Representation of the States or of the People of the State: an Analysis of the Seventeenth Amendment in a Federal System

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There have been many changes to the election’s process through amendments to the Constitution.\(^1\) However, there is one that has altered the intention of the founding fathers dramatically. The Seventeenth Amendment overturned an election process established to further the interest of the States in a federal republic in favor of the direct democracy election that was originally established only for House of Representatives on the federal level.\(^2\) This paper seeks to explore the founders’ intents on the election of Senators and the changes to this process. Part I will explore the founding fathers’ intents and the debates surround the Constitution’s drafting. Part II will explore the creation and the Passage of the Seventeenth Amendment. Part III will explore the feasibility of repealing the Seventeenth Amendment.

I. The Framers’ Intent for Election of Senators

When the Constitution was first set out to govern the original thirteen states, it read “[t]he Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof.”\(^3\) The Constitution of the United States was replacing the Articles of Confederation that loosely held together the colonies

\(^{1}\) See U.S. CONST. amend. XV, XVII, XIX, XIV, XVI.

\(^{2}\) House is elected “by the People of the several States.” U.S. CONST. art. 1, §2.

\(^{3}\) U.S. CONST. art. 1, §3, cl. 1 (amended 1913).
In order to firmly grasp why the structure of election of senators was considered important to the founding fathers, it is important to understand the document that preceded the Constitution and the debates that shaped the Constitution. It was once observed that “none can be said to know things well, who do not know them in their beginnings.” Two strong fears were playing in drafting the Constitution: fear a strong national central government and fear of direct democracy. These fears shaped the Constitution and the framework for self-governance.

1. These United States

The Articles of Confederation was drafted as a way to provide a loose union of the states within defined boundaries during the war of independence against the British. It did this while maintaining a central government that was limited in matters that affected the internal nature of the states. The first draft called the union a “firm league of friendship” for the states common defense. Each state was to retain its sovereignty and independence, unless the Articles of Confederation specifically laid out a power to be relinquished from the states to the federal

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5 The People are the Best Governors: Or a Plan of Government on the Just Principles of Natural Freedom (1776) (author unknown of this distributed pamphlet in New Hampshire), reprinted in 1 American Political Writing During the Founding Era 390 (Charles S. Hyneman & Donald S. Lutz eds., 1983) [hereinafter Pamphlet].
7 Articles of Confederation of 1781, art. 3.
8 Id.; see also Bourguignon, supra note 4, at 13,15.
9 See also Bourguignon, supra note 4, at 13,15.
government.  The states asserted this independence and power, weakening the loosely knit federal government to a point where the need for a change in structure became apparent.

At the Continental Congress, there was a need for a stronger federal government, but the states still wanted to maintain their local identity in the union. The problems of the Articles of Confederation and the previous union dispelled some of the desire for local rule or federal rule, but not by much. They were seeking a stronger federal government, in the classical definition of a federation, a league of states or cities. This new Constitution was to divide the sovereignty between the states and federal government through a contract. Members in a classical federation were joined together by a treaty (in this case the U.S. Constitution) and it was a pledge to cooperate with one another for the certain limited purposes, usually all that was needed to maintain the cooperation that was necessary for the completion of the overall goals. This is further seen in the idea of a contract as the basis for government, and thus power could be limited by the

10 Id. at 13,16.
11 See id. at 13, 24.
13 See Bernstein Et Al, supra note 4, at 11.
16 McClellan, supra note 14, at 255-266.
contract between the otherwise sovereign and independent societies.\textsuperscript{17} With states being the actors in the contract to form a federal government, the states could limit federal powers.\textsuperscript{18}

The idea that the sovereign could be bound by a contract was not new to a Judeo-Christian society, with a history of even God limiting himself through covenants with man.\textsuperscript{19} Outside of a religious context in English culture, the Magna Carta began to bind the sovereign from unlimited power.\textsuperscript{20} Limiting the sovereign, in the case of the United States, was exercised from the foundation of the nation, instead of centuries into the sovereign’s unlimited power whereas they were giving up rights to the people.\textsuperscript{21} The United States instead based its founding documents on limiting the federal government’s power through a contract with the states.\textsuperscript{22} The new contract would limit the federal government like the Articles of Confederation, but this new Constitution would create a stronger national government than seen before in the Article of Confederation; however, the states debated heavily on what they were willing to give up to achieve this.\textsuperscript{23} The result would overall change how the world would view the word “federal”.\textsuperscript{24}

\textsuperscript{17} \textsc{Herbert J. Storing}, \textit{What the Anti-Federalists Were For: The Political Thought of the Opponents of the Constitution} 65 (1981).
\textsuperscript{18} \textit{See id.}
\textsuperscript{19} \textit{See e.g. Genesis 9:9-17, Genesis 17:1-21; also see McLaughlin \textit{supra} note 15, at 74.}
\textsuperscript{20} \textit{See Magna Carta, reprinted in Three Great Documents} 1-20 (Vincent Starrett ed., 1942).
\textsuperscript{21} \textit{Compare Magna Carta, \textit{supra} note 20, at 1-20 and U.S. Const.}
\textsuperscript{22} \textit{See generally Storing, \textit{supra} note 17, at 65.}
\textsuperscript{23}McClellan, \textit{supra} note 14, at 256-257.
\textsuperscript{24} \textit{Id.}
The states were contracting what they would give to the federal government in the new Constitution that would supersede the old Articles of Confederation, but with the Articles of Confederation still in place, the States actively fought to maintain as much of their State liberties as possible “to form a more perfect union.” Eleven of the thirteen states drew up their own Constitutions to bring to the Constitutional Convention that each expressed the goal elements that each State felt essential. Virginia came up with a plan that would embody the need for a stronger national government, but also limiting the power at the same time through what became known as the Virginia plan. They proposed three branches of government, with the legislative branch divided into two. The upper house’s representatives would be chosen by the State legislatures, while the lower house would be selected through direct election by the people. Virginia also brought to the table the Bill of Rights, which expressly reserved rights to the States and to the people, in fear that absent such a prohibition that the government might begin to trample on the States.

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25 Most of the delegates came to the Constitutional Convention thinking they would were there to revise the Articles of Confederation, rather than scrap the old and write a new Constitution. However, upon the introduction of the Virginia Plan, it was clear that many delegates wanted to rethink the current system of government to find something new and better. It became harder to work in the framework of the old as the new ideas being developed, and thus the Articles of Confederation became irrelevant though these debates. See John R. Vile, A Companion to the United States Constitution and Its Amendments 13 (2d ed., 1997).

26 U.S. Const. pml.; See also Vile, supra note 25, at 13.

27 McLaughlin supra note 15, at 85.

28 McClellan, supra note 14, at 257.

29 Virginia Plan, supra note 12, at 275; see also McClellan, supra note 14, at 257.

30 Virginia Plan, supra note 12, at 275; see also McClellan, supra note 14, at 257.

31 See Virginia Plan, supra note 12, at 275.
The Bill of Rights has been said to be the major legacy of the Anti-Federalists.\textsuperscript{32} The Bill of Rights was to ensure the understanding that everything not given to the federal government was reserved to the States.\textsuperscript{33} This proposition is clearly stated in the Bill of Rights,\textsuperscript{34} making it as part of the Constitution as any other article or clause.\textsuperscript{35} The States maintained sovereignty and ensured the federal government could not add to their power without the consent of the governed, without the consent of individual States of the union.\textsuperscript{36} The appointment of senators by the state legislatures was seen as a "convenient link between the two systems."\textsuperscript{37} By giving the senate, the branch with the direct ties to the States through their appointment of Senators, the control reject or accept the treaties made by the President, it provided one more check and balance on the federal power structure in a dual sovereign system.\textsuperscript{38}

The separation of powers and federalism are two of the great themes in the Constitution and they are intricately related.\textsuperscript{39} Both were designed to limit tyranny\textsuperscript{40}, and the indirect election of senators gave States "some means of

\textsuperscript{32} \textit{Storing, supra} note 17, at 64.
\textsuperscript{33} \textit{Id.} at 65.
\textsuperscript{34} U.S. Const. amend. 17.
\textsuperscript{35} U.S. Const. art. V.
\textsuperscript{36} \textit{See generally Storing, supra} note 17, at 64.
\textsuperscript{39} \textit{See} \textit{The Federalist} No. 51 (James Madison) (Independent Journal, Feb. 6, 1788); \textit{also see} Vikram David Amar, \textit{Indirect Effects of Direct Elections: A Structural Examination of the Seventeenth Amendment}, 49 \textit{Vand. L. Rev.} 1347, 1350 (1996).
\textsuperscript{40} \textit{Id.}
defending themselves against encroachments of the National Government.”\textsuperscript{41} Or as Alexander Hamilton put it, it was an “absolute safeguard” against federal tyranny.\textsuperscript{42}

The balance of power between the States and the Federal government is also seen in other foundational documents with the debate for the “Great Compromise.”\textsuperscript{43} There was a need for a central federal power, to be the supreme power.\textsuperscript{44} Virginia was advocating for a legislative branch based on population, something that would have given Virginia more power over the federal government than other States.\textsuperscript{45} However, with fears of the smaller States being bullied by States with more numerous numbers, New Jersey insisted on representation that was based on statehood.\textsuperscript{46} The delegates from New Jersey stated “[w]e would sooner submit to a foreign power than submit to be deprived of an equality of suffrage in both branches of the legislature.”\textsuperscript{47} Because of this debate on where the power lied with representation, the Great Compromise was forged as a way to allow for both proportional representation and equal representation of the States.\textsuperscript{48} In the end, the Senate, the upper house was to apportion seats according to statehood, and not according the population.\textsuperscript{49} It was a representative of the State, and not the people. The indirect election of senators was one protection that was afforded

\begin{footnotesize}
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\item\textsuperscript{42} \textit{Id.}, (quoting Alexander Hamilton).
\item\textsuperscript{43} See David C. Hendrickson, \textit{Peace Pact: The Lost World of the American Founding} 220-232 (2003).
\item\textsuperscript{44} See \textit{id.} at 220-221.
\item\textsuperscript{45} See \textit{id.} at 220-232.
\item\textsuperscript{46} See \textit{id.; Vile, supra note 25, at 16.}
\item\textsuperscript{47} See Hendrickson, \textit{supra} note 43, at 223.
\item\textsuperscript{48} See \textit{id.} at 220-232.
\item\textsuperscript{49} U.S. Const. art. 1, §3, cl. 1 (amended 1913)(as read in the original Constitution).
\end{itemize}
\end{footnotesize}
in the Constitution to render protection to federalism.\textsuperscript{50} “Of all the institutions established by the U.S. Constitution, perhaps none was more designed to reflect the federal nature of the Union than the Senate.”\textsuperscript{51}

\textbf{2. In opposition of pure democracy}

Once the details of the Senate was being debated by the Constitutional Convention, almost everyone agreed that the representation of Senators was not to be something left in the hands of the people.\textsuperscript{52} James Madison reasoned “the Senate is to consist in its proceeding with more coolness, more system, and with more wisdom, than the popular branch.”\textsuperscript{53} It was to provide an “anti-democratic role under the Constitution,”\textsuperscript{54} which was founded in the Framers distrust of popular democratic governments.\textsuperscript{55}

Direct democracy was feared and was considered a dangerous exponent of liberty, but it was not a view shared by all.\textsuperscript{56} Some founding fathers and the literature of the day built upon the idea that the people know themselves best and therefore best able to rule themselves.\textsuperscript{57} Since the goal was liberty, some argued

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\textsuperscript{50} Ralph A. Rossom, Federalism, the Supreme Court, and the Seventeenth Amendment: The Irony of Constitutional Democracy 181 (2001).
\textsuperscript{51} Vile, supra note 25, at 201 (referencing the direct election of senators).
\textsuperscript{52} See Moyers, supra note 6, at June 7, 1987.
\textsuperscript{53} Id.
\textsuperscript{54} Todd J. Zywicki, Beyond the Shell and Husk of History: the History of the Seventeenth Amendment and its Implications for Current Reform Proposals, 45 Clev. St. L. Rev. 165, 169 (1997)(emphasis in the original)[hereinafter History].
\textsuperscript{55} Id. at 182.
\textsuperscript{56} See Moyers, supra note 6, at June 7, 1987.
\textsuperscript{57} See e.g. Pamphlet, supra at note 5, at 391.
\end{flushleft}
that only when people “hav[e] the controul [sic] of these branches (of government) in their own hands” would liberty ensue.\textsuperscript{58}

One such dissent on the indirect election of Senators came from James Wilson of Pennsylvanina.\textsuperscript{59} He objected to using the British system of Parliament as a foundation for the American government.\textsuperscript{60} With a house of government selected from “distinguished characters,” Wilson feared that the Senate bore too much resemblance to the House of Lords.\textsuperscript{61} Wilson lost his the battle, despite his objections that would separate the new American government from vestiges of the old English system.\textsuperscript{62}

The idea of indirect democracy is apparent in other articles of the Constitution as well. The election of the president is not direct election, but the election of electors to vote for President of the United States.\textsuperscript{63} The same holds true with the original intent for the election of Senators, people choose the representatives for their state office, which in turn elect those that represent the State nationally.\textsuperscript{64}

\textsuperscript{58} Compare MOYERS, supra note 6, at June 7, 1987 and Pamphlet, supra at note 5, at 391.
\textsuperscript{59} See MOYERS, supra note 6, at June 7, 1987; also see CLINTON ROSSITER, 1787: THE GRAND CONVENTION 159-181 (1966).
\textsuperscript{60} The British Parliament system has an upper house and a lower house. The lower house, the House of Commons, was to stand for the people and by the people. The upper house, the House of Lords, was based on aristocracy. See MOYERS, supra note 6, at June 7, 1987.
\textsuperscript{61} Id.
\textsuperscript{62} Id.
\textsuperscript{63} See U.S. CONST. art. II, §1.
James Madison spoke in *Federalist No. 51* about the necessity of having some protections against the impulses of men and government.⁶⁵ He famously is quoted saying: “If all men were angels, then no government would be necessary.”⁶⁶ This reasoning was used to put checks on government, but there is an underlying assumption that men in affect have a hard time to morally govern themselves.⁶⁷

The founding fathers constructed the Senate in a way to secure liberty and a federal system with dual sovereigns. Without the equal representation of the Senate, the government becomes a rule of majority without reference to statehood. Both the populous cities and the will of the majority will rule with no regard to the desires of each individual State in the union. The Senate was to represent the States, making sure democracy would not trump liberty. As Alexis de Tocqueville once stated about the finished product of the election of Senators through the State legislators, it was the “‘means of bringing the exercise of political power to the level of all classes of people.’”⁶⁸

**II. How The 17th Amendment Came to Be**

By 1913, the State legislator’s election of Senators seemed like it was an antiquated procedure that was no longer serving the country for the purpose for which it was intended.⁶⁹ Senate elections were now seen as more based on the dictates of those of party bosses in the state legislators and their desires for a

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⁶⁵ See *Federalist No. 51*, supra note 39.
⁶⁶ Id.
⁶⁷ See generally id.
⁶⁸ *Hoebike*, supra note 38, at 54.
⁶⁹ See *Id.* at 17.
Senator.\textsuperscript{70} More control by the ordinary citizen was considered a necessary revision for maintaining the original constitutional principles and making sure the senator was not too far removed from the state he served.\textsuperscript{71} The needs of the people were considered not being met by the senators, but instead the senator was serving the political machine of their state’s politics.\textsuperscript{72}

1. \textit{The debates}

The Seventeenth amendment came in during the progressive era, which came from a push to root out government corruption and refine American politics to make it more democratic.\textsuperscript{73} The proponents of the Seventeenth amendment believed that they were upholding the original intent of the Constitution by not allowing party bosses control the electoral process.\textsuperscript{74} The founders put into place restraints on the election from what they anticipated the wielders of power, the people; however, as the political parties grew, they became the source of power that needed a check on their power.\textsuperscript{75} The other concern was the Senate in practice was the millionaire's club, comprised of people that wielded too much power in their states.\textsuperscript{76} These wealthy people would influence those in the states that could elect them, and thus the process of electing senators was far removed from being democratic in nature.\textsuperscript{77} There was perception of the senate that bribery and corruption had tainted the way state legislators were choosing the senators and

\textsuperscript{70} \textit{Id.}
\textsuperscript{71} \textit{See Id. at 18.}
\textsuperscript{72} \textit{Id.}
\textsuperscript{73} \textit{VILE, supra} note 25, at 199.
\textsuperscript{74} \textit{HOEBEKE, supra} note 38, at 19.
\textsuperscript{75} \textit{Id.} at 20.
\textsuperscript{76} \textit{VILE, supra} note 25, at 86-95.
\textsuperscript{77} \textit{Id.} at 201.
interest groups were able to influence the selection of senators, to a point where the senators did not represent the ordinary citizen of that state.\textsuperscript{78}

The progressive movement stressed the importance of looking at the overall intent of the government rather than to the exact intent of the founding fathers, since they were ignorant of the changes America would have in store for her and the actual effect their words would have in governing the nation.\textsuperscript{79} By moving for direct elections of Senators, the progressives argued that one source of corruption in the selection of senators would be removed, thus enabling liberty.\textsuperscript{80}

A further argument used in favor of the passage of the amendment was a fear of deadlock in states legislatures, leaving them without a senator to send to Washington, D.C.\textsuperscript{81} In the very first Congress, New York was without representation for three months for this exact reason.\textsuperscript{82} Later in history, between 1891 and 1905, twenty states had this issue, resulting in forty-six individual deadlocks in State legislatures.\textsuperscript{83} With deadlocks, it was argued that many states would be without their fair representation of their senator in Washington until these political battles played out.\textsuperscript{84}

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\item \textsuperscript{78} Amar, \textit{supra} note 39, at 1353.
\item \textsuperscript{79} \textit{See} ROBERT A. DAHL, \textsc{How Democratic is the American Constitution} 7-29 (2001).
\item \textsuperscript{80} Amar, \textit{supra} note 39, at 1353.
\item \textsuperscript{81} \textit{See} James Christian Ure, Comment, \textit{You Scratch my Back and I will Scratch Yours: Why the Federal Marriage Amendment Should Also Repeal the 17\textsuperscript{th} Amendment}, 49 S. TEX. L. REV. 277, 286 (2007).
\item \textsuperscript{82} \textit{See also} John MacMullin, \textit{Repeal the 17\textsuperscript{th} Amendment}, \textsc{The Tenth Amendment Center} (Apr. 16, 2011, 9:59 PM), http://www.tenthamendmentcenter.com/2008/10/24/repeal-the-17th-amendment/.
\item \textsuperscript{83} Todd J. Zywicki, \textit{Senators and Special Interests: A Public Choice Analysis of the Seventeenth Amendment}, 73 OR L. REV. 1023, 1077 (1994).
\item \textsuperscript{84} \textit{See id.}
\end{itemize}
In addition to these arguments, many states had already taken measures to force the hand of their state legislatures to elect the senator that garnered the most support in the general electorate through advisory elections.\textsuperscript{85} The Oregon plan had a state constitutional amendment that bound its state legislature to the selection of the candidate as determined by a general election.\textsuperscript{86} Because the Oregon plan had started to spread to other states, some argued that the amendment was a natural progression of what States were already doing in their selection of Senators.\textsuperscript{87} In addition to these plans, forty-four out of the forty-eight states by 1910 developed a direct primary system to nominate political party candidates for the Senate to be voted on by the State Legislature.\textsuperscript{88}

However, in contrast to the argument that the Seventeenth amendment was seeking to align election procedures closer to those of the founders’ intent, there was the intention to further direct democracy.\textsuperscript{89} The founding fathers were scared of direct democracy and this can be seen in founding documents such as the Constitution with only one federal branch of government, the House of Representatives, being directly elected by the people.\textsuperscript{90} The provisions under the original Art I Section 2 for the election of senators was clear to have the senators to

\textsuperscript{85}Amar, supra note 39, at 1354-55.
\textsuperscript{86}Id.
\textsuperscript{87}Id.; see also History, supra note 54, at 190.
In addition to Oregon, two other states, Nevada and Nebraska, had copied this design in their respective states to for the selection of Senators by 1909. Amar, supra note 39, at 1354-55.
\textsuperscript{88}History, supra note 54, at 191.
\textsuperscript{89}HOEBEKE, supra note 38, at 27.
\textsuperscript{90}Compare U.S. CONST. art. I§2, I§3, II§1, II §2.
be a representative of the state’s interests, and not the populous.\textsuperscript{91} The Constitution was designed with themes of federalism and separation of powers, and when one is tampered with by making Constitutional changes without regard for the balance with the other, unintended spill over effects occur.\textsuperscript{92} Senator Elihu Root spoke of the concerns of altering the language of the Constitution during the debates regarding the Seventeenth amendment saying, “no one cane foresee the far reaching effect of changing the language of the Constitution in any manner which affects the relations of the States to the General Government”.\textsuperscript{93}

To combat the corruption rally stick that progressives used in support for the amendment, the opposition argued that their claims were exaggerated.\textsuperscript{94} They argued that this change would add to interest groups inserting their influence in the selection of senators and diminish a deliberative choice.\textsuperscript{95} Their goal overall was also to produce better Senators.\textsuperscript{96}

When Alexis de Tocqueville penned his work *Democracy in America*, he observed stark differences between the House of Representatives and Senate.\textsuperscript{97} He comes to the conclusion that the only reason there was to distinguish the “vulgar demeanor of the great assembly”\textsuperscript{98} from the “eloquent advocates, distinguished

\begin{footnotes}
\footnotetext[91]{VILE, supra note 25, at 201.}
\footnotetext[92]{Amar, supra note 39, at 1350.}
\footnotetext[93]{See Donald J. Kochan, State Laws and the Independent Judiciary: an Analysis of the Effects of the Seventeenth Amendment of the Number of Supreme Court Cases Holding State Laws Unconstitutional, 66 A\textsc{lb.} L. \textsc{R}ev. 1023, 1023.}
\footnotetext[94]{Amar, supra note 39, at 1354.}
\footnotetext[95]{Id.}
\footnotetext[96]{Id. at 1403.}
\footnotetext[97]{See ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 204-205 (Francis Bowen trans., Everyman’s Library 1972) (1862).}
\footnotetext[98]{Id. at 204.}
\end{footnotes}
generals, wise magistrates, and statesmen of note” of the Senate is in the selection process of these statesmen.100

It was after over fifty years after the Constitution was in full force when Alexis de Tocqueville made his commentary on the American political system and he commented on the remarkable differences between both houses of Congress.101 In this time, he had not seen the Senate devolve into political party power wielding, but rather Tocqueville saw the election system as a benefit to the American system of government.102 He states: “[m]en who are chosen in this manner accurately represent the majority of the nation which governs them; but they represent only the elevated thoughts that are current in the community and the generous propensities that prompt its nobler actions rather than the petty passions that disturb or the vices that disgrace it.”103 In other words, it is the indirect election that allows for democracy without having the disgrace of mob rule.104 However, by the progressive age, the “belief that state legislatures, acting as filters, would choose ‘wiser’ or ‘better’ Senators . . . [became] obsolete.”105 The progressives argued that the history of the country showed that the electorate was “worthy of trust.”106

2. Making the Seventeenth Amendment Part of the Constitution

99 Id.
100 Id. at 204-05.
101 See Francis Bowen, Introduction to ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA lviii (Francis Bowen trans., Everyman’s Library 1972) (1862).
102 DE TOCQUEVILLE, supra note 97, at 204-05.
103 Id. at 205.
104 See id. at 204-05.
105 Amar, supra note 39, at 1354.
106 Id.
In order for an amendment be passed and added to the Constitution, it requires that Congress and the Senate initiate the amendment, then the States to ratify it. Another way to get an amendment into the Constitution is by two thirds of all States calling forth a Constitutional Convention. Regardless of the way an amendment is brought to the attention of the States, it takes three-fourths of States Legislatures, or conventions called by the states, to ratify the amendment to add it to the Constitution. Federalist No. 43 remarks on the amendment process as: “[it] guards equally against that extreme facility, which would render the Constitution too mutable; and that extreme difficulty, which might perpetuate its discovered faults.” It was important to the founding fathers to have a Constitutional that could be changed, but not too easily, after looking at the results of the failed Articles of Confederation.

In the case of the Seventeenth Amendment, the alternate route by having the states call for a convention by a two-thirds majority was needed to avoid the conflict of self-interest whereas the amendment would not move past the Senate floor. The call for this movement alone, though, was enough to get Congress to pass the

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107 See U.S. CONST. art. V; see also McClellan, supra note 14, at 560.
108 See id.
109 See id.
111 See id.
112 VILE, supra note 25, at 201.
amendment proposal to the states for ratification, but in doing so applied the provisions to future elections only in order to secure their own self-interests.\textsuperscript{113} Many states voted against the amendment that had the exact problems that the progressives argued this amendment sought to combat.\textsuperscript{114} For example, both Utah and Delaware had suffered deadlocks in their state legislatures when electing Senators in the previous two years, yet both voted to reject the amendment.\textsuperscript{115} But in the end, the Seventeenth Amendment passed and became part of the Constitution.

The adoption of the 17\textsuperscript{th} amendment moved America to a more democratic society where now, the people directly elect all both houses of the legislature in the federal government.\textsuperscript{116} This amendment has also made the Senate less of a deliberative body than it once was.\textsuperscript{117} However, despite the changes and the debates, the amendment had little impact on the actual membership of the Senate at the time of its passage.\textsuperscript{118}

\textbf{III. The current push to repeal it}

\textbf{1. The Movement}

There is an emerging movement in the U.S. among conservatives and Tea Party members to repeal the Seventeenth Amendment.\textsuperscript{119} The procedural

\textsuperscript{113} Id. at 201-202.
\textsuperscript{114} History, supra note 54, at 199.
\textsuperscript{115} Id.
\textsuperscript{116} VILE, supra note 25, at 202.
\textsuperscript{117} Id., citing HOEBEKE, supra note 38.
\textsuperscript{118} Amar, supra note 39, at 1403.
\textsuperscript{119} See, e.g. MacMullin, supra note 82; REPEAL THE 17\textsuperscript{TH} AMENDMENT, http://repealthe17thamendment.blogspot.com/ (last visited Apr. 18, 2011); STATES’ LIBERTY PARTY, Why We Should Repeal the 17\textsuperscript{th} Amendment and Forfeit Our Right to Vote for U.S. Senators? http://www.liberty-ca.org/repeal17/states/montana2003oneil.htm (last visited Apr. 18, 2011); THE
problems of the Senate were resolved by the 17th amendment, but it created lasting effects on the balance of state and federal power that need to be addressed.\textsuperscript{120} The overall goal of repealing the seventeenth amendment is “relink the States to the federal political process.”\textsuperscript{121}

One of the current complaints about the 17th amendment is how it “undermin[es] the link between the Senate and the federal system.”\textsuperscript{122} Senators do not see themselves as the representative of their State, but rather of the people of the state whom elected them or of the party to which they belong.\textsuperscript{123} State legislatures have greater incentives to protect a federal system and their State’s rights than the people of a State.\textsuperscript{124} Thus, it follows that the State legislatures will elect people more aware of these federalism principles to the Senate than those just elected based on the popular vote.\textsuperscript{125} James Madison is quoted as a reference to the historical roots of the Senate\textsuperscript{126} by saying:

\begin{quote}
[T]he State Legislatures will jealously and closely watch the operations of this Government, and be able to resist with more effect every assumption of power, than any other power on earth can do; and the greatest opponents to a Federal Government admit
\end{quote}

\textsuperscript{120} See MacMullin, \textit{supra} note 82.
\textsuperscript{121} Id.
\textsuperscript{122} \textit{Vile, supra} note 25, at 202.
\textsuperscript{123} Id.
\textsuperscript{124} Yoo, \textit{supra} note 119.
\textsuperscript{125} Id.
\textsuperscript{126} Id.
the State Legislatures to be sure guardians of the people’s liberty.\textsuperscript{127}

Pre-Seventeenth Amendment Senators did the same job as they do today, but the difference comes in knowing who is voting and controls job security.\textsuperscript{128} Senator’s were accountable to their States.\textsuperscript{129} Now that the public elects Senators, however, they are accountable to the groups that have the greatest impact on public opinion and thus their electability.\textsuperscript{130} Their job security plays more to the interest groups that garner support in elections, instead of voting for issues that impact the states they represent.\textsuperscript{131} Political Action Committees, with unlimited funding and spending limits can campaign on a politicians behalf, are usually established by political interest groups that are promoting a specific agenda. Money does win elections, and since every politician is limited in how they can receive funds and how much, the interest groups can have a greater impact on the voting public than the actual senatorial candidates in elections. One problem the seventeenth amendment sought to solve was interest groups increasing involvement in politics. But the modern trend, especially after the campaign financing reforms, is interest groups have more of an influence on politics, even if it is indirect. A senator being

\textsuperscript{127} Id. quoting (James Madison during a Congressional discussion about the bill of rights in 1789.)
\textsuperscript{128} See Ure, supra note 81, at 284, citing Donald J. Kochan, State Laws and the Independent Judiciary: an Analysis of the Effects of the Seventeenth Amendment of the Number of Supreme Court Cases Holding State Laws Unconstitutional, 66 Alb. L. Rev. 1023 (2003).
\textsuperscript{129} See Ure, supra note 81, at 284.
\textsuperscript{131} See History, supra note 54, at 197.
responsible for their actions to their state creates senators who answer to the only one interest group, the state they represent.

Many of the political rally points central to the progressive movement for the direct election of senators have been shown to be over exaggerated or false.\textsuperscript{132} For example, recent historical scholarship on the issue of corruption in the pre-seventeenth amendment senate showed that between 1789 and 1909, a grand total of fifteen senators elections were ever contested for corruption or bribery.\textsuperscript{133} Out of those only seven senators were denied their seats because the allegations were shown to be true.\textsuperscript{134} This means less that 1.3% of all the Senators until that time were even looked at for the exact allegations the progressives were claiming were rampant and thus needing reform.\textsuperscript{135}

\textit{2. Effects of the Amendment: Case Study ObamaCare}

One of the most direct effects the Seventeenth Amendment has had on American government is that the Senate no longer votes in accordance with the State legislative interests when they are in conflict with the federal legislative goals.\textsuperscript{136} Originally Senator's constituents were not the public at large, it was the state legislature and their interests had to looked after in order to get re-elected.\textsuperscript{137} This was important in national legislation and a protection of the federal system because: "[a]s long as states were represented in the Senate, that body was not likely to adopt legislation which was opposed by even a significant minority of

\begin{footnotes}
\textsuperscript{132} See, e.g. id at 196-97.
\textsuperscript{133} Id.
\textsuperscript{134} Id.
\textsuperscript{135} Id.
\textsuperscript{136} Kochan, supra note 93, at 1028.
\textsuperscript{137} Id. at 1027-1029.
\end{footnotes}
The result of the Seventeenth Amendment is Senators are no longer bound to their States and even find reasons to vote for federal intervention in traditional state functions, and thus increasing the exercise of federal control. As Senator Root said during the debates ensuing the passage of the Seventeenth Amendment: “allowing state legislatures to select senators provided the states with an institutional weapon to defend their sphere of action.” Since its passage, this has no longer been the case.

In the past, when the senator was held accountable to the legislators, it has led to forced resignations when a senator voted contrary to their State’s interests. For example, in 1835 one senator, Pelog Sprague from Maine, was forced to resign when he voted against opposing the Bank of the United States (BUS), despite what instructions he did receive from his state to the contrary. Seven other senators eventually were forced to resign for similar votes involving the BUS contrary to the will of their state.

In applying these principles today, there is one majorly divisive issue that the federal government and states are differing on: the Affordable Care Act (also known by the public as ObamaCare). The Affordable Care Act enacts comprehensive

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140 Kochan, supra note 93, at 1023.
141 See id.
142 See DiLorenzo, supra note 42.
143 See id.
144 See id.
reforms to the health insurance and claims that it will enhance health care for all Americans. In addition to the reforms to the health care and insurance, it also includes changes that affect employers. The White House touts this Act as a way to lower health care costs and guarantee more choice in health care for all Americans, thus making the whole system better. But the actual law is very contentious, with many Americans against this plan and its effects.

After the act’s passage, there has been subsequent lawsuits by 26 states trying to halt the enactment of this law. They are fighting the individual mandate requirement of the Affordable Care Act for the interests of the citizens of each of their states. The states challenged and sought the law be invalidated on the grounds that the law overstepped Congress’ authority in the Commerce Clause to

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get the Act passed. The central legal argument is whether failing to buy a marketed product creates an economic activity that Congress can regulate.

When the new government took over in January 2011, the new Congress took as its mandate to overturn the Affordable Care Act. The House of Representatives had the votes, but the Senate is still in leadership of the Democratic Party that supports and originally backed the bill. Fifty-one votes

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150 See generally, e.g. id.
151 See generally, e.g. id. (The court held it was not an economic activity under the commerce clause in a very lengthy discussion in a case that invalidates the law); see generally Florida Mar. 3, 2001, 2011 U.S. Dist. LEXIS 22464, *1

However, there is a pending appeal with the SCOTUS.

Meanwhile, the healthcare law is still pressing forward as if it was still in effect, although the judge issued a subsequent clarification opinion that states he invalidated the individual mandate provision of the Affordable Health care act, it was deemed to be inseparable from the rest of the act and therefore the entire act was deemed to be null.

153 The vote was 245-189 to repeal the Affordable Care Act (or as the bill to repeal it renamed it: “Repealing the Job-Killing Health Care Act.” HOUSE OF REPRESENTATIVES ONLINE, Final Vote Results for Roll Call 14, http://clerk.house.gov/evs/2011/roll014.xml; see also Overturn ObamaCare, supra note 152.
154 The final vote on repealing the Affordable Care was 47-51, spilt right down party lines (with a democrat and an independent not voting). See SENATE.GOV, U.S. Senate Roll Calls Votes 112th Congress, 1st Session, Vote Number 9, http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=112&session=1&vote=00009 [hereinafter Senate Roll Call]; see also Overturn ObamaCare, supra note 152.
against repealing the Affordable Care Act in the Senate\textsuperscript{155}, yet twenty-six states have lawsuits against the federal government on the validity of the law.\textsuperscript{156}

These same senators in many cases voted contrary to what their state legislature would have enacted for their states. Assuming the partisan arguments are true as the only reason why there is a fight over the validity of the Affordable Care Act, that leaves twenty-six states where Republicans control the legislatures.\textsuperscript{157} If senators were held accountable to those legislatures, those that voted against the state interest would be doing so at their own peril. For example, Florida has a republican legislature and governor,\textsuperscript{158} they are clearly opposed to the Affordable Care Act as seen by their lawsuit to enjoin the federal government from implementing the law in their state,\textsuperscript{159} yet one of Florida’s Senators voted against the repeal.\textsuperscript{160} In fact, Senator Bill Nelson is up for re-election in 2012.\textsuperscript{161} Similar stories can be said about Debbie Stabenow of Michigan, Robert P. Casey Jr. of

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\begin{itemize}
\item \textsuperscript{155}See Senate Roll Call, supra note 154.
\item \textsuperscript{156} See generally Florida Jan 21, 2011, 2011 U.S. Dist. LEXIS 8822 *1
\item \textsuperscript{157} State Vote: 2011 State and Legislative Partisan Composition, NATIONAL CONFERENCE OF STATE LEGISLATORS (2011) http://www.ncsl.org/documents/statevote/2011_Legis_and_State.pdf [hereinafter State Vote].
\item \textsuperscript{158} Id.
\item \textsuperscript{159} See generally Florida Jan 21, 2011, 2011 U.S. Dist. LEXIS 8822
\item \textsuperscript{160} See Senate Roll Call, supra note 154.
\item \textsuperscript{161} SENATE. GOV, Class I- Senators Whose Term of Service Expire in 2013, http://www.senate.gov/pagelayout/reference/two_column_table/Class_I.htm [hereinafter Class I]
\end{itemize}
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Pennsylvania, Herb Kohl of Wisconsin. The same is true, sans the lawsuit, for Amy Klobuchar on Minnesota, Claire McCaskill of Missouri, and Jon Tester of Montana.

It is all speculation on whether the repeal would have been successful, but it is clear that if every Senator from every state that had a lawsuit against the implementation voted for the repeal, that would be fifty-two votes. If every Senator from a State with a Republican controlled legislature voted for the repeal, that is fifty-two votes. That is different than the actual vote of 47-51. However, despite this, the repeal probably would have still ultimately failed, as those numbers are not strong enough to overcome the presidential veto. It would have taken two-thirds of the senate to uphold the bill. It would have required 66 votes to ultimately repeal the law, 14 more than what can be seen by the state legislatures party representation.

3. Can the Seventeenth Amendment Actually be Repealed?

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162 Compare Senate Roll Call, supra note 154; Class I, supra, note 161; State Vote, supra note 157; and Florida Jan 21, 2011, 2011 U.S. Dist. LEXIS 8822*1 (for a list of plaintiff States)
163 Compare Senate Roll Call, supra note 154; Class I, supra, note 161; and State Vote, supra note 157.
164 See the states listed in Florida Jan 21, 2011, 2011 U.S. Dist. LEXIS 8822 *1; see also Brandon Stewart, List of 27 States Suing Over ObamaCare, THE FOUNDARY (Jan. 17, 2011, 4:00 PM) http://blog.heritage.org/2011/01/17/list-of-states-suing-over-obamacare/
165 See State Vote, supra note 157.
166 Senate Roll Call, supra note 154.
168 See id.
169 See State Vote, supra note 157.
One problem with the feasibility of the repealing the 17th amendment is ironically, one issue that had to be dealt with to pass it.\textsuperscript{170} When it is the Senators that are directly affected by a proposed amendment and would effect the election scheme, and thus the possibility of retaining their jobs, it creates a conflict of interest.\textsuperscript{171} In order to overcome this barrier again, if a repeal is to be successful, the movement will need 2/3 of states to propose the amendment.\textsuperscript{172} Or Congress can act on it as they did under its passage, by pre-empting the looming convention and controlling what the actual amendment would say.

Another problem lies in the people supporting the repeal of the amendment, since it would necessitate people giving up more direct control over the democratic process than they currently have.\textsuperscript{173} Because of this, it would be hard to see a successful repeal of the Seventeenth Amendment without a massive change to the hearts and minds of the general American populace.\textsuperscript{174} In a time where there is also a push to amend the constitution to rid the country of the electoral college to allow for popular choice for President,\textsuperscript{175} it is unlikely that people will want to get rid of a system that allows for a popular choice for a Senator. One group talked about

\begin{flushleft}
\textsuperscript{170} See Vile, supra note 25, at 201.
\textsuperscript{171} See id.
\textsuperscript{172} See id.
\textsuperscript{173} See Ure, supra note 81, at 286.
\textsuperscript{174} History, supra note 54, at 227.
\end{flushleft}
repealing the Seventeenth Amendment as an acquired taste that few have.\textsuperscript{176} It will take a lot more than a few to get the dramatic backing that a constitutional amendment needs to succeed.

It is argued that the current swing for dramatically limiting federal power that is sparked and rallied for by the Tea Party movement should not be wasted on a Constitutional amendment.\textsuperscript{177} There is a limited amount of political capital that the Tea Party\textsuperscript{178} has, and they will not be able have enough of it to make significant changes to the federal government and the repeal the amendment.\textsuperscript{179} However, in the November 2010 election, there were candidates running on a platform that included a push for the repeal of the Seventeenth Amendment.\textsuperscript{180} Others have long taken a stand on the limited scope of government and the return the original constitutional structure for the Senate.\textsuperscript{181} Ron Paul,\textsuperscript{182} for example, has introduced

\textsuperscript{177} Yoo, \textit{supra} note 119.
\textsuperscript{178} The tea party has the core values of fiscal responsibility, constitutionally limited government, and free markets. \textit{See, e.g.}, \textit{Mission Statement}, \textsc{Tea Party Patriots}, http://www.teapartypatriots.org/Mission.aspx (last visited Apr. 17, 2011).
\textsuperscript{179} Yoo, \textit{supra} note 119.
\textsuperscript{180} Mike Lee, for example ran in part endorsing a repeal of the 17th amendment and won his seat in the Nov. 2010 elections. \textit{See, e.g.} Johnson, \textit{supra} note 119; \textsc{Mike Lee for U.S. Senate}, http://www.mikelee2010.com/ (last visited Apr. 19, 2011).
legislation on several occasions in the past to repeal the seventeenth amendment that have not made it passed Congress’ floor.\textsuperscript{183}

A repeal of the 17\textsuperscript{th} amendment is highly unlikely given the past history and current attitudes towards direct government. It would lead to the revitalization of federalism and States’ rights. This is not a compromise that most are willing to make. Congress is unwilling to change the system as it directly affects them, and the people are unwilling to hand over their vote as a way to secure their state’s interest above their own.

**Conclusion**

Even though the founders intended for the indirect election of senators, the Seventeenth Amendment changed the Constitutional landscape of the Senate. In Part I, the founding fathers’ intents and fears were discussed and clearly shown to favor indirect democracy. Part II explored the passage of the Seventeenth Amendment and the arguments brought forth in contrast to those intents of the founding fathers. Part III explored the feasibility of repealing the Seventeenth Amendment, discovering that unless change happens in majority of Americans, a repeal will be unlikely. The solution may need a compromise between a popular vote and the Senators becoming more aware that they serve their State, not the federal government or their party.

\textsuperscript{183} See e.g. S.J. RES. 35, 108\textsuperscript{th} Cong. (2004); see also DiLorenzo, supra note 42.