than popularly supposed. This in not to say that business contributions were not steadily growing throughout the era, or that legislators never turned their heads at the offer of campaign money, but rather that the possibility of controlling the Senate through state campaign donations was somewhat remote. It would have entailed paying the election expenses of a majority of the legislators in a majority of states.[290]

A Senate responsible to state governments would tend to "underproduce" legislation demanded by national special-interest groups.[291] Senators would be expected to reward their home-state interests and to protect the state legislature's authority to engage in wealth transfer activity. Movement to direct election made it possible for them to lobby Senators directly, and for Senators to make use of the resources (money and manpower) provided by these interstate interest groups.[292] "While senators' new independence raised the costs of influencing them, this increase was dwarfed by the decrease in costs resulting from their ability to contract with senators directly, rather than work through the state legislatures."[293]

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[288] BERNSTEIN & AGEL, *supra* note 26, at 123 (footnotes omitted). *See also* HOEBEKE, *supra* note 6, at 103; FRED R. HARRIS, DEADLOCK OR DECISION: THE U.S. SENATE AND THE RISE OF NATIONAL POLITICS 94-95 (1993); Smith, *supra* note 24, at 58. Obviously, inter-state businesses had strong motives to exert their influence on Senate elections. Encumbered by commerce laws which varied from state to state, they preferred more uniform and possibly more favorable regulation at the federal level, not to mention the protection from foreign competitors in the form of tariff duties, which only Congress could provide.

[289] Zywicki, *Senators*, *supra* note 8, at 1040.

[290] HOEBEKE, *supra* note 6, at 103.

[291] As discussed above, there is no indication that public goods which could be provided on the national level, such as national defense, were underproduced as a result of the Senate's original structure. *See supra* notes 289-90.

[292] *See* Laycock, *supra* note 37, at 1737.

[293] Zywicki, *Senators*, *supra* note 8, at 1040. *See also* Amar, *Seventeenth*, *supra* note 8, at 1404; Easterbrook, *supra* note 9, at 1338; Sunstein, supra note 183, at 79 (arguing that

I am not aware of any systemic attempts to measure the degree to which the pre-Seventeenth Amendment Senate acted to thwart the redistributive efforts of the rising national special interests. Roger Meiners has observed that prior to the Seventeenth Amendment special-interest legislation frequently passed the House, only to stall in the Senate.[294] Other anecdotal evidence suggests the reluctance of the Senate to join the House in passing special interest legislation fell especially hard on national interest groups.[295]

Of course, for any legislation to become law, it must pass both Houses. Thus, the reluctance of the Senate to pass special-interest legislation would have had the effect of reducing the amount that special interests would have been willing to spend on influencing the House. Securing passage of a bill in the House would be of no value if the Senate did not also pass the bill. Thus, the Senate's reluctance to follow the House's lead in passing redistributive legislation reduced the marginal return of lobbying *either* house.[296] Marginal expenditures on lobbying will be equated across both houses of a bicameral system; thus, the small expected return from the Senate also decreased the price that House members could charge for their services.[297] Given that the Senate's reluctance to engage in special-interest legislation was having such a negative effect on House members' ability to promise such legislation, it is not surprising the House was a strong supporter of direct election.[298]

Direct election made Senators responsive to the same national forces which influenced House members. Thus, as Smith writes, "[r]ather than representing the sovereign interests of states, Senators now represent a variety of national interest groups - a role identical to that of House members."[299] Indeed, there is reason to believe that because of the more prominent role played by the Senate in national affairs (through the advise and consent clause and foreign affairs)

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democratization of the Senate is one factor that has made it easier for private interest groups to exert influence upon legislators).

[294]Meiners, *supra* note 42, at 93.

[295]*See* BUENKER, URBAN LIBERALISM, *supra* note 122, at 85 (noting that in 1911 alone, the House passed twenty-seven pro-labor measures, such as minimum wage regulation, prison labor, and woman labor restrictions, eighteen of which were rejected by the Senate).

[296]McCormick & Tollison, *supra* note 251, at 295 (James M. Buchanan et al. eds., 1980).

[297]Zywicki, *Senators*, *supra* note 8, at 1041.

[298]Between 1893 and 1911, proposals for direct election of senators passed the House six times, only to die each time in the Senate. 1 HAYNES, SENATE, *supra* note 22, at 178.

[299]Smith, *supra* note 24, at 67-68. *See also* Victoria L. Calkins, Note, *State Sovereign Immunity After Pennsylvania v. Union Gas Co.: The Demise of the Eleventh Amendment*, 32 WM. & MARY L. REV. 439, 469 (1991).

the Senate has become even more responsive to national forces than House members - the complete reverse of what the framers had contemplated.[300]

b. Direct Election Increased the Tenure of Senators

Legislative contracts to provide special interest legislation differ from typical contracts in that the interest group has no way of enforcing its claim to the benefits of the bargain.[301] Legislative contracts are executory in nature: special interests make their campaign payments up-front, but they do not receive their legislation until later. Moreover, even if a given legislator seeks to keep her promise, she must still secure majority support within the legislature. Even then, success is not guaranteed because a bargain agreed to in one session can be overturned in the next session if there is sufficient turnover in membership which destroys the winning coalition or if the legislator reneges on her promise. If the effectiveness of a legislative act can be guaranteed only until the next electoral session, the value of legislation to interest groups will decline. Special interests will be unwilling to make substantial investments in purchasing legislation that may become obsolete within a few months or years, or which may require investment of future resources at a later date.[302]

Increases in the expected length of legislative wealth transfers will, *ceteris paribus*, increase the value of the stream of rents generated by the legislation. The present value of the expected rents generated by the legislation will increase, thereby increasing the amount of surplus available to be shared between the transferee interest group and the transferor politicians.[303] An increase in legislative longevity also makes it easier to form legislative coalitions and pass legislation because more experienced legislators will have more experience working together to produce legislation and will develop confidence in the ability of each other to deliver on legislative promises.[304]

Empirical tests tend to support the hypothesis that the passage of the Seventeenth Amendment had the expected effect of increasing the average tenure of United States Senators, thereby permitting Senators to promise more

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[300] Smith, *supra* note 24 at 68 (citing RICHARD F. FENNO, JR., THE UNITED STATES SENATE: A BICAMERAL PERSPECTIVE 17 (1982)).

[301] William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J. LAW & ECON. 875 (1975).

[302] *See* Robert D. Tollision, *Public Choice and Legislation*, 74 VA. L. REV. 339, 343-44 (1988).

[303] *See* Zywicki, *Senators*, *supra* note 8, at 1028-30.

[304] *See* David N. Laband, *Transaction Costs and Production In a Legislative Setting*, 57 PUB. CHOICE 183 (1988). Note that "increased seniority has an asymmetrical effect of making new legislation easier to achieve without the risk of overturning prior legislation. Thus, increased tenure could conceivably increase both the quality and quantity of special-interest legislation produced." Zywicki, *Senators*, *supra* note 8, at 1030 & n.127.

permanent legislation to special interest groups.[305] Moreover, there is some reason to believe the Seventeenth Amendment actually reversed what had been a downward trend in legislative tenure.

IV. IMPLICATIONS OF THE SEVENTEENTH AMENDMENT FOR CONTEMPORARY PROPOSALS

As noted above, there has been a revived interest in scholarship discussing the causes and effects of the Seventeenth Amendment, suggesting its relevance to a number of current constitutional and political proposals. Some commentators have recognized the relevance of the Seventeenth Amendment to their proposals, but rarely have recognized the full implications of the Seventeenth Amendment experience. The Seventeenth Amendment experience also has important implications for other reform proposals which have not been generally recognized.

This Part briefly discusses several current reform proposals in light of the Seventeenth Amendment experience.[306] The discussion here is concerned *only* with the link between the Seventeenth Amendment and its particular implications for various reform proposals. Thus, it does not purport to be a thorough discussion of all of the various pros and cons of the various proposals under consideration. Rather it seeks to examine these proposals in light of the public choice model of the Seventeenth Amendment and to determine what implications it may have for these proposals.[307]

"Bad ideas" are those ideas which exacerbate the problems caused by the Seventeenth Amendment for the American constitutional and political system because they would have the tendency of further undermining federalism, bicameralism or otherwise making it easier for special interests to pervert the legislative process. "Good ideas," on the other hand, are those which tend to reinforce the constitutional values of federalism and bicameralism, or tend to reduce the ability of special interests to use the legislative process for their own ends.

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[305] I say that empirical tests "tend to support" this result, because it is difficult to determine how average tenure for the pre-Amendment period should be calculated due to the presence of vacant seats as discussed above. For further discussion, *see* Zywicki, *Senators*, *supra* note 8, at 1051-52 (presenting empirical tests of Senatorial longevity).

[306] Lynn A. Baker and Samuel H. Dinkin have proposed several interesting and dramatic reforms to the Senate which would remove the traditional equality of representation for all states in the Senate and enact several accompanying changes. *See* Baker & Dinkin, *supra* note 118, at 55-68. Consideration of Baker and Dinkin's proposed reforms go beyond the modest scope of the current article. Moreover, there is no indication that they believe that the history of the Seventeenth Amendment has any direct bearing on their proposal.

[307] I will leave it to the reader to weigh the significance of these observations in light of other more exhaustive arguments elsewhere advanced in support and against the discussed proposals.

A. Bad Ideas

There are at least two ideas currently in circulation which can be adjudged to be "bad ideas," when reviewed in light of the Seventeenth Amendment and its impact on the constitutional system.[308] Both proposals are problematic from a Seventeenth Amendment perspective, as they tend to exacerbate the problems caused by the Seventeenth Amendment.

The first is Robert Bork's proposed constitutional amendment which would make "any federal or state court decision subject to being overruled by a majority vote of each House of Congress."[309] A second problematic proposal is Professor Terry Smith's proposal for Senate districting. Both of these proposals would worsen the problems already caused by the Seventeenth Amendment: Bork's by further weakening federalism and the separation of powers, and Smith's by further weakening bicameralism.

1. Congressional Review of Supreme Court

In his recent book, Robert Bork has argued that the only way for the federal courts, including the Supreme Court to "be brought back to constitutional legitimacy" would be to permit Congress to overrule objectionable judicial decisions by a majority vote of each house. Bork's proposal is clearly aimed at cases of judicial overreaching, such as in *Roe v. Wade* and other cases where Supreme Court justices have been "unable to subordinate their personal sympathies and passions to the legitimate range of meanings that a dispassionate mind can find in the Constitution."[310]

To the extent Bork's proposal has the effect of reigning in an activist and overreaching Supreme Court it would clearly have a salutary effect of restoring balance to the constitutional system and restoring the right of self-governance to the people.[311] It is doubtful, however, that Congress would actually exercise its power in the way which Bork envisions, such as overturning decisions such as *Roe v. Wade*.[312]

Rather than using Bork's proposed power to overturn decisions that are unpopular with the *public*, it is likely that Congress would use the power to overturn decisions which are unpopular with *Congress*. Thus, it is not likely to

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[308]This does not purport to be an exhaustive list of all such proposals.

[309]ROBERT H. BORK, SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE 117 (1997). Bork acknowledges that the idea is not wholly original, *see id.* at 118, but as he is the leading modern advocate of this innovation, I will refer to it as Bork's proposal.

[310]*Id.* at 119.

[311]*Id.* at 117.

[312]It is not obvious that Congress actually wants to interject itself into these political battles, and thus it might not actually intervene to overturn lawless judicial decisions. Indeed, as Bork himself recognizes, Congress has refused to use the one power it clearly does have (albeit a power plagued with problems, as Bork notes) - restriction of the Court's jurisdiction - to try to reign in the Court. *See id.* at 115-16.

be *Roe v. Wade*[313] and *Miranda v. Arizona*[314] which are to feel congressional disapproval. Instead, it is more likely that it is cases such as *Seminole Tribe of Florida v. Florida*,[315] *I.N.S. v. Chadha*,[316] and *United States v. Lopez*[317] which will be overturned by Congress, as such cases strike at the heart of Congress's prerogatives.

Although Congress will often be divided on whether to overturn decisions on socially-divisive issues, it is certain it will be united in overturning limitations on its constitutional and political power. Thus, the decisions which are likely to be overturned are those which enforce limitations on Congress through the separation of powers such as *Chadha*, or those which enforce federalism limitations, such as in *Lopez* and *Seminole Tribe*. The swiftness of congressional action in reenacting the statute invalidated in *Lopez* is instructive as to where Congress's interests lie. For cases such as these, Bork's proposal would *exacerbate* the decline of federalism and separation of powers caused by the Seventeenth Amendment by allowing Congress to override even the modest limitations placed on it under current Supreme Court case law.[318]

2. Senate Districts

Professor Terry Smith has argued in favor of replacing the current statewide at-large system of electing Senators with the districting of states into two Senate seats.[319] Smith argues that his proposal would be desirable in that it would increase the number of minorities elected to the Senate and would have beneficial effects for political campaigns. Smith also believes Senate districting would be consistent with federalism and bicameralism as established in 1787 and as amended by the Seventeenth Amendment.

Professor Smith demonstrates that there is no fundamental problem with districting Senate seats, nor is there any mandate that Senators be elected on a state-wide basis. In fact, districting was common in the pre-Seventeenth Amendment Era, whether by state statute or informal practice.[320] Maryland

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[313]Roe v. Wade, 410 U.S. 113 (1973).

[314]Miranda v. Arizona, 384 U.S. 436 (1966).

[315]Seminole Tribe of Fla. v. Florida, 116 S. Ct. 1114 (1996).

[316]I.N.S. v. Chandha, 462 U.S. 919 (1983) (invalidating the so-called "legislative veto").

[317]United States v. Lopez, 514 U.S. 549 (1995).

[318]Bork's proposal could be amended in an attempt to mitigate such difficulties, but it is not evident how Bork would distinguish "structural" cases which Congress could not overrule from non-structural cases which they could. It is not clear whether Bork has considered the objection which has been raised and whether he is concerned about it. His book is silent on the issue.

[319]Smith, *supra* note 24, at 55-73. Smith suggests that Senatorial districting would be limited by the requirement that Senate seats be at least as large as House seats so that small states would not have Senate districting under his proposal. *Id.* at 51 & n.268.

[320]*Id.* at 35.

state law required one Senator to be from the eastern shore and the other from the western shore.[321] In Vermont, the informal practice was to draw one Senator from east of the Green Mountains, and the other from the west. Of course, this practice of Senate "districting" was voluntarily chosen by the state legislatures of the respective states, and was never tested in the courts, so its constitutionality was never settled. Thus, it was consistent with the exercise of the state legislature's sovereign power over its elections to develop these rules and practices.[322] Because it was freely chosen by the states, however, this historical practice does not support having the federal government or federal judiciary mandate Senate districting.

Assuming that districting is permissible, there is nothing inherent in the Seventeenth Amendment which speaks to the permissibility or desirability of drawing such districts on the basis of race.[323] That statement appears to be consistent with Professor Smith's view, which is racial districting of Senate seats is permissible, although not mandated, by the Seventeenth Amendment. Thus, the Seventeenth Amendment is silent on the wisdom of racial districting *per se*.

However, the history of the Seventeenth Amendment and the bicameral purposes of the Senate does cause one to question the desirability of Senate districting, especially as it applies to Smith's scenario. By retaining at-large election of Senate seats, some of the value of bicameralism is preserved by maximizing the size disparity between Senate and House seats. Maximizing the size of Senate seats relative to House seats furthers the goals of bicameralism by maximizing the heterogeneity of the constituency represented by Senators. A larger, more heterogeneous Senate constituency relative to House constituencies makes it more difficult to assemble logrolling coalitions across the two houses which can be used to pass special interest legislation.[324] Thus, for a given polity size and number of representatives, an increase in the size of one house relative to the size of the other increases the probability of conflict between the houses, thereby making it more likely that legislation will reflect the views of a large segment of society, rather than narrow special interests.[325] As the sizes of the two houses become more disparate and the constituencies legislators represent become more diverse, obtaining majorities

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321 *See* HAYNES, ELECTION OF SENATORS, *supra* note 22, at 31.

322 *See* Zywicki, *Ballot Access Regulations*, *supra* note 13, at 105-07.

323 There may be other problems with drawing districts on racial grounds, such as consistency with the requirements of the Equal Protection Clause. Professor Smith discusses several of these issues in Smith, *supra* note 24, at 59-61.

324 BUCHANAN & TULLOCK, *supra* note 65, at 232-35. *See also* STEARNS, *supra* note 213, at 413.

325 *See* Crain, *supra* note 282, at 612-13.

in both houses becomes more costly,[326] and increasing the public's protection against special interest control of the legislative process.

Senate districting, however, tends to make the constituencies represented by the House and Senate *more* similar, thereby undermining the protections created by bicameralism in the first place. Reducing the size of the constituencies represented by Senators will tend to make their districts more similar to House districts, and increase the homogeneity of Senate constituencies. Indeed, this appears to be Smith's expressed intent. As a result, by decreasing the size and heterogeneity of Senate constituencies, Senate districting would reduce the transaction costs associated with forming logrolling coalitions across houses and thereby increase the amount of special interest legislation generated.

The general tendency of districting to increase the similarity between the two houses of a legislature is implicit in Smith's proposal. Thus he provides as an example for his plan a hypothetical districting scheme in New York which would include New York city in one district and most of upstate New York in another.[327] The district which included New York city would be a district with substantially more minorities than the statewide population.[328] Smith cites several other cities where such patterns might be replicated, including Los Angeles, Chicago, Detroit, and Philadelphia.[329]

Assuming House districts were drawn according to their traditional patterns, the "New York City" Senate district merely would be a composite of several House districts which are also drawn from areas of New York city. Thus, there would be a virtual identity of constituencies between the House districts and the Senate districts. Moreover, as Smith notes, both the New York city district and the non-city district would be far more racially homogeneous than a statewide district. Thus, Smith's plan is flatly inconsistent with the principles of bicameralism.

Smith argues his plan is actually consistent with bicameralism, as modified by the Seventeenth Amendment. According to Smith, the adoption of direct election did not merely modify the nature of bicameralism. Rather, the adoption of direct election eliminated the key underpinning of bicameralism, the "difference in constituency" between the two houses.[330] By eliminating this element of bicameralism in *kind*, it also removed this element of bicameralism in *degree*. Thus, Smith suggests, there is no longer any need to try to maximize

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[326] William Shughart II & Robert Tollison, *On the Growth of Government and the Political Economy of Legislation*, 9 RES. L. & ECON. 111, 121 (1986).

[327] Smith, *supra* note 24, at 61.

[328] *Id.* Smith notes that minorities comprise only 30.7% of New York state's population as compared to 56.8% of New York cities population. In order to equalize the size of the two districts, Smith notes that counties surrounding New York city could be added to the district, creating a district which is 43.5% minority. *Id.* at 61.

[329] *Id.* at 62.

[330] *Id.* at 71.

the diversity of the constituencies represented by House and Senate seats because the "difference in constituency" goal is no longer present.

But Smith's argument goes too far. The *goal* of different constituencies remained unaffected by the Seventeenth Amendment. Adopting direct election decreased the role played by bicameralism in thwarting special interest legislation. But moving to Senate districting of the type envisioned by Smith would undermine this goal even further. Senate districting is appropriate only if it is believed that increasing the influence of special interests is a desirable goal which is to be further encouraged. Absent such a conclusion, Senate districting such as Smith propoess is not consistent with bicameralism.

Professor Smith also argues that Senate districting would have the additional benefit of reducing the importance of money in politics, a development which he deems to be beneficial and consistent with the intent of the Seventeenth Amendment.[331] Assuming *arguendo* that reducing the importance of money in politics is a desirable goal, there still remains the question of whether Senate districting would in fact accomplish this goal. Professor Smith asserts "[h]ouse races on average cost less than Senate races because House candidates must campaign among a smaller constituency in a more limited geographic area than Senate candidates."[332]

But Smith's premise is questionable, in that it focuses only on one side of political campaigns, e.g., the marginal costs of running a campaign. This equation, however, ignores the other side of the story. Expenditures on Senate races are greater primarily because Senate seats are so much more valuable than are House seats - there are only 100 Senate seats (only thirty-three or thirty-four which are up for election at any one time) and 435 House seats (all of which are up for election every two years). Thus, Senate seats are not only 4.35 times more valuable than House seats, but Senators retain their seats 3 times longer than House members. Buying a Senate seat, therefore, justifies larger expenditures because the payoff is so much larger. As long as Senate seats remain significantly more valuable than House seats, it is simply irrelevant whether Senators are elected statewide or by district. As Richard Epstein and Lillian BeVier have observed, the underlying problem is not geography or population but the intrusiveness and unlimited power of the federal government to redistribute wealth to favored interest-groups has raised political stakes so much that it is inevitable that massive amounts of money

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[331] Professor Smith also argues that the original intent of the Seventeenth Amendment was to decrease the importance of money in politics, and that it is a "perverse result" that direct election has instead increased the importance of money. *Id.* at 66. As discussed above, it is more likely that the supporters of the Seventeenth Amendment actually sought to increase the role of money and organization in politics, thus it is not at all a "perverse result" that such a result has come about.

[332] Smith, *supra* note 24, at 66.

will be spent in order to capture government's powers.[333] Smith's proposed reform simply does not affect this calculus.

Geographic size or the size of the constituency is largely irrelevant. For instance, in states with only one Representative, that Representative runs on a statewide basis - just as do Senators. Even though Senators and Representatives in these states represent identical georgraphy and populations, Senate candidates spend almost four times more than House candidates.[334] Indeed, because there are economies of scale in reaching voters through a statewide election (rather than districting), the *total* amount spent on *all* races under a districting scheme will probably be *greater* than undre at-large elections.[335] Thus, districting Senate seats would almost certainly increase the importance of money in Senate elections.

Further evidence can be cited which suggests election spending is driven more by the value of the office than by the size of the area over which campaigns are conducted. For instance, in many states, the offices of Secretary of State and Attorney General are elective offices, voted on by a state-wide constituency. Yet trivial amounts are raised and spent on campaigns for these seats relative to the much larger amounts spent on relatively small-district House races. Because Smith ignores the "supply" side of campaign fundraising and spending, it is likely Senate districting would do little to decrease the amount spent on Senate campaigns.

A related proposal is Professor Amar's recommendation for a constitutional amendment limiting campaign expenditures.[336] This proposal, however, ignores the fact that an effect of the Seventeenth Amendment was to significantly increase the average tenure of Senators. Because the most likely effect of limiting campaign expenditures is to increase the power of incumbency and decrease legislative turnover,[337] Professor Amar's proposal

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[333] *See* Lillian R. BeVier, *Campaign Finance Reform: Specious Argument, Intractable Dilemmas*, 94 COLUM. L. REV. 1258, 1265-66 (1994); Richard A. Epstein, *Property, Speech, and the Politics of Distrust*, *in* THE BILL OF RIGHTS IN THE MODERN STATE 41, 56 (Geoffrey R. Stone et. al eds., 1992) (arguing that the best defense against special interest influence in politics "is not to restrict the liberty to speak or to lobby, . . . [but] rather to reduce the power of government to transfer wealth and dispense favors").

[334] In the single Congressional district states from 1978 to 1996, the average House incumbent spent $551,715 (in constant 1992 dollars) and the average Senate incumbent spent $2,024,606. *See* letter from Steve Ansolabehere, Professor of Political Science, Massachusetts Institute of Technology, to Todd Zywicki, Assistant Professor of Law, Mississippi College School of Law (Aug. 5, 1997) (on file with author).

[335] Total money spent to elect the Senate from 1980 to 1996 (3 full Senate cycles) was $1.95 billion, whereas the total House cost for the same period was $2.54 billion. *See id.*

[336] Amar, *Seventeenth*, *supra* note 8, at 1404; Amar, *Senate*, *supra* note 8, at 1130.

[337] *See* BeVier, *supra* note 333, at 1259, 1278; Smith, *supra* note 24, at 1074; Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEORGETOWN L.J. 491, 537 (1997) (noting "[t]he one thing that virtually all commentators agree upon, though, is that legislators drafting campaign finance legislation will seek to enhance the advantages of incumbency."); Bradley A. Smith, *Faulty Assumptions and Undemocratic*

would simply exacerbate the increased-tenure effect of the Seventeenth Amendment.

B. Good Ideas

There are several other ideas which have been proposed which recognize the effect that the Seventeenth Amendment has had on the constitutional and political system, and would tend to offset some of the consequences which the Seventeenth Amendment has had on federalism, bicameralism and the prevalence of special-interest legislation.

1. Repeal Seventeenth Amendment

The most obvious and direct reform would be to simply repeal the Seventeenth Amendment and return to the original system of election of Senators by state legislatures. Jay Bybee has urged just such a course of action.[338] Professor Bybee's idea is a sound one, as it would restore the system of federalism and bicameralism which preserved individual freedom and limited government for a century-and-a-half. There remain, however, practical difficulties with repealing the Seventeenth Amendment.

The tide of democracy is generally difficult to contain, much less reverse. Democracy is popular.[339] Abstract notions of federalism, bicameralism and deliberation provide poor counterweights to the irresistibility of democratic tides.[340] Bybee concludes, "[t]he Seventeenth Amendment answered the people's craving for the reins of democracy, but at the level at which senators operate, democracy is a poor master."[341] At the same time, it is difficult to believe having secured the power to elect Senators directly, the people would voluntarily surrender that power. As Hoebeke confesses:

> [i]t is nevertheless fair to say that the political thinking that brought about the Seventeenth Amendment has remained triumphant down to the present day . . . . Public discourse gives substantially little

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Consequences of Campaign Finance Reform, 105 YALE L.J. 1049, 1074 & n.156 (1996); David A. Struss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369, 1386 (1994); Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390, 1400 (1994); Ralph K. Winter, *Political Financing and the Constitution*, 486 ANNALS AM. ACAD. POL. SOC. SCI. 34, 35, 48 (1986).

[338] Bybee, *supra* note 8, at 568-69. Bybee would combine a repeal of the Seventeenth Amendment with term limits for Senators and giving the state legislatures power to recall their senators. *Id.* at 569. Term limits proposals are discussed below.

[339] Even Governor Mike Leavitt, who recognizes the critical role the Senate played in protecting the states prior to the Seventeenth Amendment, concedes that "citizens should not be asked to give up the right to elect their Senators." Leavitt, *supra* note 264, at 3.

[340] *See* Deborah J. Merritt, *Three Faces of Federalism: Finding a Formula for the Future*, 47 VAND. L. REV. 1563, 1568 (1994).

[341] Bybee, *supra* note 8, at 568.

> consideration to the history of well-balanced polities, in which democracy has comprised but a single element, not the sole one.[342]

Absent a change of heart in the American populace and a better understanding of the beneficial role played by limitations on direct democracy, it is difficult to imagine a movement to repeal the Seventeenth Amendment.[343]

Moreover, repeal of the Seventeenth Amendment would fall especially hard on members of the House, thereby indicating their opposition to the proposal. As noted, House members overwhelmingly supported Senatorial direct election because doing so would have the benefit of increasing the price that House members could charge for their services.[344] Because of the House's support for direct election, the Seventeenth Amendment will be more difficult to repeal than it initially was to pass.[345] This asymmetry in costs indicates even if the Senate favored repeal of the Seventeenth Amendment, stern opposition would be faced in the House.

2. Judicial Review to Protect Constitutional Structure

The passage of the Seventeenth Amendment destroyed the Senate as a body which could act effectively to preserve the constitutional values of federalism and bicameralism. To fill this gap, it has been urged that the Supreme Court take a more active role in enforcing the structural provisions of the Constitution, especially federalism.[346] As Roger Brooks has written, "[t]he

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[342] HOEBEKE, *supra* note 6, at 194.

[343] Even if the public were convinced that repealing the Seventeenth Amendment was a good idea, it is questionable whether those wishes would ever be enacted into law. Repeal of the Seventeenth Amendment faces the same problems of congressional agenda control which have frustrated efforts to enact a balanced budget amendment and a term limits amendment, which are discussed *infra* at notes 339 - 341 and accompanying text.

[344] *See supra* notes 214 - 276 and accompanying text.

[345] Zywicki, *Senators*, *supra* note 8, at 1046-47.

[346] *See* Calabresi, *supra* note 48 at 799-800; William T. Mayton, *"The Fate of Lesser Voices:" Calhoun v. Wechsler on Federalism*, 32 WAKE FOREST L. REV. 1083 (1997). Brooks, *supra* note 8, at 209. The most obvious textual source supporting an increased judicial role for enforcing federalism is through the Tenth Amendment, although the values of federalism run throughout the document. *But see* Bybee, *supra* note 8, at 568 ("It is unclear that the Supreme Court should be responsible for guaranteeing the role of the states and protecting the people from themselves."). Lino Graglia has argued that the Supreme Court should abandon judicial review of federalism issues completely, as its highly deferential judicial review simply provides a veneer of constitutional legitimacy to unconstitutional power seizures by the federal government. *See generally* Graglia, *supra* note 270 at 268. Both this article and Brooks's article contemplate a more active role for the courts in enforcing federalism limits than they have previously taken, thereby distinguishing the proposal from Graglia's concerns. *See also* Calabresi, *supra* note 48 at 810 (arguing that although a "close call," it is better for the Supreme Court to do something rather than nothing at all).

Supreme Court cannot properly excuse itself from judging whether a challenged federal law . . . violate[s] . . . state sovereignty."[347]

It would be incorrect to say that the Supreme Court has traditionally taken a hands-off approach to issues of federalism, because it regularly intervenes to strike down laws thought to encroach on federal prerogatives.[348] Thus, the Supreme Court has been worse than neutral with respect to federalism issues. Instead, it has put its thumb on the scale in favor of increasing its own power and the power of the federal government at the expense of the states. Or, as Brooks observes, "[t]he Supreme Court is hardly serving as the 'impartial' referee envisioned by Madison if it calls fouls against only one side."[349]

It is difficult to predict what the long-lasting results of the Supreme Court's more aggressive recent enforcement of federalism principles will have on the sphere of federal-state relations, but it suggests a move in a direction which will restore some of the institutional balance destroyed by the Seventeenth Amendment. As Bybee notes, there are practical difficulties with the Supreme Court policing federalism and challenging federal authority.[350] Moreover, as a federal body, the Supreme Court has an inherent conflict-of-interest in enforcing federalism. Despite these difficulties, however, the Supreme Court should attempt to fill the gap created by the Seventeenth Amendment as well as it can. The Court faces similar difficulties in enforcing the constitutional separation of powers, but that has not deterred it from creating workable tests and protecting constitutional principle. It should not be excused for failing to do its constitutional duty in the arena of federalism.

3. State Role in Federal Lawmaking and Amendment Process

Pursuant to Article V, the states can initiate amendments to the federal constitution only by calling for a constitutional convention. As discussed above, a constitutional convention does not provide a workable or effective means for giving the states a role in the constitutional amendment process. To redress the imbalance created between the state and federal governments by the Seventeenth Amendment, it also seems wise to give the states a direct role in federal legislation and the constitutional amendment process. In essence, this would be a proposal to give the states a direct power to participate in federal law and constitution making, a power they exercised indirectly prior to the Seventeenth Amendment. The proposals take a number of different forms, but they share a common theme of providing the states with an effective means to protect themselves against federal encroachment and to restore the federalism balance.

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[347] Brooks, *supra* note 8, at 209.

[348] *Id.* at 210 (citing several dormant commerce clause cases).

[349] *Id.*

[350] *See generally* Bybee, *supra* note 8.

Aaron O'Brien's proposed reform is representative of this thinking.[351] O'Brien proposes a constitutional amendment which would allow two thirds of the states to repeal federal laws or executive regulations.[352] Governor Mike Leavitt has argued in favor of a less-dramatic mechanism which would be to give the states, upon petition of two-thirds of the legislatures, the power to force a reconsideration of a federal law, except those relating to national defense or foreign affairs.[353] Noting that "the Supreme Court, Congress, and . . . procedural protective devices have utterly failed to protect the values of federalism," O'Brien argues that there must be some way for the states to protect the powers reserved to them under the constitution.[354]

Other such proposals could be imagined. For instance, Article V could be amended to permit the states to propose constitutional amendments without the necessity for a constitutional convention. Further research is warranted to identify appropriate ways for the states to participate in the constitutional amendment process.

4. Substantive Constitutional Amendments

Several substantive amendments to the federal Constitution should be recognized as effective mechanisms for mitigating some of the mischief caused by the Seventeenth Amendment. Three such substantive measures are a constitutional amendment imposing term limits on Senators, a balanced budget amendment, and an "unfunded mandates" amendment.

As noted, one effect of the Seventeenth Amendment was to increase the average tenure of Senators, thereby increasing the longevity of the special interest contracts they created and reducing the transaction costs of forging such deals. One mechanism to offset this increase in Senatorial tenure would be to pass a constitutional amendment imposing term limits on Senators. Several commentators have recognized the propriety of such a measure as applied to Senators.[355] None of these commentators have prescribed term limits directly as a remedy to the problem caused by the increase in average tenure occasioned by the Seventeenth Amendment. When seen in this light,

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[351] *See generally* Aaron O'Brien, *States' Repeal: A Proposed Constitutional Amendment to Reinvigorate Federalism*, 44 CLEV. ST. L. REV. 547 (1997).

[352] *Id.* Bruce Fein has suggested a similar reform, requiring 75% of the states to object. FEIN, *supra* note 8, at 18.

[353] Leavitt, *supra* note 264, at 4.

[354] *See generally* O'Brien, *supra* note 351.

[355] *See* Amar, *Seventeenth*, *supra* note 8, at 1404 (proposing a limit of two eight-year terms); Amar, *Senate*, *supra* note 8, at 1130 (proposing limit of one six-year term); Bybee, *supra* note 8, at 569. Boudreaux and Pritchard provide an excellent discussion of how term limits would lead to reduced special-interest legislation and respond to charges that term limits would actually increase the amount of special-interest legislation enacted by Congress. *See* Boudreaux & Pritchard, *supra* note 159, at 157-59.

term limits should be recognized as a forceful mechanism for rectifying the problems caused by the Seventeenth Amendment.[356]

In contrast to the effects of the Seventeenth Amendment, term limits will actually *increase* churning within the legislature, upsetting legislative coalitions and making it difficult to create legislative "contracts" among legislators.[357] Term limits would also have the obvious effect of reducing the durability of legislative contracts between legislators and special interests.

The link between a constitutional amendment requiring an annually balanced federal budget and the Seventeenth Amendment is not as obvious as for term limits or an amendment prohibiting unfunded mandates. Running a budget deficit enables politicians to transfer wealth from unrepresented future generations to powerful contemporary interest groups.[358] A constitutional amendment requiring a balanced budget, therefore, corrects this imbalance in the political process which forces unrepresented future generations to bear the burden of current expenditures through the higher taxes which they will have to pay to retire the debt.

Requiring a balanced budget, therefore, imposes a budget constraint on the ability of Congress to redistribute wealth from unrepresented future generations to powerful contemporary interest groups.[359] By making possible

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[356]Justice Thomas's dissent in U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995) draws an interesting lesson from the Seventeenth Amendment for the issue of term limits. As Thomas notes, prior to the passage of the Seventeenth Amendment, there was no limit on the state's discretion to set prospective requirements on who was eligible to be elected to the Senate. Obviously, therefore, the states had the power to add to the qualifications for Senators otherwise established by the Constitution. The adoption of the Seventeenth Amendment did not do anything to change this fact. *See id.* at 1892-93 (Thomas, J., dissenting). Indeed, as Professor Smith has noted, Maryland had a state statute in place which required one Senator to be elected from the eastern part of the state and the other to be elected from the western part of the state. Smith, *supra* note 24, at 35. As this law added an additional qualification for eligibility to be elected to the Senate, it suggests that the voters should be entitled to do the same. *See Thornton*, 514 U.S. at 884 (Thomas, J., dissenting):

> If there is no reason to believe that the Framers' Constitution barred state legislatures from adopting prospective rules to narrow their choices for Senator, then there is also no reason to believe that it barred the people of the States from adopting prospective rules to narrow their choices for Representatives.

Apparently the constitutionality of the Maryland law was never challenged in court thus the above discussion assumes that it was actually constitutional during its time.

[357]*See* Linda Cohen & Matthew Spitzer, *Term Limits*, 80 GEO. L.J. 477 (1992), *reprinted in* STEARNS, *supra* note 213 at 925, 950; *see also* STEARNS, *supra* note 213, at 962-63.

[358]Boudreaux & Pritchard, *supra* note 159, at 159; Calabresi, *supra* note 48 at 796.

[359]Some critics of a balanced budget amendment have argued that it will provide an inadequate budget constraint on Congress because Congress can find ways to circumvent its requirements. There are several responses to this argument. First, as discussed below, a balanced budget amendment will be most effective if combined with an additional constitutional amendment forbidding the imposition of so-called unfunded mandates, thereby limiting the ability of Congress to push special interest transfers "off budget." Second, even if the balanced budget amendment does not operate

an increased amount of special interest legislation to be enacted by Congress, the Seventeenth Amendment made it more critical to impose some budget constraint on the ability of Congress to engage in these activities.

A constitutional amendment forbidding the imposition of so-called "unfunded mandates" on the states by the federal government is also a productive measure which would restore some of the institutional protections lost by the states with the ratification of the Seventeenth Amendment.[360] The ability of the federal government to impose unfunded mandates creates massive agency problems with respect to federal actors, as they are able to take credit for addressing whatever problem the mandate is supposed to address while imposing the costs on state and local actors.[361] Of course, prior to the Seventeenth Amendment, it would have been inconceivable for the Senate to permit this game to be played during the era when it gave the states a voice in Congress. Forbidding unfunded mandates would fill some of the constitutional gap created by the passage of the Seventeenth Amendment.

5. The Problem of Article V

Admittedly, it is unlikely that any of these "good ideas" would be likely to actually be enacted through the Article V amendment process. A constitutional convention has proven itself not to be a viable amendment procedure, which means that Congress would have to propose any of these reforms.[362] Because each of them would limit congressional power and reduce Congress's ability to provide rent-seeking legislation, there is little room for optimism that they will ever be enacted.[363] Thus, Michael Klarman notes that despite strong public

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perfectly to constrain federal deficit spending, it will force Congress to use more round-about mechanisms for redistributing wealth to special interests. These techniques are likely to be less efficient than current practices (or they would already be in use). As a result, forcing Congress to use these less-effective techniques should cause an inward shift of the supply curve for special-interest legislation, thereby reducing the equilibrium amount of special-interest legislation overall.

360 *See* Orrin G. Hatch, *Constitutional Amendment Needed to Address Unfunded Federal Mandates*, 10 WASHINGTON LEGAL FOUNDATION LEGAL BACKGROUNDER No. 10 (Mar. 17, 1995); Fein, *supra* note 8, at 18. In 1995, Congress enacted the Unfunded Mandates Reform Act, but because of its limited scope and numerous exceptions and limitations, one commentator has observed that "like the Lopez holding, this act will probably deliver more form than substance," O'Brien, *supra* note 351 at 569. *See generally* Elizabeth Garrett, *Enhancing the Political Safeguards of Federalism? The Unfunded Mandates Reform Act of 1995*, 45 KAN. L. REV. 1113 (1997).

361 Hatch, *supra* note 360, at 1. Senator Hatch also notes that the adoption of a balanced budget amendment would make an unfunded mandates amendment more necessary, because the federal government will be tempted to "resort to off-budget unfunded mandates" to evade the limitations of the balanced budget amendment. *Id.* at 3.

362 *But see generally* Rotunda & Safranek, *supra* note 104, at 243-44 (arguing that the problems with constitutional conventions are not unsolvable and that it would be appropriate to call a convention in order to enact term limits).

363 *See* Boudreaux & Pritchard, *supra* note 159, at 157.

support for legislative term limits, legislatures have continually refused to carry out the public's will.[364] In fact, Professor Klarman observes that in virtually every case where legislative term limits have been imposed, they have been enacted through a process of direct popular referendum and not through voluntary legislative action.[365] It cannot be merely a coincidence or constitutional logic that Presidents are subject to term limits - but not Congressmen and Senators. Nor can it be mere coincidence that "there has never been a constitutional amendment which has curbed any of the powers" of the central government.[366] More likely, these phenomena result from the fact that Article V gives the President no role in the constitutional amendment process, and that the states lack any realistic mechanism for proposing constitutional amendments.

As a result of this inability to effectively amend the constitution to enact these proposals, Boudreaux and Pritchard conclude that these amendments can be predicted to be "future failures" as amendments.[367] They write:

> The term-limits amendment and the balanced-budget amendment face an insurmountable obstacle in Congress' control over the agenda of the constitutional amendment process. Our analysis of the successful amendments shows that Congress has used its agenda control over the constitutional amendment process to expand its own influence and power, with a corresponding increase in the opportunities for rent-seeking at the federal level . . . . Our positive theory of constitutional amendment and history of Article V, demonstrate however, that Congress is unlikely to impose restrictions on itself that would impair its members' ability to extract money and votes.[368]

As a result of Congressional agenda control and the capture of the Article V amendment process by special interests, therefore, it may be necessary to look to other constitutional mechanisms to restore some of the institutional balance lost with the passage of the Seventeenth Amendment.[369]

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[364]Klarman, *supra* note 337, at 510. Professor Klarman identifies several public opinion polls which record 76%-80% popular support for term limits. In addition, in those states which have adopted term limits through the referendum process, the average approval rate has been around 62.5%. *Id.* at 510 & n.86.

[365]*Id.*

[366]George Anastalpo, *Amendments to the Constitution of the United States: A Commentary*, 23 LOYOLA L.J. 631, 806 (1992).

[367]Boudreaux & Pritchard, *supra* note 159, at 157.

[368]*Id.* at 160; *see also* Klarman, *supra* note 337, at 530-31 (discussing legislators' conflicts of interest in imposing term limits on themselves).

[369]The capture of the constitutional amendment process by special interests and Congress has led some commentators to recognize a role for the Supreme Court to enact "informal amendments" to the Constitution through a decentralized process which furthers the goals of precommitment, supermajoritarianism, and the reduction of

V. CONCLUSION

The Progressive Era amendments to the federal constitution amount to the pivotal constitutional moment of the twentieth century. Roosevelt's New Deal would not have been possible without the institutional changes caused by the Progressive Era amendments. The Sixteenth Amendment allowed for the federal government to raise revenues on an unprecedented scale. At the same time, the Seventeenth Amendment destroyed the systems of federalism and bicameralism which had previously checked expansionist federal activity. Indeed, as Professor Bybee has noted, Roosevelt's New Deal may have never gotten off the ground due to the fact that the Senate would have remained in Republican hands at the outset of his presidency.[370] Thus, the real "constitutional moment" of the twentieth century was in 1913, not 1933.[371] "The 'normalcy' of the 1920s incorporated considerably higher levels of federal spending and taxes than the Progressive Era before World War I."[372] The Progressive Era amendments stripped away the constitutional limits on the federal government - the New Deal simply moved in to fill this institutional vacuum.[373]

As one commentator has observed, "[t]he modern era of federal spending began shortly after ratification of the Sixteenth and Seventeenth Amendments in 1913."[374] The ability of the federal government to tax incomes enabled the federal government to collect "vastly more [in taxes] than was needed for executing the enumerated powers . . . . At the same time, the Seventeenth Amendment's alteration of the Senate's political constituency, providing for

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agency costs which underlay the original Constitution. *See generally* A.C. Pritchard & Todd J. Zywicki, Finding the Constitution, *supra* note 245.

[370]Bybee, *supra* note 8, at 553 & n.327. Of course, much of the New Deal was really just a continuation of Herbert Hoover's interventionist policies, which had already succeeded in delaying a timely economic recovery. As a result, there was little different between the Hoover and Roosevelt administrations on their approach to the Great Depression. *See* PAUL JOHNSON, MODERN TIMES: THE WORLD FROM THE TWENTIES TO THE EIGHTIES 251 (1983) ("Paradoxically, on what is now seen as the central issue of how to extricate America from Depression, there was virtually no real difference - as yet - between the parties. Both Hoover and Roosevelt were interventionists. Both were planners of a sort. Both were inflationists."). It is now generally accepted that Hoover and Roosevelt's interventionist policies extended and deepened the Great Depression, creating economic chaos and preventing adjustments which were necessary for economic recovery. *Id.* at 243-54. *See generally* MURRAY N. ROTHBARD, AMERICA'S GREAT DEPRESSION (1972).

[371]*See* Holcombe, *supra* note 41, at 197.

[372]*Id.* at 179.

[373]The concept of the New Deal as a "constitutional moment" has been advanced by Bruce Ackerman. *See* 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991).

[374]Engdahl, *supra* note 260, at 33. A public choice analysis of the Sixteenth Amendment is presented in Gary M. Anderson & Robert D. Tollison, *Political Influence and the Ratification of the Income Tax Amendment*, 13 INT'L REV. L & ECON. 259 (1993).

election of senators directly by voters rather than by state legislatures, decreased the institutional fitness and disposition of that body to serve as a political safeguard against increasing federal influence."[375] Thus, it is not surprising the first instance of large and unreversed growth in the federal government occurred during World War I, two decades prior to the onset of the Great Depression.

It has only been recently that the pivotal role in American constitutional history by the Progressive Era amendments is beginning to be understood. Nonetheless, recent commentators continue to accept at face value the rationales advanced by supporters at the time the amendments were passed. Scholars continue to resist the applicability of public choice theory to the process of constitutional change.[376]

Unquestionably many were motivated to support the Seventeenth Amendment because of a genuine belief that increased democracy would improve the operations of the federal government and reduce corruption and deadlocks in Senate elections. Nonetheless, it is impossible to believe that these selfless motives provided the driving force for the Seventeenth Amendment. This article has provided a more realistic explanation for the Seventeenth Amendment, one which comports with our growing understanding of the role played by special interest groups in the process of constitutional change. Although some might find this reality "distasteful,"[377] that does not make it any less accurate.

Despite the problems wrought by the Seventeenth Amendment, a better understanding of its history and consequences sheds light upon many constitutional and political reforms which are presently before the body politic.[378] The observations presented here do not claim to be exhaustive, nor do they claim to be the final word on these proposals. Many desirable reforms have been identified, but there is reason to doubt that many of these would not survive the Article V process. Other problematic proposals have also been identified, however, and it will be a sufficient contribution of this study to avert the enactment of those reforms.

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[375]Engdahl, *supra* note 260, at 33-34.

[376]*See* Jeffrey Rosen, *Overcoming Posner*, 105 YALE L.J. 581, 603-07 (1995) (book review).

[377]*Id.* at 606. I will leave it to the reader to determine whether the supposed "distastefulness" of a public choice model of constitutional change provides a coherent argument against its veracity.

[378]Indeed, Australia is currently looking to the American system in designing its own constitution and scholars and are advocating adoption of a model similar to that of the original senate. *See* NICHOLAS ARONEY, FEDERAL REPRESENTATION AND THE FRAMERS OF THE AUSTRALIAN CONSTITUTION (forthcoming 1998) (copy on file with author).