Repeal of the Seventeenth Amendment: A Step Toward the Restoration of Federalism in America

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I. INTRODUCTION

The form of government instituted in the United States has been extolled throughout history by natives and foreigners alike. John Adams said: "What other form of government, indeed, can so well deserve our esteem and love?"[1] In his Farewell Address, Andrew Jackson stated that "our country has improved and is flourishing beyond any former example in the history of nations."[2] The well-known French scholar, DeTocqueville, and English commoner, Gladstone, have issued equally notable praises.[3]

The United States Constitution which defines this remarkable form of government, is built upon certain enduring principles. These principles are espoused in the Declaration of Independence and the Framers gave them form in the United States Constitution.[4] Speaking of these immutable principles, Thomas Jefferson said:

> These principles form the bright constellation which has gone before us and guided our steps through an age of revolution and reformation. The wisdom of our sages and blood of our heroes have been devoted to their attainment. They should be the creed of our political faith, the text of civic instruction, the touchstone by which to try the services of those we trust; and should we wander from them in moments of error or of alarm, let us hasten to retrace our steps and to regain the road which alone leads to peace, liberty, and safety.[5]

As with all governments, it becomes necessary, from time to time, to reacquaint ourselves with its basic mechanics of operation. The Founding Fathers gave posterity a written constitution to aid in this process.[6] When there are doubts as to its meaning, one must study its original intent to discern proper application, for "the intent of the Lawgiver is the Law."[7]

Current events in this nation have provoked citizens and scholars to perform this assessment – to "retrace our steps" – in yet another area: the principle of federalism. Simply defined, federalism is

> a system that combines States retaining sovereignty within a certain sphere with a central body possessing sovereignty within another sphere, and a third sphere where concurrent jurisdiction (exists].[8]

After years of silence on the matter, a resurgence of interest in federalism is evident. President Reagan's "New Federalism," "The Federalist Society," and a report on federalism issued by the Domestic Policy Council[9] are just some of the manifestations of this increasing concern.

The reason for this interest is that America is reaping the fruit of centralized government. Contrary to the Founding Fathers' original vision of separate spheres of jurisdiction between the people, the states, and national government, our current system is now dominated by the national government.

The United States Constitution, as drafted by the Founding Fathers, clearly enumerated the limited powers of the national government. All other powers were reserved to the states or the people. The

10th Amendment affirms this noting:

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

The separate spheres of jurisdiction of the national and state governments have gradually been eroded. The national government has increasingly usurped the reserved power of both the people and the states. It has been documented that

> States, once the hub of political activity and the .very source of our political tradition, have been reduced – in significant part – to administrative units of the national government ....[10]

As a result of this erosion process, both the national government and the state governments are crippled in their effectiveness. The national government, having taken on too much power, is unable to properly administer all the areas it has arrogated unto itself. On the other hand, the state governments are impotent in legislating and executing the will of the people because they are subject to unpredictable subjugation by the national government.

Our founding document, the Declaration of Independence, proclaims as self evident the proposition that "all men are ... endowed by their Creator with certain unalienable rights," and that "to secure these rights, governments are instituted among men." When state governments so instituted become impotent, then it is their right and duty to reacquire the appropriate power in order to fulfill the purpose for which they were originally established.

In order to assist state governments in this task, this thesis will analyze Article I, Section 3 of the United States Constitution and the Seventeenth Amendment which modified it. Article I, Section 3 was designed to protect the exercise of a state's constitutionally reserved power against anticipated national encroachment by requiring Senators to be appointed by the legislatures of their respective states.[11] This method of election was changed in 1913 by the ratification of the Seventeenth Amendment.[12] That Amendment called for direct election of United States Senators by popular vote of the citizens of the respective states. This modification has materially weakened the voice of the states <u>as states</u> within the national government and contributed to their present condition of national subjugation. Subsequent to an examination of these provisions, remedies will be proposed to assist the states in regaining their constitutional place in our federal system of government.

II. SENATORIAL ELECTION BY STATE LEGISLATURES

<u>A. Founders' Intent</u>

1. Constitutional Convention Debates

An examination of James Madison's notes of the debates of the Constitutional Convention reveals pertinent information about the method of senatorial election. Of the fifty-five delegates who

attended the convention, fifteen contributed to the debate concerning the method of electing United States Senators. Thirteen of these delegates expressed the belief that Senators should be elected by the various state legislatures. Careful study of these debates reveals three main reasons the founders believed this to be the most appropriate method.

One of the chief reasons was that the delegates felt it was imperative that the states as states have a certain degree of representation in the General Government. The basis for this was predicated upon the nature of the relationship this new Constitution would establish between the General Government and the state governments. The General Government would derive authority from the citizens of the United States and the states to wield power over certain objects that affected the nation as a whole. State governments would continue to derive authority from their respective citizens to wield power over objects enumerated in their state constitutions. A distinction between the spheres of jurisdiction in which the different governments should operate was therefore created.[13] Madison's convention notes reveal the following analogy given by Mr. Dickinson:

> He compared the proposed National System to the Solar System, in which the States were the planets, and ought to be left to move freely in their proper orbits.[14]

The Founders saw the need to protect the integrity of these distinct areas of jurisdiction. They knew that a national government would not be capable of properly fulfilling all the legitimate functions of civil authority.[15] They felt that state representation in the national government would act as a check against usurpation of state power by the General Government. It was believed that a Senate elected by the state legislatures would provide this necessary check. In an explanation of the necessity of instituting this mode of election, Mr. Dickinson cited the exigency of the influence of the states within the national government.

> The preservation of the States in a certain degree of agency [within the national government] is indispensable. It will produce that collision between the different authorities which should be wished for in order to check each other.[16]

He emphasized that barring the state governments from direct participation in the national government would tend toward destructive centralization and accordingly warned:

> If the State Governments were excluded from all agency in the national one, and all power drawn from the people at large, the consequence would be that the national Government would move in the same direction as the State Governments now do, and would run into all the same mischiefs. The reform would only unite the 13 small streams into one great current pursuing the same course without any opposition whatever.[17]

In order to guard the federal structure, it was important that the states be represented in the national government and equally as important that all the legislative power not be drawn immediately from the people. The logical means to accomplish both of these objectives was to allow the state legislatures to elect Senators. This would ensure the federal character of the national government

and would be a safeguard against the development of merely a national consciousness devoid of state loyalties.

That the debates over the method of senatorial election were indissolubly linked to the issue of the relationship between the General Government and the state governments is evinced in numerous statements similar to Mr. Dickinson's. In a discussion over this subject, Mr. Ellsworth said: "The only chance of supporting a General Government lies in engrafting it on that of the individual States."[18] Mr. Pinkney "wished to have a good National Government and at the same time to leave a considerable share of power in the States."[19] Before one of the preliminary votes on the method of election, Colonel George Mason declared that "The State Legislatures also ought to have some means of defending themselves against encroachments of the National Government."[20] Prescribing senatorial election by state legislatures, Mason went on to say:

> what better means [of defense] can we provide [the states] than the giving them some share in, or rather to make them a constituent part of the National Establishment.[21]

In a later discussion, Mr. Pinkney articulated the political maxim that "the General Government can not effectually exist without reserving to the States the possession of their local rights."[22] He considered it imperative that the Senate be a vehicle for protecting the state's political survival. Continual comments of this nature demonstrate that the Founders unquestionably intended that the Senate represent the states: that their voice in the national government was essential to guard against centralization.

Mr. Sherman believed this so strongly that he even advocated election of the first branch – the House of Representatives – by state legislatures. He believed that direct election by the people would lead to the abolition of the states:

> 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 National and State Governments that the elections to the former should be made by the latter.[23]

In view of the unanimous decision that Senators be elected by their state legislatures, it is clear that the Senators were thought of, somewhat, as ambassadors. Mr. Dickinson communicated this when he said that one of the reasons for his motion was "because the sense of the States would be better collected through their Governments; than immediately from the people at large."[24] Senators were to be representatives of their states as-states, to guard and protect their respective spheres of jurisdiction. The text of the debates reveal indisputably that this was an important consideration in determining the method of election.

It is important to note that the Founders believed that the people, and not merely the states, should also be represented in the national legislature. Considerable discussion was likewise devoted to the method of electing members to the first branch of government – the House of Representatives. It was almost unanimously agreed that this branch should represent the people directly and should

therefore be elected by the people directly. As noted by Mr. Wilson, this would cause the two branches to rest on different foundations.[25] The opinion of Mr. Pierce reveals one of the important distinctions between the two branches. He

> was for an election by the people as to the first branch and by the States as to the second branch; by which means the Citizens of the States would be represented both individually and collectively.[26]

This important distinction was very desirable. Mr. Williamson stated: "The different modes of representation in the different branches will serve as a mutual check."[27] It was the Founders' full intention that the two branches rest on different foundations – the mode of election was the determining factor. Regarding the importance of this distinction, Mr. Madison reported:

> Mr. Dickinson considered it as essential that one branch of the Legislature should be drawn immediately from the people; and as expedient that the other should be chosen by the Legislature of the States.[28]

Mr. Madison himself considered the popular election of one branch of the National Legislature "as essential to every plan of free Government" but he also advocated "the policy of refining the popular appointments by successive filtrations...."[29] In other words, he recognized that both direct and indirect elections were desirable modes to utilize: each method served an appropriate purpose.

The next consideration regarding the method of election is related to the ends to be served by the Senate. James Madison summarized these ends as: 1) "to protect the people against their rulers;" 2) "to protect the people against "the transient impressions into which they themselves might be led;" and. 3) to guard against the danger of interested coalitions oppressing the minority.[30]

It was determined that in order to serve these ends, wise and virtuous men of sterling character would be needed. This issue, as if set apart from the state representation issue, raised a separate question: which method of election was more likely to secure Senators of this caliber? There was much less discussion over this point than that of state representation. There was also less of a settled opinion on the matter. Mr. Gerry and Mr. Pinkney actually distrusted the people's ability to choose men of adequately high stature. The other delegates who expressed an opinion on this subject were not as severe. Mr. Sherman's fear in letting the people choose was that they would be deceived by misinformation. He said: "They [the people] want information and are constantly liable to be misled."[31] Mr. Ellsworth and Mr. Dickinson simply believed that the State legislatures were more capable of selecting seasoned statesmen.[32] In a discussion on the matter, Mr. Ellsworth commented:

> Wisdom was one of the characteristics which it was in contemplation to give the second branch. Would not more of it issue from the Legislatures; than from an immediate election by the people.[33]

In addition to this issue which affected all the ends summarized by Madison, the first one – that of protecting the people from their rulers – was specifically addressed. Mr. Madison noted:

> An obvious precaution against this danger [betrayal of the public trust] would be to divide the trust between different bodies of men who might watch and check each other.[34]

So, the Senate, being comprised of representatives of the states; and the House, being comprised of representatives of the people directly, were to act as checks against one another.

It was generally agreed that in order for the Senate to meet the second end summarized by Madison – that of protecting the people from "the transient impressions into which they themselves might be led," – the Senate must be insulated to a certain degree from the people.[35] This notion must not be taken to mean that the Founders mistrusted the people. The contrary was true, but the Founders believed that a check was necessary even upon the people. History proved that nations which instituted a pure democracy eventually came to ruins.[36] A Republic which "refine[d] and enlarge[d] the public views by passing them through the medium of a chosen body of citizens"[37] was better suited to preserve the life, liberty, and happiness of the American people. An additional check upon the impassioned will of the people was through the use of successive filtrations of representation in at least one branch of the national legislature.[38] Regarding this, Mr. Randolph acknowledged

> that the general object was to provide a cure for the evils under which the U.S. laboured; that in tracing these evils to their origin every man had found it in the turbulence and follies of democracy: that some check therefore was to be sought for against this tendency of our Governments: ....[39]

He concluded with this astute observation: "a good Senate seemed most likely to answer the purpose."[40]

Election by State legislatures was intended to render the Senate <u>indirectly</u> dependent upon the people, thus diminishing the pressure to comply with transient or arbitrary popular wishes. Mr. Madison made reference to the people deliberating about "the plan of government most likely to secure their happiness," and said that "they themselves, as well as a numerous body of Representatives, were liable to error also, from fickleness and passion."[41] He then stressed the importance of a venerable Senate stating:

> A necessary fence against this danger would be to select a portion of enlightened citizens, whose limited number, and firmness might seasonably interpose against impetuous councils.[42]

The Senate, therefore, was to be a more deliberate body -one in which the will of the people was given a reflective "second thought." According to Mr. Madison, "The use of the Senate is to consist in its proceeding with more coolness, with more system, and with more wisdom, than the popular branch."[43] The indirect election of Senators was intended to produce this affect.

Finally, an explanation of Madison's third point; that of guarding against the danger of interested coalitions oppressing the minority, is found earlier in the debates. Madison presented a brief survey

of situations in history when a majority, due to its united force, had threatened the inalienable rights of the minority. He then interposed several remedies and congruently presented the faults of each. He concluded with an elucidation of the only viable remedy, stating:

> enlarge the sphere, and thereby divide the community into so great a number of interests and parties, that in the first place a majority will not be likely at the same moment to have a common interest separate from that of the whole or of the minority; and in the second place, that in case they should have such an interest, they may not be apt to unite in pursuit of it.[44]

The Senate, therefore, having a foundation different from that of the House, was to produce one of those "divisions of interest." This was to safeguard the government from falling to mere majority rule, apart from government by law, which could lead to eventual anarchy.[45] In a later discussion on the matter, Madison posed this question: "How is the danger in all cases of interested coalitions to oppress the minority to be guarded against?"[46] His answer was:

> Among other means by the establishment of a body in the Government sufficiently respectable for its wisdom and virtue, to aid on such emergencies, the preponderance of justice by throwing its weight into that scale.[47]

It is evident, therefore, that these two aspects of the Senate – that it created another division of interests and that it was comprised of virtuous men – combined to constitute a Senate which would act as a control upon the evils which may arise when a majority tries, by its mere force, to subject an entire society to its will when that will us unjust. The method of election had definite bearing or formulating a Senate of this nature. Election by state legislatures was the best means to this end.

While these thirteen spokesmen on senatorial election held the same or similar views, there were two delegates who presented contrary opinions. Mr. Read felt that

> Too much attachment is betrayed to the State Governments. We must look beyond their continuance. A national Government must soon of necessity swallow all of them up. They will soon be reduced to the mere office of electing the National Senate.[48]

This notion was not supported.

Mr. Wilson believed that

> The General Government is not an assemblage of States, but of individuals for certain political purposes – it is not meant for the States, but for the <u>individuals</u> composing them; the individuals therefore, not the states, ought to be represented in it....[49]

He moved an amendment to this effect but it was not seconded. His concept that the United States

represented the individual citizens comprising it was true. His failure, however, was in not acknowledging the federal relationship of the states and General Government and the need for that relationship to be protected.

Mr. Wilson was also a strong adherent of a more direct fulfillment of the democratic principle.

> He wished for vigor in the Government, but he wished that vigorous authority to flow immediately from the legitimate source of all authority. The Government ought to possess not only first the force, but secondly the mind or sense of the people at large. The Legislature ought to be the most exact transcript of the whole Society. Representation is made necessary only because it is impossible for the people to act collectively.[50]

The other delegates did not support him in this proposition. Though they strongly agreed that the source of authority is derived from the people, they believed that a republican system (in which even that authority is checked) was better suited to the nation's needs.[51]

2. The Federalist Papers

In addition to Madison's convention notes, The Federalist Papers, another compilation of the thoughts of the Founders, can be used as a source from which to discern original intent. In Federalist No. 39, Madison explained the combination of both national and federal characteristics contained in the Constitution. One of the national features of the Constitution was the provision that the House be elected directly by the people. He explained:

> The House of Representatives will derive its powers from the people of America; and the people will be represented in the same proportion and on the same principle as they are in the legislature of a particular State. So far the government is national, not federal.[52]

The provision of Senate election by state legislatures. however, was one of the facets of federal character:

> The Senate, on the other hand, will derive its powers from the States as political and coequal societies; and these will be represented on the principle of equality in the Senate, as they now are in the existing Congress. So far the government is federal, not national.[53]

Alexander Hamilton also touched upon this subject. He said that if the state legislatures had not been designated to elect Senators, a misinterpretation of the federal character of government would have been likely upon announcement of and deliberation over the Constitution. This method of election was an "absolute safeguard" for the states and ultimately for the people. Hamilton was not naive. He realized the inherent dangers of senatorial appointments. He acknowledged, however, that potential dangers were slight when compared to the obvious debilitating effects of denying the states

a direct voice in the national government. Thus he said:

> 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 is 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 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.[54]

Hamilton thus confirmed that the method of election was the provision which distinguished the Senate as a federal attribute of the Constitution.

In a discussion on the powers of the General Government in relation to the states, James Madison spoke of the desirability of state influence in the national legislature:

> The State governments may be regarded as constituent and essential parts of the federal government. The Senate will be elected absolutely and exclusively by the state legislatures.[55]

He then said that the Senate, being so elected, would "consequently feel a dependence, which is much more likely to beget a disposition too obsequious than too overbearing towards them."[56] Here again, the influence of the states is emphasized in another effort to dispel fears about possible centralization of the national government.

In the main dissertation on the constitution of the Senate – Federalist No. 62 – Madison plainly stated the primary purposes for the method of election chosen by the Founders:

> 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.[57]

3. Historical Documents

During the ratification period of the Constitution, other dissertations on the Constitution were published in newspapers and pamphlets. In 1788, the Delaware Gazette published a letter by John Dickinson (under the pen name "Fabius") which contained the following excerpt regarding the Senate:

let it be remembered, that it [the Senate] is to be created by the sovereignties of the several states; that is, by the persons, whom the people of each state shall judge to be most worthy, and who, surely, will be religiously attentive to making a selection, in which the interest and honour of their

state will be so deeply concerned.[58]

This statement accentuates the notion that the states had a vested interest in their choice of Senators because the Senators were to protect that portion of sovereignty which remained with the State.

Tench Coxe, a well-known lawyer, economist, and author from Philadelphia, published a pamphlet on the Constitution in 1788 after eleven states had ratified the Constitution. Referring to Senators he said:

> They will also feel a considerable check from the constitutional powers of the state legislatures, whose rights they will not be disposed to infringe, since they are the bodies to which they owe their existence. and are moreover to remain the immediate guardians of the people.[59]

This statement, coupled with Dickinson's, demonstrates a reciprocity of obligation between the State legislatures and United States Senators. In deriving their appointment from the state legislatures, the Senators were accountable to their states. Concurrently, the state legislatures were all the more obliged to the people who elected them because of this paramount responsibility of choosing their national representatives.

B. Founders' Method Affirmed Abroad

Two eminent constitutional scholars, widely read and well respected in America, also concur with these propositions concerning senatorial election: James Bryce and Alexis DeTocqueville. The English statesman, James Bryce. wrote a detailed monograph on the American form of government including the Senate's contribution to the federal aspect of the national government. He said:

> The most conspicuous, and what was at one time deemed the most important feature of the Senate, is that it represents the several States of the Union as separate commonwealths, and is thus an essential part of the Federal scheme.[60]

He also acknowledged the desirable affect of instituting the two legislative branches on different foundations:

> The plan of giving representatives to the States as commonwealths has had several useful results. It has provided a basis for the Senate unlike that on which the other House of Congress is chosen.... It produces a body which is both strong in itself and different in its collective character from the more popular house.[61]

Bryce next confirmed Hamilton's expectations. by asserting that the Senate

> constitutes, as Hamilton anticipated, a link between the State Governments and the National Government. It is a part of the latter. but its members derive their title to sit in it from their choice by State legislatures.[62]

Bryce attributed all these desirable qualities to the method of election declaring:

> The method of choosing the Senate by indirect election has excited the admiration of foreign critics. who have found in it a sole and sufficient cause of the excellence of the Senate as a legislative and executive authority.[63]

Alexis DeTocqueville's conception of the Senate was even more acute. He compared the House and the Senate and believed that the Senate contained men of more distinguished character. He attributed the creation of this distinction to the difference in the methods of election. In his famous book. Democracy in America, he said that the Senate 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.[64]

Then, in contrasting the House and the Senate. DeTocqueville asked why "the latter has a monopoly of talents and enlightenment?"[65] Note his answer:

> 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. 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.[66]

DeTocqueville then explained this maxim of indirect elections:

> The Senators therefore do represent the result, albeit the indirect result, of universal suffrage, for the legislature which appoints the Senators is no aristocratic or privileged body deriving its electoral right from itself; it essentially depends on the totality of citizens; it is generally annually elected by them, and they can always control its choice by giving it new members.[67]

This elucidation clearly demonstrates that the people do exercise a degree of control over senatorial election.

DeTocqueville then explained that election by state legislatures acted as a filter and that the resultant product is an assembly of representatives sufficiently noble to check the "transient impressions" of the people. He said:

> But it is enough that the popular will has passed through this elected assembly for it to have become in some sense refined and to come out clothed in nobler and more beautiful shape. Thus the men elected always represent exactly the ruling majority of the nation, but they represent only the lofty thoughts current there and the generous instincts animating it, not the petty passions which often trouble or the

> vices that disgrace it.[68]

Of additional significance is the fact that DeTocqueville not only commended the appropriate use of the filtration of elections; he went so far as to warn that if this feature was not used, the republic could be lost to the throes of excessive democracy. He cautioned:

> It is easy to see a time coming when the American republics will be bound to make more frequent use of election in two stages, unless they are to be miserably lost among the shoals of democracy.... Those who hope to make it the exclusive weapon of one party, and those who fear it, seem to me to be making equal mistakes.[69]

DeTocqueville did not think that this method of election was to be feared: on the contrary; he believed it was a necessity.

Having examined the original intent of the Framers by surveying their debates in the constitutional convention and by reviewing pertinent Federalist papers; and. having examined the opinions of two eminent scholars of early American government, several conclusions regarding the method of senatorial election may be drawn. Senatorial election by state legislatures was designed to: 1) affect state representation in the national legislature for the three-fold purpose of: (a) thwarting potential centralization by guarding the federal aspect of the general government; (b) providing an opportunity for the states to vocalize their interests in national decisions, treaties. and appointments; and, (c) establishing the bicameral legislature on two different foundations for the purpose of instituting a political check; 2) utilize indirect election as a means of filtering out the "transient impressions" of the people; and, 3) foster the choosing of virtuous Senators, as the state legislatures would be most familiar with the character and qualifications of potential candidates. Though the generation which ratified the Constitution was satisfied with this method, seeds of discontent were soon to be sown.

III. DEBATE OVER POPULAR ELECTION

A. The Political Climate

As early as 1826, discontent over the original method of senatorial election was expressed. Popular election of Senators was first proposed by members of the House of Representatives. However, it was discussed for many years before the Senate even considered it.

Interest in this proposition gradually mounted and then peaked in 1892 at the launching of the Populist Party.

> their platform called for an extension of popular control over legislative machinery... in this very year some 23 constitutional amendments providing for the popular election of Senators were introduced.[70]

In an historic sense, the significance of the Populist Party was broader than merely its provocation

of the popular election of Senators. The party had significant effect upon the nation in terms of ideas, even though it had little success placing its adherents in elected office. Unfortunately, those ideas were founded on socialistic principles – the notion that "it is the business of society to look after and provide for the needs of every one of its members."[71] This concept is depicted in a statement made by a Populist supporter: "I claim it is the business of Government to make it possible for me to live and sustain the life of my family."[72] The perpetration of this kind of thinking would certainly lead to the expansion and centralization of the national government. It is therefore significant to note that some of the programs championed by the Populist Party were later adopted by the Democratic Party and were eventually enacted, albeit in an altered form.

Of this period, it is also important to note that the general population had become skeptical of government officials, fearing that they were controlled by big business. Ward Elliott, author of The-Rise of Guardian Democracy, said that the late 1800's are

> remembered as the most corrupt in the nation's history. The growth of industry and finance after the Civil War made control of state and city governments a valuable prize for fortune hunters in and out of government. It was the era of the professional politician, the hey-day of the boss.[73]

Many people came to believe that a solution for these social ills was the exertion of more popular control over government. Thus, the popular election of Senators was posed as one avenue by which to achieve this objective.

Though the Populist Party disbanded, interest in popular election was only temporarily cooled. Two amendments for popular control were introduced in 1902 and in 1908, five. By 1910, however, a resurgence of interest again began to peak.[74]

This curious fluctuation may have been a result of the political shift from Populism to Progressivism.

> Populism had hardly been turned back and its following begun to dwindle away when a new surge of reform swept over America in the early 20th century. It is generally called Progressivism, and it had a much broader following and greater impact than did all the third party, reformist, and collectivist movements of the latter part of the 19th century.[75]

Progressivism was an ideology, the goal of which was: "to associate the idea of progress with reform measures in such a way as to make the expanded role of government appear to be progressive.[76]

The Progressive ideology sprang from Darwinism – an ideology based upon the doctrine of evolution. The theory of evolution was applied to the field of sociology by the British philosopher, Herbert Spencer. The term, "survival of the fittest" was coined by Spencer. Applied in society, this meant that only the strong survived and that any interference with this natural process which weeded out the weak was counterproductive to the overall progress of mankind. The result was a theory

which purported "that evolution was synonymous with progress."[77]

Another philosophy which emerged from the theory of evolution also found expression in the Progressive movement: pragmatism. Formulated by John Dewey, Chauncey Wright, Charles Peirce, and William James, this philosophy embraced the notion that "the test of truth was to be found in its consequences; the business of the philosopher was to find out what worked to the best possible purposes."[78] The problem with this philosophy was that it exchanged function for form, and practice for principle. The authors of The Growth of the American Republic lamented: "The effect of such an attitude [pragmatism] on politics, law, economics, social institutions, education, art, and morals was little less than revolutionary."[79] Speaking not just of pragmatism, but of the overall philosophical shift of the turn of the century, Carroll and Faulk, in Home of the Brave likewise affirmed: "these were momentous years, during which a revolution was occurring[80]

One of the chief leaders of this "revolution" was Theodore Roosevelt. The introduction of the progressive agenda into the Republican Party was due largely to him.[81] The Roosevelt administration established the groundwork for accomplishing progressive reforms and then William H. Taft was launched into the presidency (primarily by Roosevelt's power) to continue its momentum. Though Taft, in actuality, did not further the progressive agenda as radically as was wished, his administration still, unfortunately, proved to be subversive of the established system.[82] Woodrow Wilson, a Democrat, defeated Taft in the election of 1912. His was the administration which ushered in the Sixteenth, and Seventeenth Amendments, as well as the Federal Reserve System.[83] These radical changes represented a gross departure from the previous constitutional government of more than a century.

Such was the milieu out of which the Seventeenth Amendment sprang. A liberal influence pervaded the politics of that day. A world view which espoused enduring principles was being overtaken by an evolutionary world view. It was believed that mankind was developing toward perfection – that theories and beliefs adhered to in the past were outmoded for the present and future.

In 1910, the Maine Law Review published an article by University of Maine professor Robert T. Sprague which aptly depicted the progressive attitude of this period. Calling for a constitutional convention Sprague alleged:

> Since 1789 the whole religious and philosophic aspect of the world has revoluted, and vital social and political problems, unknown at that time, have arisen.
>
> And with all this has changed the aspect of the functions and relations of the state to society. The old theory that "that government is best which governs least,"...has given way to government as a means for the development of an ideal society. Social legislation is becoming progressive and constructive, with a goal of race betterment and the brotherhood of man.
>
> Government is ... regarded as ... the best instrument for accomplishing good works....

> In the 120 years since 1789, mankind has made more material and spiritual progress than it had made in thousands of years before that date. Wonderful as the work of the 1787 Convention was and thoroly [sic] as it seemed to meet the needs of that distressed period, it cannot be regarded as sufficient for all time or all conditions....
>
> No human instrument of this kind could be expected to be sufficient for all the evolving stages of the wonderful progress of man.[84]

This kind of thinking was propagated among legal and political scholars and then disseminated to the general public. As it gained acceptance, constitutional bulwarks began to erode.[85]

It is not surprising, therefore, that the era which saw the ratification of the Seventeenth Amendment saw great changes occur in the fundamental principles of the United States' form of government. Historian Forrest McDonald of the University of Alabama described these changes in his book, The Constitutional History of the United States. He first affirmed that before the turn of the century, the government, as originally established, remained essentially unchanged in form:

> Despite the technological revolution and the sweeping economic and social changes that came with it, the Constitution continued to be, until 1910 or thereabouts, much what it had been a century earlier. It still provided a mixed "republican" form of government, with sovereignty divided by the federal system and the separation of powers.[86]

He then regrettably reported that, "Growing numbers ... were convinced that the system was obsolete[87] Consequently,

> During the next quarter of a century major overhauls were made to remedy these supposed defects. As a result, the system of checks and balances and the very idea of limited government underwent a great deal of erosion.[88]

McDonald continued by describing the essence of the changes which resulted from this erosion. He characterized one of those changes as being "toward greater democratization and nationalization – toward a powerful central government...."[89]

He next asserted, however, that

> That was not what the Founding Fathers had had in mind; their aim had been to create a diverse system that would protect the people from one another and from government itself.[90]

The constitutional bulwark of that original system was traded in for what was naively believed to be a superior system – one based on, supposedly, a more advanced theory of government. How was one system substantively traded in for the other? McDonald concluded that, "Much of the democratizing and nationalizing was done through constitutional amendments,"[91] one of which was

the Seventeenth.

Familiarity with the political climate of this period assists one in understanding the actual debates concerning the method of senatorial election. Those debates are now reviewed.

B. Arguments for Popular Election

Adherents of popular election cited many reasons for their belief in the necessity of this change. Briefly summarized, these reasons are as follows.

1. Election by state legislatures is obsolete. The condition of the nation has radically changed since 1787. Whereas the Founders mistrusted the people, officials of today believe that the people are trustworthy and intelligent. Whereas the states used to be loosely united and jealous of their sovereignty, a national consciousness has come to be more predominant. Whereas popular election was impractical before due to poor communication, new innovations have eradicated this problem.[92]

2. Both national and state interests suffer due to protracted senatorial contests in the state legislature Many legislatures render themselves ineffective in the internal affairs of the state because they become deadlocked in decisions regarding United States Senators. These deadlocks have continued for months and sometimes lasted an entire legislative session. In some cases, the state goes unrepresented or only partially represented in the Senate because an election is not resolved. National interests then suffer due to the absence of various state Senators.[93]

3. The-change will not affect General Government-State government relations. The original method of election was not the factor which distinguished that the states be represented as states in the Senate: equal representation was. Even so, the Senator can still represent the state as a state though he is elected by the people.[94]

4. Popular election would not hinder the Senate's past prestige and success. It was not the method of election which contributed to the Senate's success, it was the length of their term, gradual renewal and its small size.[95]

5. The current method fosters bribery and corruption The Senate has come to be referred to as "the rich man's club." Rich men can buy a seat in the Senate. Corrupt men can be placed in the Senate and become rich by taking bribes to do corporate bidding. The people do not trust the Senate any more. The Senate's inaction on the issue of popular election has tended to incriminate it.[96]

6. Popular election would make the Senate responsive to the people. The people are the proper mouth-piece of the state. yet the Senate is unresponsive. The proposed amendment is a just tribute to the intelligence and integrity of the individual voter. The current method fosters a "kaleidoscopic constituency" for the Senator. Many or most of the men in the state legislature who voted him in are no longer there at his time of re-election. Searching for consistency, he turns to the party. The Senator winds up representing the party boss rather than the state or the people.[97]

7. Public opinion demands the change. Obviously, the majority of the people want this amendment.[98] It would be undemocratic not to give the people what they want.

8. Amending the Constitution is not odious when done for a just cause shown. The Founders were not opposed to change, that is why they included Article V. The Constitution must change with the times according to the needs of the people.[99]

9. Representatives for the state legislatures are not being chosen for the proper reasons. The people are electing officials, not for their abilities, but for their choice of United States Senator. In a state election, the voter is forced to consider both national and state issues.[100]

10. The-election of Senators is not a legislative function. State legislatures are to make laws, not elect Senators.

This summary represents views which were widely held and publicized during the turn of the century.[101]

C. Arguments Against Popular Election

Despite the fact that those who supported this change finally grew to a majority, there were statesmen and citizens who boldly presented arguments in support of the status quo. A synopsis of these arguments is as follows.

1. Election-by-state legislatures was a wise plan. The Founders chose to institute a bicameral legislature founded on different bases as a check against usurpation of power and as a distinction between representation of the population versus representation of the states. This was a foundation of the federal system. Furthermore, it was believed that the men charged with serving the interests of the states were best qualified to choose the State's representative (Senator) in the General Government.[102]

2. Election-by-state legislatures was a protectiv e device against the excesses of democracy: This notion, properly understood does not imply a mistrust of the people. George F. Hoar, eminent Senator from Massachusetts and avid opponent of popular election, aptly stated:

> I am not afraid to say to the American people that it is dangerous to trust any great power of government to their direct or inconsiderate control. I am not afraid to tell them, not only that their sober second thought is better than their hasty action, but that a government which is exposed to the hasty action of a people is the worst and not the best government on earth. No matter how excellent may be the individual, the direct, immediate, hasty action of any mass of individuals on earth is the pathway to ruin and not to safety. It is as true to-day as it was when James Madison ... first said it, "That, although every Athenian citizen might be a Socrates every Athenian assembly would still be a mob."[103]

Though the Founders believed in this necessary check upon the passions of the people, increased democracy is being advocated through popular election of United States Senators. The consequences of increased democracy are already being reaped in other areas:

> More and more, American government has been democratized, in the sense of the voters taking power directly into their own hands. In some state governments, this has been carried to absurd lengths, and entirely non-political offices ... are chosen by an electorate who know next to nothing of the nature of the work to be done, or of the candidate's qualifications for such service.[104]

This is an indication of the demise which is certain if Senators are elected by popular vote.[105]

3. Election by state legislatures has been successful. The United States Senate has been hailed as the most successful upper chamber in the world. It has thus been imitated by a considerable number of other federal governments. A historical role call of the Senate demonstrates the caliber of men who have served their states and nation over the last 100 years. Most Senators have already demonstrated that they have gained the people's confidence, having previously been directly elected to other positions.[106]

4. "Popular" election would, in reality, amount to choice by party convention In most states, a party convention would choose the nominees for United States Senator. The people would not really be any nearer to true choice of representation. Corruption can occur in party conventions more easily than in state legislatures because state officials are under oath and constant public scrutiny.[107]

5. Popular election would impair the necessary independence of the Senate. The Senate is constituted to be a buffer against the schemes of political manipulation. Popular election would subject the Senate to continual pressure from special interest groups. Senators would be unduly distracted from their work by having the extra burden of maintaining good communication with constituents.[108]

6. Disputed elections would be more frequent and more difficult to settle if election was by popular vote. Contests in the Senate have been comparatively few whereas the House has had about 350 contested elections. The likelihood of disputed elections increases with a popular vote. Because each house is the judge of the elections of its members, an inquiry into a popular election would be a serious drain to the Senate, being much more difficult than an inquiry into a legislature's election.[109]

7. Popular election would produce disproportionate representation of the population. If Senators are to be elected by the direct vote of the people.... the election [will be] committed to mere mass. to mere weight of numbers. with no regard to the qualitative elements or to the State's varying sections and interests except as they may chance to be served by proportionality to population.[110]

8. Popular election could entice large sates to advocate proportional representation in the Senate. Equal suffrage in the Senate is the only provision of the Constitution secured against amendment. However. representation of the-people in the Senate. rather than of the states. may foster great

discontent among the larger states due to their unequal representation. This discontentment could produce disastrous results.[111]

9. Popular election will not guarantee better Senators. It may be reasoned that because election by state legislatures worked well for many years, the evil symptoms now experienced must be produced from a different source, a proven method does not suddenly become defective.

10. Popular election would attract the wrong kind of men to seek the senatorship. The necessary qualities of a Senator are such that he would most likely not be the kind of person to run the stump. The qualities of a Senator should be:

> Long schooling in statecraft, ability to master intricate problems of finance, to keep one's head in the midst of popular clamor, to hold one's tongue when public policy demands silence ....[112]

Oftentimes, the winner of a popular election is merely a man with a magnetic personality – a master of perfervid oratory. Greater depth than mere charisma is necessary for the senatorship.[113]

11. Dead-locks in state legislatures can be alleviated. The Act of 1866 could be reformed so that if a majority is not reached within a reasonable amount of time, a plurality will suffice. Another solution may be to encourage the states to experiment and develop a viable strategy for resolution. When the best plan is found, the other states will most likely develop similar plans.[114]

This short summary of the debates generates much food for thought. It can also foster confusion due to one major factor: many of the reasons given are based on expediency and are simply pragmatic. Addressing the question "What will work?" was paramount to answering the question "What is right, based upon the principles at issue?" Consequently, before giving any further attention to the debates, one must assess the proposed amendment from a principled standpoint.

IV. ANALYSIS OF THE SEVENTEENTH AMENDMENT

The Founders, aware of their fallibility, made provision for amending the Constitution. Although the amending process is outlined in Article V, the Constitution, itself, does not specifically set forth the criteria by which to discern the legitimacy of an amendment. The criteria for an amendment is identical to the criteria for a constitution. A constitution articulates the form of government appropriate to the administration of law in accordance with certain principles. As the United States Constitution embodies a form of government derived from the principles in the Declaration of Independence, so too must amendments.

The Declaration established the United States as one people though, as yet, they had no form or constituted government.[115] In creating one people, the Declaration asserted the following principles:

> We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life,

> Liberty, and the Pursuit of Happiness – That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed....

Thus, the purpose of government is to secure the inalienable rights of men. When the English form of government became destructive of those rights to the point of "absolute Despotism," the Revolution was undertaken to "throw off" that form and institute a new form. Accordingly, the Founders articulated the basis upon which that new form of government was to be established:

> whenever any Form of Government becomes destructive of these Ends, it is the Right of the People to alter or to abolish it, and to institute new GovernmentL laying its Foundation on such Principlest and organizing its Powers in such Form, as to them shall seem most likely to effect their Safety and Happiness.[116]

The Declaration of Independence was a statement of the "principles" upon which the new government's "foundations" were laid, and the Constitution was the framework for "organizing its Powers in such Form as to them [the governed] shall seem most likely to effect their Safety and Happiness." The term, "effect their Safety and Happiness," is simply a way of saying, "secure the unalienable rights of the people."[117]

The Constitution drafted by the Framers embodied an "organization of powers" laid upon the principles asserted in the Declaration of Independence. The new form was both federal and national in a republican framework. This combination seemed "most likely to effect their Safety and Happiness."

A lesson and rule are herein reflected and bear directly on the Seventeenth Amendment: as the Constitution corresponds to the principles asserted in the Declaration, amendments to that Constitution should also correspond to those same principles. This rule provides one criterion by which the legitimacy of an amendment may be tested.

The second criterion for testing legitimacy is related to the purpose of an amendment. That purpose is to correct a discovered fault which renders the Constitution inconsistent with its purposes. A "fault" may be in the form of a missing provision which has been deemed essential as an inclusion. The amendment process outlined in Article V reflects this correlation. Of this process James Madison said:

> It guards equally against that extreme facility which would render the Constitution too mutable; and that extreme difficulty which might perpetuate its discovered faults.[118]

The discovery and amendment of faults is desirable so as to render the Constitution more consistent with the principles espoused in the Declaration of Independence, i.e., more likely to secure the inalienable rights of the people.

In summary then, an amendment must first be consistent with the principles asserted in the Declaration of Independence, and second, it should serve the purpose of correcting a fault in the Constitution. These two controlling propositions constitute the legal framework by which the legitimacy of the Seventeenth Amendment may be tested.

A. First Test: The Principles

The principles articulated in the Declaration of Independence are: 1) that all men are created equal; 2) that they are endowed by their Creator with certain inalienable rights; 3) that governments are instituted to secure those rights; 4) that government is by the consent of the governed; and 5) that governments may be altered or abolished when they become destructive of inalienable rights and new governments which better secure those rights may be established in their place.

1. Equality

Of these points, the proposition of equality deserves initial consideration. The principle of equality translates constitutionally into an equal representation in the Congress.[119] Because men are equal, no person should be given more weighty representation than another.[120] Under the original method of election, this principle did not come to bear upon individuals directly because the Senate represented the states as political entities – the people in their corporate capacity, rather than in their individual capacities. The equality principle did come to bear upon the states, however, and this is why they are represented equally – two Senators per state. Madison affirms this, stating: "The Senate ... will derive its powers from the States as political and coequal societies; and these will be represented on the principle of equality in the Senate...."[121] Because the Senate represented the states as political entities, representation based upon population would have been contradictory. Therefore, though the more populated states did not have proportionally greater representation in the Senate, the principle of equality was not violated because it did not apply, in this case, to the individual.

The Seventeenth Amendment shifted the manner of election from the states directly to the people directly. In so doing, it shifted representation from the states, directly to the people, directly. Consequently, in order to remain consistent with the equality principle, proportional representation would have to be instituted. It was not. The number of senators remained fixed at two. While the equality of representation principle has been ensured in the House of Representatives by the Fourteenth Amendment[122] No similar provision has been made with respect to the Senate. Consequently, the interests of people in more populated states like California receive disproportionately less representation. Delaware, on the other hand, a relatively unpopulated state, is accorded greater representation since it elects the same number of senators as California – two.

This disproportion grossly contradicts the equality principle. It denies the proposition that equality is required in representation. The Seventeenth Amendment, therefore, because it was not accompanied by a provision for apportionment, contradicted the equality principle. It shifted the representation to the people, but did so without the necessary correlative of apportionment.

Though instituting apportionment would correct the equality of representation principle, it would

create other problems. If apportionment was instituted, the large states, having proportionally greater representation in the Senate. might tend to take advantage of the small states. The small states would have no adequate provision to defend themselves against such encroachment. This would consequently weaken their ability to secure the inalienable rights of their citizens. Thus, another principle would be violated – the principle that governments are instituted to secure the inalienable rights of men.

A no-win situation is created by the Seventeenth Amendment. If apportionment is not instituted, the equality of representationzprinciple is violated; yet, if it is instituted, the constitutionally reserved powers of the small states are threatened, rendering them less able to secure inalienable rights. The only viable conclusion in light of this irreconcilable contradiction is that, in a federal system, the election of Senators must be by state legislatures in order to remain consistent with its controlling principles.[123] On these grounds. repeal of the Seventeenth Amendment is indicated.

2. Consent

The next principle of the Declaration by which the Seventeenth Amendment must be considered is closely related to the previous one: that is, consent of the governed. Because government is by consent, the states, acting on behalf of the corporate interests of their citizens, must be represented in the national government just as the people individually are represented (in the House of Representatives). Just as the people seek to insure the protection of their inalienable rights by electing representatives unto this end, so states were intended to have a similar means of protecting their reserved powers. However, as a result of the Seventeenth Amendment, the states as states can no longer participate in the national legislative process. If Congress proposes a bill that will effectively strip a state of one of its constitutionally reserved powers, how can that state overcome such an attempt?

In the Senate, the states may no longer vocalize their interests with respect to treaties, or the appointment of ambassadors, supreme court justices or other government officials. How may the states protect themselves against national encroachment if they are denied this influence in the national legislature? If the president wants to appoint a supreme court justice who would construe the law in such a way as to encroach upon the reserved powers of a state, how can that state defend itself? Additionally, might not a border state have more of an interest in the appointment of ambassadors to Canada and Mexico than an interior state? Without bona fide state representatives in the Senate, these types of interests cannot be authoritatively expressed.

The authority to represent a state. as a state, was derived by the method of election. A representative is responsible to that political body he is elected to represent. If he is elected by the people of a state, then he is responsible to <u>them</u>. If he is elected by the state legislature, then he represents that body as they speak for the <u>incorporated</u> whole. If this had not been the case, then the Founders would not have articulated a clear distinction between the House and the Senate – that the House, being elected by the people, represented the people, and the Senate, being elected by the state legislatures, represented the states.

It has been argued that even though Senators are now elected by the people, their ability to represent the interests of their state is not diminished. This is not the case. The Senate simply does not represent the states either de iure or de facto. They do not represent the state as a matter of law because they are not legally amenable to the states as states. Neither do they represent the states in fact since the political realities skew their positions toward special interests. The plain fact of the matter is that senators now have no legal or factual motivation to defend the states against federal encroachments. Because the Senate was to be the branch of the legislature in the national government which represented the states as states, and, because this representation was secured by the election of Senators by state legislatures, the abolition of election by state legislatures also abolished de jure and de facto state representation in the Senate. This clearly demonstrates that the Seventeenth Amendment contradicts the principle of consent of the governed.

3. Instituting a New Form

The Declaration also asserts that men are endowed with unalienable rights; that governments are to secure those rights; and that new governments may be established to replace former governments when they become destructive of those rights. Assessing the Seventeenth Amendment in light of these principles requires a determination of whether or not the form of government as amended, better secures inalienable rights.

Federal Character

The form of government established by the Constitution is a mixture of federal and national characteristics in a republican framework. James Madison explained the unique combination of federal and national features in Federalist No. 39. He concluded with this summary:

> The proposed Constitution ... is, in strictness, neither a national nor a federal Constitution, but a composition of both. In its foundation it is federal, not national; in the sources from which the ordinary powers of the government are drawn, it is partly federal and partly national; ...[124]

He also stated that this mixture presented "at least as many federal as national features."[125] This demonstrates a delicate balance of power. The Founders believed that, of all the possible ways to organize the government's powers, this particular form seemed "most likely to effect their Safety and Happiness." Madison affirmed this arrangement in Federalist No. 51. He explained:

> 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 departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.[126]

With respect to the success of this system, Madison noted, "This view of the subject must particularly recommend a proper federal system to all the sincere and considerate friends of

republican government...."[127]

The Founders believed that a federal system would best secure inalienable rights. It is crucial to note, therefore, that the Seventeenth Amendment significantly undermined the original federal structure by abolishing state representation in the Senate.[128] Consequently, either the Founders were wrong in their belief about the federal structure's ability to secure inalienable rights, or, the Seventeenth Amendment tended to jeopardize inalienable rights.

To judge the validity of the Seventeenth Amendment's modification of the federal aspects of the Constitution. one need only consider whether such an alteration better secured the inalienable rights of the people. If inalienable rights are better secured by a diminished federal nature, then the Amendment improved the Constitution. But if the Amendment jeopardizes inalienable rights by diminishing the federal features, then it should be repealed.

That a diminished federal structure does tend to jeopardize inalienable rights is depicted in a recent Supreme Court case: Roe-v. Wade. The Court gave constitutional status to abortion at the expense of state power and the unalienable right to life of an unborn child. That Court was composed of nine justices whom the states had no ability to select or to reject. The power of the state to protect the unalienable right to life was rendered inoperative by this Supreme Court ruling. The relationship between the Seventeenth Amendment and abortion is not tenuous. It is a prime example of the states being disabled from checking the usurpations of state power to protect unalienable rights. Though other factors are involved, the Seventeenth Amendment is nevertheless relevant. Its repeal on these facts alone is warranted.

Republican Feature

In Federalist No. 39, James Madison defined a republic to be:

> a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure for a limited period, or during good behavior.[129]

In Federalist No. 10, Madison contrasted this form of government is with a democracy. First he defined a pure democracy and exposed its inherent flaws:

> a pure democracy, by which I mean a society consisting of a small number of citizens, who assemble and administer the government in person, can admit of no cure for the mischief of faction. A common passion or interest will, in almost every case, be felt by a majority of the whole; a communication and concert results from the form of government itself; and there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual.[130]

He then stated that democracies, being unable to secure inalienable rights, are short lived:

> Hence it is that such democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths.[131]

After this disparaging description, Madison said that a republic "opens a different prospect and promises the cure for which we are seeking."[132] He then elucidated the ways in which a republican system affects these cures. Madison said that representation of the people was designed to "refine and enlarge the public views by passing them through the medium of a chosen body of citizens..."[133]

Representation was to "refine" – to filter out – only the passions of the people: it was not meant to silence the people's will. Accordingly, Madison explained: "it is the reason alone that ought to control and regulate government. The passions ought to be controlled and regulated by the government."[134] Acknowledging that human nature is subject to passions which oftentimes negate reason, the Founders instituted a government "of the people" based on a republican rather than a democratic form. They instituted this necessary "check" – representation – in the interest of the citizenry; to promote the good of the people. Madison affirmed this stating:

> Under such a regulation it may well happen that the public voice, pronounce by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves."[135]

A unique expression of this republican principle was incorporated into the Senate. The method of indirect election of Senators through state legislatures was constituted as an additional check upon the "transient impressions" of the people. Federalist No. 63 graciously explains this useful aspect of the Senate:

> such an institution may be sometimes necessary as a defense to the people against their own temporary errors and delusions. As the cool and deliberate sense of the community ought, in all governments, and actually will, in all free governments, ultimately prevail over the views of its rulers; so there 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 themselves, until reason, justice, and truth can regain their authority over the public mind?[136]

Furthermore, because the House and Senate were built on different foundations (representatives of the people/representatives of the states) the use of representation produced still another check: the House and the Senate would check each other. Madison conveyed the need to form a government which would check the vices of both the people and their rulers in Federalist 51:

> 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 it to control itself.[137]

In light of these considerations. the Founders believed that utilizing the republican principle both by direct representation in the House and indirect representation in the Senate would best secure inalienable rights. Accordingly, Madison asserted:

> It is evident that no other form would be reconcilable with the genius of the people of America; with the fundamental principles of the Revolution.... If the plan of the convention, therefore, be found to depart from the republican character, its advocates must abandon it as no longer defensible.[138]

The Seventeenth Amendment, therefore, by abolishing indirect election and by eliminating the differing bases of representation, significantly diminished the original republican character of the government. As with the federal feature, likewise, to judge the validity of the Seventeenth Amendment's modification of the republican feature of the Constitution, one need only consider whether such an alteration better secured the inalienable rights of the people. If unalienable rights are better secured by a diminished republican feature, then the Amendment improved the Constitution. But if the Amendment jeopardizes inalienable rights by diminishing the republican feature, then it should be repealed.

The ratification of the Seventeenth Amendment itself presents a good example. For many years, the Senate successfully resisted attempts to institute popular election. Senators recognized this request as a misguided opinion of the people because. being skilled statesmen, they knew that such a change would, in reality, be detrimental to the people. Public opinion on the matter swelled, however, and many state legislatures gradually succumbed to instituting various processes which enabled their respective citizens to indicate their choice of United States Senators – a popular election of sorts, though the legislatures maintained the final authority as to Senate appointments. Just prior to the ratification of the Seventeenth Amendment, the Senators of twenty-nine states obtained their Senate seats in this manner. The corollary is that one of the chief arguments these Senators raised in support of popular elections was that the people clamored for the change. Were those Senators failing to assess the requested change in light of the principles at stake? Did their interest in reelection supersede their desire to do what was right? Was it a coincidence that after the quasi-method of popular elections was instituted by over half of the states, that the Senate became unable to resist the misguided opinions of the people?

Other examples not within the scope of this thesis could be examined. It is sufficient to conclude that the Seventeenth Amendment's modification of the republican feature of indirect election does not better secure the inalienable rights of the people because it diminishes the necessary refinement process essential to protect the people from their own mistaken impressions.

According to the Declaration of Independence, when an existing form of government is altered, the new form instituted in its place must better secure the inalienable rights of the people. The

Seventeenth Amendment clearly altered the original form in two ways: in nullifying state representation, it altered the national government's federal character; by abolishing indirect representation and the different foundations of the bicameral legislatures, two of the safeguards of the republican system were revoked. Because these alterations did not better secure inalienable rights, and in fact, subverted them, the Seventeenth Amendment is inconsistent with the principles in the Declaration which dictate the conditions under which legitimate alterations may be made.

The foregoing examination reveals that the Seventeenth Amendment fails miserably to conform to the principles asserted in the Declaration of Independence. It consequently fails the first test applied to assess an amendment's legitimacy.

B. Second Test: A Discovered Fault

Was the purpose of the Seventeenth Amendment to correct a fault in the Constitution? In his presentation of the argument against popular election, George H. Haynes (noted scholar on the Senate) indicated the necessity of asking such a question in this remark:

> Nothing more plainly marks the tyro in politics than his eagerness to secure radical changes in existing institutions without first asking whether the alleged abuses find their real source in the institution which he assails; whether the remedy he proposes is appropriate or adequate, or whether its application will produce disorg,3nization and other evils worse than those which it aims to remove.[139]

Haynes asserted the necessity of determining the true cause of the Senate's defects before suggesting a remedy, and certainly before proposing an amendment as a remedy:

> To prove that the Constitution of the United States should be so amended as to provide for the election of Senators by popular vote, it is not enough to point out deplorable defects in the Senate: it must further be proved that these defects are due to the present method of election, that popular elections are calculated to remedy the evils and to do so without causing disproportionate injury to the structure and working of American government.[140]

Most of the arguments for popular election were filled with accusations against the Senate and it is true that the Senate was evincing some serious defects.[141] What was not true was that the method of election was responsible for those defects. If one were to reduce the complaints against senatorial election by state legislatures to their lowest common denominators, the end products would essentially be corruption and the consequences of protracted senatorial contests in the state legislatures. These were, indeed, real problems, but their root did not lie in the existing Constitution; therefore, amending that Constitution was neither appropriate nor remedial: it was futile and destructive.

1. Bribery and Corruption

Bribery and corruption can occur regardless of the method of election. Proponents on both sides of the issue tried to persuade others that the method they endorsed was more likely to curb corruption. Although arguments on both sides were convincing, the real issue was that the existing method of election neither produced nor provoked corruption. The heart of the problem was, ultimately, the people.

A former Senator apportioned responsibility for the Senate's defects as follows:

> Whatever faults now and then happen under the present system do not arise from any fault in the system itself, but from the fault of the body of citizens themselves – non-attendance at caucuses and primaries; non-attendance at registration and at the polls; slavish fidelity to party organizations and party names; a contribution to and winking at corrupt use of money at nominating conventions and elections, and the encouragement or toleration of individual self-seeking in respect of getting possession of offices, all of which are truly public trusts.[142]

Thus, the people must bear a degree of responsibility for defects in civil government if they either allow or contribute to political corruption. As Madison said, the government is "the greatest of all reflections on human nature."[143] A republic will never be greater than its people. If the electorate is corrupt, or too apathetic to guard against corruption, then their government will be corrupt. Woodrow Wilson said that the Senate "contains the most perfect product of our politics, whatever that product may be."[144] This holds true, even when that "product" is bad.

Nine years after the Seventeenth Amendment was ratified, an article by Thomas Shelton was published in the Central Law Journal. In it, Shelton articulated the futility of an amendment designed to eliminate corruption in politics. He stated that "fraud [was] occurring in elections in nearly every state..." and that "the amendment [had] failed in its purpose."[145] He asserted the following as the reason for its failure:

> the elimination of the disposition to defraud, oppress, cheat or bribe in elections, is not within the legislative control. It never will be. It will occur so long as the people governed wish or permit it, whatever be the method of election or the punishment for transgression prescribed. It is a maxim that a government is no better nor worse than the people it serves .... criminal laws do not make honest men nor were they intended for such. And still another thing, viz: that the dishonest will continue to pursue their wicked ways whatever the Constitution.[146]

One may easily see that it was not a defect in the Constitution they were trying to correct – it was their own hearts. However, in the words of Shelton, "Force never permanently settled anything.... And it never created or improved the morals of a people."[147] Proponents of popular election had confused the issues. Consequently, they wound up trying to apply the wrong remedy to the wrong problem.

The true solution to bribery and corruption lies in a revival of morals, not in amending the Constitution; and, while civil government has no jurisdiction over the conscience of man, it may encourage those activities which foster good citizenship. Accordingly, Shelton issued this bold proclamation:

> Lessons in citizenship and government and their relation are needed. The children must be taught as an assurance of the future. Their elders need to learn that the government must be perpetuated for the children. If we have been guilty of preaching, it is a sermon in behalf of the awakening of the American people to a keen consciousness of the responsibility and duty of the individual suffragan and the relation of the sovereign states to the Union; to a sense of the disgrace that has come upon them by their neglect – the admission that their legislatures could not be trusted to elect United States Senators, and to the determination to bring up a new generation whose moral standards and political ethics are those of the founders of governments in America.[148]

2. Protracted Contests

While it is also true that both national and state interests suffered due to protracted senatorial contests in the state legislatures, the method of election was not to blame. The state legislatures were to blame. Shelton asked these pointed questions:

> Are the sovereign states performing their duty to themselves? Are they depending too much upon the federal government? Are they taking any interest at all? Is there a realization that a United States Senator represents the sovereignty of the state and not the people?[149]

The legislatures could have done more to resolve the causes of deadlock or prolonged decision-making. In earlier years states had resisted encroachment. Now the states were apathetic. The central government was able to enlarge its sphere of power in proportion to the states' abdication of their own.[150] The Amendment, however, could not have corrected a fault in the Constitution since the fault lay in the state legislatures themselves.[151]

In summary, the Seventeenth Amendment falls short of the criteria of amendment laid down in the Declaration of Independence. It fails to maintain the standard of equality and consent, and lacks the requisite federal and republican characteristics necessary to better secure inalienable rights. In addition, the Amendment corrected no constitutional fault. Consequently, the Seventeenth Amendment was destined to deteriorate the security of the Constitution and ultimately the rights of the people.[152]

The area most deteriorated has been in the maintenance of the constitutionally reserved powers of the states. It is not within the scope of this paper to trace the exact connection between the Seventeenth Amendment and the multifaceted process by which state powers have been eroded.

The connections. however, can be alluded to by a brief review of the conclusions of others.

In his book, The Making-of-America. constitutional scholar Cleon Skousen cites the Seventeenth Amendment as a cause of the erosion of state powers. He states:

> This amendment provided that Senators must be elected by the people of the state "at large," but there is no one in Washington specifically appointed to watch over state rights and state sovereignty. A serious deterioration has occurred since the Seventeenth Amendment was adopted at the insistence of the states themselves.[153]

Skousen later said that the Founders' original arrangement to provide an important balance "is no longer part of the system," since the Seventeenth Amendment and that in many ways. "the detrimental consequences of this change have already become self-evident."[154] Though Skousen does not elaborate on those "detrimental consequences." his statement is indicative of the relevance of further inquiry into the matter.

Additional significance is indicated by the recent formation of the Working Group on Federalism. This group was mandated by the federal government. Its purpose is set forth below:

> Established by the Domestic Policy Council in August. 1985, the central purpose of the Working Group. as defined in its charter. is to develop "a basic. administration-wide strategy" for ensuring that federal law and regulations are rooted in "basic constitutional federalism principles."[155]

One of the most influential products of this Working Group has come in the form of a report entitled. The-Status of Federalism in America. Referring to the causation of the erosion of state powers, the report asserts:

> The nationalization of state sovereignty has been accomplished largely through a two-step process in which (1) the national government's political branches, usually relying on the commerce power or the spending power, enact a measure extending the reach of the national government into matters within the reserved powers of the States and (2) the national government's judicial branch, through the power of constitutional interpretation, upholds the measure as consistent with constitutional federalism.[156]

This means that the Senate itself has enacted legislation which has encroached upon state powers.

The report also states that "the major thrust toward centralization has occurred during the twentieth century."[157] It then discusses the Sixteenth and Seventeenth Amendments and makes this statement about the Seventeenth:

> Originally, Senators were elected by state legislatures. The Senate was designed to be a federal institution within the Congress. The Seventeenth Amendment

> substantially diluted the original purpose of the Senate – to provide a "constitutional recognition of the portion of sovereignty remaining in the individual States.[158]

Thus, the report concluded that the legitimate authority of the states was "substantially diluted" by the Seventeenth Amendment. Although the report does not directly outline the specific consequences of the Seventeenth Amendment, the fact that it is mentioned in a report entirely devoted to the erosion of federalism is very telling.

Additionally, in his book, The Growth of America: 1878-1928, Clarence B. Carson excoriated the Seventeenth Amendment stating: "No other amendment to the Constitution has done so much to unsettle the structure of the government conceived by the Founders."[159] After outlining the original intent of the Framers in instituting senatorial election by state legislatures and explaining the Seventeen Amendment's alteration of this intent, Carson concluded: "state governments lost their main check on the federal government, and that has borne some strange fruit."[160]

George H. Haynes' two-volume history of the Senate (published in 1938) outlines some of the negative effects of the Seventeenth Amendment. Though he was a proponent of popular elections, his conclusions clearly demonstrate that after 1913, Senators did represent individualized and/or localized interests at the expense of state and national interests.[161]

Based upon a principled analysis of the effects of the Seventeenth Amendment and upon the evidence presented, it is emphatically clear that the Seventeenth Amendment should be repealed.

V. RECOMMENDATION

The foregoing analysis includes several points. First, the Seventeenth Amendment is inconsistent with many of the principles reflected in the Declaration of Independence.

The Amendment contravenes the principle of equality because, in shifting representation from the states to the people, it failed to make provision for equal representation of the people. It violates the principle of consent by denying the states a voice in the national government. The Amendment significantly diminishes both the federal character and republican nature of the the Constitution. In essence, the Seventeenth Amendment fails to better secure the inalienable rights of the people. In encroaching upon the reserved powers of the states, it obstructs states from securing the inalienable rights of its citizens. Practically, the Amendment did not remedy any faults. It was a misappropriation because the defects it sought to correct were not grounded in the Constitution. Instead of being remedial, the Seventeenth Amendment was detrimental: it created numerous new constitutional problems which contributed to the decline of federalism. Ironically, what was purported to be a remedy is now, itself, the cause for remedial action. Successful achievement of an agenda to repeal the Seventeenth Amendment requires careful cultivation. Two approaches to rectify this severe problem are recommended: education and action.

In an era when proper functioning of the American republic is misunderstood by the majority of citizens, one must purpose to reeducate that citizenry if one expects to gain grass-roots support. Due

to the nature of the Seventeenth Amendment, one must gain support at the grass roots level for its repeal. Now that the population has the power to elect their Senators, it will take a great deal of educating for the people to realize that it is in their best interest to relinquish that power and return it to the state legislatures.

First, the people must be taught that the Declaration of Independence is the true expositor of the principles and terms employed in the Constitution. Accordingly, the purpose of government is to secure the inalienable rights of the people, not to undermine those rights. Once this foundation is laid, education is needed in three basic areas: federalism, the Constitution, and the Senate. When the people understand the controlling principles which govern these three areas, they will be equipped to draw their own conclusion about the Seventeenth Amendment.

People need to understand what federalism is and why it is crucial to the American form of government. They need to know the jurisdictional distinctions between the national and state governments and be made aware of the problems that have resulted from the erosion of state powers. These problems must be framed in practical terms to which the people can relate. When they are convinced of the necessity of federalism, they will search for restorative solutions. At that point, the people would be ready to consider repealing the Seventeenth Amendment.

Additionally, the American people need to understand their Constitution – not only what it provides, but how it provides. In other words, besides understanding what it says, they need to understand the nature of constitutions in general. When citizens comprehend the controlling principles that govern the United States Constitution, they will be able to assess the propriety of proposed amendments. They will not be prone to suggest constitutional amendments as the ultimate solution to every civic problem. When the people once again become constitutionally literate, they will be in a position to reconsider the Seventeenth Amendment. Having gained the tools to assess its legitimacy, citizens would be equipped to discern its misappropriation.

Finally, the institution of the Senate must be retaught from a principled perspective. Citizens should be aware of how the Senate was constituted and why it was designed as it was. Because Attorney General Edwin Meece has already done much to reeducate the public in the area of "original intent," it would be profitable to implement a strategy for repealing the Seventeenth Amendment by emphasizing the original intent for the Senate. It is hoped that this renewed perspective would foster a principled assessment of the Senate's ills and diminish proposals of pragmatic remedies. An encouragement toward remedial action couched in this framework would be an excellent environment in which to suggest the repeal of the Seventeenth Amendment. In addition, when people realize that Senators were originally considered representatives of their state, as a state, they will see the obvious correlation between this and the method of election.

Another consideration aside from the general population is the state governments. The state legislatures need the same education. Because many of the state's legitimate responsibilities are now handled entirely or partially by the federal government, the state governments are not currently used to operating, fully, like true states. A cultivation process must, therefore, also take place in the state governments. Until they again begin to exercise their legitimate authority, electing a Senator as their

representative would be premature. The mandate for such a transformation in the state governments must come from the people. They must gain a greater sense of state consciousness. Rather than considering themselves as merely United States citizens, the people must regain an attitude of dual citizenship – of their state and nation.

The states presently possess the authority to call for a correction of the encroachment upon their reserved powers. It is in the best interest of the people for the states to reacquire accountability between the state legislatures and their respective Senators. This would give the states more control in the national Congress and permit them to protect themselves from national encroachment. The state legislatures could begin to reacquire such accountability by passing a resolution which would require Senators to appear before their respective state legislatures both before and after Congress opens and closes. The legislature could then inform the Senators as to the best constitutional interests of the state and its people before Congress opened and then assess their performance after it closed. The state legislatures could hold their Senators accountable in the public eye and should work to do so. Action of this kind would be a step in a restorative direction.

Additionally, when grass-roots education is successfully achieved, and the state legislatures are sufficiently prepared, the next step toward repeal is to encourage action in the national legislature. When the societal disposition becomes favorable to the abrogation of the Seventeenth Amendment, various appeals to this effect can be made to governing authorities. Consistent entreaties should eventually yield positive results. This would require that members of the United States Senate also be reeducated about the constitutional role of the Senate. Senators need to be persuaded of the wisdom of the original intent of the Senate – that was an integral part of the federal system. Then, the Senate itself should undertake to repeal the Seventeenth Amendment for the benefit of all United States citizens.

Though there would be obvious, and, at times, fierce opposition to the foregoing strategy, such a battle must be waged. The threat of defeat is not an acceptable excuse for inaction. When principles have been wounded, one has no option whether or not to fight, only how and when. The threat of defeat need not be so ominous, however. There is cause for hope when one considers that America is governed by a written constitution and that the original intent can be discerned. Though the foundation for federalism is severely damaged, it is not totally destroyed. What remains can be strengthened and used as an allurement to restore what has been lost.

When all is said and done, however, the author realizes that without virtue in the people, the recognition of the truth of the aforementioned propositions will be negligible. Without sustaining virtue, the consequences of vice can never be rolled back. It is the prayer of this author that the American people will rise to the occasion – it is their government – a republic, if they can keep it.

ENDNOTES

1. John Adams. "Inaugural Address." published in James D. Richardson, ed., A Compilation of the Messages of the Presidents, 1789-1897, 20 vols. (New York: Bureau of National Literature, Inc., 1897), 1:219.

2. Andrew Jackson, "Farewell Address," published in Ibid., 4:1512.

3. William Gladstone said that "the American Constitution is the most wonderful work ever struck off at a given time by the brain and purpose of man." Quoted in James Beck, The Constitution of the United States, with a Preface by The Earl of Balfour (New York: George H. Doran Co., 1922), p. 29. Alexis DeTocqueville was so impressed with the governmental systems in America that he wrote a two volume work entitled Democracy in America to explain its workings and praiseworthy attributes.

4. Those principles were given form in various state constitutions as well, particularly after the Resolution of May 15, 1776. Issued just prior to the Declaration, it urged the colonies to form separate governments for the exercise of civil authority within each colony. This was because the colonies were no longer ruled by the crown, being in a state of war with the same. Many of the men who helped formulate these early constitutio n were instrumental in issuing the Declaration of Independence, and later, the United States Constitution.

5. Thomas Jefferson, "First Inaugural Address," published in Richardson, 1:312.

6. For a discussion on the significance of a written constitution, see: Edwin Meece, Address before The Federalist Society, 30 January 1987, Washington, D.C., pp. 5-15, (Typewritten). Explains the significance of a written constitution.

7. Abraham Lincoln, "First Inaugural Address," published in Richardson, 7:3207. See-also, Ibid. for a discussion on original intent.

8. U.S., Domestic Policy Council, Working Group on Federalism, The - Status of Federalism in America, (November, 1986), p. 8. See - also James Madison, The Federalist-Papers No. 45, with Introduction by Clinton Rossiter (New York: New American Library, 1961; reprint ed.. McLean edition, 1788), pp. 292-293.

9. President Reagan issued a "Statement on Federalism Principles" on April 8, 1986. During his administration, he has endeavored to reinstitute some of these principles within the national government structure. His plan, referred to as "New Federalism" incorporates federal budget cuts on domestic programs and the redirecting of federal programs such as education, housing, and transportation to state and local levels. Robert Beneson, "Federalism Under Reagan," Editorial Research. Reports 1 (24 May 1985):379-384. It can be considered a compromising strategy to restore constitutional federalism.

The Executive Office is involved in a "Working Group on Federalism" established in 1985 by the Domestic Policy Council. This group consists of representatives from nine agencies and the White House. Their purpose is to develop a strategy to reinstill "basic constitutional federalism principles" into federal law and regulations. See, Working Group on Federalism, title page. In November of 1986, the Working Group on Federalism published a comprehensive report on the contemporary status of federalism in America.

The Federalist Society was founded in April, 1982, by a group of law students from Yale, Harvard, Stanford, and the University of Chicago. It is now comprised of lawyers and law and public policy students and faculty who desire to work toward the restoration of the rule of law and corresponding traditional values in American society.

10. Working Group on Federalism, p. 2.

11. Art. I, Sec. 3 of the United States Constitution reads in part as follows:

> 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.

12. The Seventeenth Amendment of the United States Constitution reads as follows:

> The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.
>
> When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.
>
> This amendment shall not be so construed as to affect the election or term of any Senator chosen before it

becomes valid as part of the Constitution.

13. See generally Alexander Hamilton. Federalist No. 17, published in Rossiter, pp. 118-122; Madison, Federalist Nos. 44, and 45, published in Rossiter. pp. 280-294.

14. James Madison, Notes of Debates in the Federal Convention of 1787, with an Introduction by Adrienne Koch (Athens, OH: Ohio University Press, 1966; reprint ed., U.S., Congress, House, Documents Illustrative of the Formation of the Union of the American States, ed. C.C. Tansill, H. Doc. 398, 69th Cong., 1st sess., [Washington, D.C.: Government Printing Office, 1927]), p. 84.

15. Mason said:

> whatever power may be necessary for the National Government a certain portion must necessarily be left in the States. It is impossible for one power to pervade the extreme parts of the U.S. so as to carry equal justice to them. Ibid., p. 87. See also Ibid., pp. 84, 87, 187, 189-190; and Hamilton, Federalist No. 17, pp. 118-119.

16. Madison, Notes of Debates, p. 84.

17. Ibid., pp. 84-85, (emphasis added).

18. Ibid., p. 190.

19. Ibid., p. 78.

20. Ibid., p. 87, (emphasis added).

21. Ibid., (emphasis added).

22. Ibid., p. 187.

23. Ibid., p. 74.

24. Ibid., p. 82.

25. Ibid. This is not to imply that Wilson supported the notion of two houses on different foundations, only to demonstrate that it was realized that different foundations existed.

26. Ibid., p. 78.

27. Ibid., p. 82.

28. Ibid., p. 77.

29. Ibid., pp. 40-41.

30. Ibid., pp. 193-195. This last statement is not indicative of the erroneous notion that minorities have certain special rights that majorities do not have. All men are created equal and are endowed by their Creator with certain unalienable rights. Because the purpose of civil government is to secure these rights (for all men) it is reasonable that. that government be so engineered as to institute a safeguard such that a majority, by its shear force, may not usurp the inalienable rights of men in a minority. Madison was making the point that part of the reason for the creation of the Senate was to provide another division of interests as a means of thwarting attempts by a majority to oppress a minority. Ibid, p. 77. The Senate was also intended to be comprised of men who were wise and virtuous enough to discern unjust schemes of this sort so that it could throw its weight against such schemes. Ibid., p. 195

31. Ibid., p. 39.

32. Ibid., pp. 77, 82.

33. Ibid., p. 189.

34. Ibid., p. 193.

35. Ibid.

36. See Madison, Federalist No. 10, published in Rossiter, p. 81.

37. Madison, Federalist No. 10, published in Rossiter, p. 82. See also Idem, Federalist, No. 39, published in Rossiter, p. 240.

38. Alexis DeTocqueville, Democracy in America, ed. J.P. Mayer, trans. George Lawrence (Garden City, NY: Doubleday and Co., Inc., 1966), p. 201.

39. Madison, Notes of Debates, p. 42.

40. Ibid.

41. Ibid., p. 194.

42. Ibid.

43. Ibid., p. 83.

44. Ibid., p. 77.

45. Dual principles apply here. One is that because government is by consent, the will of the majority is to prevail. Tho other is that all men are created equal and are endowed with inalienable rights. Therefore, the stipulation upon executing the will of the majority is that that will not usurp the inalienable rights of the minority. Thomas Jefferson articulated this maxim as follows:

> All, too, will bear in mind this sacred principle, that though the will of the majority is in all cases to prevail, that will, to be rightful must be reasonable; that the minority possess their equal rights, which equal law must protect, and to violate would be oppression. Thomas Jefferson, "First Inaugural Address," published in Richardson, 1:310.

46. Madison. Notes of Debates, pp. 194-195.

47. Ibid., p. 195.

48. Ibid., p. 78.

49. Ibid., p. 189.

50. Ibid., p. 74.

51. See Madison, Federalist No. 39, published in Rossiter, p. 240. See-generally Ibid., pp. 240-246.

52. Published in Ibid., p. 244.

53. Published in Ibid.

54. Hamilton, Federalist No. 59, published in Rossiter, p. 364.

55. Madison, Federalist No. 45, published in Rossiter, p. 291.

56. Published in Ibid.

57. Idem, Federalist No. 62, published in Rossiter, p. 377.

58. John Dickinson, The Letters of Fabius on the Federal Constitution, published in E.H. Scott, ed., The Federalist Papers and Other Contemporary Papers on the Constitution of the United States (Chicago: Scott, Foresman, and Co., 1894; reprint ed., Pamphlets on the Constitution, ed. Paul Leicester Ford (Brooklyn: Brooklyn Historical Club, 1888),

p. 784.

59. Tench Cox, "An Examination of the Constitution for the United States of America," published in Ibid., p. 762.

60. James Bryce, The American Commonwealth, 2 vols., 3d ed. (New York: The MacMillan Co., Ltd., 1909), 1:98.

61. Ibid., 1:99. Bryce also said:

> Every nation which has formed a legislature with two houses has experienced the difficulty of devising methods of choice sufficiently different to give a distinct character to each house.... The American plan, which is older than any of those in use on the European continent, is also better, because it is not only simple, but natural, i.e. grounded on and consonant with the political conditions of America. Ibid., 1:99-100.

62. Ibid., 1:100

63. Ibid.

64. DeTocqueville, pp. 200-201.

65. Ibid., p. 201.

66. Ibid.

67. Ibid.

68. Ibid.

69. Ibid.

70. U.S., Congress, Senate, Proposed Amendments to the Constitution tion of the United States Introduced in Congress from December 4th 1889 to July 2t 1926, S. Doc. 93, 69th Cong., 1st sess. (Washington, D.C.: Government Printing Office, 1926; reprint ed., Westport, CT: Greenwood Press, 1976), P. III.

71. Clarence B. Carson, The Growth of America: 1878-1928 A Basic History of the United States Series, no. 4 (Greenville, AL: American Textbook Committee, 1985), p. 111.

72. Quoted in Ibid., p. 111.

73. Ward E. Elliott, The - Rise of Guardian Democracy (Cambridge: Harvard University Press, 1974), p. 90. Elliott also said:

> It was also probably the most intensely political era of an unusually political people. The Gilded Age saw the pinnacle of strength and discipline both in Congress and in the political parties. It saw the highest voter turnout in the United States history and, in some respects. the strongest sense of popular participation in government. Ibid.

74. U.S., Congress, Senate, Proposed Amendments, p. III.

75. Carson, p. 116.

76. Carson. p. 280.

77. John Alexander Carroll and Odie B. Faulk, Home of the Brave, A Patriot's Guide to American History (Lanham, MD: University Press of America, 1976), p. 278.

78. Samuel Eliot Morison, Henry Steele Commanger, and William E. Leuchtenburg, The Growth of the American Republic, 2 vols. (New York: Oxford University Press, 1980), 2:199.

79. Morison, Commanger, and Leuchtenburg, 2:199.

80. Carroll and Faulk, p. 277.

81. Ibid., p. 285; Morison, Commanger, and Leuchtenburg, 2:271.

82. Carroll and Faulk, pp. 289-290; Carson, pp. 161-164.

83. Carroll and Faulk, pp. 294- 295; Carson, pp. 166178. Progressives were in power nationally from 1901 to 1921, that is from [Roosevelt's term] to the end of Wilson's second term.... The three Presidents who served – Theodore Roosevelt, William Howard Taft, and Woodrow Wilson -professed to be Progressives.... As Progressives. they tended to identify progress with an expanded role of government.... Ibid., p. 146.

84. Robert J. Sprague, "Shall We Have a Federal Constitutional Convention, and What Shall It Do?," Maine Law Review 3 (February 1910):115, 116, 121.

85. See Rhodri Jeffreys-Jones and Bruce Collins, eds., The Growth of Federal Power in American History (Dekalb: Northern Illinois University Press, 1983), pp. 76-88. See also Carson, pp., 176-178.

86. Forrest McDonald, A-Constitutional History of the United States (New York: Franklin Watts, 1982), p. 175.

87. Ibid.

88. Ibid., (emphasis added).

89. Ibid., pp. 175-176.

90. Ibid., p. 176

91. Ibid. See-also Carson, pp. 176-178.

92. George H. Haynes, The Election of Senators (New York: Henry Holt and Co., 1906), pp. 153-158.

93. Ibid., pp. 158-160; 187-195.

94. Ibid., pp. 160-162.

95. Ibid., pp. 162-163.

96. Ibid., pp. 169-179.

97. Ibid., pp. 166-167.

98. See Appendix A for Table 1 entitled "Action Taken by State Legislatures in Favor of an Amendment providing for the Election of United States Senators by the Direct Vote of the People."

99. Haynes, pp. 204-210.

100. Ibid., pp. 180-183.

101. U.S., Congress, House, Proposed Amendments to the Constitution, H. Doc. 551, 70th Cong., 2d sess. (Washington, D.C.: Government Printing Office, 1929; reprint ed., Westport, CT: Greenwood Press, 1976), pp. 215-219. See also Appendix A.

102. Haynes, pp. 211-216.

103. U.S., Congress, Senate, Senator Hoar speaking against an amendment to provide for the direct election of Senators by popular vote, 53d Cong., 1st sess., 7 April 1893, Congressional Record 25:103.

104. Haynes, p. 216.

105. Ibid., pp. 220-222.

106. Ibid., pp. 216-220. See also table, "Previous Service of U.S. Senators in Elective Office" in Ibid., p. 220. Also provided in Appendix B.

107. For a detailed account of this argument see Ibid., p. 224.

108. Ibid., pp. 225-226.

109. Ibid., pp. 226-227.

110. Ibid., p. 229.

111. Ibid., pp. 229-231.

112. Ibid., p. 235.

113. Ibid., pp. 232-235.

114. Ibid., pp. 240-243.

115. John Quincy Adams, The Jubilee of the Constitution: A Discourse-Delivered at-the Reguest of the New York Historical Society, in the City of New York, on Tuesday, the 30th of April, 1839; Being the Fiftieth Anniversary of the Inauguration of George Washington as President of the United States (New York: S. Colman, 1839; reprint ed., [Typewritten], Virginia Beach: CBN University, 1986), p. 3. See also, Abraham Lincoln, "First Inaugural Address," published in Richardson, 7:3208.

116. (emphasis added)

117. The first attempt of the Framers to establish a new form of government to secure the rights of the people proved disastrous. The Continental Congress called for a committee to "prepare and digest the form of a confederation to be entered into between these colonies."-Quoted- in The Formation of the Union (Washington. D.C.: National Archives Publications, [1970]), p. 34, (emphasis added). The resultant Articles of Confederation instituted a "firm league of friendship [between the states] for their common defense, the security of their Liberties, and their mutual and general welfare." Articles of Confederation. Unfortunately, the nature of this union was deficient according to John Quincy Adams who recounted:

> Such was the system ... put together with eminent ability and untiring industry, but vitiated by a defect in the general principle -in the departure from the self-evident truths of the Declaration of Independence; the natural rights of man, and the exclusive, sovereign, constituent right of the people. John Quincy Adams, The Jubilee of the Constitution: A Discourse Delivered at the Reguest of the New York Historical-Society, in the-City of New York, on Tuesday, the 30th of Apri1, 1839, Being the Fiftieth Anniversary of the Inauguration of George Washington as President of the United - States (New York: S. Colman, 1839; reprint ed., [Typewritten], Virginia Beach: CBN University, 1986), p 11.

The defect of the "organization of powers" under the Articles of Confederation was that it created a confederacy. It was merely a union of states – a "firm league of friendship" between sovereign political entities. This "form" of government contradicted a general principle articulated in the Declaration of Independence – that the nation was formed by its people, collectively, and not exclusively by the states in combination.

After several years of laboring under such a defect, it became apparent that the powers enumerated in the Articles were insufficient for the security of the people's rights. Specifically, Congress had no power to lay and collect taxes, or to regulate foreign or interstate commerce. There was no executive power to enforce acts of Congress and no judicial branch. Passage of laws required a two-thirds vote while amendment required unanimous consent by all the states. The results of a confederation of states were insurrection at home and ineffectiveness abroad.

In summary, the Articles failed because they were not laid on "such principles" – the principle of sovereignty in the people – and, they were not "organized in such a way" – a national government with actual power – so as to secure the safety and rights of the people. These hardships were not suffered in vain. Learning from their mistakes, the Founders of the Constitution were better equipped to develop a new form of government.

118. Madison, Federalist No. 43, published in Rossiter, p. 278.

119. This principle is also reflected the in the Constitution in several other ways: by the prohibition against titles of nobility, (U.S. Constitution, art. I, secs. 9, 10) and by equal application of the law to all citizens (U.S. Constitution, art.

IV, sec. 2, cl. 1). In addition to reflecting that all men are equal, the Constitution also reflects the equality of the states in its provision that "no State, without consent, shall be deprived of its equal suffrage in the Senate."(#cite article, sec.)

120. In other words, John Doe may not be given the opportunity to vote for two representatives while his neighbor is allowed to vote for only one representative.

121. Madison, Federalist No. 39, published in Rossiter, p. 244

122. The Fourteen Amendment provided that representatives "be apportioned among the several States according to their respective numbers...." U.S. Constitution, Amend. XIV, sec. 2.

123. In an effort to circumvent the relevance of this obvious defect of the Seventeenth Amendment, one might rebuff by asserting that the equality principle was not violated because the principle continues to bear directly upon the states (and not the people) – that only the manner of election was changed: not representation. This proposition is based upon the notion that the people of a state could elect the Senators and the state could still be represented as a state. This is not a logical argument. A representative is responsible first, to his conscience, second to his oath, and third, to that political body he is appointed to represent. If he is elected by the people of a state, then he is responsible to them. If he is elected by the state legislature, then he represents that body as they speak for the incorporated whole. If this had not been the case, then the Founders would not have articulated a clear distinction between the House and the Senate – that the House, being elected by the people, represented the people, and the Senators, being elected by the state legislatures, represented the states.

124. Madison, Federalist No. 39, published in Rossiter, p. 246.

125. Ibid., p. 244.

126. Idem, Federalist No. 51, published in Rossiter, p. 323.

127. Ibid., p. 324.

128. As previously demonstrated, election by state legislatures affected state representation in the Senate. State representation in the Senate, in turn, was a central pillar of the federal character of the General Government. Thus, when the Seventeenth Amendment abolished state representation, the main pillar of the federal structure was destroyed. This alteration disturbed the delicate balance of power which previously existed between the states and national government. Though other ingredients of the federal character remained unchanged, the loss of this primary ingredient did much to undermine the original federal structure.

129. Madison, Federalist No. 39, published in Rossiter, p. 241.

130. Idem, Federalist No. 10, published in Rossiter, p. 81 .

131. Ibid.

132. Ibid.

133. Ibid., p. 82, (emphasis added).

134. Idem, Federalist No. 50, published in Rossiter, p. 317.

135. Idem, Federalist, No. 10, published in Rossiter, p. 82.

136. Idem, Federalist, No. 63, published in Rossiter, p. 384. See also DeTocqueville, p. 201.

137. Madison, Federalist No. 51, published in Rossiter, p. 322. Prior to this statement, Madison explained the reason why such a challenge exists:

> what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. Ibid.

Government, therefore, cannot overcome the fallen nature of man. A perfect system is therefore not possible, so checks to guard against the abuse of power are necessary. Regarding these checks Madison said:

> A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions. Ibid.

The many checks and balances of power contained in the Constitution are what is here referred to as "auxiliary precautions." Many people are familiar with the checks instituted for the powers within government (i.e..: separation of the three branches) but they are not as informed about the checks instituted to protect the people from their own errors or the errors of their fellow citizens. Though less apparent and less flattering, these types of checks on power are equally as necessary as checks on intragovernmental powers.

138. Idem, Federalist No. 39, published in Rossiter, p. 240.

139. Haynes, p. 211.

140. Ibid.

141. Ibid., pp. 158-160; 169-179; 187-195.

142. George F. Edmunds, "Should Senators be Elected By the People?," Forum, November 1894, p. 278, quoted in Haynes, p. 233-234.

143. Madison, Federalist No. 51, published in Rossiter, p. 322.

144. Woodrow Wilson, Congressional Government (Washington, D.C.: John Hopkins University, 1885; reprint ed., with an Introduction by Walter Lippmann, Gloucester, MA: Peter Smith, 1973), p. 136.

145. Thomas W. Shelton, "The Sin of 'Experimenting' With the Constitution," Central-Law Journal 94 (3 March 1922):147.

146. Ibid., pp. 147, 149.

147. Ibid.. p. 147.

148. Ibid.. p. 148.

149. Ibid.

150. Gary DeMar. God and Government: A Biblical and Historical Study. 3 vols. (Atlanta: American Vision Press, 1982), pp. 21-24.

151. Haynes. p. 211.

152. As if this analysis was not defense enough for the original method of election. the following is a brief refutation of the arguments listed in support of popular vote.

1) Obsolescence: (a) The condition of the nation has radically changed since 1787 but the legal principles upon which the Declaration of Independence and the Constitution are founded are fixed. uniform and universal. Like the law of gravity. they are applied the same in the future as they were in the past. (b) Though some of the Founders mistrusted the people (Gerry & Pinkney, for example). this was not the general consensus. The Founders' wise understanding of the passions as well as the corruptibility of human nature caused them to integrate protections against these vices within the constitutional framework. These protections must not be mistakenly interpreted to mean that the Founders mistrusted all people generally. (c) It is true that a greater national consciousness had developed by 1900 but that did not obliterate the need for state governments. or for state representation in the national government. (d) It was said that the inferior communication of 1787 imposed the need for Senators to be elected by state legislatures. If this were true. then why did the same notion not apply to the House of Representatives? (Apportionment did not begin until 1868, so the answer is not because representatives were known locally).

2) National/state interests sacrificed: This argument is refuted in the text.

3) Does not affect General/state government relations: This argument is refuted in the text.

4) The Senate's success: Though length of term, gradual renewal, and small size were all factors of the Senate's success, the Founders believed that election by state legislatures was an essential contributor to that success. It was believed that the men who were directly and continually involved in the political dealings of a state would be best acquainted with men qualified to serve as United States Senators.

5) Bribery and corruption: Without virtue in the people, bribery and corruption will occur no matter which method of election is used. This argument is dealt with in the text.

6) Responsive to the people: The people of a state have willingly consented to elect their state legislature to be the "mouth-piece" of the state. A state legislature free of corruption and able to elect a Senator of fine character is a just tribute to the intelligence and integrity of the individual voters. Election by state legislatures would not foster a "kaleidoscopic constituency" if the Senator was a statesman who voted in accordance with principle, conscience, and oath rather than a politician who voted in accordance with selfish ambition for the purpose of reelection.

7) Public opinion: The Seventeenth Amendment stands as a reproach against the generation which ratified it. It attests to the constitutional illiteracy of the time.

8) Amending the Constitution is not odious when done for a just cause shown: This thesis directly addresses this proposition.

9) State legislatures not chosen for right reasons: The fact that the voters were forced to consider both state and national issues when voting for their state legislatures proves that the Founder's intention was working according to theory. State representation in the General Government was a safeguard against national encroachment. It kept the people looking to their states rather than to the General Government. This leverage was designed to help perpetuate the powers reserved to the states.

10) Legislative function: It is true that election of Senators is not a legislative function. However, the state, as a legal entity, has certain powers (referred to in the Tenth Amendment). The United States Senate, as a legislative body, requires representatives from the respective constituencies. When the states were being represented as states. it was the duty of the legislatures to send their representatives.

153. Skousen, p. 258.

154. Skousen, p. 290.

155. Working Group on Federalism, title page.

156. Ibid., p. 2, (emphasis added)

157. Ibid., p. 14.

158. Ibid., p. 15.

159. Carson, p. 176.

160. Ibid., p. 178.

161. George H. Haynes, The Senate of the United States: Its History and Practice, e, 2 vols. (New York: Russell and Russell, 1960), pp. 1037-1101.