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Comment

*277 YOU SCRATCH MY BACK AND I'LL SCRATCH YOURS: WHY THE FEDERAL MARRIAGE AMENDMENT SHOULD ALSO REPEAL THE SEVENTEENTH AMENDMENT

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I. Introduction

The Johnsons have a problem. Mrs. Johnson hired their butler, Franz, to prepare their food, clean their home, and do the family's laundry. At first, Franz was wonderful. Because Mrs. Johnson's office was downtown and Mr. Johnson worked from home, Mrs. Johnson assigned Mr. Johnson the responsibility of training Franz in his new tasks and overseeing their fulfillment. Under Mr. Johnson's training and admonition, Franz learned what kinds of foods the family enjoyed, how to keep the home clean, and how to care for every family member's laundry. The Johnson family was pleased with Franz.

However, Mr. Johnson secretly began abusing his new-found servant. He learned that he could pay Franz a little extra and have Franz place bets and follow the results for him down at the race tracks. He also learned that Franz could buy him the alcohol that Mrs. Johnson, who did the grocery shopping, refused to buy.

Soon, however, Mrs. Johnson found out about Mr. Johnson's misuse of Franz's services and, in a fit of indignation, revoked all of Mr. Johnson's responsibilities for Franz. She decided to take on full responsibility for the remainder of his training and for monitoring his ***278** actions. Even though Mr. Johnson's abuse was minor and Franz had performed well under him for the most part, Mrs. Johnson knew that she could not be tempted to abuse her authority over Franz.

With no one to send Franz on personal, prohibited errands, Franz no longer acted outside the scope of his employment. The plan worked--at first. But, eventually, Franz began to wax sporadic in his cooking and cleaning and became lackadaisical in his laundry responsibilities. Dinners were frequently from a can, the dishes piled up, and the whites began to gray. He would even nap on the leather sofa with his feet up on the coffee table, but because Mrs. Johnson was rarely aware of his misconduct and thus rarely reprimanded him, Franz had no reason to change his habits.

Over time, it has become clear to Mrs. Johnson that Franz is no longer performing the services he was hired to perform. She has learned that Franz requires regular monitoring and strict accountability. However, despite her knowledge that Mr. Johnson is better positioned to provide the monitoring and accountability, Mrs. Johnson enjoys her power and would rather exercise a somewhat loose authority over Franz than figure out a way to give that authority to Mr. Johnson with the proper restrictions placed on it.

This simple analogy is designed to illustrate the fundamental flaw [FN1] in the Seventeenth Amendment to the Constitution of the United States. [FN2] This Amendment altered the structure of the U.S. Constitution by taking the right to elect U.S. Senators from state ***279** legislatures and vesting that right in the voters at large. [FN3] In our story, Mrs. Johnson represents the voters at large, Mr. Johnson represents the state legislatures, and Franz represents the Senate. Just as Franz was hired to do select tasks, the Senate was originally commissioned to do select tasks. [FN4] Additionally, both Franz and the Senate, by their very nature, require close follow up and tight accountability for optimal performance. [FN5] Thus, Franz's misbehavior increased and his performance dwindled when responsibility for him was taken from Mr. Johnson, who was likely to monitor him and hold him accountable, and vested in Mrs. Johnson, who was less likely to monitor him and therefore unlikely to provide the necessary accountability. Similarly, since the Seventeenth Amendment took the responsibility of electing Senators from state legislatures and vested it in the voters at large, the Senate has likewise engaged in conduct outside the scope of its commission and neglected duties it is commissioned to fulfill. [FN6]

Just as Mrs. Johnson should turn the duties of monitoring Franz and providing the accountability he requires

back to her husband, the Seventeenth Amendment should be repealed, thus placing the duties of monitoring and providing accountability to the Senate back in the state legislatures. [FN7] The question faced by scholars is how to do so. After further making the case for repeal, this Comment provides one possible answer to this important question, namely combining an amendment to repeal with the Federal Marriage Amendment.

To set up the case for repeal, Part II of this Comment discusses the nature of the Senate and then provides the historical background of the Seventeenth Amendment. Part III discusses in detail some of the major adverse effects of this Amendment. It focuses on the decline in state sovereignty and the increase in interest group sovereignty that resulted from the Seventeenth Amendment. Part IV first focuses on the current status of efforts to repeal and then suggests that combining an amendment to repeal with the Federal Marriage Amendment may be mutually beneficial for proponents in both camps.

***280** II. History of the Seventeenth Amendment

The Seventeenth Amendment has an interesting history that lends insight into its questionable validity. However, to understand the importance of that history one must first appreciate the nature of the Senate. Therefore, this section will first discuss the nature of the Senate and then discuss the history of the Seventeenth Amendment.

A. Nature of the Senate

The Senate is one mark of a "mixed" form of government--a form that controls power by dividing it up, attaching certain responsibilities to each division, and then pitting division against division through checks and balances. [FN8] In creating the Constitution of the United States, the Founders accomplished something that political scientists had been seeking to accomplish for centuries: they developed and established a form of government that successfully divided and balanced the power between "the one, the few, and the many." [FN9] The "one" in this phrase refers to a position in the government for a monarch-like director or executive who can make immediate decisions in times of war or emergency. [FN10] The "few" refers to a position for an aristocratic-like body of select wise men who can lend stability by safeguarding against both "the reckless ambitions of the monarch" and the "soak the rich" demands of the people, both of which would "destroy the property and productive or industrial base of the nation." [FN11] The "many" refers to the position of power the ***281** people themselves should fill due to the tendency of monarchs and aristocrats to ignore the needs of the common people--a tendency that eventually causes such shameful treatment of the masses that they feel compelled to "overthrow the whole political system by violence and revolution." [FN12] In the system chosen by the Founders, the role of the President was created for the "one," the role of the Senate for the "few," and the House of Representatives for the "many." [FN13]

This Comment focuses is on the nature and responsibilities of "the few," the United States Senate. The primary role these aristocratic-like wise men should play is best articulated in the form of a generalization made by James Madison in Federalist No. 63, while discussing the necessity of a well-constructed Senate: "The objects of government may be divided into two general classes: the one depending on measures which have singly an immediate and sensible operation; the other depending on a succession of well-chosen and well-connected measures, which have a gradual and perhaps unobserved operation." [FN14] According to Madison, the measures which have an immediate, palpable operation are left to the voters directly and to the legislative body designed to represent the voters, the House of Representatives; [FN15] but the role of the Senate is to discern the gradual and unobserved operations and to either implement or restrict those measures, depending on whether or

not their operation is in the best interest of the people. [FN16]

***282** The types of measures the Founders saw fit to vest in the discretion of the Senate because of their vital but less tangible nature included the powers to make laws, [FN17] restrict the making of laws, [FN18] advise the President about the nomination of Supreme Court Justices (and subsequently either consent to or withhold consent from the President for those nominees), [FN19] similarly offer advice and consent ***283** regarding treaties, [FN20] and try impeached officials. [FN21] The Senate's charges regarding the exercise of these powers included being "a defence to the people against their own temporary errors and delusions," [FN22] being a defense to the people against the betrayal of their representatives, [FN23] and keeping the laws few and coherent to the public. [FN24]

In short, the Senate should be a governmental body that focuses on protecting the government and the people against the less tangible, even unobservable threats that neither "the one" [FN25] nor "the many" [FN26] ***284** are likely to detect due to their more whimsical natures.

Regarding the nature of the Senate, a final question is on whose behalf the Senate is to wield such important and prestigious powers. The answer to this question changed with the passage of the Seventeenth Amendment. [FN27] Prior to the Seventeenth Amendment, the Senate was appointed by state legislatures, and Senators were therefore beholden to their states. [FN28] Pre-Seventeenth Amendment senators considered the same issues--such as determining whether to consent to a Supreme Court nominee, ratify a treaty, or oppose legislation passed by the House--but they did so with an eye towards preventing unobservable harm to the states, who were their source of accountability. [FN29] However, a different source of senatorial accountability rears its head in the post-Seventeenth Amendment world. [FN30] Because senators are now elected by the public at large, they are beholden to those groups that have the greatest impact on public opinion. [FN31] Thus, as discussed in Part III.B, Senators today wield their important and prestigious powers largely to protect against unobservable harm to private interest groups. [FN32] Changing the source of accountability has changed the very nature of the Senate. [FN33]

***285** B. History of the Seventeenth Amendment

With the fundamental roles of the Senate in mind, the history of the Seventeenth Amendment is particularly interesting. At the time of ratification, there was a virtual consensus that the Senate should be elected by state legislatures. [FN34] However, starting in 1901, various states passed resolutions calling for an amendment to the U.S. Constitution that would provide for direct election of Senators. [FN35] These resolutions spread, and in 1913 they reached fruition. [FN36]

These efforts were fueled by several factors. One prominent Seventeenth Amendment scholar conveniently divides all explanations for the repeal into two categories, internal and external. [FN37] The internal explanations are those which focus on the inherent problems associated with having state legislatures elect the Senators and include corruption and bribery, [FN38] delay in the election process, [FN39] and the tendency of state legislatures to become distracted from state business with the election process. [FN40] The external explanation focuses on the early twentieth century social trend towards democracy in general. [FN41]

The most common internal explanation for the Amendment is that it was a reaction to the bribery that was popping up in state legislatures. [FN42] While this argument was commonly used by proponents ***286** of the Amendment, [FN43] it does not appear in the historical record to have been a very big problem. [FN44] Recent scholarship shows that "[o]f the 1,180 senators elected from 1789 to 1909, only fifteen [1.3%, or 1 out of 79]

were contested due to allegations of corruption, and only seven [.60%, or 1 out of 169] were actually denied their seats." [FN45] As an aside, even if this small showing of bribery and corruption constituted a substantial problem, the solution was not a constitutional amendment, but rather a "more narrow reform aimed more directly at the problem." [FN46]

Another argument used by proponents of the Amendment was that the delay from prolonged disagreements in the election process as carried out by the state legislatures caused several states to be without a Senator for all or part of a Senatorial session. [FN47] "Between 1891 and 1905, there were forty-six deadlocks across twenty states." [FN48] While this is a legitimate concern, history shows that most repeated deadlocks occurred in newly-admitted western states with inexperienced legislatures, and that more experienced states generally only encountered the occasional deadlock. [FN49] That this deadlocking problem did not merit a constitutional amendment is evidenced by the fact that several of the states who were most affected by deadlocks did not vote for the Amendment. [FN50]

The final internal explanation for passage of the Amendment is that electing Senators distracted state legislators, especially when deadlocks occurred. [FN51] History, however, reveals that even when deadlocking was a problem, the amount of time dedicated to the election process amounted to one vote at the beginning of each day--then the legislators would continue with their normal affairs. [FN52] Thus, in retrospect, none of the internal explanations for the Amendment sufficiently justified amending the Constitution.

Rather than focusing on the inherent problems with direct ***287** election, the external explanation for passage approaches the issue on a macro scale. This approach views the Seventeenth Amendment "as just one element of the greater Progressive Movement" of the late nineteenth and early twentieth centuries that "wrest[ed] control of the government from the wealthy and powerful," and transferred it "to 'the people' who could then use the government as an instrument of positive social change." [FN53] This movement also pushed for other forms of direct democracy, such as the initiative, referendum, and election of judges. [FN54] In the case of the Seventeenth Amendment, it was thought that direct election would eradicate the political corruption that resulted from Senatorial election by the state legislatures, [FN55] thus acting "as a democratic vaccine to immunize the Senate from corrupt and ineffective representation." [FN56]

This is the most likely historical explanation for passage of the Amendment. [FN57] However, as shall be shown in the next section, the practical effects of the Seventeenth Amendment turned the reasoning of this "Progressive Movement" on its head. [FN58]

III. Adverse Effects of the Seventeenth Amendment

Just as the measures of government may be classified as having either a direct or an indirect operation, [FN59] the major adverse effects of the Seventeenth Amendment may be classified as either direct or indirect. [FN60] This section will first focus on the direct effects of the Seventeenth Amendment: the decline in state sovereignty and a general decline in some types of political participation. Next, it will focus on the indirect effect: the rise in interest group sovereignty.

A. Direct Effect: The Decline of State Sovereignty

Arguably, the most direct adverse effect of the Seventeenth Amendment in today's constitutional structure is that state legislative interests are substantially less protected against federal ***288** encroachments. [FN61] The Seventeenth Amendment trampled on state legislative interests because state legislatures no longer vote their

U.S. Senators into office, making any "instruction" they give to their senators of no force. [FN62] Additionally, because U.S. Senators are no longer bound to state interests, they have incentive to use their advice-and-consent power to install Supreme Court justices who are inclined to increase federal power at the expense of state sovereignty. [FN63] Finally, in addition to the decline in state legislative interests, another direct effect of the Seventeenth Amendment is a general decline in the amount of incentive the average citizen has to be involved in some aspects of the political process. [FN64]

The idea that state sovereignty declined as the result of direct election should not be a surprise. [FN65] Prior to this Amendment, state legislatures had direct access to the powers of the Senate because state legislatures were the primary constituency of their respective Senators, [FN66] making Senators beholden to them. [FN67] And, as stated by one professor in a fairly recent congressional hearing on the preemption of state laws, "As 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 states." [FN68]

This state influence over the instrument of the Senate was exercised not only through the election itself, but through methods such as "instruction." [FN69] Under this practice, state legislatures told ***289** Senators how to vote on particular bills. [FN70] This practice was rooted in the theory that a Senator was "an ambassador of the State to the nation." [FN71] Failing to follow these "instructions" was an offense serious enough to lead to the resignation of several non-complying Senators before their terms were complete. [FN72] States were firm with their Senators because "[a]s agents of the state legislatures, the primary duty of senators was to protect the sphere in which state and local governments could operate, free from the potentially strong arm of Washington." [FN73]

Then entered the Seventeenth Amendment. This Amendment stripped states of the ability to hold Senators accountable to state interests by removing the threat of not re-electing them, thereby dissolving the bite that made "instruction" effective. [FN74] When U.S. Senators stopped being ambassadors of the state, they not only lost the primary goal of protecting state interests, but became "possessed [of] a natural inclination to encroach on state sovereignty; after all, states were a competing power center for servicing constituents and interest groups." [FN75] The decline in state sovereignty was the inevitable result.

Another way this Amendment has directly weakened state sovereignty is through the federal judiciary. [FN76] One scholar has pointed out that the increasing number of Supreme Court cases holding state laws unconstitutional can be traced directly back to the Seventeenth Amendment. [FN77] The causal chain that justifies this assertion may be summarized as follows: (1) when U.S. Senators stopped being accountable to the states, they entered into a competition with the states for power; [FN78] (2) due to this competition, Senators became inclined to protect the institutional interests of the federal government rather than the state governments, thereby increasing their own ***290** power; [FN79] (3) this inclination led Senators to consent to Supreme Court nominees who espoused a more expansive view of the role of the federal government, instead of those who would protect states' rights; [FN80] and (4) the confirmations of these new types of justices has sparked a large increase in the number of Supreme Court cases holding state laws unconstitutional. [FN81]

***291** A final direct effect of the Seventeenth Amendment, one that goes hand in hand with the decline in state sovereignty, is a decline in some aspects of political participation. A decline in the political process was natural because the less political power in question, the less incentive to be involved--and, ironically, direct election decreased the political power of the average citizen. [FN82] The counterintuitive position that direct election decreased the political power of the average citizen can be justified by using a hypothetical with actual numbers to illustrate the nature of the accountability chain between people and their senators, both before and after the Amendment.

Suppose a small, local rotary club has particular concerns with a piece of legislation before the U.S. Senate. Suppose further that the state population is 2,250,000, the ideal district size for each state House of Representatives district is 30,000 constituents, and the state legislature is comprised of seventy Representatives and thirty Senators. [FN83]

Before the Amendment, these citizens would have been able to exert some influence over their senator's conduct by simply contacting their state representative, who would have had both incentive to take them seriously and power to influence that state's U.S. Senators. He would have had incentive to take them seriously for several reasons. For instance, because a state legislator represents local interests, he is likely to have had some connection to local groups such as our rotary club that are involved in public happenings. [FN84] Some members of this club would have been likely to have met their representative, and ***292** some may even have known him or helped on his campaign. [FN85] Additionally, legislation that is of concern to a rotary club in this district is potentially a concern to the representative himself, who also lives in that district. [FN86] Finally, even if the representative has no other connection to the group, this group is part of the 15,001 votes the representative needs to win his next election. If there are fifteen concerned citizens, each is one of only 1,000 needed votes. [FN87]

In addition to having incentive to listen to his constituents, the representative would also have had power to influence the state's two U.S. Senators. These senators would certainly pay close attention to any counsel from the state representative because the representative is one of only fifty-one votes that will keep them in the Senate. The combination of the 1000:1 and 51:1 ratios provided a tight chain of accountability between citizens and their U.S. Senators.

Now consider the rotary club's plight, post-Seventeenth Amendment. Unlike the pre-Seventeenth Amendment structure, calling the state representative is now nearly pointless because the representative is only one of the 1,125,001 votes that put each senator in and can vote each senator out. [FN88] In fact, as an aside, even if the entire state legislature combined in opposition to the legislation (discounting the effect this would have in the media), they are still only 100 of the 1,125,001 votes needed, each representing one of 11,250.

Additionally, for the rotary club members to call the U.S. Senators directly would be nearly pointless for the same reasons. Each of our fifteen concerned citizens represents only 1 of 150,000 votes to ***293** their Senators. This 150,000:1 ratio is a far cry from the accountability that resulted from the 1,000:1 and 51:1 ratio combination.

Because average Americans' votes now bear less weight to their Senators, the average American has less incentive to be involved in the political processes associated with voting for and monitoring their Senators. [FN89]

B. Indirect Effect: The Rise of Interest Group Sovereignty

The decline in state power had indirect consequences as well. Power is not static, and the gaping hole this Amendment left in the balance of powers was soon filled--only it was filled less by voters and more by interest groups than was intended. [FN90] The chain of causation that led to this outcome can be illustrated in four steps: (1) the Amendment made Senators accountable to the voters at large instead of a set group of legislators; [FN91] (2) the average voter is less capable of monitoring a Senator's conduct than is a legislator; [FN92] (3) with less monitoring, Senators are more susceptible to legislative schemes that sacrifice their constituents' concerns for their own interests and those of special-interest groups; [FN93] and (4) special-interest groups enjoyed increased influence because they could now centralize at the federal level and influence the Senators directly instead of being “dispersed across several states” and having to lobby “multiple state legislatures in order to get the Senate

[to] consent to a piece of legislation." [FN94]

The two primary issues are the decrease in monitoring and the impact this decrease had on interest group influence. [FN95] The decrease in monitoring resulted from the fact that the voters at large are both less ***294** capable of monitoring and less likely to do so than the state legislatures. [FN96] Voters are less capable because they simply cannot devote the same amount of time a legislator can to considering the issues and details on the senatorial agenda. [FN97] As Montesquieu stated (in blunt fashion), "The great advantage of representatives is, their capacity of discussing public affairs. For this the people collectively are extremely unfit, which is one of the chief inconveniences of a democracy." [FN98] Additionally, voters have less incentive to monitor than legislators because a voter "senses the insignificance of his individual ballot," while a legislator was one of a small group whose every vote was worth lobbying for to a Senator. [FN99]

This decrease in monitoring has led to an increase in the amount of influence interest groups enjoy. After all, because senators are now only remotely monitored by state legislatures and voters, they are left more susceptible to the pressures of interest groups (who can now lobby them directly instead of through the state legislatures). [FN100] One scholar has observed that prior to the Seventeenth Amendment, special-interest legislation frequently passed the House but was stalled in the Senate, [FN101] presumably because the interest groups' prerogatives were contrary to those of the states. In the post-Seventeenth Amendment world, however, the trend switches directions because "[r]ather than representing the sovereign interests of states, Senators now represent a variety of national interest groups." [FN102]

At the same time the Amendment gave public interest groups great incentive to gather at the national level because of the decrease in monitoring, interest groups were independently motivated to centralize by a general shift in the American economy at the early ***295** twentieth century towards a more national form. [FN103] This national centralization of the economy caused great expansion in interstate commerce and thereby "increased the gains . . . to any group that could tap into this [new national] wealth through the political process." [FN104] Thus, in addition to the direct-lobbying incentive that fueled nationalization of interest groups, this simultaneous national economic centralization added further gusto to their shift in structure towards a national form. [FN105]

Finally, interest groups grew in influence in the post-Seventeenth Amendment world because the movement aimed at curbing this national centralization of economic power made a fatal mistake. This counter-centralization movement was the Progressive Movement discussed earlier [FN106]--a movement that sought to transfer control of the government to "the people" so they could thereby "protect themselves from the rich and powerful who had increasingly come to control social, political, and economic power in the post-Civil War period." [FN107] The Progressive Movement sought to battle this economic centralization with a push towards incorruptible democracy (of which the Seventeenth Amendment was but a part), [FN108] but the results of the Amendment were an increase in the amount of economic influence interest groups had and a decrease in the worth of the average citizen's senatorial vote, as previously explained. [FN109] Therefore, the very reasoning that fueled the Amendment was turned on its head by the Amendment's practical effects. [FN110] Ironically, this "democratic" movement pulled out the primary stop that was holding back the twentieth-century trend of economic and political centralization, and left the Senate wide open to be an instrument of social change for the benefit of wealthy and powerful interest groups instead of constituents. [FN111]

IV. Suggested Method of Repeal

Repeal is the most obvious and direct method of reform to offset the consequences the Seventeenth Amendment has had on our ***296** constitutional system, [FN112] but several other alternative solutions have also been

proposed. [FN113] This section discusses the merits of repeal, the current status of efforts to repeal, and some of the alternatives that have been suggested. It will conclude by suggesting that coupling an amendment to repeal the Seventeenth Amendment with the Federal Marriage Amendment ("FMA") may be a mutually beneficial solution.

A. Current Status of Efforts to Repeal

The adverse effects of the Seventeenth Amendment have lately been the subject of legal scholarship, [FN114] congressional hearings and debate, [FN115] popular press articles and commentary, [FN116] and both grassroots efforts [FN117] and state legislative efforts aimed at its repeal. [FN118] The most obvious and direct method advocated for curing these adverse effects is simply to repeal the Amendment and return to the original system of election of senators by state legislatures. [FN119] Scholars find repeal attractive because history has already taught the risks and benefits of having state legislatures appoint Senators--our nation functioned under that model for over one hundred years. [FN120] Repeal is the only method of curing the adverse effects of this Amendment that ***297** would not result in any experimental change to our constitutional framework, and yet would shift the entire system in favor of state sovereignty. [FN121] However, while repeal remains the best solution theoretically, scholars find "practical difficulties" [FN122] with it because it would require people in this democratic era to voluntarily surrender their power. [FN123]

These practical difficulties are not seen as insurmountable by all, however. Proponents of both the grassroots efforts and legislative efforts aimed at repeal think that repeal is possible. [FN124] These groups think that if enough state legislators are educated about the effects of the Seventeenth Amendment, they can eventually initiate a constitutional amendment by calling a constitutional convention pursuant to Article V of the U.S. Constitution. [FN125] These groups continue to work towards repeal amidst warnings by scholars like Zywicki that "[a]bsent 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 [fruition of] a movement to repeal the Seventeenth Amendment." [FN126]

Because of the public's general lack of understanding regarding the benefits of the limitations on direct democracy, [FN127] several alternative solutions to repeal have been proposed. [FN128] One proposal advocated would give the states a direct power to participate in federal law and Constitution making. [FN129] This type of amendment can take on a variety of forms--such as the amendment proposed by Aaron O'Brien which would allow two thirds of the states to repeal ***298** federal laws or executive regulations [FN130]--but they all "share a common theme of providing the states with an effective means to protect themselves against federal encroachment and to restore the federalism balance." [FN131]

Another type of amendment is aimed more at limiting senators' power than increasing states' power. Like the amendments for state involvement in federal law making, this limiting-type also takes on different forms. Jay S. Bybee, for example, argues that a constitutional amendment imposing term limits on Senators would curb the adverse effects of the Seventeenth Amendment, [FN132] and cites to the following quote by Hamilton in support of his proposition: "[Because the Senate would see] a constant and frequent change of members, . . . any scheme of usurpation will lose, every two years, a number of its oldest advocates, and their places will be supplied by an equal number of new, unaccommodating, and virtuous men." [FN133] Professor Zywicki is more direct: "Term limits would . . . have the obvious effect of reducing the durability of legislative contracts between legislators and special interests." [FN134]

Other limiting-type amendments would place a more direct constraint on senatorial power. [FN135] For in-

stance, a balanced budget amendment would "impose[] a budget constraint on the ability of Congress to redistribute wealth from unrepresented future generations to powerful contemporary interest groups." [FN136] Similarly, an amendment forbidding the imposition of "unfunded mandates" from the federal government to state or local governments, would limit the extent of possible senatorial overreaching. [FN137]

Yet, while all of these proposed amendments may be viewed as "good ideas," [FN138] each of them requires an experimental change to our constitutional framework. [FN139] Thus, while repeal remains an uphill ***299** battle due to the "practical difficult[y]" of getting people to voluntarily surrender their power, [FN140] perhaps this practical difficulty is mitigated some by the alternative difficulties that may result from engaging in constitutional experimentation on the federal level.

B. One New Possible Method of Repeal: The Federal Marriage Amendment

While getting citizens to give up their political power to vote for their senators is an uphill battle, there is one method of repeal that has not been explored. If some other proposed constitutional amendment existed that was able to garner the tremendous popular support required for passage and that had a vested interest in repealing the Seventeenth Amendment, perhaps combining the two would change the heart of the American populace sufficiently for passage. The Federal Marriage Amendment ("FMA") [FN141] may be just such an amendment.

According to the text of the Amendment, the FMA has two primary purposes: to (1) define marriage as only "the union of a man and a woman," and (2) bar further judicial construction of any constitutional provision, whether state or federal, that would "require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman." [FN142]

Each of these two purposes will be served by repealing the Seventeenth Amendment. First, the majority of state legislatures are opposed to alternative definitions of marriage and are thus likely to elect Senators who are similarly opposed. [FN143] Second, and more ***300** importantly, the FMA is only designed to plug the definition-of-marriage leak in the federalism levees, which are currently allowing so much judicial spillover. [FN144] Repealing the Seventeenth Amendment completely revamps the levees, thereby preventing the need for further amendments to plug similar leaks. [FN145]

Jay S. Bybee has made a similar argument to combine a repeal of the Seventeenth Amendment with an amendment imposing term limits for Senators and giving state legislatures power to recall their senators. [FN146] Combining repeal with the FMA may be more likely to see passage because it would result in the significant advantage of allowing the repeal to ride on the coattails of a movement that is already well-understood, very close to home, and upon which much of the populous has already formed an opinion--the definition of marriage. [FN147]

However, even of those who think pairing an amendment to repeal the Seventeenth Amendment with some broadly appealing amendment may solve a difficult problem, some are certain to argue that the FMA is an awkward choice because it centralizes the legal definition of marriage [FN148] whereas the objective of repealing the Seventeenth Amendment is to decentralize [FN149] such policy decisions. [FN150] ***301** This contention requires a deeper look into how the FMA figures into the framework of federalism. [FN151]

The Tenth Amendment to the U.S. Constitution provides that "[t]he 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." [FN152] In Federalist No. 45, Madison elaborated on the powers delegated to the federal government and those retained by the states:

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce . . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs; concern the lives, liberties, and properties of the people and the internal order, improvement, and prosperity of the State. [FN153]

This description of power to regulate the objects that affect the lives and properties of the people in "the 'ordinary' [course of] affairs" certainly encompasses the regulation of domestic relations. [FN154] Additionally, "[t]he Supreme Court has repeatedly acknowledged and developed the doctrine of federalism in family law in a variety of contexts dealing with a wide array of issues, for nearly 150 years, as a vital principle of constitutional, statutory and common law." [FN155]

However, while family law is properly a matter of state law, ***302** passage of the FMA will secure more state sovereignty in family law than if the Amendment is not passed. [FN156] This is so because it is clear that the issue of whether to legalize same-sex marriage is inevitably going to be decided on the federal level, either as a matter of constitutional interpretation or constitutional amendment; [FN157] and if left to constitutional interpretation by courts, the precedent promises to be very destructive to traditional state sovereignty over family law. [FN158]

That the definition of marriage will inevitably be decided as a constitutional matter and that allowing courts to define marriage through constitutional interpretation will harm federalism in family law is apparent from the wide array of constitutional principles some state courts have already evoked to force states to legalize same-sex unions and to extend benefits to same-sex couples. Some have invoked federal equal protection principles [FN159] or principles of substantive due process such as privacy, the right to marry, and the right to association, [FN160] while others have stretched further by invoking federal due process standards of arbitrariness or irrationality, [FN161] and privileges and immunities. [FN162] One court, in a display of interpretive gymnastics, even invoked the Bill of Attainder Clause to support a preliminary finding that a state Defense of Marriage Amendment was unconstitutional. [FN163] Based on these precedents, one advocate of federalism in family law pointedly asks which of the two available options will best preserve and revitalize family law federalism: (1) allowing courts to extend federal constitutional doctrines to mandate the legal creation of same-sex marriage, thereby sanctioning new methods of federalizing family law; or (2) passing a narrow constitutional amendment addressing the specific issue of same-sex ***303** marriage, [FN164] thereby putting an end to the line of cases using such strained reasoning to obtain a desired political result. [FN165] In other words, insofar as the issue is a matter of family law it should ideally be left to state law for decision; however, politicized courts have already established that the issue is to be decided as a federal constitutional matter. Thus, advocates of federalism no longer have the option of choosing where the issue will be resolved--the only remaining questions are who is going to resolve it and how. [FN166]

***304** V. Conclusion

The event that shaped the constitutional understanding of the twentieth century was not the New Deal in 1933; rather, it was the passage of the Seventeenth Amendment in 1913. [FN167] By depriving state legislatures of the right to elect U.S. Senators and vesting that right in the voters at large, [FN168] this Amendment ushered in an era deprived of the "institutional fitness and disposition . . . to . . . safeguard [states] against increasing federal influence." [FN169] Without these safeguards, federal encroachments like the New Deal [FN170] and private encroachments from wealthy interest groups [FN171] were the natural forces that moved in to fill this institutional vacuum. Just as Mrs. Johnson, our character from the introduction, brought disorder and unaccountab-

ility upon her household by stubbornly withholding the authority over Franz from Mr. Johnson, [FN172] this Amendment has dealt a devastating blow to the balance of powers in our constitutional system by withholding election and monitoring authority from state legislatures, thereby making the theory of dual sovereignty a thing of ***305** the past. [FN173] As former Utah governor Mike Leavitt summed it up:

> State leaders [now] have status only as lobbyists and special interest groups. The leaders go hat in hand, hoping and wishing that Congress will listen. There is no balance of power. States must accept whatever the Congress gives them. If states have any influence at all, it results only from the personal willingness of congressional leaders to pay attention. States have no tools, no rules, ensuring them an equal voice in the cutting of the pie or the selection of the pieces. [FN174]

The best way to restore the proper balance of powers and re-enthrone states as dual sovereigns, giving them the institutional safeguards they need to protect state interests, and to re-vest power now exercised by powerful interest groups back into the people, is to repeal the Seventeenth Amendment. [FN175] While repealing an amendment is an uphill battle, perhaps coupling an amendment to repeal with the FMA will serve the dual purpose of helping promoters of the FMA by preventing the need for similar future amendments and helping proponents of repeal by increasing the popular support necessary to change the public's heart with reference to the adverse effects of direct election.

Federalism, the large common denominator between the FMA and repeal of the Seventeenth Amendment, provides sufficient cohesiveness to justify combining the two amendments, and it would certainly be bolstered by their passage.

[FN1]. For examples of the mounting arguments that the Seventeenth Amendment is flawed, see Vik D. Amar, The Senate and the Constitution, 97 Yale L.J. 1111 (1988); Jay S. Bybee, Ulysses at the Mast: Democracy, Federalism, and the Sirens' Song of the Seventeenth Amendment, 91 Nw. U. L. Rev. 500 (1997); Laura E. Little, An Excursion into the Uncharted Waters of the Seventeenth Amendment, 64 Temp. L. Rev. 629 (1991); Roger G. Brooks, Garcia, the Seventeenth Amendment, and the Role of the Supreme Court in Defending Federalism, 10 Harv. J.L. & Pub. Pol'y 189 (1987); Kris W. Kobach, Rethinking Article V: Term Limits and the Seventeenth and Nineteenth Amendments, 103 Yale L.J. 1971 (1994); 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 (1997) [hereinafter Zywicki, History]; Todd J. Zywicki, Senators and Special Interests: A Public Choice Analysis of the Seventeenth Amendment, 73 Or. L. Rev. 1007 (1994) [hereinafter Zywicki, Special Interests]; Donald J. Kochan, State Laws and the Independent Judiciary: An Analysis of the Effects of the Seventeenth Amendment on the Number of Supreme Court Cases Holding State Laws Unconstitutional, 66 Alb. L. Rev. 1023 (2003).

[FN2]. In relevant part, the Seventeenth Amendment provides: “The Senate of the United States shall be composed of two Senators from each state, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.” U.S. Const. amend. XVII, § 1.

[FN3]. Id.

[FN4]. See discussion infra Part II.A.

[FN5]. See discussion infra Part III.B.

[FN6]. See discussion infra Part III.A-B.

[FN7]. Id.

[FN8]. For a discussion regarding the benefits of this "mixed" form of government, see generally The Federalist Nos. 47-51 (James Madison) (arguing the merits of separating the power of government into the three branches and pitting each against the others).

[FN9]. The concept of "the one, the few, and the many" has been discussed by political scientists through the ages. For a brief analysis of some of the societies throughout history who have overtly tried to incorporate some form of this idea in their government, see generally Letter from John Adams to Dr. Swift entitled Ancient Republics, and Opinions of Philosophers, in A Defense of the Constitutions of Government of the United States of America (1787-1788), reprinted in A Defense of the Constitutions of Government of the United States of America (Da Capo Press 1911) (discussing, inter alia, the development of "the one, the few, and the many" theory in governmental forms throughout history).

[FN10]. The Federalist No. 70, at 380 (Alexander Hamilton) (Michael Loyd Chadwick ed., 1987) (stating that this need for quick decisions is "essential to the protection of the community against foreign attacks," but adding that an energetic executive is also necessary "to the steady administration of the laws; to the protection of property against those irregular and high-handed combinations which sometimes interrupt the ordinary course of justice; to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy").

[FN11]. W. Cleon Skousen, The Making of America: The Substance and Meaning of the Constitution 258 (1985) [hereinafter Skousen, America].

[FN12]. Id.

[FN13]. Id. at 259. That the House of Representatives is "the many" may not be readily apparent, but is clear from the record. As Oliver Wolcott, Connecticut Congressman and signer of the Declaration of Independence, stated: "The Representatives [in the House] are to be elected by the people at large. They will therefore be the guardians of the rights of the great body of the citizens." Id. at 250 (internal quotation marks omitted). Additionally, the House's role is apparent from its appellation as a "numerous body." The Federalist No. 63 (James Madison), supra note 10, at 341-42 (emphasis omitted).

[FN14]. The Federalist No. 63 (James Madison), supra note 10, at 341.

[FN15]. Id. at 341-42.

[FN16]. Id. However, if establishing national values falls under this duty to implement the unobservable measures that are in the best interest of the nation, some constitutional scholars disagree that such a duty ought to reside in the Senate, even if it originally did. For instance, Vikram David Amar points out in the article Indirect Effects of Direct Election: A Structural Examination of the Seventeenth Amendment, that Professor Bickel's famous book, Least Dangerous Branch, contains arguments supporting the theory that the Supreme Court should establish national values, not the Senate. Amar compares Professor Bickel's arguments with a broader section of Madison's quote from Federalist No. 63, which is strikingly similar in form but opposite in conclusion.

Professor Bickel states:

> [M]any actions of government have two aspects: their immediate, necessarily intended, practical effects, and their perhaps unintended or unappreciated bearing on values we hold to have more general and permanent interest. It is a premise we deduce not merely from the fact of a written constitution but from the history of the race, and ultimately as a moral judgment of the good society, that government should serve not only what we conceive from time to time to be our immediate material needs but also certain enduring values.... But such

values do not present themselves ready-made.... And it remains to ask which institution of our government... should be the pronouncer and guardian of such values....

Initially, great reliance for principled decision was placed in the Senators and the President, who have more extended terms of office and were meant to be elected only indirectly. Yet the Senate and the President were conceived of as less closely tied to, not as divorced from, electoral responsibility and the political marketplace. And so even then the need might have been felt for an institution [the Court] which stands altogether aside from the current clash of interests, and which, insofar as is humanly possible, is concerned only with principle.

Vikram David Amar, Indirect Effects of Direct Election: A Structural Examination of the Seventeenth Amendment, 49 Vand. L. Rev. 1347, 1399 (1996) (quoting Alexander Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 24-25 (2d ed. Yale Univ. Press 1986) (1962)).

A fuller section of Madison's quote states:

The objects of government may be divided into two general classes: the one depending on measures which have singly an immediate and sensible operation; the other depending on a succession of well-chosen and well-connected measures, which have a gradual and perhaps unobserved operation. The importance of the latter description to the collective and permanent welfare of every country needs no explanation. And yet it is evident that an assembly elected for so short a term [the House] as to be unable to provide more than one or two links in a chain of measures, on which the general welfare may essentially depend, ought not to be answerable for the final result any more than a steward or tenant, engaged for one year, could be justly made to answer for places or improvements which could not be accomplished in less than half a dozen years....

The proper remedy for this defect must be an additional body in the legislative department [the Senate], which, having sufficient permanency to provide for such objects as require a continued attention, and a train of measures, may be justly and effectually answerable for the attainment of those objects [as an elected body].

Id. at 1400 (first alteration in original) (quoting The Federalist No. 63 (James Madison), supra note 10, at 341-42).

[FN17]. U.S. Const. art. I, § 7 (requiring that all bills pass both the House and the Senate).

[FN18]. Id.

[FN19]. U.S. Const. art. II, § 2, cl. 2.

[FN20]. Id.

[FN21]. U.S. Const. art. I, § 3, cl. 6.

[FN22]. The Federalist No. 63 (James Madison), supra note 10, at 342. It is for this reason that Senators needed to be accountable to a body other than the people at large--a body that traditionally understood more about the gradual and unobserved measures that may cause a Senator to do or refrain from doing something the voters at large saw fit. To Madison, the best candidate was so obvious that it was "unnecessary to dilate on the appointment of senators by the State legislatures" because this set-up would "giv[e] to the State governments... an agency in the formation of the federal government" and "may form a convenient link between the two systems." The Federalist No. 62 (James Madison), supra note 10, at 335.

[FN23]. The Federalist No. 63 (James Madison), supra note 10, at 343 (stating that the Senate should protect the people against "betray[al] by the representatives of the people").

[FN24]. The Federalist No. 62 (James Madison), supra note 10, at 338. Madison suggests that the stability of a tenured Senate would filter down into the amount and coherence of the legislation passed. He states that "[i]t

will be of little avail to the people, that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood....” Id.

[FN25]. See generally The Federalist No. 75 (Alexander Hamilton), supra note 10 (discussing, inter alia, the instability of the President). For a comparison of the instability of the President as compared to the Senate, consider Hamilton's reasoning behind requiring the advice and consent of the Senate for treaties, even though the executive is the branch designed to deal with foreign powers:

However proper or safe it may be in governments where the executive magistrate is an hereditary monarch, to commit to him the entire power of making treaties, it would be utterly unsafe and improper to intrust that power to an elective magistrate of four years' duration.... [A]n hereditary monarch, though often the oppressor of his people, has personally too much stake in the government to be in any material danger of being corrupted by foreign powers. But a man raised from the station of a private citizen to the rank of chief magistrate, possessed of a moderate or slender fortune, and looking forward to a period not very remote when he may probably be obliged to return to the station from which he was taken, might sometimes be under temptations to sacrifice his duty to his interest, which it would require superlative virtue to withstand.

Id. at 406.

[FN26]. See generally The Federalist No. 62 (James Madison), supra note 10 (discussing, inter alia, the instability of the House as compared to the Senate). Madison states:

The mutability in the public councils arising from a rapid succession of new members, however qualified they may be, points out, in the strongest manner, the necessity of some stable institution in the government. Every new election in the States is found to change one half of the representatives [in the House]. From this change of men must proceed a change of opinions; and from a change of opinions, a change of measures. But a continual change even of good measures is inconsistent with every rule of prudence and every prospect of success. The remark is verified in private life, and becomes more just, as well as more important, in national transactions....

....

... No government, any more than an individual, will long be respected without being truly respectable; nor be truly respectable, without possessing a certain portion of order and stability.

Id. at 337-39.

[FN27]. See discussion infra Part III.A-B.

[FN28]. See discussion infra Part III.A.

[FN29]. Kochan, supra note 1, at 1028.

[FN30]. See discussion infra Part III.B.

[FN31]. John O. McGinnis & Michael B. Rappaport, Supermajority Rules as a Constitutional Solution, 40 Wm. & Mary L. Rev. 365, 392 (1999) (“[B]ecause state legislators were superior to the general public at monitoring the behavior of senators, the amendment increased monitoring costs, making it easier for senators to prefer special interests to the interests of their constituents.”).

[FN32]. Id.

[FN33]. For further authority regarding the original nature of the Senate's relationship with the states, consider the following quotes from the original debate:

“The people will be represented in one house, the state legislatures in the other.” Statement by James Ire-

dell, quoted in Skousen, America, supra note 11, at 260.

"The Constitution effectually secures the states in their several rights. It must secure them for its own sake; for they are the pillars which uphold the general systems. The Senate, a constituent branch of the general legislature, without whose assent no public act can be made, are appointed by the states, and will secure the rights of the several states. The other branch of the legislature, the Representatives, are to be elected by the people at large. They will therefore be the guardians of the rights of the great body of the citizens. So well guarded is this Constitution throughout, that it seems impossible that the rights either of the states or of the people should be destroyed." Statement by Oliver Wolcott, quoted in id.

"In the general Constitution, the House of Representatives will be elected immediately by the people, and represent them and their personal rights individually; the Senate will be elected by the state legislatures, and represent the states in their political capacity; and thus each branch will form a proper and independent check on the other, and the legislative powers will be advantageously balanced." Statement by C.C. Pinckney, quoted in id.

[FN34]. Zywicki, History, supra note 1, at 183. See also discussion, supra note 22.

[FN35]. Zywicki, History, supra note 1, at 190.

[FN36]. U.S. Const. amend. XVII.

[FN37]. Zywicki, Special Interests, supra note 1, at 1015-16.

[FN38]. Zywicki, History, supra note 1, at 196.

[FN39]. Id. at 198.

[FN40]. Id. at 201.

[FN41]. See generally Roger E. Meiners, Economic Considerations in History: Theory and a Little Practice, in Economic Imperialism: The Economic Method Applied Outside the Field of Economics 79, 93 (Gerard Radnitzky & Peter Bernholz eds., 1987) (noting that the Seventeenth Amendment was "the product of a 'reform movement"').

[FN42]. Brooks, supra note 1, at 200 ("Corruption, of both state legislators and senators, was the greatest evil blamed on the system of indirect election.").

[FN43]. Id.

[FN44]. Zywicki, History, supra note 1, at 196-97.

[FN45]. Id.

[FN46]. Id. at 197.

[FN47]. Zywicki, Special Interests, supra note 1, at 1022.

[FN48]. Id.

[FN49]. Id. at 1024.

[FN50]. Zywicki, History, supra note 1, at 199. Zywicki illustrates that Utah, for example, was a newly-admitted state who had already suffered two deadlocks and yet did not vote for the amendment. Id. Similarly, Delaware, who suffered seven deadlocks in ten years affirmatively voted to reject the amendment. Id.

[FN51]. Id. at 201.

[FN52]. Id.

[FN53]. Id. at 185.

[FN54]. Id.

[FN55]. Id. at 185-86.

[FN56]. Id. at 186 (internal quotation marks omitted) (quoting Little, supra note 1, at 640).

[FN57]. Id. at 202.

[FN58]. See discussion infra Part III.B.

[FN59]. The Federalist No. 63 (James Madison), supra note 10, at 341.

[FN60]. See generally Amar, supra note 1 (discussing examples of federal judicial encroachment that indirectly resulted from the Seventeenth Amendment).

[FN61]. Kochan, supra note 1, at 1028.

[FN62]. As former Utah governor Mike Leavitt stated:

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

Zywicki, History, supra note 1, at 211 (quoting Mike Leavitt, States Need New Weapons to Fight Intrusive Federal Actions, 11 Wash. Legal Found. Legal Backgrounder No. 20, at 2-3 (1996)).

[FN63]. See generally Kochan, supra note 1 (tracing the increasing number of Supreme Court cases holding state laws unconstitutional to the Seventeenth Amendment).

[FN64]. See discussion infra Part III.A.

[FN65]. See Kochan, supra note 1, at 1027.

[FN66]. Id. at 1028-29.

[FN67]. Id. at 1029.

[FN68]. Regulation of Federal Preemption of State Laws: Hearings Before the Subcomm. on National Economic Growth, Natural Resources and Regulatory Affairs of the Government Reform Comm., 106th Cong. (June 30, 1999) [hereinafter Hearings] (testimony of Professor John S. Baker, Jr.).

[FN69]. Zywicki, Special Interests, supra note 1, at 1036.

[FN70]. Id.

[FN71]. Id. (noting that a Representative in the House, on the other hand, "was simply a member of his branch of congress and not in any way subject to other authority than that of his constituents and of the nation as a whole").

[FN72]. Id.; see generally Kenneth Bresler, Rediscovering the Right to Instruct Legislators, 26 New Eng. L. Rev. 355 (1991) (providing a historical analysis of the right to instruct legislators, including citation to several examples of senators who refused to follow their "instructions" and were thereby led to early resignation).

[FN73]. Zywicki, Special Interests, supra note 1, at 1036.

[FN74]. See id. at 1037.

[FN75]. McGinnis & Rappaport, supra note 31, at 391.

[FN76]. See generally Kochan, supra note 1 (tracing the increasing number of Supreme Court cases holding state laws unconstitutional to the Seventeenth Amendment).

[FN77]. Id. at 1026.

[FN78]. See McGinnis & Rappaport, supra note 31, at 391.

[FN79]. Kochan, supra note 1, at 1037 (stating that government institutions can be expected to "preserve their interests from attack from coordinating or competing institutions").

[FN80]. Id. at 1039 ("[T]hrough its advice and consent power, the United States Senate has the power to fill... Supreme Court... seats on the bench with judges whose preferences are more compatible with congressional preferences.").

[FN81]. Id. at 1047. In this article, Kochan sets forth the results of a study designed to determine whether any discrepancy exists in the number of Supreme Court cases holding state laws unconstitutional before, as compared to after, the Seventeenth Amendment. According to Kochan:

> [L]ooking only at the actual number of cases holding state laws unconstitutional per term, both pre- and post-submission of the Seventeenth Amendment, one can attempt to determine whether there is a statistically significant difference between these two time periods. The test produced a p-value well below zero causing a rejection of the null hypothesis [that stated there was no significant difference] in favor of the alternative hypothesis that there exists a statistically significant difference between the number of cases holding state laws unconstitutional across the two time periods.
>
> ....
>
> ... It is... informative that the federal courts appear to have treated state laws differently and with greater hostility after ratification of the Seventeenth Amendment, without as correspondingly stark a change in the treatment of federal laws.

Id. at 1053-54.

Further, he concludes:

> Because the Court and Congress are in an institutional relationship that affects the Court's decision-making, alterations in the constituencies of Congress should be expected to alter the Court's analysis of institutionally ac-

ceptable case outcomes. The Seventeenth Amendment... eliminat[ed] state legislatures from that group. Whereas the Court was once institutionally tied to the interests of state legislatures through the state's agents in the Senate, the ratification of the Seventeenth Amendment significantly altered that relationship.

The court is only responsive to the preferences of another institution when it must anticipate a controlling response, either fearing the exercise of a constraining power or anticipating a reward if it acts congruously with the will of the controlling institution. The Court is not substantially concerned with the reactions of an institution that has little, if any, direct control over its interests. Once state legislatures were cut out of the Court-Congress relationship, it could be hypothesized that the response of state legislatures no longer was a significantly relevant factor in deciding cases, precisely because those legislatures had no structural means for affecting the institutional interests of the Court.

... Prior to the Seventeenth Amendment, the Court's preferences were presumably more aligned with the preferences of state legislatures. Therefore, the Court's desire for institutional stability and preservation, and avoidance of reprisal, made it in the Court's interest to preserve state legislative preferences. After the Seventeenth Amendment, the Court could freely pursue its own policy preferences (or, to curry favor with its controllers in Congress, effectuate Congress's policy preferences even if they conflicted with those of the States) and no longer have particular concern for state legislative preferences.

Id. at 1054-55.

[FN82]. See discussion infra Part III.A.

[FN83]. These numbers are roughly proportionate to the state of Utah, which has an ideal House district size of 29,776 (totaling roughly 2,228,000 people), and a legislature comprised of seventy-five Representatives and twenty-nine Senators. Office of Legislative Research & Gen. Counsel, Utah State Legislature, 2001 Redistricting in Utah 107, 351 (2002), http:// www.le.state.ut.us/documents/redistricting/redist.htm (last visited June 5, 2007).

[FN84]. Rotary is defined as "a worldwide charitable society of businessmen, businesswomen, and professional people, formed in 1905." The Oxford American College Dictionary 1180 (2002).

[FN85]. This is especially likely for groups such as rotary clubs, who have an emphasis in business, because many state legislators are businessmen and businesswomen. In Utah, for example, substantially more legislators claim business as their profession than any other occupation. In 2005, "[s]ome 37 [Utah legislators] listed some sort of business as their primary job, with 10 saying there [sic] are business owners. Education came next with 13; 12 are attorneys (and both the Senate president and the House speaker are attorneys); 8 lawmakers listed farming/ranching as their profession. Others are accounting, 5; homemaker, 5; retired, 5; builder/developer, 4; engineer, 3; banker, dentist/orthodontist, law enforcement/fire, nurse, and real estate all had 2. Other professions represented by one legislator are veterinarian, editor, heavy equipment operator, millwright, child advocate, foundation director, and AFL-CIO president." LaVarr Webb, Professions of Legislators, Utah Pol'y Daily, Jan. 21, 2005, http://www.utahpolicy.com/pages/newsletters/daily178.htm.

[FN86]. The Utah Constitution, as is to be expected, requires a representative or senator to live in the district she is representing. Utah Const. art. VI, §5.

[FN87]. If there were more than two candidates on the ballot, this ratio would obviously be even lower.

[FN88]. 1,125,001 is equal to one half of the number of citizens in our hypothetical state, plus one.

[FN89]. In Gregory v. Ashcroft, 501 U.S. 452, 458 (1991), Justice O'Connor discusses some of the advantages

of increasing state sovereignty, one of which is greater "opportunity for citizen involvement in democratic processes." Implied in this statement is the principle that citizens are more likely to be involved when they are empowered with greater influence.

[FN90]. Zywicki, History, supra note 1, at 207 (suggesting that the institutional vacuum left by this amendment was also partially filled by the federal executive and legislative branches).

[FN91]. In relevant part, the Seventeenth Amendment provides: "The Senate of the United States shall be composed of two Senators from each state, elected by the people thereof, for six years; and each Senator shall have one vote." U.S. Const. amend. XVII, § 1.

[FN92]. Zywicki, History, supra note 1, at 207.

[FN93]. McGinnis & Rappaport, supra note 31, at 392.

[FN94]. Zywicki, History, supra note 1, at 216. Further, the Senate went from upholding state interests to "possess[ing] a natural inclination to encroach on state sovereignty" because, "after all, states were [now] a competing power center for servicing... interest groups." Kochan, supra note 1, at 1031.

[FN95]. Zywicki, History, supra note 1, at 207.

[FN96]. C.H. Hoebeke, The Road to Mass Democracy: Original Intent and the Seventeenth Amendment 4 (1995) ("In large part such apathy stems from the fact that the private citizen has been asked to consider more issues and more details than he can possibly devote his time to ....").

[FN97]. Id.

[FN98]. Baron de Montesquieu, The Spirit of Laws, in 38 Great Books of the Western World 71 (Robert Maynard Hutchins ed., Thomas Nugent trans., Encyclopedia Britannica, Inc. 1952) (1748).

[FN99]. Hoebeke, supra note 96, at 4.

[FN100]. Zywicki, History, supra note 1, at 216. "While senators' new independence [from state legislative monitoring] raised the costs of influencing them, this increase was dwarfed by the decrease in costs resulting from [interest group's] ability to contract with senators directly, rather than work through the state legislatures." Zywicki, Special Interests, supra note 1, at 1040.

[FN101]. Zywicki, History, supra note 1, at 217.

[FN102]. Terry Smith, Rediscovering the Sovereignty of the People: The Case for Senate Districts, 75 N.C. L. Rev. 1, 67-68 (1996).

[FN103]. Zywicki, History, supra note 1, at 215.

[FN104]. Zywicki, Special Interests, supra note 1, at 1039.

[FN105]. Zywicki, History, supra note 1, at 215.

[FN106]. See discussion supra Part II.B.

[FN107]. Zywicki, History, supra note 1, at 185.

[FN108]. Meiners, supra note 41, at 92-93.

[FN109]. See discussion supra Part III.A.

[FN110]. See Zywicki, History, supra note 1, at 215.

[FN111]. See id. at 215-18.

[FN112]. Bybee, supra note 1, at 568-69.

[FN113]. See Zywicki, History, supra note 1, at 219-32 (listing several such proposals and categorizing them into "Good Ideas" and "Bad Ideas").

[FN114]. See articles cited supra note 1.

[FN115]. See Hearings, supra note 68.

[FN116]. E.g., Junius W. Peake, Scrap 17th Amendment, Denver Bus. J., Jan. 1, 1999, http:// denver.bizjournals.com/denver/stories/1999/01/04/editorial3.html.

[FN117]. E.g., Repeal 17th, http://www.articlev.com/repeal17.htm [hereinafter Repeal 17th] (identifying organizations dedicated to repealing the Seventeenth Amendment) (last visited June 5, 2007); Friends for America, http://www.friendsforamerica.org [hereinafter Friends for America] (a group dedicated to repealing the Seventeenth Amendment through a combination of grassroots efforts and state legislative repeal) (last visited June 5, 2007).

[FN118]. E.g., S.J. Res. 10, 2003 Leg., Reg. Sess. (Mont. 2003) [hereinafter S.J. Res. 10] ("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 [Seventeenth] Amendment to the United States Constitution that provides for State legislatures to elect members of the United States Senate"); see also H.C.R. Res. 2024, 42nd Leg., 2d Reg. Sess. (Ariz. 1996) [hereinafter H.C.R. Res. 2024] (offering a resolution calling for Congress to propose amendment to repeal the Seventeenth Amendment).

[FN119]. Zywicki, History, supra note 1, at 226.

[FN120]. See U.S. Const. art. I, § 3 (amended by U.S. Const. amend. XVII). A constitutional amendment repealing the Seventeenth Amendment would restore Article I to its original form, just as the Twenty-First Amendment (repealing prohibition) restored the Constitution to its pre-Eighteenth Amendment condition. U.S. Const. amend. XVIII & XXI.

[FN121]. Repeal is obviously the only constitutional amendment that would not result in an untried shift in the balance of powers. This is because it is the only alteration that would be a return to a former method of balancing power instead of an exploration into some new method.

[FN122]. Zywicki, History, supra note 1, at 226. But see generally Bybee, supra note 1 (arguing that repeal is possible).

[FN123]. Even former Utah Governor Mike Leavitt, who understands the critical role the Senate played in protecting states' interests pre-Seventeenth Amendment, concedes that "citizens should not be asked to give up the right to elect their Senators." Leavitt, supra note 62, at 3.

[FN124]. Regarding the grassroots efforts, see Repeal 17th, supra note 117; Friends for America, supra note 117. Regarding the state legislative efforts, see S.J. Res. 10, supra note 118; H.C.R. Res. 2024, supra note 118.

[FN125]. See supra note 124.

[FN126]. Zywicki, History, supra note 1, at 227.

[FN127]. Id.

[FN128]. See id. at 219-32 (listing several such proposals and categorizing them into "Good Ideas" and "Bad Ideas").

[FN129]. Id. at 229.

[FN130]. Aaron J. O'Brien, States' Repeal: A Proposed Constitutional Amendment to Reinvigorate Federalism, 44 Clev. St. L. Rev. 547, 549 (1996) (proposing that such an amendment is necessary to truly reestablish federalism).

[FN131]. Zywicki, History, supra note 1, at 228.

[FN132]. See Bybee, supra note 1, at 530-34.

[FN133]. Id. at 533-34 (internal quotation marks omitted).

[FN134]. Zywicki, History, supra note 1, at 230.

[FN135]. See id.

[FN136]. Id.

[FN137]. Id. at 231.

[FN138]. See id. at 226-33 (holding out each of these types of amendments as "Good Ideas").

[FN139]. Repeal is clearly the only constitutional amendment that would not result in an untried shift in the balance of powers because it is the only amendment that would be a return to a former method of balancing power instead of an exploration into some new method.

[FN140]. Zywicki, History, supra note 1, at 226.

[FN141]. The current versions of the FMA provide: "Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution, nor the constitution of any State, shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman." S.J. Res. 1, 109th Cong. (2006) [hereinafter S.J. Res. 1]. See also H.J. Res. 88, 109th Cong. (2006) [hereinafter H.J. Res. 88]. The two versions are identical.

[FN142]. H.J. Res. 88, supra note 141.

[FN143]. As of June 2006, only Massachusetts expressly allows same-sex marriage, and even in that state a constitutional amendment has been proposed. The remaining 49 states may be categorized as follows:

State Constitutional Provisions Banning Same Sex Marriage. Nineteen states have state constitutional provi-

sions banning same-sex marriage. These states are Alaska, Arkansas, Georgia, Hawaii, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, Texas, and Utah. Additionally, Tennessee, Arizona, and Wisconsin have pending constitutional amendments.

State Laws Banning Same-Sex Marriage. Twenty-three states have laws that ban same-sex marriage. These states are Alabama, Arizona, California, Colorado, Delaware, Florida, Idaho, Illinois, Indiana, Iowa, Maine, Maryland, Minnesota, New Hampshire, North Carolina, Pennsylvania, South Carolina, South Dakota, Tennessee, Virginia, Washington, West Virginia, and Wyoming.

State Judicial Rulings Disfavorable to Same-Sex Marriage. Three states, New Mexico, New York, and Wisconsin, have judicial rulings that work against same-sex marriage.

No Public Policy Disallowing Same-Sex Marriage. Four states do not have public policy expressly accepting or rejecting same-sex marriage. These states are Connecticut, New Jersey, Rhode Island, and Vermont. About.Com, Same-Sex Marriage in the U.S. (June 2006), http:// uspolitics.about.com/od/gaymarriage/l/bl_gay_marriage_2006.htm.

[FN144]. See generally Lynn D. Wardle, Tyranny, Federalism, and the Federal Marriage Amendment, 17 Yale J.L. & Feminism 221 (2005) (arguing that the FMA is partially a result of judicial encroachment into legislative duties).

[FN145]. See generally Amar, supra note 1 (noting other examples of judicial encroachment that indirectly resulted from the Seventeenth Amendment).

[FN146]. Bybee, supra note 1, at 568-69.

[FN147]. That the definition of marriage is a topic upon which much of the populous has already formed a strong opinion is evidenced by the number of states that have already amended their state constitutions or passed legislation in response to the same-sex marriage debate. See supra note 143.

[FN148]. Some conservative opponents of the FMA oppose it based on these grounds. See, e.g., Charles E. Rice, A Cultural Tour of the Legal Landscape: Reflections on Cardinal George's Law and Culture, 1 Ave Maria L. Rev. 81, 109-10 (2003); Jonathan Rauch, Give Federalism a Chance, Nat'l Rev. Online, Aug. 2, 2001, http://www.nationalreview.com/comment/comment-rauchprint080201.html.

[FN149]. For discussion on decentralization as an objective of repealing the Seventeenth Amendment, see discussion supra Part III.A.

[FN150]. In response to the idea that the FMA should also repeal the Seventeenth Amendment, at least one constitutional scholar has voiced this centralization/decentralization concern: "You may be correct that the only way to repeal the 17th amendment is to pair it with some broadly appealing proposed amendment, but the proposed marriage amendment is an awkward partner because it centralizes the legal definition of marriagewhereas the objective of repealing the 17th amendment is to decentralize more policy decisions." E-mail from William Niskanen, Chairman, CATO Institute, to the author (Aug. 9, 2006, 14:32 EST) (on file with author).

[FN151]. For a thorough treatment of how the FMA figures into the framework of federalism, see generally Wardle, supra note 144 (setting forth an historical analysis of federalism in family law and discussing how the FMA fits into this analysis).

[FN152]. U.S. Const. amend. X.

[FN153]. The Federalist No. 45 (James Madison), supra note 10, at 252.

[FN154]. Wardle, supra note 144, at 229. Further, the "fostering of civic virtue, believed by the Founders to be the critical pre-constitutional foundation for any 'republican' (representative democratic) form of government, was believed to be beyond the ability and competence and safe control of the national government. Instead, local communities could more appropriately shape laws that would reflect the family (especially parenting) values of the polis." Id. at 233.

[FN155]. Id. at 249.

[FN156]. See generally id. (setting forth an historical analysis of federalism in family law and suggesting, inter alia, that modern judicial encroachments have made the FMA necessary).

[FN157]. Id. at 260-61.

[FN158]. Id. at 259.

[FN159]. See, e.g., Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 959 (Mass. 2003); Baker v. State, 744 A.2d 864, 879, 882, 885 (Vt. 1999); Baehr v. Lewin, 852 P.2d 44, 67 (Haw. 1993); Langan v. St. Vincent's Hosp. of N.Y., 765 N.Y.S.2d 411, 420-21 (Sup. Ct. 2003), rev'd, 802 N.Y.S.2d 476 (App. Div. 2005).

[FN160]. See, e.g., Goodridge, 798 N.E.2d at 959-60; Andersen v. King County, No. 04-2-04964-4, 2004 WL 1738447, at *3-4, *11 (Wash. Super. Ct. 2004), rev'd, 138 P.3d 963 (Wash. 2006); Hernandez v. Robles, 794 N.Y.S.2d 579, 594-95 (Sup. Ct. 2005), rev'd, 805 N.Y.S.2d 354 (App. Div. 2005).

[FN161]. See, e.g., Goodridge, 798 N.E.2d at 959-60; Andersen, 2004 WL 1738447, at *11.

[FN162]. See, e.g., Baker, 744 A.2d at 867; Castle v. State, 2004 WL 1985215, *3-4, *10-11, *16 (Wash. Super. Ct. 2004), rev'd, Andersen v. King County, 138 P.3d 963 (Wash. 2006).

[FN163]. Citizens for Equal Protection, Inc. v. Bruning, 290 F. Supp. 2d 1004, 1008-11 (D. Neb. 2003).

[FN164]. Wardle, supra note 144, at 261.

[FN165]. See, e.g., Goodridge, 798 N.E.2d at 959-60; Baker, 744 A.2d at 867, 879, 882, 885; Baehr v. Lewin, 852 P.2d 44, 67 (Haw. 1993); Langan v. St. Vincent's Hosp. of N.Y., 765 N.Y.S.2d 411, 420-21 (Sup. Ct. 2003), rev'd, 802 N.Y.S.2d 476 (App. Div. 2005); Andersen, 2004 WL 1738447, at *10-11; Hernandez, 794 N.Y.S.2d at 586, 593-95; Castle, 2004 WL 1985215, at *3-4, *10-11, *16; Bruning, 290 F. Supp. 2d at 1008-11.

[FN166]. Wardle, supra note 144, at 260-61. Incidentally, the FMA is also necessary to protect federalism on a much broader level because traditional marriage is an essential nongovernmental component of our political system. Professor Wardle explains how traditional marriage is inextricably connected to the strength of our political system, quoting several sources:

The framers of the American Constitution believed that virtue was the indispensable quality upon which rested the superstructure of republican constitutional government and its complex arrangements designed to preserve liberty under law. For example, Benjamin Franklin wrote that "only a virtuous people are capable of freedom. As nations become corrupt and vicious, they have more need of masters." John Adams acknowledged, "[o]ur constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other." James Madison likewise declared that "to suppose that any form of government will secure liberty or

happiness without any virtue in the people, is a chimerical idea." Thus, virtue was the substructure upon which the superstructure of constitutional rights and government was built. If that foundation slipped, the government and the liberties it protects would not survive.

....

[And where was this foundation of national morality to be formed?]

... John Adams observed: "The foundation of national morality must be laid in private families.... [For] [h]ow is it possible that Children can have any just Sense of the sacred Obligations of Morality or Religion if, from their earliest Infancy, they learn their Mothers live in habitual Infidelity to their fathers, and their fathers in as constant Infidelity to their Mothers?" Likewise, "George Mason argued that republican government was based on an affection 'for alters and firesides.' Only good men could be free; men learned how to be good in a variety of local institutions--by the firesides as well as at the altar.... Individuals learned virtue in their families, churches, and schools."

....

... [S]ocial commentator Francis Grund, emphasized the importance of the republican family for the preservation of the American constitutional system when he observed: "I consider the domestic virtue of the Americans as the principal source of all their other qualities.... No government could be established on the same principle as that of the United States with a different code of morals. The American Constitution is remarkable for its simplicity; but it can only suffice a people habitually correct in their actions, and would be utterly inadequate to the wants of a different nation. Change the domestic habits of the Americans, their religious devotion, and their high respect for morality, [their view of marriage] and it will not be necessary to change a single letter in the Constitution in order to vary the whole form of their government."

Thus, the institution of marriage not only serves as a buffer against tyranny of feral youth and of alienated adults, but also against the tyranny of anarchy and of the collapse of the constitutional system.

Id. at 249-53 (footnotes omitted). Clearly, the family in the prevailing political theory of the founding era "not only needed to be nurtured, but also protected from the tyranny of the government." Id. at 251. If the family needed protection from the tyranny of the government in that era, how much more so today? The FMA will serve the important function of securing the marital family, which in turn will help promote the virtue necessary for our constitutional system to function. By so doing, the FMA will help protect not only federalism, but every other long-term institutional device used to prevent tyranny.

[FN167]. Zywicki, History, supra note 1, at 233 (citing Randall G. Holcombe, The Growth of the Federal Government in the 1920's, 16 Cato J. 175, 197 (1996)).

[FN168]. In relevant part, the Seventeenth Amendment provides: "The Senate of the United States shall be composed of two Senators from each state, elected by the people thereof, for six years; and each Senator shall have one vote." U.S. Const. amend. XVII, § 1.

[FN169]. David E. Engdahl, The Spending Power, 44 Duke L.J. 1, 34 (1994). See also McGinnis & Rappaport, supra note 31, at 391 (noting that "after adoption of the amendment, senators possessed a natural inclination to encroach on state sovereignty... [as] states were a competing power center for servicing constituents and interest groups").

[FN170]. Zywicki, History, supra note 1, at 233.

[FN171]. Id. at 207.

[FN172]. See hypothetical infra Part I.

[FN173]. Kochan, supra note 1, at 1028.

[FN174]. Zywicki, History, supra note 1, at 211 (quoting Mike Leavitt, States Need New Weapons to Fight Intrusive Federal Actions, 11 Wash. Legal Found. Legal Backgrounder No. 20, at 2-3 (1996)).

[FN175]. Bybee, supra note 1, at 568-69.

[FNa1]. Juris Doctorate, May 2007. I would like to dedicate this article to my father, a lover of freedom and federalism, to Nels Jensen, who inspired me to “say what needs to be said,” and to my beautiful wife, Angela, who invests all she has into our children and fills up my life with smiles--even when I don't deserve it.
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