Information Paper – Seventeenth Amendment

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Why the Seventeenth Amendment to the U.S. Constitution must be abolished.

Problem:

The Seventeenth Amendment was never properly ratified by the states of the Union at the time of the vote back in 1913. Due to the political climate in America today and based on past efforts to expose this legal fact having been met with horrendous resistance by any members of Congress or the Federal Courts, it is believed the only way to resolve this problem is through the state legislatures.

History:

There can be no mistaking the intention of the framers of the U.S. Constitution regarding the function of the proposed national government: the interests of the states creating the new national government would be protected and represented in Congress with equal numbers per state. The people of the states would have their interests protected by electing representatives to serve in this new Congress. A fair balance of powers.

Article 1, Section 3, Clause 1 of the Constitution sets forth that United States Senators shall be chosen by the state legislature; Clause 2 prescribes the method of filling vacancies and other procedures.

> "The proposed Constitution, so far from implying an abolition of the State governments, makes them constituent parts of the national sovereignty, by allowing them a direct representation in the Senate, and leaves in their possession certain exclusive and very important portions of sovereign power. This fully corresponds, in every rational import of the terms, with the idea of a federal government".
> -Federalist 9, by Alexander Hamilton

Hamilton wasn't alone in his insistence that the states shall have a say in the affairs of the national government. James Madison, known as the Father of the U.S. Constitution said:

> "Whenever power may be necessary for the national government, a certain portion must be necessarily left with the states, it is impossible

> for one power to pervade the extreme parts of the United States so as to carry equal justice to them. The state legislatures also ought to have
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> some means of defending themselves against the encroachments of the national government. In every other department we have studiously endeavored to provide for its self-defense. Shall we leave the states alone un-provided with the means for this purpose? And what better means can be provided than by giving them some share in, or rather make them a constituent part of, the national government?"

Madison also opined in the Federalist 51: "…that "the legislative authority, necessarily predominate. The remedy for this inconveniency is, to divide the legislature, [and] render them by different modes of election, and different principles of action."

The 17th Amendment: Should it be Repealed?

Below is a discussion paper by John W. Dean, former Presidential Counsel, September 13, 2002:

Why The Direct Election Of Senators May Have Been A Serious Mistake, And One That Helps Explain The Supreme Court's States' Rights Views

"Federalism - the allocation and balancing of power between state and federal government - has emerged as a central concern of the Supreme Court under Chief Justice William Rehnquist. Slowly, but steadily, the Rehnquist Court has been cutting back federal powers, and protecting state's rights.

"Many have wondered what the Court is doing. Why are the Court's five conservatives - the Chief Justice himself, along with Associate Justices Sandra Day O'Connor, Antonin Scalia, Anthony Kennedy, and Clarence Thomas - creating this new jurisprudence of federalism?

"The answer is simple: they are seeking to fill a void in our constitutional structure, a problem created early in the Twentieth Century. The problem began when, in the name of "democracy," we tinkered with the fundamental structure of the Constitution by adopting the Seventeenth Amendment.

"The Amendment calls for direct election of U.S. Senators. It's a change that has in fact proved anything but democratic. And it is a change whose aftermath may haunt the Twenty-first Century.

Concerns about Federalism, especially post-September 11

"Divisions of power are rooted in our Constitution. Experience had taught the Framers the dangers of concentrations of ruling authority, resulting in their ingenious template of checks and balances, with divisions and distributions of power.

“Ultimate power in a democracy resides with the people. We are not a pure democracy, however, but rather a confederated republic (one that features, as well, county and local political subdivisions).

“Thus, while there is national sovereignty, there is also state sovereignty. Power has been so divided and spread for one reason: to provide for and protect the highest sovereignty - that of each individual citizen.

“Only fools reject the wisdom of this founding principle of defusing power. Yet from the outset there has been debate regarding the appropriate allocation and balancing of these powers. The debate has focused on not only whether a particular matter should be dealt with at the state versus the national level, but also on how these allocations are adjusted from time to time.

“Of late, for example, along with laments for those who tragically lost their lives during the September 11th terrorist attack, there has been widespread concern with new realignments of federal/state powers that have followed in the name of homeland security.

“Most significantly, as I discussed in a previous column, Washington is assuming powers that have only previously existed during a congressionally declared war.

Creating the United States Senate: The Framers' Bicameralism

“In designing our Constitutional system, the Framers sought to remedy the limits of the Articles of Confederation, which created a loose association of states with little central power. The new system, they decided, ought to feature a better allocation of powers - and the federal government should have the powers "necessary and proper" to perform its envisaged functions. The will of the People should be the foundation, and the foundational institution should be the law-making legislative branch.

“Unsurprisingly, the Revolutionaries were not very impressed with most aspects of the British model of government. They rejected parliamentary government, with its king or queen and three estates of the realm (lords spiritual, lords temporal, and the commons).

“But one feature of the British system, the Framers did borrow. That was bicameralism - a word coined by Brit Jeremy Bentham to describe the division of the legislature into two chambers (or, in Latin, *camera*).

“The British Parliament had its House of Lords as the upper chamber and the House of Commons as the lower chamber. Citizens selected members of the House of Commons. The members of the House of Lords, in contrast, were those who had been titled by a king or queen (lords temporal) and the archbishops and bishops of the Church of England (lords spiritual).

“Loosely basing our bicameral legislature on this model (minus the lords, both temporal and spiritual), the Framers created the House of Representatives as the lower chamber, whose members would be selected directly by the people. And with almost unanimous agreement, they determined that members of the upper chamber, the Senate, would be selected by not directly, but by the legislatures of the states. Each state would have two Senators, while Representatives would be apportioned based on population.

“James Madison was not only involved in structuring the system, but was also a keeper of its contemporaneous record. He explained in Federalist No. 10 the reason for bicameralism: "Before taking effect, legislation would have to be ratified by two independent power sources: the people's representatives in the House and the state legislatures' agents in the Senate."

“The need for two powers to concur would, in turn, thwart the influence of special interests, and by satisfying two very different constituencies, would assure the enactment was for the greatest public good. Madison summed up the concept nicely in Federalist No 51:

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

“The system as designed by the Framers was in place for a century and quarter, from 1789 until 1913, when the Seventeenth Amendment was adopted. As originally designed, the Framers' system both protected federalism and ensured that relatively few benefits would be provided to special interests.

The Cloudy Reasons Behind The Seventeenth Amendment

“There is no agreement on why the system of electing Senators was changed through the enactment of the Seventeenth Amendment. But there is widespread agreement that the change was to the detriment of the states, and that it played a large part in dramatically changing the role of the national government.

“Before the Seventeenth Amendment the federal government remained stable and small. Following the Amendment's adoption it has grown dramatically.

“The conventional wisdom is that it was FDR's New Deal that radically increased the size and power of federal government. But scholars make a convincing case that this conventional wisdom is wrong, and that instead, it was the Seventeenth Amendment (along with the Sixteenth Amendment, which created federal income tax and was also adopted in 1913) that was the driving force behind federal expansion.

"The Amendment took a long time to come. It was not until 1820 that a resolution was introduced in the House of Representatives to amend the Constitution to provide for direct elections of Senators. And not until after the Civil War, in 1870, did calls for altering the system begin in earnest. But forty-three years passed before the change was actually made.

"This lengthy passage of time clouds the causes that provoked the Amendment to be proposed and, finally, enacted. Nonetheless, scholars do have a number of theories to explain these developments.

"George Mason University law professor Todd Zywicki has assembled an excellent analysis of the recent scholarship on the history of the Seventeenth Amendment, while also filling in its gaps. Zywicki finds, however, that received explanations are incomplete.

Two Main Seventeenth Amendment Theories Don't Hold Water on Examination

"There have been two principal explanations for changing the Constitution to provide for direct election of Senators. Some see the Amendment as part of the Progressive Movement, which swept the nation in the late 1800s and early 1900s, giving us direct elections, recall, and referendums.

"Others, however, believe the Amendment resulted from the problems the prior Constitutional system was creating in state legislatures, who under that system were charged with electing Senators. These problems ranged from charges of bribery to unbreakable deadlocks.

"Deadlocks happened from time to time when, because of party imbalance, a legislature was unable to muster a majority (as necessary under the 1866 law that controlled) in favor any person. The result was to leave the Senate seat empty and leave the state represented by only a single Senator, not the Constitutionally-mandated two.

"Professor Zywicki basically demolishes both these explanations. He contends, first, that explaining the Seventeenth Amendment as part of the Progressive Movement is weak, at best. After all, nothing else from that movement (such as referendums and recalls) was adopted as part of the Constitution. He also points out that revisionist history indicates the Progressive Movement was not driven as much by efforts to aid the less fortunate as once was thought (and as it claimed) - so that direct democracy as an empowerment of the poor might not have been one of its true goals.

"What about the "corruption and deadlock" explanation? Zywicki's analysis shows that, in fact, the corruption was nominal, and infrequent. In addition, he points out that the deadlock problem could have been easily solved by legislation that would have required only a plurality to elect a Senator - a far easier remedy than the burdensome process of amending the Constitution that led to the Seventeenth Amendment.

“Fortunately, Professor Zywicki offers an explanation for the Amendment's enactment that makes much more sense. He contends that the true backers of the Seventeenth Amendment were special interests, which had had great difficultly influencing the system when state legislatures controlled the Senate. (Recall that it had been set up by the Framers precisely to thwart them.) They hoped direct elections would increase their control, since they would let them appeal directly to the electorate, as well as provide their essential political fuel - money.

“This explanation troubles many. However, as Zywicki observes, "[a]thought some might find this reality 'distasteful,' that does not make it any less accurate."

Should The Seventeenth Amendment Be Repealed?

“Those unhappy with the Supreme Court's recent activism regarding federalism should considering joining those who believe the Seventeenth Amendment should be repealed. Rather than railing at life-tenured Justices who are inevitably going to chart their own courses, critics should focus instead on something they can affect, however difficult repeal might be.

“Repeal of the amendment would restore both federalism and bicameralism. It would also have a dramatic and positive effect on campaign spending. Senate races are currently among the most expensive. But if state legislatures were the focus of campaigns, more candidates might get more access with less money - decidedly a good thing.

“Returning selection of Senators to state legislatures might be a cause that could attract both modern progressive and conservatives. For conservatives, obviously, it would be a return to the system envisioned by the Framers. For progressives - who now must appreciate that direct elections have only enhanced the ability of special interests to influence the process - returning to the diffusion of power inherent in federalism and bicameralism may seem an attractive alternative, or complement, to campaign finance reform.

“Professor Zywicki likes this idea as well, but is probably right in finding repeal unlikely. He comments - and I believe he's got it right -- "Absent a change of heart in the American populace and a better understanding of the beneficial role played by limitations on direct democracy, it is difficult to imagine a movement to repeal the Seventeenth Amendment."

Several States moving to abolish Seventeenth Amendment

In 2003, Montana State Senator Jerry O’Neil introduced SJ 10:

A joint resolution of the Senate and the House of Representatives of the State of Montana declaring as defective the current process of choosing United States Senators; requesting Congress to transmit for consideration by States of the United States an

Amendment to the 17th Amendment to the United States Constitution that provides for State Legislatures to elect members of the United States Senate; and informing the President of the United States Senate, the Speaker of the United States House of Representatives, and each member of the Montana Congressional Delegation of the request for an Amendment to the Seventeenth Amendment to the United States Constitution.

A full copy of the bill is attached.

In 1996, the State of Arizona brought forth HCR2024:

A Concurrent Resolution Making Application to the Congress of the United States to Propose an Amendment to the Constitution of the United States to Repeal the Seventeenth Amendment

A full copy of the bill is attached.

Additional support material:

A definitive, scholarly presentation on the Seventeenth Amendment is contained in "Amplifying the Tenth Amendment," 31 Arizona Law Review 915 (1989) by John MacMullin. This comprehensive analysis on the Tenth Amendment brings the Seventeenth in as a matter of necessity in order to demonstrate the harmony sought by the framers of the Constitution. A copy of this work is attached or you can read it on line at: http://liberty-ca.org/presentations/articles/ampliffying10th/amp10_01.htm

An additional academic article in support of repeal is: Far-reaching and forgotten: The Seventeenth Amendment by Nathan Lehman. A copy of this work is attached or you can read it on line at:

http://www.neopolitique.org/Np2000/Pages/Essays/Articles/17th.html