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COMMENT

FEDERALISM, THE SEVENTEENTH AMENDMENT, AND
ITS EFFECT ON THE PUBLIC SCHOOL SYSTEM

Thomas Ryan Lane[†]

I. INTRODUCTION

On April 8, 1913, the structure of the United States government was radically altered from the structure intentionally instituted by the framers of the Constitution.¹ Yet the Seventeenth Amendment, of enormous structural import to our government, has rested tranquilly amongst the American people, avoiding controversy since its ratification.² In fact, when asked to recite the Seventeenth Amendment, few are capable of even approximating a correct answer.³ Part of the reason why the Seventeenth Amendment has not invoked serious debate amongst the American people is due to a misconception; namely, that direct democracy is a preferable form of government, one that allows for the greatest freedom to its people.⁴

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1. See David E. Engdahl, *The Spending Power*, 44 DUKE L.J. 1, 34 (“[T]he Seventeenth Amendment’s alteration of the Senate’s political constituency, providing for 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.”); see also Todd J. Zywicki, *Beyond the Shell and Husk of History: The History of the Seventeenth Amendment and Its Implications for Current Reform Proposals*, 45 CLEV. ST. L. REV. 165, 233 [hereinafter, Zywicki, *History of the Seventeenth Amendment*] (“The Progressive Era amendments stripped away the constitutional limits on the federal government—the New Deal simply moved in to fill this institutional vacuum.”).

2. See C.H. HOEBEKE, *THE ROAD TO MASS DEMOCRACY: ORIGINAL INTENT AND THE SEVENTEENTH AMENDMENT 18* (1995) (“Not surprisingly, 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.”).

3. The Seventeenth Amendment provides, in relevant part: “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.” U.S. CONST. amend. XVII (emphasis added).

4. As Madison explains in speaking of the factions of majoritarian rule, an evil which democracy often provides:

“When a majority is included in faction, the form of popular government [a democracy] . . . enables it to sacrifice to its ruling passion or interest, both the public good and the rights of other citizens. To secure the public good, and private rights, against the danger of such a faction, and at the same time to

Another plausible explanation for the quietness of the Seventeenth Amendment is that the argument against the direct election of Senators may, at first blush, appear complicated to a person unfamiliar with the organic structure of our government prior to the Seventeenth Amendment.⁵

Regardless of the explanations for why the Seventeenth Amendment has garnered so little interest amongst the American people, the Seventeenth Amendment has had a sweeping impact on many areas of American life. For example, the removal of the election of Senators from the state legislative bodies enabled Congress to swallow up the states' control over commerce, affecting an individual farmer's ability to grow wheat for use on his own farm.⁶ Individual farmers, however, are not the only persons to feel the sting of the Seventeenth Amendment's abrogation of the structural protections from an ever encroaching national government.

Every child in America that receives a public education is affected by the consequences of the Seventeenth Amendment.⁷ Increasingly, Congress enacts legislation that has a direct impact on local public schools.⁸ The

preserve the spirit and the form of popular government, is then the great object to which our enquiries are directed.”

THE FEDERALIST NO. 10 (James Madison).

Madison then continues, in a latter paragraph, discussing what form of government is capable of achieving “the great object to which our enquiries are directed”: “A *republic*, by which I mean a government in which the scheme of representation takes place, opens a different prospect [from that of a democracy], and promises the cure for which we are seeking.” *Id.* (emphasis added).

5. In discussing the issue of the direct election of Senators with non-constitutional scholars, one first has to explain what the Seventeenth Amendment states. Next, one has to explain the process for electing Senators prior to the passage of the Seventeenth Amendment. This step generally entails numerous tangents, such as explaining the issue of sovereignty amongst the people, the states, and the national government, explaining federalism and bicameralism and their respective importance in our governmental system, and explaining the purpose of the original Senate in preserving these mechanisms. Finally, one can then begin to explain the repercussions that the Seventeenth Amendment has had on the structure of our intended government. *See* discussion *infra* Parts II & III.

6. *Wickard v. Filburn*, 317 U.S. 111, 124 (1942) (holding that Congress' cannot only regulate inter-state commerce, but commerce within a particular state if such commerce would have an effect on inter-state commerce); *see also* *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 31 (1937) (holding that acts which burden or obstruct interstate commerce or its free flow are within the reach of Congress' power).

7. *See* discussion *infra* Part IV.

8. *See, e.g.*, No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (codified at 20 U.S.C. §§ 6311, *et. seq.* (2002)); Improving America's Schools Act of 1994, 20 U.S.C. § 6301 *et seq.* (1994); Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681-1688 (1995).

result of such legislation is an increasing trend towards nationalizing education. Education is a function traditionally considered to lie in the realm of the states.⁹ The consequence of an increasing trend towards nationalization is the stripping of an important function, education, from those bodies most competent to perform such a function—a local school board acting as an arm of the state.¹⁰

This Comment argues that, by adopting the Seventeenth Amendment, we have altered the very structure of our government and eroded many of the protections originally embedded in the Constitution. It develops this argument in four steps. The Comment first discusses the nature of federalism, including its purpose and importance as a theory of government as applied to our American system.¹¹ Second, it analyzes the contours of the Seventeenth Amendment, including a discussion on the purposes of the Senate, the importance of the pre-Seventeenth Amendment method of electing Senators, and the consequences of the Seventeenth Amendment on our political system.¹² Third, it applies these principles by addressing the effect of the Seventeenth Amendment on the public school system.¹³ Finally, this Comment, after considering some possible resolutions to the conundrum that the Seventeenth Amendment has presented to the public school system and the structure of the American system of government, proposes repealing the Seventeenth Amendment.¹⁴

II. FEDERALISM: A NOVEL CONCEPT, BUT ONE OF SIGNIFICANT IMPORT

A. *Federalism Defined, Including Past and Modern Understandings of the Term*

The principle of Federalism, as instituted by the original drafters of the Constitution, was one of the main structural protections designed to prevent the central government from consuming the power of the states.¹⁵

9. See *Wright v. Council of City of Emporia*, 407 U.S. 451, 478 (1972) (Burger, J. dissenting) (stating that education is best administered by the local school districts).

10. See discussion *infra* Part IV.

11. See discussion *infra* Part II.

12. See discussion *infra* Part III.

13. See discussion *infra* Part IV.

14. See discussion *infra* Part V.

15. Todd J. Zywicki, *Senators and Special Interests: A Public Choice Analysis of the Seventeenth Amendment*, 73 OR. L. REV. 1007, 1009 [hereinafter, Zywicki, *Senators and Special Interests*] (“The ratification of the Seventeenth Amendment in 1913, providing for the direct election of U.S. senators, undermined the twin structural pillars of the Constitution: federalism and the separation of powers.”).

Federalism, simply stated, is the equal distribution of power in an organization, here a government, between a central authority and the constituent parts.¹⁶

When the term federalism¹⁷ is used in our modern society, the term generally connotes the political philosophy of reducing the central government's sphere of power and increasing or returning such power to the state governments. At the time of the Philadelphia Convention, however, the term federalism, or the "federalists," stood for the proposition of a stronger central government—as compared with the then existing government under the Confederate States of America.¹⁸ Federalism aimed at creating a stronger central government by permitting the central government to assume certain expressed powers from the states.¹⁹

Federalism, as originally projected, was a compromise between confederation and centralization whereby the sovereignty of each state was curtailed to invest authority in the newly created federal government. Some functions were placed entirely in federal hands, others were left exclusively with the states, while a third group of functions was shared by both.²⁰

16. See BLACK'S LAW DICTIONARY 644 (8th ed. 2004) (defining federalism as "[t]he legal relationship and distribution of power between the national and regional governments . . ."). *Black's Law Dictionary* also defines "cooperative federalism" as the "Distribution of power between the federal government and the states in which each recognizes the powers of the other while jointly engaging in certain governmental functions." *Id.*

17. Although the term "federalism" was never used by the founders, it was the principle of federalism that they used in compromising "between those who favored a unitary, national regime, and those who favored the continuation of the loose confederation of sovereign states that had existed ever since the Declaration of Independence." Arnold I. Burns, *The Perspective of Federalism at the United States Department of Justice in 1987*, in FEDERALISM: THE SHIFTING BALANCE 45 (Janice C. Griffith, ed. 1989).

18. Under the Articles of Confederation, each state retained its sovereignty, freedom and independence. See ART. CONFED. art. II.

Under the Articles of Confederation, the authority of the central government was "dependent on the willingness of the states to accept [the central government's] measures. . . . [The central government under the Articles of Confederation] could suggest, but it could not command." Joseph Lesser, *The Course of Federalism in America – An Historical Overview*, in FEDERALISM: THE SHIFTING BALANCE 1, 2 (Janice C. Griffith, ed. 1989).

19. See Roy F. Nichols, *Federalism versus Democracy: The Significance of the Civil War in the History of the United States Federalism*, in FEDERALISM AS A DEMOCRATIC PROCESS 49 (1942).

20. *Id.* at 49-50.

The problem, and the reason why the term federalism has taken on a reverse connotation in our modern society, is that the Seventeenth Amendment fractured the structure of the government that was set in place after the 1787 convention.²¹

The Seventeenth Amendment, in large part, has led to an ever-increasing central government.²² As a result of its increased size, the central government is now an entity engaging in activities it was never intended to entertain. The balance between the state governments and the central government, and their respective functions, has been inharmoniously altered. As a result of the unbalanced and excessively large central government, the principle of federalism cries out for a restoration of balance in favor of the state governments.²³

This unbalance in power, scales tipping in favor of the central government, is what causes our modern society to associate the term federalism with the idea of reducing the central government's sphere of power and returning such power to the state governments. Thus, federalism, as a constitutional principle, seeks a balance between the centralized power and its constituent parts—the states.²⁴ Given the size of our current central government as compared to the size of the central government in 1787, it should serve as little surprise that we associate a different meaning with the term federalism than did the founders.²⁵

21. See discussion *infra* Part III.

22. Zywicki, *History of the Seventeenth Amendment*, *supra* note 1, at 233 (“[T]he Seventeenth Amendment destroyed the systems of federalism and bicameralism which had previously checked expansionist federal activity.”).

23. One of the foundational presuppositions of the American system of government is that the sovereignty rests with the *people*, not in the organs of government they create, such as a central or state government. Thus, to be more precise, it is not the *state governments* that need power restored to them in order to properly balance our federal system. Rather, it is the state governments in the sense of the *political communities* of the people.

The people, in whatever territory dwelling, either temporarily or permanently, and whether organized under a regular government, or united by looser and less definite relations, constitute the state. This is undoubtedly the fundamental idea upon which the republican institutions of our own country are established.

Texas v. White, 74 U.S. 700, 720 (1869).

24. See BLACK'S LAW DICTIONARY 644 (8th ed. 2004) (defining the terms “federalism” and “cooperative federalism”).

25. In arguing for a stronger union, which would require the allocation of more power to the central government than what the Articles of Confederation allowed, Hamilton stated:

Such were the consequences of the fallacious principle, on which this interesting establishment was founded. Had Greece, says a judicious observer on her fate, been united by a stricter confederation, and persevered in her union,

B. Why the Principle of Federalism is Vital for the American Form of Government

Through the Constitution, the framers initiated our federal system in which the people allocated certain express powers to the central government, while leaving all other powers to the states or to the people.²⁶ As Madison wrote in urging the populace to embrace the proposed constitution, the central government's "jurisdiction extends to certain enumerated objects only, and leaves to the several states, a residuary and inviolable sovereignty over all other objects."²⁷

Certain functions or powers between the centralized government and the governments of the individual states were destined to overlap.²⁸ As advocates such as Madison and Hamilton anticipated, the direct consequence of the overlap of power between the states and the centralized government would inevitably lead to conflict between the centralized government and the government of the states. "Indeed, this conflict and competition between levels of government was welcomed by the framers as a means—like the tripartite separation of powers within the federal government—of preventing the conglomeration of tyrannical power."²⁹

The founders understood that conflict within a political system, if arranged properly, would not lead to strife and division but, rather, to strength and protection.³⁰

In a single republic, all the power surrendered by the people, is submitted to the administration of a single government; and the usurpation are guarded against, by a division of the Government into distinct and separate departments. In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate people. The

she would never have worn the chains of Macedon; and might have proved a barrier to the vast projects of Rome.

THE FEDERALIST NO. 18 (Alexander Hamilton).

26. U.S. CONST. amend. X; see also Arnold I. Burns, *The Perspective of Federalism at the United States Department of Justice in 1987*, in *FEDERALISM: THE SHIFTING BALANCE*, 45, 45 (Janice C. Griffith, ed. 1989).

27. THE FEDERALIST NO. 38 (James Madison).

28. See *supra* text accompanying note 20.

29. Burns, *supra* note 26, at 45.

30. See THE FEDERALIST NO. 51 (Alexander Hamilton).

different governments will control each other; at the same time that each will be controlled by itself.³¹

However, the structure of the political system must be such that the two conflicting entities must have near equal power. Otherwise, if one entity possesses more power than the opposing entity, then the lesser entity will simply be quashed and no strengthening of the body politic will have taken place.³² In other words, if either the central government or the states acquire too much power, then the principle of federalism is usurped along with any healthy accompanying conflict.

As the founders properly understood, in the American form of government, it is imperative that the central government and the state governments serve as a check on one another.³³ Even John Dickinson, an avid Anti-Federalist, stated “that election [of Senators] by state legislatures would ‘produce that collision between the different authorities which would be wished for in order to check each other.’”³⁴

The Seventeenth Amendment, however, has severed an important institutional check between the central government and the government of the states.³⁵ As a result, the principle of federalism, one of the foundations of American political theory, has been severely eroded.³⁶

III. THE SEVENTEENTH AMENDMENT EXPOSED: THE ORIGINAL SENATE AND THE SUBSEQUENT EFFECTS OF THE SEVENTEENTH AMENDMENT

There are a number of purposes that the Senate was created to perform. Besides conducting the regular duties of a political body, there are three main purposes that the Senate was designed to serve in the American political experiment that have been lost as a result of the Seventeenth Amendment. These lost purposes, the hallmarks of the Senate, are as follows: the Senate as the voice of reason, the Senate as a voice for the states in national politics, and bicameralism.

31. *Id.*

32. *Id.* (“If a majority be united by a common interest, the rights of the minority will be insecure.”).

33. *See id.*

34. Zywicki, *History of the Seventeenth Amendment*, *supra* note 1, at 171 (quoting DEBATES IN THE FEDERAL CONVENTION OF 1787, S. DOC. NO. 404, 57th Cong., 1st Sess. 6 (1902) (statement by John Dickinson)).

35. *See* discussion *infra* Part III.

36. *See* Zywicki, *Senators and Special Interests*, *supra* note 15 (“[T]he Seventeenth Amendment in 1913, providing for the direct election of U.S. senators, undermined the twin structural pillars of the Constitution: federalism and the separation of powers.”).

A. *The Voice of Reason*

1. That Temperate and Respectable Body of Citizens

The Senate and House of Representatives were created to serve different masters in order to achieve the public good. "The object of government may be divided into two general classes; the one depending on measures which have singly an immediate and sensible operation (the House of Representatives); the other depending on a succession of well-chosen and well-connected measures, which have a gradual and perhaps unobserved operation (the Senate)."³⁷ "As originally constituted, the House represented the people directly, but the Senate represented the state legislatures directly, and the people only indirectly."³⁸ Accordingly, in order to bring about the public good while yet serving different masters, each respective branch reacted to public concerns in accordance with the commands of its master.³⁹

The House of Representatives are directly responsible to the people.⁴⁰ Additionally, members of the House of Representatives serve two-year terms.⁴¹ This combination of serving short terms and being directly responsible to the people requires the members of the House of Representatives to react quickly to public concerns.⁴² The House of Representatives was created to serve as "the voice of passion," to react swiftly in the face of public outcries.⁴³ As the founders properly understood, however, if Congress was entirely subject to the voice of passion, then sheer tyranny would result.⁴⁴

37. THE FEDERALIST NO. 63 (Alexander Hamilton).

38. Zywicki, *History of the Seventeenth Amendment*, *supra* note 1, at 214.

39. See Jay S. Bybee, *Ulysses At The Mast: Democracy, Federalism, and the Sirens' Song of the Seventeenth Amendment*, 91 NW. U. L. REV. 500, 517 (1997) (discussing the practice of instruction whereby state legislatures would "instruct" their respect senators on matters of great importance to that particular state).

40. U.S. CONST. art. I, § 2 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.").

41. *Id.*

42. See THE FEDERALIST NOS. 54-56 (Alexander Hamilton) (discussing the House of Representatives' ratio and relation to the people).

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

44. See THE FEDERALIST NO. 63 (Alexander Hamilton).

In order to prevent the Congress from being ruled entirely by the voice of passion, the founders created the Senate.⁴⁵ As Hamilton noted:

[T]here are particular moments in public affairs, when the people, stimulated by some irregular passion, or some illicit advantage, or misled by the artful misrepresentations of interested men, may call for measures which they themselves will afterwards be the most ready to lament and condemn. In these critical moments, how salutary will be the interference of some temperate and respectable body of citizens, in order to check the misguided career and to suspend the blow meditated by the people against themselves⁴⁶

Thus, in order to serve as a “temperate and respectable body of citizens,” the Senate was created.⁴⁷

Unlike the House of Representatives, prior to the Seventeenth Amendment the Senate was not directly responsible to the people of the several states.⁴⁸ Rather, each Senator was directly responsible to his or her respective state legislative body.⁴⁹ This allowed the Senate to serve as a cooling mechanism against the passions of a directly elected body, the House of Representatives.⁵⁰ “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.’”⁵¹

Alexis De Tocqueville, visiting the United States from France in 1830, wrote in his famous work *Democracy in America* the following concerning his impressions of the Senate as compared to the House of Representatives:

45. Bybee, *supra* note 39, at 512 (“A senate appointed by state legislatures would be a near-complete defense to national encroachment because the senate controlled one-half of Congress.”).

46. THE FEDERALIST NO. 63 (Alexander Hamilton).

47. See HOEBEKE, *supra* note 2, at 16 (“As a final insurance that it remain ‘an anchor against popular fluctuations,’ the Senate was elected by the state legislatures.”).

48. See *supra* note 38.

49. U.S. CONST. art. I, § 3, cl. 1, *amended* by U.S. CONST. amend. XVII, § 1 (“The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.”)

50. Bybee, *supra* note 39, at 515 (“[The Senate] was a tempering institution, a body of elite senators whose terms and manner of election ensured greater stability in the Congress.”).

51. Zywicki, *History of the Seventeenth Amendment*, *supra* note 1, at 180 (quoting Roger G. Brooks, Comment, *Garcia, The Seventeenth Amendment, and the Role of the Supreme Court in Defending Federalism*, 10 HAR. J.L. & PUB. POL’Y 189, 195 (1987)).

There are some laws, democratic in their nature, which nonetheless succeed in partially correcting democracy's dangerous instincts.

When one enters the House of Representatives at Washington, one is struck by the vulgar demeanor of that great assembly. One can often look in vain for a single famous man. Almost all the members are obscure people whose names form no picture in one's mind. They are mostly village lawyers, tradesmen, or even men of the lowest classes. In a country where education is spread almost universally, it is said that the people's representatives do not always know how to write correctly.

A couple of paces away is the entrance to the Senate, whose narrow precincts contain 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. Every word uttered in this assembly would add luster to the greatest parliamentary debates in Europe.

What is the reason for this bizarre contrast? Why are the elite of the nation in one room and not in the other? Why does the former assembly attract such vulgar elements, whereas the latter has a monopoly of talents and enlightenment? . . . Whence, then, comes this vast difference? *I can see only one fact to explain it: the election which produces the House of Representatives is direct, whereas the Senate is subject to election in two stages.*⁵²

Even a disinterested foreigner such as de Tocqueville understood that what caused the difference between the House of Representatives and the Senate, the voice of passion and the voice of reason, was that the Senate was subject to the state legislatures while the House of Representatives was subject to the people directly.

2. The Senate Now Subjected to the Sudden Breeze of Passion

“As long as states were represented in the Senate, that body was not likely to adopt legislation which was opposed by even a significant

52. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 201 (J.P. Mayer ed., Perennial Classics 1969) (1835) (emphasis added).

minority of states.”⁵³ Thus, as long as the Senate continued to serve a different master than the House of Representatives, the Senate would serve as a check on legislation that was based upon public outcry but was not necessarily for the public good.⁵⁴ In recognizing this, Hamilton noted:

The republican principle demands, that the deliberate sense of the community should govern the conduct of those to whom they entrust the management of their affairs; but it does *not* require an unqualified complaisance *to every sudden breeze of passion, or to every transient impulse* which the *people* may receive When occasions present themselves, in which the interests of the people are at variance with their inclinations, it is the duty of the persons whom they have appointed to be the guardians of those interests, *to withstand the temporary delusion*, in order to give them time and *opportunity for more cool and sedate reflection*.⁵⁵

The Seventeenth Amendment, however, drastically altered the Senate’s ability to serve as a check on the House of Representatives. The Seventeenth Amendment now calls for the direct election of Senators by the people.⁵⁶ Hence, the Senate answers the beckoning of a new master: the people. As a result, the Senate is no longer afforded the opportunity to serve as the voice of reason, the check against the House of Representatives. Rather, the Senate, being directly responsible to the people, must now respond in the same fashion to public outcries as does the House of Representatives.

At first blush, particularly in view of our modern society’s embracement of direct election,⁵⁷ it appears desirable to have the public serve as the master of the Senate. The framers of the structure of the American government, however, understood well the dangers of direct election. Madison, commenting on the dangers of “popular governments” governed by direct election, stated “that measures are too often decided, not according to the rules of justice, and the rights of the minor party, but by

53. *Regulation of the Preemption of State Laws: Hearing Before the Subcommittee On National Economic Growth, Natural Resources and Regulatory Affairs of the House Government Reform Committee*, 106th Cong. (June 30, 1999) (testimony of Professor John S. Baker, Jr.), available at 1999 WL 461860.

54. THE FEDERALIST NO. 71 (Alexander Hamilton) (noting that “the people commonly intend the public good,” but rarely achieve it when acting out of passion (emphasis added)).

55. *Id.* (emphasis added)

56. See *supra* note 3 (citing the relevant text of the Seventeenth Amendment).

57. Other forms of direct election that have garnered favor in recent times include referendums, initiatives, and recall elections.

the superior force of an interested and overbearing majority.”⁵⁸ “The runaway tendencies of popular rule” and “the Framers’ distrust of popular government provided the primary motive force for indirect election of Senators.”⁵⁹ “[P]opular 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.”⁶⁰

The Seventeenth Amendment, consequently, has removed the Senate as a check on the House of Representatives, one of the main purposes the Senate was created to fulfill. Now, both the Senate and the House of Representatives serve the same master, the people, and both must act out of passion in order to secure their seats.

B. The Senate as a Voice for the States in National Politics

1. An Agency in the Formation

In order to ensure true federalism, the founders understood that the states would need a voice in national politics.⁶¹ The second main purpose of the Senate, then, was to serve as an agent for the states.⁶² In other words, the Senate was to serve as a voice within the central government for the benefit and protection of the states.

This concept, the Senate serving as the states’ agent in national politics, was so well-settled at the founding of the Constitution that only one paragraph is given over to the discussion of this topic in *The Federalist*.⁶³

It is equally unnecessary to dilate on the appointment of senators by the State Legislatures. Among the various modes which might have been devised for constituting this branch of the Government, that which has been proposed by the Convention is

58. THE FEDERALIST NO. 10 (James Madison).

59. Zywicki, *History of the Seventeenth Amendment*, *supra* note 1, at 182 (quoting HOEBEKE, *supra* note 2, at 189 (1995)).

60. HOEBEKE, *supra* note 2, at 17.

61. The central government, through the Supremacy Clause, has a reciprocal voice in state governments. U.S. Const. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).

62. See Zywicki, *Senators and Special Interests*, *supra* note 15, at 1014.

63. See *id.* at 1013 n.20.

probably the most congenial with the public opinion. It is recommended by the double advantage of favoring a select appointment, and of giving to the State Governments such an agency in the formation of the Federal Government, as must secure the authority of the former, and may form a convenient link between the two systems.⁶⁴

“As agents of the state legislatures, the primary duty of senators was to protect the sphere in which state and local governments could operate, free from the potentially strong arm of Washington.”⁶⁵ Senators, understanding that they were directly responsible to the legislature of their respective state, would not vote for the passage of legislation that encroached on those functions that had been reserved to the states. “[T]he Senate protected the states as states; it stood as a defense to the federal government in the same way that each of the three branches of the national government had checks and balances against abuse of power by the other branches.”⁶⁶

The Senate, then, served as a check by preventing the central government from encroaching into areas that are traditionally the functions of the states, such as education. “[T]he equal vote allowed in the Senate is . . . at once a constitutional recognition of the sovereignty remaining in the states, and an instrument for the preservation of it. It guards them against . . . a consolidation of the states into one simple republic”⁶⁷

2. The Practice of Instruction

If the Senate were to properly serve as an agent of the states, then the states would need some mechanism to ensure compliance by its agent. Thus, the practice of instruction arose.⁶⁸ “State governments ensured that senators represented their interests through the historic practice of ‘instructing’ senators. Under this practice, state legislatures told senators how to vote on particular legislative items.”⁶⁹ “As the ‘constituency’ of

64. THE FEDERALIST NO. 62 (Alexander Hamilton).

65. See Zywicki, *Senators and Special Interests*, *supra* note 15, at 1036.

66. Bybee, *supra* note 39, at 516 (1997).

67. 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 502 (Thomas M. Cooley ed., 1873).

68. “The right to instruct legislators is distinct from the right to present petitions and otherwise express opinions. Petitions and opinions are advisory; *instructions are binding*.” Kenneth Bresler, *Rediscovering the Right to Instruct Legislators*, 26 NEW ENG. L. REV. 355, 355 (1991).

69. Zywicki, *Senators and Special Interests*, *supra* note 15, at 1036.

U.S. Senators, the state legislatures regularly instructed [Senators].”⁷⁰ “The right [to instruct Senators] had honorable origins in both the British and the colonial experience, particularly in the states of the South and Northeast.”⁷¹

Former President John Taylor, while serving as a Senator of Virginia, wrote the following concerning instruction: “I now reaffirm the opinion at all times heretofore expressed by me, that instructions are mandatory, provided they do not require a violation of the Constitution or the commission of an act of moral turpitude.”⁷² Thus, under the practice of instruction, if a proposed piece of legislation was before the Senate that would have an impact on a particular state, then that state’s legislature would direct its two Senators to vote according to the best interest of the state.⁷³

A famous instance of instruction took place in Virginia in 1812 when the Virginia legislature passed a resolution concerning the subject of instruction. The Virginia legislature had instructed both Virginia Senators to vote against the re-chartering of the Bank of the United States.⁷⁴ Both Senators refused, thus spurring the Virginia legislature to pass a resolution on the practice of instruction. The resolution asserted the “right of the State Legislatures to instruct their Senators in the Congress of the United States,” and disapproved of the “conduct of the Senators from this State in Congress, in relation to the instructions given them at the last session, on the subject of the Bank of the United States.”⁷⁵ In summarizing the Virginia legislature’s resolution, Robert Luce stated:

So it was “resolved” that the Assembly disapproved the action of Senators that raised the issue; declared instruction an indubitable right, with, as a consequence, bounden duty of obedience . . . and proclaimed that no man who did not hold himself so bound ought thereafter to accept the appointment of a Senator of the United States from Virginia.⁷⁶

70. Bresler, *supra* note 68, at 365.

71. Bybee, *supra* note 39, at 517.

72. ROBERT LUCE, LEGISLATIVE PRINCIPLES: THE HISTORY AND THEORY OF LAWMAKING BY REPRESENTATIVE GOVERNMENT 469 (The Lawbook Exchange 2006) (1930).

73. Bybee, *supra* note 39, at 518 (stating that states “could instruct on matters of great importance to the state or the people”).

74. LUCE, *supra* note 72, at 464 (“Its Legislature had instructed Senators Giles and Brent to vote against the recharter of the Bank.”).

75. *Id.*

76. *Id.* at 465 (footnote omitted).

Senators who refused to vote according to their respective state legislature's instructions faced the obvious consequence of not being re-elected for a subsequent term.⁷⁷ Moreover, "Senators who failed to heed their instructions were usually forced to resign, even if their terms were not complete."⁷⁸ Thus, Senators understood the importance of following their respective state legislature's instructions and, equally, the states had a means of ensuring that their voices in the national government were accurately heard.⁷⁹

The states' ability to instruct its agent, however, was severed with the passage of the Seventeenth Amendment.⁸⁰ "As an ultimate irony, the last recorded refusal to follow legislative instructions was that of Senator Weldon Heyburn of Idaho, who refused to support the Seventeenth Amendment and disenfranchise the body that elected him."⁸¹

77. Robert Luce tells an amusing story about a particular instance where a Senator refused his legislature's instruction and was later called to account for his actions:

Two English women who traveled in America have told about the experiences of men who disobeyed instructions. "I remember," wrote one whose book was published in 1821, "the case of a distinguished member from the west of Pennsylvania (Mr. Baldwin), who once voted in decided opposition to his received instructions. At his return home, he was summoned to give an explanation or apology, under risk of being thrown out. The member replied that, at the time of his vote, he had expressed his regret that his opinion differed from that of his electors; but that he should have been unworthy of the distinguished office he held, and of the public confidence which he had for so many years enjoyed, if he could apologize for having voted according to the decision of his judgment; that his fellow citizens were perfectly right to transfer their voices to the man who might more thoroughly agree with them in sentiment than in this case he had done; that for himself, he could not only promise to consider every question attentively and candidly, to weigh duly the wishes of his constituents, but never to vote in decided opposition to his own opinion. His fellow citizens received his declaration with applause, and, as his whole political life had been in unison with their sentiments, they took this one instance of dissent as additional proof of his integrity, and unanimously reelected him."

Id. at 466-67 (footnote omitted).

78. Zywicki, *Senators and Special Interests*, *supra* note 15, at 1036.

79. Bybee, *supra* note 39, at 519 ("[T]he state legislatures elected senators and could re-elect them. Accordingly, there was an efficient mechanism—the legislature—for advising senators, and a means—refusal to re-elect—for disciplining those who disobeyed instructions.").

80. *Id.* at 527 ("the practice [of instruction] survived until the adoption of the Seventeenth Amendment").

81. *Id.* at 527-28.

3. Specific Functions Exclusive of the Senate

In accordance with the ideal of giving the states a voice in national politics via the Senate, a number of functions are specifically given to the Senate. The President is required to obtain the “advice and consent” of the Senate in order to appoint ambassadors, public ministers and consuls, and federal judges.⁸² Additionally, the President must receive approval of at least two-thirds of the Senate before a treaty becomes binding.⁸³ Further, in instances of impeachment, the sole power to try the offense that led to the impeachment is confided in the Senate.⁸⁴

In all of the above-described powers that have expressly been entrusted to the Senate, no corresponding power exists in the House of Representatives.⁸⁵ The reason for the allocation of these powers within the Senate is not a statement that the members of the House of Representatives are somehow not capable of fulfilling such duties. Rather, the allocation of these powers to the Senate, the agent of the states, was a deliberate act on the part of the framers to give the states a voice in matters that are of important national concern. In discussing the rationale for confiding the advice and consent power in the Senate, as opposed to simply allowing the President to appoint whomever he desired, Hamilton stated:

82. Article II, Section 2, Clause 2 of the United States Constitution provides:

[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. CONST. art. II, § 2, cl. 2.

83. *Id.*

84. Article I, Section 3, Clause 6 of the United States Constitution provides:

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

U.S. CONST. art. I, § 3, cl. 6.

85. The House of Representatives has the power to impeach, but they do not have any power to try the offense. U.S. CONST. art. I, § 2, cl. 5 (“The House of Representatives . . . shall have the sole Power of Impeachment.”).

To what purpose then require the co-operation of the Senate? I answer, that the necessity of their concurrence would have a powerful, though in general a silent operation. It would be an excellent check upon a spirit of favoritism in the President, and *would tend greatly to prevent the appointment of unfit character from State prejudice . . .*⁸⁶

With respect to the appointment of judges, none could be more important to the states than the appointment of Supreme Court Justices.⁸⁷ The Supreme Court is to serve as the final arbiter in a number of situations that involve the states.⁸⁸ Consequently, being subject to the authoritative disposition by the Supreme Court, states have a significant interest in Justices that are appointed to the Supreme Court. The requirement of gaining the Senate's consent to Supreme Court nominees, prior to the Seventeenth Amendment, ensured the appointment of Supreme Court Justices that were mindful of the delicate balance of federalism.⁸⁹

Treaties are also of significant importance to the states. As the Constitution states, Treaties are to be treated as "the supreme Law of the

86. THE FEDERALIST NO. 76 (Alexander Hamilton) (emphasis added).

87. *Black's Law Dictionary* defines "our federalism" as "[t]he doctrine holding that a federal court must *refrain* from hearing a constitutional challenge to state action if federal adjudication would be considered an *improper intrusion* in the state's right to enforce its own laws in its own courts." BLACK'S LAW DICTIONARY 1134 (8th ed. 2004). This concept undoubtedly represents the principle of federalism in the court system, a concept that arguably has been lost in our modern federal judiciary.

88. Article III, Section 2, Clause 1 of the United States Constitution provides, in relevant part:

The judicial Power shall extend . . . to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. CONST. art. III, § 2, cl. 1.

Article III, Section 2, Clause 2 of the United States Constitution provides:

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

U.S. CONST. art. III, § 2, cl. 2.

89. See *supra* notes 59-63.

Land.”⁹⁰ If the President could enter into a binding treaty without the advice and consent of the Senate, then the states would be subjected to a “supreme Law” without acquiescing. The founders, mindful of the balance of federalism, required the advice and consent of two-thirds of the Senate before a treaty would have the effect of becoming the “supreme Law.”⁹¹ As a result of the Senate serving as an agent of the states, providing a check on an encroaching central government, the President could not enter into a treaty “without an equal eye to the interests of all the states.”⁹²

Consequently, the states have lost their voice in matters of national concern since the passage of the Seventeenth Amendment. The states are no longer capable of defending against “the strong arm of Washington.”⁹³ Consequently, states can no longer ensure, for example through the Senate’s advice and consent power, that issues which are traditionally state functions, such as education, will not be encroached by the federal judiciary.

C. Bicameralism: *The Lost Art of Constitutional Protection*

“In framing a government, which is to be administered by men over men, the great difficulty lies in this: You must first enable the Government to control the governed; and in the next place, oblige [the Government] to control itself.”⁹⁴ Bicameralism, not to be confused with federalism,⁹⁵ is an important check instituted by the founders to protect against encroachment by the central government. As the framers recognized, Congress is the most powerful and dangerous branch of government in the American system:

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*

90. U.S. CONST. art. VI, cl. 2 (“[A]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land”).

91. U.S. CONST. art. II, § 2, cl. 2 (“[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur”).

92. THE FEDERALIST NO. 64 (John Jay).

93. See *supra* note 65.

94. THE FEDERALIST NO. 51 (Alexander Hamilton).

95. See Zywicki, *History of the Seventeenth Amendment*, *supra* note 1, at 176 (“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.”) (emphasis in original).

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 dependence on the society, will admit. It may even be necessary to guard against dangerous encroachments, by still further precautions.⁹⁶

Consequently, an additional structural protection, namely bicameralism, was built into the Constitution to safeguard against any potential abuse by Congress.

The framers instituted the institutional protection of bicameralism in order to prevent the passage of legislation at the mere sound of a public outcry, so that the public good, not the public will, would be accomplished.⁹⁷ In describing the Senate's role in raising the shield of bicameralism, Hamilton wrote:

Another advantage accruing from the ingredient in 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 [is a] complicated check on legislation . . . [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.⁹⁸

In order for legislation to be binding, it must meet approval by both the House of Representatives and the Senate, and then be signed into law by the President.⁹⁹ Hence, “[b]efore 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.”¹⁰⁰

Bicameralism also helps ensure that Congress only passes legislation that is based upon the public good, as opposed to passing legislation that only benefits a particular special interest group. In order for a special interest

96. THE FEDERALIST NO. 51 (Alexander Hamilton) (emphasis added).

97. See Zywicki, *Senators and Special Interests*, *supra* note 15, at 1034-35.

98. THE FEDERALIST NO. 52 (Alexander Hamilton) (emphasis added).

99. U.S. CONST. art. I, § 7, cl. 2 (“Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States”).

100. Zywicki, *Senators and Special Interests*, *supra* note 15, at 1034.

group to procure legislation, prior to the Seventeenth Amendment, the group would have had to convince a majority of both the House of Representatives and the Senate.¹⁰¹ In order to procure a majority amongst the Senate, however, the special interest group would have to convince over half of the state legislatures. If the special interest group was successful in such an endeavor, then the proposed legislation would likely favor the public good and the principle of federalism.

The Seventeenth Amendment, however, removed the impediment to legislation that bicameralism once provided. Prior to the Seventeenth Amendment, bicameralism ensured that legislation which was not committed to the public good would not be enacted because both the House of Representatives and the Senate were accountable to distinct masters.¹⁰² This accountability to separate constituencies served as the foundation for bicameralism in the American form of government.¹⁰³ Now, however, both the Senate and the House of Representatives are accountable to the same constituency.¹⁰⁴

Being accountable to the same constituency enables private interest groups to easily procure beneficial legislation, regardless of whether it bolsters the public good. "Private interest legislation is common today, much more so than in 1787, and more common at the national level than among the states."¹⁰⁵ The reason for the rise in a private interest group's ability to procure legislation is because both houses of Congress are, since the passage of the Seventeenth Amendment, responsible to the same constituency. When both houses of a bicameral legislature represent the same constituency, "then the winning coalition in the first house could easily be replicated in the second house, thereby undermining the purpose of bicameralism in protecting the public from special interest[] [groups]."¹⁰⁶ "If, however, the two houses are drawn from different constituencies, the logrolling coalitions necessary to generate passage in both houses become

101. See Zywicki, *History of the Seventeenth Amendment*, *supra* note 1, at 177-78 ("[A] special interest group seeking preferential legislation will have to put together a winning coalition in *both* houses.") (emphasis in original).

102. See THE FEDERALIST NO. 10 (James Madison) (describing how to ensure that the public good is not discarded).

103. See Zywicki, *History of the Seventeenth Amendment*, *supra* note 1, at 176 ("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.")

104. See discussion *supra* Part III.A.1.

105. Frank H. Easterbrook, *The State of Madison's Vision of the State: A Public Choice Perspective*, 107 HARV. L. REV. 1328, 1334 (1994).

106. Zywicki, *History of the Seventeenth Amendment*, *supra* note 1, at 178-79.

more complicated” and, thus, a private interest group’s ability to procure legislation inapposite to the public good becomes frustrated.¹⁰⁷

As a result of the Seventeenth Amendment, even though both the Senate and the House of Representatives must still approve a bill before it can be enacted, the shield of bicameralism has been lost. This final main purpose of the Senate, to ensure that the structural protection of bicameralism prevents the passage of legislation that is not for the public good, has been removed.

D. Why the Post-Seventeenth Amendment Senate Is Unable to Fulfill the Originally Intended Senatorial Purposes

1. The People Fall Short

When discussing the abstractness of the Seventeenth Amendment, one cannot avoid discussing the temptations of direct democracy. In fact, in modern America, the idea of a direct democracy is often seen as the pinnacle of political achievement. In succinctly diagnosing the problem, C.H. Hoebcke writes:

It is nevertheless fair to say that the political thinking that brought about the Seventeenth Amendment has remained triumphant down to the present day. *There is little appreciation for the classical notion of constitutionalism as a means of checking the sovereign, and not merely the sovereign’s magistrates. Public discourse gives substantially little consideration to the history of well-balanced polities, in which democracy has comprised but a single element, not the sole one.* And among those in power, significantly few voices are raised to remind the people that they themselves are ultimately responsible for the problems in their government, that politicians who promise to fulfill [the people’s] every demand do no service to [the people’s] long-term interests, and that they ought to suspect the flatterers who offer to put them more directly in command. *It is hard to imagine, therefore, the well-nigh total revolution in thinking that would be necessary to arrest, let alone reverse, the erosion of constitutional barriers that has*

107. Zywicki, *Senators and Special Interests*, *supra* note 15, at 1031.

*occurred under the steady force of the political philosophy of obedience to oneself.*¹⁰⁸

As long as people continue to embrace the notion that pure democracy is the greatest political good, the consequences of the Seventeenth Amendment cannot be fully appreciated. The framers understood well the dangers of placing the powers of government directly with the people.¹⁰⁹

One danger that has arisen as a result of the Seventeenth Amendment is the people's inability to serve as an effective check on their representatives in the Senate in order to ensure that such members are fulfilling their Senatorial purposes.¹¹⁰ "A . . . characteristic of the movement to direct election was that it made monitoring a senator's behavior more difficult. As monitoring became more difficult, it became easier for senators to sacrifice their constituents' concerns for their own desires and those of special-interest groups."¹¹¹ Modern society keeps Americans busy enough with their own affairs, let alone the responsibility of adequately keeping tabs on a fast-paced Senatorial body. "[T]he sad truth is that the average citizen is apt to know far less about the character and conduct of his senator than he did before direct elections. This is probably the single greatest irony of the whole direct democracy movement."¹¹² As opposed to the American people, however, the state legislatures were an ideal body capable of properly monitoring the Senate.

"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, . . . state legislatures were in a better position than the dispersed public to gain access to important information . . . [and] to interpret information."¹¹³ The general public, often uneducated in the science of politics, cannot effectively monitor the behavior of the Senate. "One 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."¹¹⁴ Besides, even if every American was well versed in the science of politics, the only mechanism of control over the post-Seventeenth Amendment Senate is voting every six years; whereas, in addition to merely monitoring, prior to the Seventeenth Amendment there

108. HOEBEKE, *supra* note 2, at 194 (emphasis added).

109. *See supra* notes 59-61, and accompanying text.

110. *See supra* Parts III.A-III.C for a discussion on Senatorial purposes.

111. Zywicki, *Senators and Special Interests*, *supra* note 15, at 1041.

112. HOEBEKE, *supra* note 2, at 192.

113. Zywicki, *History of the Seventeenth Amendment*, *supra* note 1, at 201.

114. Zywicki, *Senators and Special Interests*, *supra* note 15, at 1041.

existed controls such as instruction.¹¹⁵ Now, however, the people are only left with the voting polls, a poor check on the activities of a Senator during the interim six years.

In addition to having the proper tools to effectively monitor the Senate, the state legislatures also had a greater incentive to monitor the Senate as compared to the people generally. “[B]ecause they elected and instructed senators, legislators had an incentive to monitor their behavior; the *legislator* could be made to suffer at the polls for unpopular decisions by senators.”¹¹⁶ Thus, state legislators had an obvious motive, albeit a self-driven motive, to monitor the voting behavior of Senators: during re-election each state legislator would be held accountable for failing to properly monitor the actions of the state’s Senators.

Thus, the decreased monitoring that has occurred as a result of the Seventeenth Amendment has left Senatorial behavior virtually unchecked. Consequently, the main purposes of the Senate—to serve as the voice of reason, to serve as an agent for the states, and to ensure the principle of bicameralism—are no longer accomplished by the post-Seventeenth Amendment Senate because of the loss of an effective check, the state legislatures, on the Senatorial body.

2. The Change in Constituency

In addition to decreased monitoring, the most compelling reason for the Senate’s inability to perform its main intended purposes is the change in the Senate’s constituency that resulted from the passage of the Seventeenth Amendment. As a result of direct election, Senators now have a different motive for acting upon legislation than what existed prior to the Seventeenth Amendment.¹¹⁷ Prior to the Seventeenth Amendment, Senators understood that in order to ensure re-election, they would have to support only the legislation that was in the best interest of their respective state.¹¹⁸ A natural consequence of this process was the protection of federalism and bicameralism.¹¹⁹

115. See discussion *supra* Part III.B.2 (discussing the tool of instruction).

116. Zywicki, *Senators and Special Interests*, *supra* note 15, at 1041 (emphasis added).

117. See Zywicki, *History of the Seventeenth Amendment*, *supra* note 1, at 217 (“Direct election made Senators responsive to the same national forces which influenced House members.”).

118. See discussion *supra* Part III.B.1; see also Zywicki, *History of the Seventeenth Amendment*, *supra* note 1, at 216 (“Senators would be expected to reward their home-state interests . . .”).

119. See discussion *supra* Part III.C.

The Seventeenth Amendment has not changed the Senate's necessity to serve its constituents in order to ensure re-election. However, the change in constituency that resulted from the passage of the Seventeenth Amendment altered the behavior of the Senate, thus severing the Senate's desire to fulfill its main intended purposes—to serve as the voice of reason, to serve as an agent for the states, and to ensure the principle of bicameralism.¹²⁰ The behavior of the Senate, still premised on each Senator's desire for re-election, now responds to the beckoning of those responsible for placing him or her in office—special interest groups.¹²¹

Senatorial campaigns are far from inexpensive.¹²² In 1988, a Democratic Senator from Wisconsin spent \$7 million vying for his first Senatorial seat.¹²³ In 1990, a Republican Senator from Texas spent \$12.5 million in order to secure his re-election.¹²⁴ Nation-wide, the estimated average cost of a Senatorial campaign is \$5 million.¹²⁵ The typical, middle-class American is not capable of providing the funding necessary in order for a post-Seventeenth Amendment Senator to become elected; rather, Senators primarily rely on special interest groups to provide the funding necessary in order to procure election. "An increasing proportion of campaign contributions comes from nationally organized interests outside the state a senator actually represents"¹²⁶

120. See Zywicki, *History of the Seventeenth Amendment*, *supra* note 1, at 216 ("Movement to direct election made it possible for [special interest groups] to lobby Senators directly, and for Senators to make use of the resources (money and manpower) provided by these interstate interest groups.").

121. See *id.* at 218 ("[S]pecial interests make their campaign payments up-front, but they do not receive their legislation until later.").

122. In describing the media frenzy that Senatorial campaigns now generate, C.H. Hoebeke writes:

A hundred years ago, entire speeches from Senate proceedings were quoted verbatim in the daily newspapers. Today, senators vie with each other for as few as five second "sound bytes" on the evening news. . . .

The vast majority of campaign money is spent on advertising, increasingly on half or even quarter-minute appeals on television. Large commissions are paid out to successful public relations firms, armed with the latest marketing data, to yield the highest emotional response with the least amount of footage.

HOEBEKE, *supra* note 2, at 192-93.

123. *Id.* at 191.

124. *Id.*

125. *Id.*

126. *Id.*

As C.H. Hoebeke stated:

[T]he Seventeenth Amendment has utterly failed to drive the influence of money, special interests, and backstage manipulators from the election of United States senators. On the other hand, it succeeded in making the Senate, and thus the Congress in general, more responsive, and in the process less deliberative in the use of its many powers. As one former member and scholar of the institution has written, the Senate “has become less responsible as it has grown more responsive, less efficient as it has grown more representative.”¹²⁷

As a result of the Seventeenth Amendment, Senators still serve their respective masters. However, instead of serving the interest of the states, Senators now serve at the benefit of private interest groups in order to ensure election and re-election.

IV. THE PUBLIC SCHOOL SYSTEM: FEELING THE LASHES OF THE SEVENTEENTH AMENDMENT

Ever since the inception of the public school system, education has been a local function: local school districts working at the community level and maintaining responsibility to the state and to the parents.¹²⁸ One statute enacted in the earliest days of colonial America, “ye old deluder” statute, solidified the principle that education is a local function.¹²⁹ Connecticut enacted virtually the same law in 1650.¹³⁰ Since the passage of the

127. *Id.*, quoting FRED R. HARRIS, *DEADLOCK OR DECISION: THE U.S. SENATE AND THE RISE OF NATIONAL POLITICS* 7 (1993).

128. See *Milliken v. Bradley*, 418 U.S. 717, 741-42 (1974) (“No single tradition in public education is more deeply rooted than local control over the operation of schools.”); *United States v. Lopez*, 514 U.S. 549, 566 (1995) (“[Congress does not have] the authority to regulate each and every aspect of local schools.”); *id.* 514 U.S. at 580-81 (Kennedy, J., concurring) (stating that education is a “traditional concern of the States”).

129. See HENRY STEELE COMMAGER, *DOCUMENTS OF AMERICAN HISTORY, VOL. I: TO 1898* 29 (7th ed. 1965). The “ye old deluder” statute stated originally as follows:

It being one chiefe project of ye ould deluder, Satan, to keepe men from the knowledge of ye Scriptures It is therefore ordred, yt evry towneship . . . forthwith appoint one . . . to teach all such children . . . to write & reade [and] whose wages shall be paid eithr by ye parents to mastrs of such children, or by ye inhaitants in genral”

Id.

130. LAWRENCE A. CREMIN, *AMERICAN EDUCATION: THE COLONIAL EXPERIENCE, 1607-1783* 181-82 (1970).

Seventeenth Amendment, however, education is becoming less of a localized function and becoming more of a nationalized function. As Chief Justice Burger stated:

Local control is not only vital to continued public support of the schools, but it is of overriding importance from an educational standpoint as well. The success of any school system depends on a vast range of factors that lie beyond the competence and power of the courts. Curricular decisions, the structuring of grade levels, the planning of extracurricular activities, to mention a few, *are matters lying solely within the province of school officials*, who maintain a day-to-day supervision¹³¹

The Seventeenth Amendment, however, threatens the “overriding importance” of the local control of education by removing the voice of the states in the national government.

Education is *not* a fundamental right guaranteed by the United States Constitution.¹³² Despite the fact that there is no federal right to education, the federal government has steadily encroached on the states’ ability to function in the realm of education. Through the enactment of a series of legislative measures, Congress has steadily moved towards standardizing education.

Congress first proceeded through the enactment of the National Defense Education Act (“NDEA”).¹³³ In 1957, the Union of Soviet Socialist Republics, or U.S.S.R., launched the first ever satellite into space. Americans immediately feared being out-performed in the area of science by our Soviet antagonists. As a result, Congress enacted the NDEA in

131. *Wright v. Council of City of Emporia*, 407 U.S. 451, 478 (1972) (Burger, J. dissenting) (emphasis added).

132. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973). (“Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.”). Many state constitutions, however, have been interpreted as guaranteeing a fundamental right to education. *See, e.g., Meyers v. Bd. of Educ. of San Juan Sch. Dist.*, 905 F.Supp. 1544, 1557 (D. Utah 1995) (“Utah’s constitution required the legislature to provide for ‘the establishment and maintenance of the state’s education systems including . . . a public education system, which shall be open to all children of the state’”) (quoting UTAH CONST. art. X, § 1); *Skeen v. State*, 505 N.W.2d 299, 313 (Minn. 1993) (holding that education is a fundamental right under the Minnesota constitution). *Contra Idaho Sch’s for Equal Educ.’al Opportunity v. Evans* 850 P.2d 724, 733 (Idaho 1993) (“[E]ducation is not a fundamental right because it is not a right directly guaranteed by the state constitution”).

133. National Defense Education Act (NDEA) of 1958, Pub. L. 85-864, 72 Stat. 1580 (codified as amended in scattered sections of 20 U.S.C. (later omitted)).

order to foster the American school system's achievement in the areas of mathematics and science.¹³⁴

The next significant piece of federal legislation in the realm of education was the Elementary and Secondary Education Act of 1965 ("ESEA").¹³⁵ The ESEA was primarily championed by President Johnson as a part of his campaign to help eliminate poverty and racial tensions in America.¹³⁶ As a result, the ESEA, commonly referred to as "Title I," was designed to provide assistance to states and local school districts in their task of adequately educating low income families.¹³⁷ Under Title I, unlike the No Child Left Behind Act that would later replace it, each school was allowed to choose its own method of assessing students.¹³⁸ At this point, the states and their educational systems were free from having to seek the national government's approval in using a particular method of assessment.

In 1983, the U.S. Department of Education published *A Nation at Risk*.¹³⁹ The status of public education in 1983, according to the U.S. Department of Education's *A Nation at Risk*, was "described as undermining the ability of the United States to compete in the global economy."¹⁴⁰ Similar to the reaction of our nation's lawmakers to the Russian Space satellite Sputnik, there was an outcry for intervention in the public educational system.

In 1989, President George H.W. Bush called the nation's governors to Charlottesville, Virginia, for the first ever National Education Summit. The nation's leaders descended upon Virginia for the purpose of establishing "a set of challenging education standards: Goals 2000, the National Education

134. See Judith A. Winston, *Achieving Excellence & Equal Opportunity in Educ.: No Conflict of Laws*, 53 ADMIN. L. REV. 997, 1003 (2001) ("[T]he federal government [was] stunned by the apparent superior position of the Soviet Union in science and mathematics. The . . . public school system[] attempted to move quickly to reclaim [its] position[] as first among nations of the world in science, mathematics, and technology by making increased and significant investments in science and mathematics education for American students.").

135. Elementary and Secondary Education Act (ESEA), Pub. L. No. 89-10, 79 Stat. 27 (1965) (current version at 20 U.S.C.A §§ 6301-7941).

136. CARL F. KAESTLE, *FEDERAL AID TO EDUCATION SINCE WORLD WAR II: PURPOSES AND POLITICS IN THE FUTURE OF THE FEDERAL ROLE IN ELEMENTARY & SECONDARY EDUCATION* 23 (2001).

137. Judith A. Winston, *Achieving excellence and Equal Opportunity in Education: No Conflict of Laws*, 53 ADMIN. L. REV. 997, 1004 (2001) ("Children [of low income families] participating in the Title I program receive supplementary education assistance in basic subjects such as reading and math.").

138. *Id.*

139. Nat'l Comm'n on Educ. Excellence, *A Nation at Risk* (1983), available at <http://www.ed.gov/pubs/NatAtRisk/index.html> (last visited March 11, 2008).

140. Winston, *supra* note 138, at 1002 n.11.

Goals.”¹⁴¹ Congress subsequently codified the National Education Goals.¹⁴² The Goals 2000 offered to states the promise of federal funding if the states would develop rigorous academic standards.¹⁴³ This was the largest step to date in moving towards a national, standardized public school system.

“By the end of the 1990’s . . . every state in the nation had enacted educational standards that defined the rights of their students to an adequate education, and all but one had state assessments to measure achievement of at least some standards.”¹⁴⁴ Hence, the push for uniform standard-based education started to gain momentum as a consequence of such national legislation.

As a result of the momentum towards uniform standard-based education that national legislation had sparked, Congress enacted the Improving America’s Schools Act of 1994 (“IASA”).¹⁴⁵ For the first time, Congress began making demands on the states in the realm of public education. IASA required uniformity in the system of standard based education that was already the result of the national government’s pressures.¹⁴⁶ Through IASA, Congress required the states that were receiving federal funding for Title I students, to hold such students accountable for the same standards that the state had enacted for all non-Title I students.¹⁴⁷ In other words, Congress mandated that the states apply the same standard-based testing to its students, regardless of whether such students were Title I students that were in need of additional assistance.¹⁴⁸

On January 8, 2002, President George W. Bush signed the No Child Left Behind Act (“NCLBA”) into law.¹⁴⁹ The NCLBA makes significant increases in the number of mandates placed upon States and their respective

141. *Id.* at 1009.

142. *See* Goals 2000: Educate America Act, Pub. L. No. 103-227, 108 Stat. 128 (1994) (current version at 20 U.S.C.A. §§ 5801-6084).

143. *See id.*

144. David Nash, Note, *Improving No Child Left Behind: Achieving Excellence and equity in Partnership with the States*, 55 RUTGERS L. REV. 239, 246-47 (2002).

145. Improving America’s Schools Act (IASA) of 1994, Pub. L. No. 103-382, 108 Stat. 3518 (1994) (current version at 20 U.S.C.A. 20 §§ 6301-7941).

146. *See supra* note 138.

147. *See supra* note 145.

148. *See* Winston, *supra* note 138, at 1010 (“[P]oor children are now expected to meet the same levels of performance and achievement as wealthier students. Schools are expected to provide these children with the kind of instructional quality that will close the gap in achievement between them and more affluent non-Title I students.”).

149. No Child Left Behind Act (NCLBA) of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (codified at 20 U.S.C. §§ 6311, *et. seq.* (2002)).

educational institutions.¹⁵⁰ A discussion of only a few provisions of the NCLBA is needed in order to illustrate the significant demands that Congress has placed on the states as a result of the NCLBA.

States are required to administer tests primarily in the subjects of mathematics and language arts. States are to administer such tests to its students every year in grades three until eight and at least once in grades ten through twelve.¹⁵¹ In addition to testing for mathematics and language arts, states must also administer science tests at least once to its students during each of the elementary, middle school, and high school years.¹⁵² Yet another command placed upon the states, one that is generally met with controversy, is that by the year 2014 states must have 100% of its students successfully completing the assessment tests.¹⁵³

Further, in order to ensure that the tests administered by the states are adequate in the areas of reading and mathematics, states are required to participate in the National Assessment of Educational Progress.¹⁵⁴ Congress, for the first time in the educational realm, also places penalties on states if they fail to meet certain provisions of the NCLBA.¹⁵⁵

Competition and experimentation are hallmarks of the American form of government. In speaking of the functions traditionally left to the states, with fifty members in the Union, it is possible to have fifty distinct approaches to the same function. Yet, in the realm of education, Congress is pressing the states towards a uniform approach in educating public school children.¹⁵⁶

There must be power in the states and the nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs. . . . To stay experimentation in things social and economic is a grave responsibility. *Denial* of the right to experiment may be fraught

150. This paper is not concerned with whether the NCLBA has been successful in implementing its stated goals. See 20 U.S.C. § 6301 (“The purpose of [the NCLBA] is to ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging state academic achievement standards and state academic assessments.”). Rather, this paper is only concerned with Congress’ infringement upon the states in the area of education in violation of the principle of federalism.

151. See 20 U.S.C. § 6311(b)(3)(C)(vii).

152. See § 6311(b)(3)(A).

153. See § 6311(b)(2)(F).

154. See § 6311(c)(ii).

155. See, e.g., § 6311(g)(2).

156. See discussion *supra* Part IV.

with serious consequences to the nation. *It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.*¹⁵⁷

The removal of federalism as a structural protection in our American system of government has all but eliminated the ability of a “courageous state” to “serve as a laboratory” in the ambit of education.

As the above review of the progression of national legislation demonstrates, Congress is steadily moving into the realm of education, a function traditionally asserted to be that of the states.¹⁵⁸ As a result of the Seventeenth Amendment, states no longer have a voice in Congress.¹⁵⁹ The Senate, serving as the agent of the states, was once held to be the bastion of the states in the national government in such critical issues as education.¹⁶⁰ As the No Child Left Behind Act demonstrates, however, any notion of respecting the states’ ability to perform traditional state functions was amended along with the passage of the Seventeenth Amendment.

V. CONCLUSION: POSSIBLE RESOLUTIONS TO THE CONUNDRUM OF THE SEVENTEENTH AMENDMENT

As is often said, one should not pose a problem without a willingness to present a solution. When speaking of the problem posed by the Seventeenth Amendment, however, the range of possible solutions do not present an optimistic outlook for re-instituting the structure of government originally instituted by the framers. There are, however, a few possible solutions worthy of discussion.

A. *Possible Direct Resolutions With Respect to the Public School System*

The function of education is not a specific, enumerated power of Congress.¹⁶¹ Consequently, in order for Congress to control education, it must use one of its enumerated powers to control education indirectly. With respect to the pieces of legislation discussed above, Congress has

157. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (emphasis added).

158. *See supra* note 93 and accompanying text.

159. *See* discussion *supra* Part III.

160. *See supra* notes 61-67 (discussing the Senate as an agent of the states).

161. *See* U.S. CONST. art I.

chosen to exercise its “spending power” to indirectly control education.¹⁶² “[L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions.”¹⁶³ Thus, in speaking of the national legislation affecting the public school system, the states must first accept the financial support proffered by Congress in order for such legislation to be binding on the states.

“The legitimacy of Congress’ power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the ‘contract.’”¹⁶⁴ Once a particular state accepts the federal funding in the realm of education, it must thereby accept the demands that Congress has conditioned upon accepting the funding.¹⁶⁵ Hence, one possible resolution for the states to avoid the commands of Congress in the realm of education is to simply refuse the federal funding being conditioned by Congress.

The states refusal to accept the conditioned funding in the realm of education by Congress, however, is a practical solution that does not resolve the underlying structural problem posed by the Seventeenth Amendment. Even if many of the states refused to accept the funding provided by Congress, such actions would not preclude Congress from positing legislation that further encroached into the realm of education. Additionally, some have argued that the states’ ability to reject the conditioned federal funding is not realistic.¹⁶⁶ Regardless, an individual state’s refusal to accept the conditioned federal funding would serve only as a short term resolution.

162. See U.S. CONST. art I., § 8, cl 1 (“The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;”).

163. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (Pa. 1981) (discussing Congress’ power to legislate pursuant to the spending clause).

164. *Id.*

165. *Id.* (“[O]ur cases have long recognized that Congress may fix the terms on which it shall disburse federal money to the States.”)

166. See Gina Austin, Comment, *Leaving Federalism Behind: How the No Child Left Behind Act Usurps States’ Rights*, 27 T. JEFFERSON L. REV. 337 (2005) (“the NCLBA provides no practical method of refusing funds because states cannot realistically cut all federal education subsidies from their budgets”); Gary Natriello & Edward L. McDill, *Title I: From Funding Mechanism to Educational Program*, available at <http://www.columbia.edu/~gjn6/id001.html> (last visited March 11, 2008).

Another possible resolution for the states is to follow the Utah model.¹⁶⁷ Utah accepted the federal money conditioned by the No Child Left Behind Act. However, Utah did not stop by simply accepting the federal money and the directives of Congress. Rather, the Utah legislature passed a bill designed to protect Utah's sovereignty over the realm of education and yet still implement the No Child Left Behind Act.¹⁶⁸

The bill Utah designed to accomplish this two-fold purpose is known as the "Implementing Federal Programs Act."¹⁶⁹ Under this bill, state educators are required to provide "*first priority* to meeting *state* goals, objectives, program needs, and accountability systems as they relate to federal programs,"¹⁷⁰ and provide "*second priority* to implementing *federal* goals, objectives, program needs, and accountability systems that do not directly and simultaneously advance state goals, objectives, program needs, and accountability systems."¹⁷¹

States following a similar model as the Implementing Federal Programs Act would require their local school boards and school administrators to continue to primarily implement state educational objectives and only implement federal educational objectives to the extent that they do not contradict the state mandates.¹⁷² The Utah approach, however, has been questioned by a host of critics including the Secretary of Education.¹⁷³ More importantly, Secretary of Education Margaret Spellings warned that, depending on how Utah applies the Implementing Federal Programs Act, the Department of Education might withhold \$76 million of the \$107 million that Utah currently receives in federal education subsidies.¹⁷⁴

Thus, the extreme approach taken by the Utah legislature does not appear to be an amicable solution to the federal government intruding into

167. For a critique of the approach taken by the Utah legislature, see Joshua. J. Bennett, Note, *Using Utah's Children As Collateral In A Gamble For State's Rights: Why House Bill 1001 Is Fundamentally Flawed*, 8 J. L. & FAM. STUD. 225 (2006).

168. See UTAH CODE ANN. § 53A-1-903 (West 2005).

169. UTAH CODE ANN. § 53A-1-901 (West 2005).

170. UTAH CODE ANN. § 53A-1-903(2)(a)(i) (West 2005) (emphasis added).

171. UTAH CODE ANN. § 53A-1-903(2)(a)(ii) (West 2005) (emphasis added).

172. See *id.*

173. Sam Dillon, *Utah Vote Rejects Parts of Education Law*, N.Y. TIMES, Apr. 20, 2005, at A14, available at <http://www.nytimes.com/2005/04/20/national/20child.html?ex=1271649600&en=b259a0074c6cf357&ei=5090&partner=rssuserland&emc=rs> (last visited March 11, 2008).

174. See *id.*

the area of education.¹⁷⁵ Again, while the Utah model might temporarily ensure that the function of educating Utah residence remains with the state of Utah, the Implementing Federal Programs Act does nothing to remedy the underlying structural problem posed by the Seventeenth Amendment.

B. Curing the Disease and Not Merely the Symptoms

Removing the structural protection of federalism from the American form of government has had far reaching consequences.¹⁷⁶ The Seventeenth Amendment has not only altered the way that Senators are elected, but has also had the effect of centralizing education, a function traditionally considered to be local in nature.¹⁷⁷ However, simply focusing on the realm of education ignores the fundamental problem that is the root of the ever-expanding tree known as the federal government. Consequently, the only way to attack the disease and not merely treat the symptoms is to work towards repealing the Seventeenth Amendment.

Amendments to the United States Constitution may be passed in one of two ways.¹⁷⁸ If two-thirds of the states call for a constitutional convention, then Congress must convene a convention for the purpose of proposing amendments to the Constitution.¹⁷⁹ As history has proven, however, this method of amending the Constitution has proven unfruitful.¹⁸⁰ In fact, the constitutional convention method of amending the Constitution has never been utilized.¹⁸¹

175. In addition to not being an amicable solution, there are some moral implications to accepting the federal government's financial contributions but refusing to accept the terms that the contributions were conditioned upon. In keeping with the contract analogy, Utah would certainly appear to be in breach. *See supra* note 164 and accompanying text.

176. *See* discussion *supra* Parts II & III.

177. *See* discussion *supra* Part IV.

178. *See* U.S. CONST. art. V ("The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed;").

179. *Id.*; *see also* Bybee, *supra* note 39, at 564 (1997) (discussing the Article V Amendment process).

180. *See* Zywicki, *History of the Seventeenth Amendment*, *supra* note 1, at 232 ("A constitutional convention has proven itself not to be a viable amendment procedure . . .").

181. *Id.* at 213.

The other method of amending the Constitution takes place when two-thirds of both the House of Representatives and the Senate propose an amendment that is passed by three-quarters of the state legislatures or state conventions.¹⁸² This method of Congress proposing an amendment has produced all twenty-seven amendments to the Constitution.¹⁸³ Thus, in treating the disease that the Seventeenth Amendment has posed, we must strive to utilize this method of repealing the Seventeenth Amendment.

Congress, however, will not willingly give up the power that the Seventeenth Amendment has vested. Moreover, “[t]he tide of democracy is generally difficult to contain, much less reverse. Democracy is popular. Abstract notions of federalism, bicameralism and deliberation provide poor counterweights to the irresistibility of democratic tides.”¹⁸⁴ Thus, in order to overcome the “tide of democracy,” we must strive to educate the general populace on the issue of federalism and the Seventeenth Amendment.

The framers’ rationale for placing such structural protections as federalism and bicameralism are instructive. However, in striving to educate the general populace, this Comment is not calling for a repeal of the Seventeenth Amendment based upon the notion that merely because the founders intended Senators to be appointed by the state legislatures we should therefore return to following such an intention. Rather, this Comment calls for a repeal of the Seventeenth Amendment based upon the notion that the structural protections afforded by the pre-Seventeenth Amendment Senate are vital for the continuing freedoms long cherished by American citizens.

The “grass roots” methodology, which calls upon a myriad of sources, is the only technique capable of sparking enough debate to call the Seventeenth Amendment to the public’s attention. Once the grass roots methodology educates the general public about the structural problems that the Seventeenth Amendment has presented to the American form of government, we may then strive to repeal the Seventeenth Amendment. However, we cannot merely petition our current Senators and House of Representative members to propose an amendment that would repeal the Seventeenth Amendment. Rather, the most effective method of repealing the Seventeenth Amendment must be based upon a campaign promise. Namely, that persons running for election to Congress must incorporate as part of their platform for election the promise of proposing an amendment

182. U.S. CONST. art. V.

183. Zywicki, *History of the Seventeenth Amendment*, *supra* note 1, at 213.

184. *Id.* at 226 (footnote omitted).

that would repeal the Seventeenth Amendment. Only then, when we make it utterly clear that we are electing the individual based largely upon whether he or she will push to restore the principle of federalism that has been lost as a result of the Seventeenth Amendment, will the structural protections envisioned by the framers be restored.

