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## **Auxiliary Protections: Why the Founders' Bicameral Congress Depended on Senators Elected by State Legislatures**

Vince Eisinger

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**AUXILIARY PROTECTIONS:  
WHY THE FOUNDERS' BICAMERAL CONGRESS DEPENDED  
ON SENATORS ELECTED BY STATE LEGISLATURES**

*Vince Eisinger*<sup>\*</sup>

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<sup>\*</sup> J.D. 2014 (New York University); B.S. 2011 (Brigham Young University, Provo). Many thanks to the editors of Touro Law Review for their aid in preparing this Article for publication. I am also grateful to Professor Stephen Holmes of New York University School of Law, who opened my eyes to the genius of the Federalist Papers and helped me select the topic initially. But my greatest thanks are to my wife, Kate, who singlehandedly fulfilled so many responsibilities, including caring for our son, while I spent many long weeks writing in the Law School library.

In *The Federalist Number 52*, James Madison<sup>1</sup> famously describes several principles of good government:

In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.<sup>2</sup>

Madison, of course, wrote from experience. As a delegate at the Constitutional Convention not too many months earlier, he and the other Framers had continually debated how to design a government that would control itself. They spent months outlining how the three branches of the federal government would separate power. They scrutinized myriad checks and balances that would govern the interrelationship of the branches. And because of those efforts, the Constitution they ultimately presented to the American people included a vast assortment of mechanisms to protect the people's liberty—it included “auxiliary precautions.”

One such precaution was the mode of election for Senators, who would comprise the second branch of Congress. Senators were to be elected by the legislature of the state they represented.<sup>3</sup> This prescription was the subject of thoughtful, careful debate by the Framers.

In the course of their debates, the Framers emphasized three primary arguments for prescribing state legislative election of Senators: (1) it would further diversify the chambers of this bicameral Congress, thus decreasing the likelihood of congressional action that infringed the people's liberties; (2) the Senators would thereby

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<sup>1</sup> This paper refers heavily to the arguments written in *The Federalist Papers*. Typically, the author of a particular paper is specified, but at times when multiple papers of different authors are referred to collectively, the author is labeled as Publius. *The Federalist Papers* are actually the composite work of three of the Founding Fathers, Alexander Hamilton (who organized the project), James Madison, and John Jay. See Clinton Rossiter, *Introduction to THE FEDERALIST PAPERS*, at ix (Clinton Rossiter ed., 1961). For political reasons, the *Papers* at the time were published under the collective pseudonym Publius, see *id.* at x–xi, thus my use of that name when referring to multiple papers collectively.

<sup>2</sup> THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

<sup>3</sup> U.S. CONST. art. I, § 3, cl. 1, *amended by* U.S. CONST. amend. XVII.

represent the states, which constitute a phenomenally active constituency for the second branch because of the states' ability to gather, process, and distribute information and their natural inclination to oppose overreaching federal measures; and (3) it would result in distinguished Senators who were sufficiently independent from the people such that they could check the volatilities of democracy. Clearly, the Framers thought things through.

The miracle that was the Constitution<sup>4</sup> was accompanied by yet another miracle, an American people who were open to the same type of thoughtful debate as the Framers.<sup>5</sup> Those who opposed the Constitution raised a slew of arguments, old and new, against the document, including its Senate. Proponents made their responses, and thus the American people witnessed a debate, both live and written, regarding a government that would change the world. The American people, too, were convinced of the virtues of the Constitution, including its auxiliary protection of electing Senators by state legislatures.

Enter the Progressives. Unlike the Framers or the ratifiers, members of the Progressive Movement observed problems in the world around them and myopically marched straight ahead to implement hasty solutions. They lived in a republic but wanted a democracy. And one of their number one priorities was to alter the election mode for Senators—surely things would improve if the people directly elected their Senators.

Opponents of this proposal raised various counterarguments, including those that the Founders had made over a century earlier. But proponents were undeterred. That was a different time, they said. The Founders did the best they could with what they had, but times have changed. In the Framers' grand scheme, state legislative election for Senators was a hasty afterthought with little to say for it.

The Progressive Movement prevailed: the Seventeenth Amendment instituted direct election for Senators.<sup>6</sup> An auxiliary protection was eliminated—the results were disastrous.

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<sup>4</sup> See THE FEDERALIST NO. 37, at 230–31 (James Madison) (finding evidence of divine guidance in the Convention's result).

<sup>5</sup> See THE FEDERALIST NO. 1, at 33 (Alexander Hamilton) (describing the American people as in a unique moment in history “to decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice”).

<sup>6</sup> U.S. CONST. amend. XVII.

This Note intends to remind readers of the arguments the founding generation made when they selected state legislative election for Senators.<sup>7</sup> Part I sets the stage with a brief overview of the movement that culminated in the Seventeenth Amendment. Part II presents and analyzes the Founders' arguments. Part II.A argues that the Framers chose state legislative election for Senators because they intended a bicameral Congress with distinct houses. Part II.B argues that they compromised to let Senators represent states and, having done so, recognized that state legislative elections would provide Senators with an optimal constituency—the States. Part II.C argues that state legislative election was implemented as a means of producing distinguished Senators who were independent from the people such that they could check the people in moments of temporary error. Each of these subsections also provides a brief assessment of the historical arguments from a modern view. Part III concludes with a general warning to respect the wise, careful planning the Framers employed in designing America's government.

## **I. A BRIEF HISTORY OF THE PASSAGE OF THE SEVENTEENTH AMENDMENT**

The first proposal for direct election of senators came in 1826 (from a House Representative, obviously), and over the next few decades, similar proposals surfaced now and then.<sup>8</sup> By the mid-

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<sup>7</sup> As the reader is likely aware, the legal world has been embroiled in a decades-long debate over the proper methods for ascertaining legislative intent. Textualists seem to have secured a firm foothold regarding the proper starting point for such an inquiry—the text itself. *See, e.g.,* *Milner v. Dep't of Navy*, 131 S. Ct. 1259, 1264 (2011). But jurists' viewpoints on a text's ambiguity (and thus the need to proceed to extrinsic evidence) differ, and the legitimacy of legislative history is in question. *See, e.g.,* *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 567–72 (2005). As one who is persuaded by the textualist argument, I feel it necessary to explain a Note that delves heavily into historical debates and writings. And the explanation is simple: the Constitution's text was perfectly clear about the mode of election the Framers desired. U.S. CONST. art. I, § 3, cl. 1 (“The Senate of the United States shall be composed of two Senators from each State, *chosen by the Legislature thereof* . . . .” (emphasis added)), *amended by* U.S. CONST. amend. XVII. Indeed, it was Progressives' recognition of the text's clarity that led them to amend the text itself. This Note, then, need not prove the meaning of the Framers' text. Instead, it focuses on the arguments that convinced the Framers and ratifiers to adopt the text they did.

<sup>8</sup> *See* RALPH A. ROSSUM, *FEDERALISM, THE SUPREME COURT, AND THE SEVENTEENTH AMENDMENT* 194–95 (2001). This section barely scratches the surface of the history of the Seventeenth Amendment. For a more detailed review, *see generally* GEORGE H. HAYNES, *THE ELECTION OF SENATORS* (1906); C.H. HOEBEKE, *THE ROAD TO MASS DEMOCRACY*

nineteenth century, Andrew Johnson was proposing direct election as a Representative, and within twenty years, as President.<sup>9</sup> And by the end of that century, proposals for direct election were abundant.<sup>10</sup> Despite the growing momentum, though, no proposed amendment could garner the requisite two-thirds majority in the Senate.<sup>11</sup> In May of 1912, the Senate gave in,<sup>12</sup> and one year later, the states had ratified the Seventeenth Amendment to the Constitution.<sup>13</sup>

The long road to the Seventeenth Amendment included a great deal of debate about the state legislatures' election of Senators and the advantages and disadvantages of that system.

First,<sup>14</sup> proponents of the Amendment argued that Senators were unresponsive to the people.<sup>15</sup> Senators depended less on their popularity with the people than with the state legislators.<sup>16</sup> Thus, when the people called for certain changes important to them, Senators were not always attentive.<sup>17</sup> Indeed, some Senators were not even responsive to the desires of the *state legislature*.<sup>18</sup> These conflicting interests between the Senate and House dampened Congress's ability to pass necessary laws.<sup>19</sup>

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(1995); ROSSUM, *supra*, at 181–218.

<sup>9</sup> See ROSSUM, *supra* note 8, at 195.

<sup>10</sup> See HOEBEKE, *supra* note 8, at 137.

<sup>11</sup> See, e.g., ROSSUM, *supra* note 8, at 210 (describing the defeat of the last failed proposal, that of the 61st Congress).

<sup>12</sup> See *id.* at 214.

<sup>13</sup> See *id.* at 218.

<sup>14</sup> For responses to the objections in this paragraph, see HOEBEKE, *supra* note 8; *infra* Sections II.A.2 and II.C.

<sup>15</sup> See HOEBEKE, *supra* note 8, at 191.

<sup>16</sup> See HAYNES, *supra* note 8, at 168 (writing that a Senator's election chances then depended on their ability to "negotiate" with the legislature).

<sup>17</sup> See *id.* at 167 ("Almost inevitably it results that [a Senator] renounces any attempt to keep in sensitive touch with the people.").

<sup>18</sup> See *id.* at 168.

<sup>19</sup> See *id.* at 155 (describing the mode of senatorial election as a roadblock for "democracy's consistent advance"). An important question regarding this objection is, "'Necessary' from whose point of view?" If "necessary" to the people, then the objection has some traction (although it may not be persuasive, see *infra* note 137). But if "necessary" to special interest groups, then the objection is unfounded. Yet in a brilliant article, Todd Zywicki makes a strong case for just that. See Todd J. Zywicki, *Senators and Special Interests: A Public Choice Analysis of the Seventeenth Amendment*, 73 OR. L. REV. 1007 (1994). In a classic case of Baptists and bootleggers, see Bruce Yandle, *Bootleggers and Baptists—The Education of a Regulator Economist*, 7 VIEWPOINT 12, 13 (1983), available at <http://object.cato.org/sites/cato.org/files/serials/files/regulation/1983/5/v7n3-3.pdf>, special interests were the impetus for, and greatest beneficiaries of, the Seventeenth Amendment,

Second, the reputation of Senate elections was tarnished by incidents of bribery and corruption.<sup>20</sup> This created doubts as to the efficacy of state legislative elections in electing distinguished, upstanding Senators.<sup>21</sup>

Third, deadlock in state legislatures on election of Senators had resulted in vacancies in the United States Senate.<sup>22</sup> A switch to direct election would mean hundreds of thousands, or even millions, of voters choosing between candidates, making the likelihood of deadlock infinitesimally small.<sup>23</sup>

Finally, electing Senators by state legislatures was an antiquated concept that had been little more than an afterthought for the Founders.<sup>24</sup> They were, in fact, “comparatively indifferent as to the means or manner of election.”<sup>25</sup> Guided by the lessons of history, the people now know how to design Congress better, and direct election is the right option.<sup>26</sup>

Each of the objections above includes a footnote referencing a subsection of this Note and/or other sources that have provided responses thereto, except the last—that the Founders were “indifferent” toward the mode of election for Senators. If this Note succeeds in convincing the reader of anything, I hope it will be that this final rationale was totally and utterly wrong.<sup>27</sup>

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see Zywicki, *supra*, at 1054.

<sup>20</sup> HOEBEKE, *supra* note 8, at 91–94.

<sup>21</sup> See HAYNES, *supra* note 8, at 165–66. For responses to this objection, see HOEBEKE, *supra* note 8, at 94–97 (demonstrating the overblown nature of the perception of corruption); *infra* Section II.C.3 (describing the Senate’s reputation as a House of distinguished characters).

<sup>22</sup> See ROSSUM, *supra* note 8, at 183–90. For a discussion of why Congress, not the states, was to blame for this circumstance, see *id.* at 183–84.

<sup>23</sup> See HOEBEKE, *supra* note 8, at 90.

<sup>24</sup> See 46 CONG. REC. 1979 (1911) (statement of Sen. Henry Cabot Lodge) (arguing emphatically that the Framers were not aware “they were destroying the popular quality of their work” in designing the mode of election for the President and Senate).

<sup>25</sup> William A. Harris, *The Election of Senators by the People*, 52 INDEP. 1291, 1291 (1900).

<sup>26</sup> S. REP. NO. 61-961, at 4 (1911) in 1 CONGRESSIONAL EDITION: VOLUME 6078, at 3 (1911). (“In what possible way could the mode of choosing Senators change his relations to the State or the people thereof?”).

<sup>27</sup> It is worth noting that the anti-Constitutional movement of the founding generation, the Anti-Federalists, would also have rejected the Seventeenth Amendment. Their primary philosophical dispute was whether a republican government could govern adequately a nation of such size. See HERBERT J. STORING, 1 THE COMPLETE ANTI-FEDERALIST 15 (Herbert J. Storing ed., 1981); *id.* at 15 n.\*4 (listing myriad examples from the Anti-

## II. THE FRAMERS AND RATIFIERS' PURPOSE

In the heat of the moment, the proponents of the Seventeenth Amendment lost sight of the purpose behind the Senate's mode of election. That isn't to say they lost sight of the founding generation's intent. They knew quite clearly that they were departing from the original design of the Framers. What they lost sight of was the purpose of that design, the reasons it was chosen. Their error was to presume they saw the whole picture and then think themselves wiser than their forbearers.

The Framers and ratifiers of the Constitution hand-selected state legislatures as the electing bodies of Senators.<sup>28</sup> This section explains in detail their purpose for doing so. Each section is generally organized by: (1) a brief introduction to the topic(s), (2) within a topic or sub-topic, the debates that occurred at the Convention, accompanied by analysis, (3) within the same topic or sub-topic, the debates that occurred among the ratifiers of the text, and (4) a modern assessment of the historical arguments.

### A. The Concurrence of Two Distinct Bodies

In his study of American democracy, Alexis de Tocqueville observed a striking difference between the members of the 1830 Congress's two houses. Of the Representatives, Tocqueville described, "you feel yourself struck by the vulgar aspect of this great assembly."<sup>29</sup> He remarked at the lack of fame and prominence

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Federalist literature); Cecelia M. Kenyon, *Men of Little Faith: The Anti-Federalists on the Nature of Representative Government*, 12 WM. & MARY Q. 3, 6 (1955). That philosophy stemmed from Montesquieu's assertion that republics only work for small jurisdictions, and that larger areas require a monarchy or despot. See MONTESQUIEU, *THE SPIRIT OF THE LAWS* 124–26 (Anne M. Cohler et al eds. & trans., Cambridge Univ. Press 1989) (1748). Thus, Anti-Federalists would have rejected outright the Seventeenth Amendment's democratization of government on a national scale. See Kenyon, *supra*, at 43 (concluding that the Anti-Federalists never called for direct election of Senators because they lacked the faith to "extend their principles nation-wide").

<sup>28</sup> See Todd Zywicki, *Repeal the Seventeenth Amendment and Restore the Founders' Design*, 12 ENGAGE 88, 90 (2011), available at <http://www.fed-soc.org/publications/detail/ramifications-of-repealing-the-17th-amendment> ("[T]he authors of *The Federalist Papers* and others believed that election of the Senate by state legislatures would be both a necessary and sufficient condition for . . . limiting the federal government.").

<sup>29</sup> ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 191 (Harvey C. Mansfield & Delba Winthrop eds., Univ. of Chicago 2000) (1835).



associated with these men, and even indulged in a rumor that some Representatives did not “know how to write correctly.”<sup>30</sup> Yet “[t]wo steps away,” Tocqueville describes, “is the chamber of the Senate, whose narrow precincts enclose a large portion of the celebrities of America.”<sup>31</sup> Unlike their House counterparts, Senators were “eloquent,” “distinguished,” and “well-known.”<sup>32</sup> And “[a]ll the words that issue from this assembly would do honor to the greatest parliamentary debates of Europe.”<sup>33</sup>

The “enormous difference” between these two houses led Tocqueville to ask why.<sup>34</sup> The question was particularly puzzling because, unlike some European legislatures (such as the Houses of Commons and Lords), the ultimate electorates of both bodies enjoyed universal suffrage.<sup>35</sup> Tocqueville concluded, “I see only a single fact that explains it: the election that produces the House of Representatives is direct; that from which the Senate emanates is subject to two stages.”<sup>36</sup>

The circumstances observed by Tocqueville were no accident—America’s Founding Fathers intended for the houses of Congress to be as distinct as possible.<sup>37</sup> In this way, legislative structure would reduce the potential for laws that infringed on the people’s rights. And mode of election was one of several ways to ensure the houses’ distinctive characteristics.<sup>38</sup> This section demonstrates the Framers’ intent for distinct Congressional houses by sketching the historical context and by analyzing the arguments of the Framers and ratifiers.

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<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> TOCQUEVILLE, *supra* note 29, at 191–92.

<sup>35</sup> *Id.* at 192.

<sup>36</sup> *Id.*

<sup>37</sup> *See* HOEBEKE, *supra* note 8, at 173.

<sup>38</sup> Beyond the scope of this paper are other ways the Framers ensured that the House and Senate would be distinct. These included different candidacy qualifications, term lengths, membership numerosity, and district size (note that even those opposed to election by state legislatures favored larger Senatorial districts than those of the House, *see, e.g.*, Notes of James Madison (June 7, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 154 (Max Farrand ed., rev. ed. 1937) [hereinafter 1 FARRAND’S RECORDS] (“[Mr. James Wilson] was for an election by the people in large districts . . .”). *Compare* U.S. CONST. art. I, § 2, with *id.* § 3.

### 1. *Historical Context*

At the close of his career as a historian of American law's British roots, J.R. Pole observed that, although America had imported a certain "ideology" from British government, American institutional structures were necessarily informed by the "accumulated effects" of America's own "institutional memories and habits."<sup>39</sup> This insight is paramount here. It turns out that the Framers and ratifiers did not often debate (at least compared to other hot-button topics) the need to make the House and Senate distinct. It was not, apparently, a contentious point. History explains why: The Framers and ratifiers took distinctness for granted because they had never known bicameralism to mean anything else.

British government provides our starting point. Parliament was and is a bicameral legislature divided into the House of Commons and House of Lords.<sup>40</sup> As the name suggests, the House of Commons originated to represent freemen who lacked noble ancestry.<sup>41</sup> And the House of Lords had long been comprised of the Lords Temporal, i.e. the barons, and the Lords Spiritual, i.e. the clergy.<sup>42</sup> Although the distinctive divide between these houses was largely a product of history (rather than theory), the Framers knew well its virtues.<sup>43</sup>

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<sup>39</sup> J. R. POLE, *CONTRACT & CONSENT: REPRESENTATION AND THE JURY IN ANGLO-AMERICAN LEGAL HISTORY* 154-55 (2010).

<sup>40</sup> *See id.* at 154.

<sup>41</sup> MOYRA GRANT, *THE UK PARLIAMENT* 2 (2009). Initially, the term "commons" referred, not to a parliamentary house, but a group of knights who joined King Henry III's Great Council synchronous with the King's extension of the tax burden to freemen. *Id.*; J.R. MADDICOTT, *THE ORIGINS OF THE ENGLISH PARLIAMENT, 924-1327*, at 187, 199 (2010). During that first century or so, whenever the King summoned the commons, he would make his wishes known and then quickly dismiss them. GRANT, *supra*. The commoners began the practice of gathering in a second chamber (hence, bicameralism) and, eventually, making their own demands of the King in exchange for their consent to taxes. *Id.* By the mid-fourteenth century, Britain formalized the authority of both the Lords and Commons, requiring the consent of both (and the Crown) for any law. *Id.* at 3. Charles Pinckney surveyed this history when he commenced the Convention's debate on senatorial elections. *See* Notes of James Madison (June 25, 1787), in 1 FARRAND'S RECORDS, *supra* note 38, at 399-400.

<sup>42</sup> GRANT, *supra* note 41. The Lords, which predated Commons, initially was comprised of the King's advisors, referred to as a Great Council. *Id.* Although the bargaining power of the Lords had long necessitated their consent to the King's edicts, their authority too was first formally legitimized in the mid-fifteenth century. *Id.* at 3.

<sup>43</sup> *See* SANFORD LEVINSON, *FRAMED: AMERICA'S FIFTY-ONE CONSTITUTIONS AND THE CRISIS OF GOVERNANCE* 136 (2012) (suggesting that the composition of Parliament, the

The Framers had also read the political philosophers of the Enlightenment. Montesquieu advocated for a separation of the nobles and the people into separate legislative chambers.<sup>44</sup> In this way, he argued, each could represent “separate views and interests” and provide a check on one another.<sup>45</sup> Hume recognized the importance of the House of Lords in representing the nobility’s interests, but he viewed the institution as too weak to provide an adequate counterbalance to the power of the House of Commons.<sup>46</sup> And although Locke was seemingly indifferent toward dividing a legislature into separate chambers,<sup>47</sup> he was adamant that the legislature represent society’s wide spectrum of distinct interests.<sup>48</sup>

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House of Commons and House of Lords, informed the Framers’ view of bicameralism). Perhaps the most famous evidence of this deep awareness is John Adams’ response to the criticisms of Anne-Robert-Jacques Turgot. In 1785, Turgot wrote to Dr. Richard Price, a known supporter of American independence, and criticized American state governments for dividing powers among branches. See Letter from Anne-Robert-Jacques Turgot, Comptroller of the Finance in France, to Dr. Price (Mar. 22, 1778), reprinted in HONORÉ-GABRIEL DE RIQUETTI, *CONSIDERATIONS ON THE ORDER OF CINCINNATUS* (Samuel Romilly trans., 1785). Turgot’s stance was that this division was an impetuous imitation of British governmental structure rendered unnecessary by the lack of a monarch. *Id.* He proposed a unicameral legislature as a superior alternative. See *id.* (questioning the states’ decision to not consolidate authority into one body). In response, John Adams published his multi-volume treatise, *A Defence of the Constitutions of Government of the United States of America, against the Attack of M. Turgot in His Letter to Dr. Price, Dated the Twenty-Second Day of March, 1778*. JOHN ADAMS, 1 *A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA, AGAINST THE ATTACK OF M. TURGOT IN HIS LETTER TO DR. PRICE, DATED THE TWENTY-SECOND DAY OF MARCH, 1778*, 3–4 (3d ed. 1797). Adams argued that Turgot was in error, *id.*, and, in the words of J.R. Pole, “ransacked ancient history and the Old World to prove that true republican principles had never been safe, and had never lasted long, without the resort of a second chamber.” POLE, *supra* note 39, at 169.

<sup>44</sup> MONTESQUIEU, *supra* note 27, at 159–60.

<sup>45</sup> *Id.* Publius never cites Montesquieu for this particular proposition (again, historically, the idea of distinct bodies was not controversial) but does for, among others, the concept of the separation of powers. See THE FEDERALIST NO. 47, at 301–03 (James Madison).

<sup>46</sup> See DAVID HUME, *ESSAYS: MORAL, POLITICAL AND LITERARY* 44 (Oxford Univ. Press 1963) (1741). Publius was certainly familiar with Hume’s writings. See THE FEDERALIST NO. 85, at 527 (Alexander Hamilton).

<sup>47</sup> See, e.g., JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 159–163 (Ian Shapiro ed., Yale Univ. Press 2003) (1690) (referring to the legislative power “whether placed in one or more” houses).

<sup>48</sup> See *id.* at 164 (“[I]n well ordered commonwealths, where the good of the whole is so considered, as it ought, the legislative power is put into the hands of divers [sic] persons . . .”). Locke certainly seemed to have no qualms with Parliament’s bicameral choice. See *id.* (describing the legislative body of “divers [sic] persons” as potentially sharing the legislative power). But his indifference contrasts starkly with Montesquieu, who argued that combining the representatives of the nobles and those of the people would swallow the interests of the

The governments of colonies provide further context. During the decades immediately preceding the Revolutionary War,<sup>49</sup> eleven of the thirteen original colonies had bicameral legislatures (Delaware and Pennsylvania did not).<sup>50</sup> The lower houses were modeled after the House of Commons and elected by the people.<sup>51</sup> The composition of the upper houses (called “councils”) varied depending on the particular colony’s categorization, which might be royal, proprietary, or popular.<sup>52</sup> Two of the three popular colonies (Connecticut and Rhode Island) elected their councils by popular vote, but the third colony’s (Massachusetts’) council was elected by its lower house, and all of the remaining colonies’ councils were appointed by the King or proprietor respectively.<sup>53</sup> And regardless of the mode of election, all colonial councils constituted an aristocratic body that defended the royal interests.<sup>54</sup>

After declaring independence, most states reassessed their governmental structure, including the legislature.<sup>55</sup> After a small shuffle on the cameral front, eleven of the thirteen states moved forward with bicameral legislatures.<sup>56</sup> But of course, the councils (some now renamed as “senates”)<sup>57</sup> could no longer depend upon

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nobles (who comprise, almost by definition, a minority). MONTESQUIEU, *supra* note 27, at 160.

<sup>49</sup> Focusing on these decades accomplishes two purposes. First, it highlights the governments with which the founding generation was most familiar. Second, it sets aside the complexities associated with those less relevant years, including Pennsylvania’s transition to unicameralism in 1701, PEVERILL SQUIRE, *THE EVOLUTION OF AMERICAN LEGISLATURES* 23 (2012), Georgia’s transition from unicameralism in 1755, *id.*, and the annexation of various colonies into what we now refer to as the “thirteen original colonies,” *id.* at 13 tbl.2.1 & nn.d–e.

<sup>50</sup> Jay S. Bybee, *Ulysses at the Mast: Democracy, Federalism, and the Sirens’ Song of the Seventeenth Amendment*, 91 NW. U. L. REV. 500, 507 (1997); *see also* SQUIRE, *supra* note 49 (“[B]icameralism . . . became the established norm in the colonies.”).

<sup>51</sup> Bybee, *supra* note 50.

<sup>52</sup> *See id.*

<sup>53</sup> *Id.*; *see also* SQUIRE, *supra* note 49, at 13 tbl.2.1.

<sup>54</sup> Bybee, *supra* note 50.

<sup>55</sup> *See* SQUIRE, *supra* note 49, at 83 (explaining that eleven of the thirteen colonies chose to draft new constitutions, with Connecticut and Rhode Island continuing under their popular charters).

<sup>56</sup> *Id.* at 84 tbl.3.1. Delaware transitioned to a bicameral legislature, and Georgia transitioned (back) to a unicameral legislature. *Id.* at 84 tbl.3.1, 86. Although the large majority of states simply retained their legislature’s bicameralism, Pole emphasizes that these constitutional designs were the product of conscious decisions based on experience. POLE, *supra* note 39, at 160.

<sup>57</sup> SQUIRE, *supra* note 49, at 84 tbl.3.1.

royal appointment for their membership, and the royalty no longer provided a constituency for senators. The various states accommodated this shift differently. Georgia reversed course and implemented a unicameral legislature.<sup>58</sup> Several states retained their bicameral legislatures but restricted the popular electorate of the upper house through certain property requirements,<sup>59</sup> an attempt to recreate the natural class division the royalty previously constituted.<sup>60</sup> Some states replaced the royal constituency with other government bodies. South Carolina's lower house began to elect its upper house's members.<sup>61</sup> Most uniquely of all, Maryland elected its senators through an electoral college.<sup>62</sup> The college was comprised of two electors from each county and one elector each from Baltimore and Annapolis.<sup>63</sup> The college then elected fifteen senators, with a mandate that nine reside on the western shore of the Chesapeake Bay and six on the eastern shore.<sup>64</sup>

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<sup>58</sup> *Id.* Although according to Noah Webster, a proponent of the Constitution, the people of the state quickly discovered the “inconveniences” of that shift. A CITIZEN OF AMERICA (PSEUDONYM OF NOAH WEBSTER), AN EXAMINATION INTO THE LEADING PRINCIPLES OF THE FEDERAL CONSTITUTION (1787), *reprinted in* 1 THE DEBATE ON THE CONSTITUTION 134 (Bernard Bailyn ed., 1993) [hereinafter 1 DEBATE].

<sup>59</sup> HOEBEKE, *supra* note 8, at 38. The five states were Massachusetts, New York, New Hampshire, New Jersey, and North Carolina. *Id.*

<sup>60</sup> See POLE, *supra* note 39, at 159 (“[The upper house] had been a much weaker branch of the government than either the governor or the assembly; it had not established any very distinct legitimation for its existence in a society formally lacking in social differentiation.”); *id.* at 161 (“Constitution makers were deliberately striving to use existing institutional forms for the representation of social elements not far removed from class interests, which had never been previously defined as fitting into distinct institutions . . .”). Because land was so abundant, property ownership failed to create any meaningful difference between these state houses. See HOEBEKE, *supra* note 8; POLE, *supra* note 39, at 163. The Framers recognized that failure and frequently cited Massachusetts’ troubles to evidence the evils of popular passions. See, e.g., THE FEDERALIST NO. 74, at 448 (Alexander Hamilton) (explaining that the rebellious attitude exhibited in Shays’ Rebellion “embrace[d] a large proportion of the community” and that one “might expect to see the representation of the people tainted with the same spirit”).

<sup>61</sup> SQUIRE, *supra* note 49, at 82.

<sup>62</sup> See MD. CONST. OF 1776, art. XIV, XV, available at [http://avalon.law.yale.edu/17th\\_century/ma02.asp](http://avalon.law.yale.edu/17th_century/ma02.asp).

<sup>63</sup> *Id.* art. XIV.

<sup>64</sup> *Id.* art. XV. Senators served five-year terms. See *id.* art. XIV (providing that senatorial elections take place every fifth year). Maryland’s senate became a model for its US counterpart. See Notes of James Madison (June 12, 1787), *infra* note 292, at 218–19 (statement of James Madison) (recognizing the similarity between the Maryland Senate and the proposed US Senate and recommending that the Committee continue to follow Maryland’s example); see also THE FEDERALIST NO. 39, at 242 (James Madison) (describing

Lastly, it is important to keep in mind the national government structure the Framers chose to leave behind—the Confederation. The Articles of Confederation prescribed a government for member states (not people).<sup>65</sup> Accordingly, the Articles provided for state legislatures to direct the selection of representatives in the Continental Congress.<sup>66</sup> And not surprisingly at all, that Congress was unicameral.<sup>67</sup>

In sum, the founding generation grew up among institutions and theories that treated bicameralism as sensible only if the resultant houses were distinct from each other. This context informs the distinguishing characteristics they chose for the United States Senate.

## 2. *Founders' Arguments*

As explained above, the concept of distinct houses in a bicameral legislature was not terribly controversial among the Founders.<sup>68</sup> The arguments tended to regard, first, whether the national legislature ought to be bicameral at all and, second, if so, to what degree the distinction ought to be pressed.

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some similarities); THE FEDERALIST NO. 63, at 388 (James Madison); *infra* notes 322–329 and accompanying text. Admittedly, Delaware and Virginia did not assign distinct constituencies to the different houses of their bicameral legislatures. HOEBEKE, *supra* note 8, at 38. But by virtue of their exceptional nature, these states tend to prove the rule. What's more, these states did differentiate their houses by number (and, thus, district size) as well as term length. See SQUIRE, *supra* note 49, at 84 tbl.3.1. Indeed, to the degree their legislative houses were similar, these states only became an example of how a legislature ought not to be designed. See POLE, *supra* note 39, at 168 (“Thomas Jefferson and James Madison agreed in finding the two houses in their own state of Virginia too homogeneous with each other . . .”).

<sup>65</sup> ARTICLES OF CONFEDERATION OF 1781, pmbl. (prefacing the Articles as “[b]etween the states”); *id.* art. V (referring to Congress’s convening as a “meeting of the States”); see also POLE, *supra* note 39, at 165 (“The old Congress was in essence a meeting of sovereign states . . .”).

<sup>66</sup> ARTICLES OF CONFEDERATION OF 1781, art. V, para. 1.

<sup>67</sup> *Id.* More striking still, but beyond the scope of this paper, was that Congress constituted the national government *in its entirety*. The Articles provided for neither an executive nor courts. See ARTICLES OF CONFEDERATION OF 1781; see also THE FEDERALIST NO. 38, at 238 (James Madison) (“Is it improper and unsafe to intermix the different powers of government in the same body of men? Congress, a single body of men, are the sole depository of all the federal powers.”).

<sup>68</sup> Even a staunch advocate of unicameralism like Republicus acknowledged that bicameralism, if accepted, requires distinctness between the chambers. See Republicus, *Essay*, KY. GAZETTE (Lexington), Feb. 16, 1788, reprinted in 5 THE COMPLETE ANTI-FEDERALIST 164 (Herbert J. Storing ed., 1981) (writing that “no man” would support a second chamber composed of “identical” legislators).

Although we now take our bicameral Congress for granted, the matter was hardly settled when the Constitutional Convention delegates convened in 1787. Recall that the delegates' commission was to revise the Articles of Confederation,<sup>69</sup> and that the Articles already provided for a unicameral legislature composed of state representatives.<sup>70</sup> Indeed, the New Jersey Plan, proposed three weeks into the Convention, suggested that Congress retain its unicameral nature but be granted additional powers.<sup>71</sup> Proponents argued (publicly) that their alternative was more amenable to the will of the people.<sup>72</sup> The people, they claimed, had no issue with Congress's structure, only its inefficacy, and the remedy for the latter was augmented power.<sup>73</sup> To meddle with the structure by dividing the legislature into two branches was unnecessary because (1) the passions of political parties were absent at the national level, thus obviating the need for a check on those passions, and (2) if any check was needed, the state representatives themselves provided it.<sup>74</sup> If the reasoning appears weak, it is.<sup>75</sup> The proponents' real concern was preserving state sovereignty through per-state Congressional voting.<sup>76</sup>

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<sup>69</sup> See THE FEDERALIST NO. 40, at 247–48 (James Madison). See generally ARTICLES OF CONFEDERATION OF 1781, art. XIII (providing for amendments of the Articles).

<sup>70</sup> See *supra* notes 65–66 and accompanying text.

<sup>71</sup> See Notes of James Madison (June 15, 1787), in 1 FARRAND'S RECORDS, *supra* note 38, at 242–45.

<sup>72</sup> See *id.* at 251 (stating that the people were not complaining about Congress but only wished it to have more power).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> As to the first point, the Framers generally were shortsighted in ignoring the potential for national political parties. See Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2320 (2006) (“[T]he Framers had attempted to design a ‘Constitution Against Parties.’ But the futility of this effort quickly became apparent.” (footnote omitted)). But as to the second point, suggesting that a governmental branch is its own best check, borders on the absurd (indicating the New Jersey Plan's proponents were probably making any argument that came to mind in an attempt to preserve state power). The argument conflates the concern that any particular state might accumulate too much power, in which case the other states could provide a check, with Congress's accumulating too much power, in which case its own members necessarily lacked such a check. Cf. Notes of James Madison (June 19, 1787), in 1 FARRAND'S RECORDS, *supra* note 38, at 317–18 (detailing instances of the states' infringements on one another's sovereignty under the Articles of Confederation).

<sup>76</sup> See Notes of James Madison (June 15, 1787), *supra* note 71, at 251 (recounting the small states' prior hesitancy in joining the Confederation and their ultimate agreement on condition of equal sovereignty in Congress). Private communications provide yet greater evidence that state sovereignty was the true issue. See *id.* at 242 n.\* (John Dickinson, of

Nonetheless, the transition toward bicameralism was accepted rather quickly once the Convention began. The first step towards acceptance actually preceded the Convention's commencement: while waiting for other delegates to arrive, Madison and his fellow Virginians prepared fifteen resolutions for the national government.<sup>77</sup> And one of those fifteen proposed a bicameral legislature in which the people elected a House of Representatives, and the House in turn elected the Senate.<sup>78</sup> Virginia proposed its Virginia Plan as soon as the Convention had settled on some internal rules,<sup>79</sup> and by thus seizing the agenda, the Virginians finessed their fellow delegates into a summer of debates that revolved around those fifteen resolutions.<sup>80</sup>

The fight for bicameralism depended on more than seizing the agenda. The Plan benefitted greatly from the endorsement of some of the Convention's stars, most notably George Washington and Benjamin Franklin.<sup>81</sup> Moreover, these men were convinced by the

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Delaware, to Madison at the time of the New Jersey Plan's proposal: "[Y]ou see the consequence of pushing things too far. Some of the members from the small States wish for two branches in the General Legislature . . . ; but we would sooner submit to a foreign power, than submit to be deprived of an equality of suffrage, in both branches of the legislature . . .").

<sup>77</sup> DAVID O. STEWART, *THE SUMMER OF 1787*, at 37–38, 52–53 (2007).

<sup>78</sup> Notes of James Madison (May 29, 1787), in 1 FARRAND'S RECORDS, *supra* note 38, at 20 (Fourth Resolution).

<sup>79</sup> STEWART, *supra* note 77, at 50–52.

<sup>80</sup> For the next two weeks, literally every debate regarded the Virginia Plan because the delegates reconstituted as a Committee of the Whole, a parliamentary fiction comprised of the same delegates but geared toward discussion, solely to consider the Plan and make recommendations (to themselves) for consideration when they again sat as the Convention. *See* STEWART, *supra* note 77, at 53–54. But even when the Convention sat again, it had to consider the Committee's recommendations, and it largely did so for the balance of the summer. *See, e.g.*, Journal (June 25, 1787), in 1 FARRAND'S RECORDS, *supra* note 38, at 395 (documenting that the Convention voted to accept the fourth resolution of the Virginia Plan as found in the Committee of the Whole's report).

<sup>81</sup> *See, e.g.*, STEWART, *supra* note 77, at 37–38 (including Washington among the Virginians who drafted the Plan). Although Franklin himself preferred a unicameral legislature, *see* Notes of James Madison (May 31, 1787), in 1 FARRAND'S RECORDS, *supra* note 38, at 48, his greater objective was to see that the Convention draft a successful proposal, *see id.* at 111–12 (reporting Franklin's proposed "Great Compromise"), and for strong evidence that Franklin considered the ultimate result a success, *see* K. [a pseudonym for Benjamin Franklin], Letter to the Editor, FEDERAL GAZETTE (Phila.), Apr. 8, 1788, in 2 THE DEBATE ON THE CONSTITUTION 401–05 (Bernard Bailyn ed., 1993) [hereinafter 2 DEBATE]. James Madison, Gouverneur Morris, and James Wilson were also supportive stars (indeed, Wilson instigated the Three-Fifths-Clause Compromise in an attempt to succeed in transforming the federal government), though of somewhat lesser stature. *See* Notes of James Madison (June 19, 1787), *supra* note 38, at 314–22 (recording Madison's lengthy attack on the New Jersey Plan and defense of the Virginia alternative); Notes of James



arguments. James Wilson summarized those arguments in his passionate defense of the Virginia Plan: “If the Legislative authority be not restrained, there can be neither liberty nor stability; and it can only be restrained by dividing it within itself, into distinct and independent branches. In a single house there is no check . . . .”<sup>82</sup> The Virginia Plan,<sup>83</sup> and bicameralism,<sup>84</sup> triumphed at the Convention.

During the period of ratification, critics of the Convention’s proposal largely ignored the question of bicameralism.<sup>85</sup> Indeed, in

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Madison (May 30, 1787), in 1 FARRAND’S RECORDS, *supra* note 38, at 33 (noting that Morris seconded the motion to begin consideration of the Virginia Plan’s first three proposals); Notes of James Madison (June 16, 1787), in 1 FARRAND’S RECORDS, *supra* note 38, at 252–55 (recording Wilson’s floor speech in which he compared the two Plans in an effort to demonstrate the Virginia Plan’s superiority). Alexander Hamilton rounded out the delegates’ household names; his infamous, day-long Convention speech railed against the Virginia Plan (as well as the New Jersey Plan), but only because he found that it failed to go far enough—he proposed the British model as the “best in the world.” Notes of James Madison (June 18, 1787), in 1 FARRAND’S RECORDS, *supra* note 38, at 288; *see also id.* at 291 (recording Hamilton’s proposed government structure, which began with dividing the legislative power into two bodies).

<sup>82</sup> Notes of James Madison (June 16, 1787), *supra* note 38, at 254.

<sup>83</sup> Journal (June 19, 1787), in 1 FARRAND’S RECORDS, *supra* note 38, at 313 (reporting that the Committee of the Whole voted to recommend the Virginia Plan over the New Jersey Plan by a count of 7-3, with 1 divided).

<sup>84</sup> Journal (May 31, 1787), in 1 FARRAND’S RECORDS, *supra* note 38, at 45–46. The Convention’s ultimate vote on the question of bicameralism broke down as 9-2, Journal (June 25, 1787), *supra* note 80, at 395, with Virginia and Pennsylvania against, *see infra* note 111.

<sup>85</sup> *See, e.g.,* Luther Martin, “The Genuine Information” I, MD. GAZETTE (Balt.), Dec. 28, 1787, reprinted in 1 DEBATE, *supra* note 58, at 636 (criticizing Committee’s recommendation of proportional representation in both branches, but making no comment on creating two branches); Samuel Spencer, Speech Regarding the Powers of Senate at the North Carolina Ratifying Convention (July 28, 1788), in 2 DEBATE, *supra* note 81, at 879–81 (acknowledging the Senate as a second branch of the legislature and criticizing, instead, its shared executive power with the President in appointing officers). Compare Melancton Smith & Alexander Hamilton, Debate Regarding Representation, Aristocracy, and Interests at the New York Ratifying Convention (June 21, 1788), in 2 DEBATE, *supra* note 81, at 772 (Hamilton: arguing that the division of the legislature into separate houses aids in preserving the people’s liberty), with *id.* at 774 (Smith: responding to Hamilton’s federalism argument but making no comment on the point of bicameralism). Many Anti-Federalists were specifically in favor of bicameralism. *See, e.g.,* A FEDERAL REPUBLICAN (1787), reprinted in 3 THE COMPLETE ANTI-FEDERALIST 70 (Herbert J. Storing ed., 1981); Brutus, Essay XVI, N.Y. JOURNAL, Apr. 10, 1788, reprinted in 2 THE COMPLETE ANTI-FEDERALIST 287–88 (Herbert J. Storing ed., 1981) [hereinafter Brutus XVI]; Letter XI from the Federal Farmer to the Republican (Jan. 10, 1788) [hereinafter Federal Farmer XI], in *An Additional Number of Letters from the Federal Farmer to the Republican Leading to a Fair Examination of the System of Government Proposed by the Late Convention; To Several Essential and Necessary Alternations in It; And Calculated to Illustrate and Support the Principles and*

his immensely influential pamphlet *An Examination into the Leading Principles of the Federal Constitution*, Noah Webster wrote that bicameralism “ha[d] so many advocates in America, that it needs not any vindication.”<sup>86</sup> But this apparent concession did not stop proponents of the Constitution from extolling bicameralism’s virtues. Webster himself went on to argue that, in separating the two chambers, bicameralism effectively isolates whatever particular passion or influence might seize one or the other body.<sup>87</sup> And if that passion results in a bill, the uninfluenced branch can check the measure by voting it down.<sup>88</sup> This point was echoed forcefully in a successive publication, *The Federalist*, the influence of which has become timeless: “In republican government, the legislative authority necessarily predominates. The remedy for the inconveniency is to divide the legislature into different branches . . . .”<sup>89</sup> Another

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*Positions Laid Down in the Preceding Letters* (1788), reprinted in 2 THE COMPLETE ANTI-FEDERALIST, *supra*, at 287–88. But see Republicus, *supra* note 68, at 164–65 (arguing that a unicameral legislature is superior because it fills its role about as well as a bicameral one but with far less cost and inconsistency); Luther Martin, The Genuine Information Delivered to the Legislature of the State of Maryland Relative to the Proceedings of the General Convention Lately Held at Philadelphia, in 2 THE COMPLETE ANTI-FEDERALIST, *supra*, at 44–45 (arguing that only the states should be represented in the federal government, making only one house necessary).

<sup>86</sup> A CITIZEN OF AMERICA, *supra* note 58, at 130; see also *id.* at 147 (“Luckily this objection has no advocates but in Pennsylvania; and even here their number is dwindling. . . . The division of the legislature . . . will be deemed, by nineteen-twentieths of the Americans, one of the principal excellencies of the constitution.”).

<sup>87</sup> See *id.* at 131–32; see also *id.* at 133–34 (contrasting the superior governance of Maryland and Connecticut, the legislatures of which were bicameral, with those of Pennsylvania, the legislature of which was unicameral).

<sup>88</sup> *Id.* at 131; see also Benjamin Rush, *Extract of a Letter from Dr. Rush, of Philadelphia, Lately Received by Gentleman [David Ramsay] of This City*, COLUMBIAN HERALD (Charleston), Apr. 19, 1788, reprinted in 2 DEBATE, *supra* note 81, at 417–18 (“I have the same opinion with the antifederalists of the danger of trusting arbitrary power to any single body of men; but no such power will be committed to our new rulers. Neither the house of representatives, [nor] the senate . . . can perform a single legislative act by themselves.”); Simeon Baldwin, Speech at New Haven (July 4, 1788), in 2 DEBATE, *supra* note 81, at 521 (praising the Congress as a “most perfect legislature” that possessed “all those checks which are necessary” to ensure “due deliberation”). The argument is reminiscent of James Wilson’s defense of the Virginia Plan at the Convention, see *supra* text accompanying note 82, which Wilson himself renewed while supporting Pennsylvania’s ratification, see James Wilson, Speech in Response to William Findley at the Pennsylvania Ratifying Convention (Dec. 1, 1787), in 1 DEBATE, *supra* note 58, at 823 [hereinafter Wilson’s Response] (“[T]he most useful restraint upon the legislature, because it operates constantly, arises from the division of its power, among two branches . . . .”); see also *id.* at 824.

<sup>89</sup> THE FEDERALIST NO. 51, *supra* note 2, at 322; see also THE FEDERALIST NO. 63, *supra* note 64, at 386 (“[T]he danger [of representatives betraying the people] will be evidently

argument that began to surface was that, assuming (as proponents were happy to do) that Congress would have a House that answered frequently to the people, a steadier second branch was necessary to infuse Congress with the benefits of experience, custom, and professionalism.<sup>90</sup> Such steadiness was of particular importance for maintaining foreign relations,<sup>91</sup> an area in which the Confederation currently was failing miserably.<sup>92</sup>

Although the debate over making the legislature bicameral was contentious, the proponents of bicameralism were the clear victors. Among these proponents, though, the debate regarding the degree of distinctness was more even-handed, at least in regard to the mode of election.<sup>93</sup>

The Virginia Plan may have successfully secured a foothold on the issue of bicameralism but not regarding its resolution that the Senate be elected by the House: the Committee of the Whole's<sup>94</sup> first encounter with the resolution was to reject it.<sup>95</sup> The next week, John Dickinson returned to the issue, moving that the Senate be elected by

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greater where the whole legislative trust is lodged in the hands of one body of men than where the concurrence of separate and dissimilar bodies is required in every public act.”); *id.* at 387–88 (“Without exerting the means of corruption with equal success on the House of Representatives, the opposition of that co-equal branch would inevitably defeat [any] attempt [by the Senate to form a ‘tyrannical aristocracy.’]”).

<sup>90</sup> See A CITIZEN OF AMERICA, *supra* note 58, at 132; THE FEDERALIST NO. 62, at 379–80 (James Madison); Alexander Hamilton, Speech Regarding the Senate at the New York Ratifying Convention (June 24, 1788), in 2 DEBATE, *supra* note 81, at 796 [hereinafter Hamilton Regarding the Senate].

<sup>91</sup> Hamilton Regarding the Senate, *supra* note 90; see also THE FEDERALIST NO. 63, *supra* note 89, at 382–83 (arguing that the United States must present a “national character” to foreign nations, which the Senate can provide); THE FEDERALIST NO. 64, at 391–92 (John Jay) (considering the Senate an able body for exercising the treaty power).

<sup>92</sup> See generally DAVID J. BEDERMAN, THE CLASSICAL FOUNDATIONS OF THE AMERICAN CONSTITUTION 164 (2008) (describing various reasons the United States’ reputation internationally was at the time “nothing less than atrocious”). Wilson had raised this point briefly at the Convention. See Notes of James Madison (June 26, 1787), in 1 FARRAND’S RECORDS, *supra* note 38, at 426 (arguing that Britain’s refusal to enter into a commercial treaty with America was evidence of the need for a stable, respectable second branch).

<sup>93</sup> Again, many of the distinguishing features between the House and Senate are beyond the scope of this paper. See *supra* note 38. Publius engaged in a spirited debate regarding term length. Compare THE FEDERALIST NO. 62, *supra* note 90, at 378–83 and THE FEDERALIST NO. 63, *supra* note 64, at 383–84, 387–90, with BRUTUS V XI, *supra* note 85, at 444. However, membership numerosity, as we will see, was inextricably intertwined with mode of election. See *infra* note 105.

<sup>94</sup> See *supra* note 80.

<sup>95</sup> Journal (May 31, 1787), *supra* note 84, at 46.

the state legislatures.<sup>96</sup> The stances of the Framers can be placed along a spectrum. On one end, James Wilson was opposed to any arrangement except popular election for the Senate.<sup>97</sup> His two basic arguments were, first, the people were sovereign, and the government ought to originate from them directly, and second, creating distinctive houses would result in “dissensions” between them.<sup>98</sup> Surely the delegates unanimously agreed with Wilson as to people’s sovereignty (even the monarch-loving Hamilton supported that point<sup>99</sup>).<sup>100</sup> But as to whether the sovereign people should directly choose both houses, the delegates were in disagreement. Many supported election by some different body.<sup>101</sup> Some, like Elbridge Gerry, argued that an indirect election was necessary to temper the people’s volatility.<sup>102</sup> And some others, including Dickinson, Roger Sherman, and George Mason, supported the motion specifically because they advocated

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<sup>96</sup> Journal (June 7, 1787), in 1 FARRAND’S RECORDS, *supra* note 38, at 148. Roger Sherman seconded the motion. *Id.*

<sup>97</sup> Notes of James Madison (June 7, 1787), *supra* note 38, at 151. Wilson ultimately reconciled with the Committee’s decision on mode of election. See James Wilson, Opening Address at the Pennsylvania Ratifying Convention (Nov. 24, 1787), in 1 DEBATE, *supra* note 58, at 795–96 (arguing that Congress will more adequately represent the people, i.e., sovereign, than does Parliament); Wilson’s Response, *supra* note 88, at 823 (“[T]here are two sources from which the representation is drawn, *though they both ultimately flow from the people.*” (emphasis added)). It is anyone’s guess how he would have viewed the Seventeenth Amendment.

<sup>98</sup> Notes of James Madison (June 7, 1787), *supra* note 38, at 151.

<sup>99</sup> See, e.g., THE FEDERALIST NO. 22, at 152 (Alexander Hamilton) (“The fabric of the American empire [i.e. the Constitution] ought to rest on the solid basis of THE CONSENT OF THE PEOPLE.”).

<sup>100</sup> And just as surely did the other delegates (with the exception, perhaps, of Gouverneur Morris, see Notes of James Madison (June 7, 1787), *supra* note 38, at 151 (seconding Wilson’s motion)) disagree with Wilson’s caution against “dissensions” between the branches; indeed, that was the whole point of bicameralism. See Terry Smith, *Rediscovering the Sovereignty of the People: The Case for Senate Districts*, 75 N.C. L. REV. 1, 23 (1996) (“Dissension between the House and the Senate was exactly what the Framers desired.”). Dickinson’s response is almost comical: “The objection is that [‘]you attempt to unite distinct Interests[’]—I do not consider this an objection, Safety may flow from this variety of Interests . . . .” Notes of Rufus King (June 7, 1787), in 1 FARRAND’S RECORDS, *supra* note 38, at 158–59.

<sup>101</sup> HOEBEKE, *supra* note 8, at 44 (noting George Read wanted executive appointment and Hamilton suggested an electoral college with life tenure). Even Madison was open to “other channel[s].” See Notes of Madison (June 7, 1787), *supra* note 38, at 154 (statement of James Madison).

<sup>102</sup> Notes of James Madison (June 7, 1787), note 38, at 152 (statement of Elbridge Gerry) (stating that indirect election would result in Senators who could provide a check against the people). For further development of this theme, see *supra* Section II.C.

retaining some form of state representation in Congress.<sup>103</sup> Madison's view fell somewhere in the middle, although he had no objection to state legislatures on principle;<sup>104</sup> his concern for keeping the Senate body small led him to argue for some other way of restraining democratic fervor.<sup>105</sup>

As much as the arguments regarding state legislature election were balanced and varied, the ultimate vote by the Committee was

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<sup>103</sup> See, e.g., Notes of James Madison (June 7, 1787), *supra* note 38, at 150 (statement of John Dickinson). For further development of this theme, see *supra* Section II.B.

<sup>104</sup> See Notes of James Madison (June 7, 1787), *supra* note 38, at 154 (statement of James Madison) (arguing that the delegates should see if a better option exists). The statement was likely one of conciliation and compromise; Madison, and many others, believed the states deserved a majority of the blame for the Confederation's failings. See STEWART, *supra* note 77, at 19; THE FEDERALIST NO. 85, *supra* note 46, at 521–22 (accusing the state governments of “undermin[ing] the foundations of property and credit” and “plant[ing] mutual distrust in the breast of all classes of citizens.”); see also THE FEDERALIST NO. 62, *supra* note 90, at 377 (conceding only that state legislature election was “probably the most congenial with the public opinion”). James Wilson ended up in a bit of a shouting match with John Dickinson as to whether Wilson hoped to eliminate the states. Compare Notes of James Madison (June 7, 1787), *supra* note 38, at 152–53 (statement of John Dickinson), with *id.* at 153 (statement of James Wilson).

<sup>105</sup> See Notes of James Madison (June 7, 1787), *supra* note 38, at 154 (statement of James Madison); see also Notes of James Madison (May 29, 1787), *supra* note 78, at 20 (Virginia Plan) (resolving that the second chamber should be elected by the first). Madison's numerosity concerns warrant a brief explanation. Recall that the Virginia Plan included a resolution that *both* houses of Congress would have proportional representation (whereas the sole branch of the Continental Congress had equal representation, ARTICLES OF CONFEDERATION OF 1781, art. V, para. 1). See Notes of James Madison (May 29, 1787), *supra* note 78, at 20. As the Committee debated the Senate's mode of election, the members viewed the discussion through that lens. Proportional representation, though, forced a trade-off between a small Senate and election by state legislatures. Notes of James Madison (June 7, 1787), *supra* note 38, at 152 (editorial insertion by Farrand); see also *id.* at 151 (statement of James Madison) (“[I]f the motion (of Mr. Dickenson [*sic*]) should be agreed to, we must either depart from the doctrine of proportional representation; or admit into the Senate a very large number of members.”); Notes of James Madison (June 25, 1787), *supra* note 41, at 408 (stating that the large states viewed election by state legislatures “as opposed” to proportional representation). As Charles Pinckney pointed out early in the debate, to allot Rhode Island, the smallest state, just one Senator would mean a Senate membership that numbered at least eighty. See Notes of James Madison (June 7, 1787), *supra* note 38, at 150 (statement of John Dickinson). Madison perhaps would have accepted Dickinson's proposal if it allowed for a small Senate, but because the sizes and populations of states varied so much, only equal representation could reconcile state legislative election with a small Senate. Thus, Madison argued for some other mode. See Notes of James Madison (June 7, 1787), *supra* note 38, at 154 (statement of James Madison). Interestingly, John Dickinson not only accepted the trade-off but welcomed it, stating that he hoped for a large Senate. Notes of James Madison (June 7, 1787), *supra* note 38, at 150 (statement of John Dickinson), a view not shared by any other delegate.

not: Dickinson's proposal passed unanimously.<sup>106</sup> The vote is all the more remarkable when compared to a fractured vote just the previous day rejecting a similar proposal to elect the House of Representatives through state legislatures.<sup>107</sup> It's difficult to know why the vote came out the way it did. Perhaps (but not likely) the proponents' arguments found their mark;<sup>108</sup> perhaps the most vocal opponents, Madison and Wilson,<sup>109</sup> were in actuality a small minority; or perhaps (most likely) the delegates realized that the greater issue by far was the debate over proportional or equal representation—election by state legislatures mattered little in comparison.<sup>110</sup> Whatever the reason(s) behind it, the unanimous vote settled the issue with force<sup>111</sup>: the proposed

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<sup>106</sup> Journal (June 7, 1787), *supra* note 96, at 149. The vote is particularly curious because James Wilson first moved that the question be postponed as the Committee considered his own proposal for direct election, Notes of James Madison (June 7, 1787), *supra* note 38, at 151 (statement of James Wilson), yet that measure failed, Journal (June 7, 1787), *supra* note 96, at 148–49. For reasons we cannot fully know, a large majority of the delegates wanted to settle the issue right then.

<sup>107</sup> Journal (June 6, 1787), in 1 FARRAND'S RECORDS, *supra* note 38, at 130 (rejecting by vote of 3-8).

<sup>108</sup> The indelible George Mason had the last (powerful) word before the vote. See Notes of James Madison (June 7, 1787), *supra* note 38, at 155–56 (statement of George Mason).

<sup>109</sup> In advocating for ratification of the Constitution, both men eventually found themselves arguing for the provision. See THE FEDERALIST NO. 62, *supra* note 90, at 377; James Wilson, (Nov. 24, 1787), in 1 DEBATE, *supra* note 97, at 795-96 (referencing Wilson's shift in attitude). From the start, Madison's opposition was subordinate to other concerns (again, his greater concern was numerosity, see *supra* note 105 and accompanying text), and he borrowed Dickinson's analogy of the solar system—with the states as planets—the very next day. Compare Notes of James Madison (June 7, 1787), *supra* note 38, at 153 (statement of John Dickinson), with Notes of James Madison (June 8, 1787), in 1 FARRAND'S RECORDS, *supra* note 38, at 165 (statement of James Madison).

<sup>110</sup> I draw this conclusion from comments made during this debate, see Notes of James Madison (June 7, 1787), *supra* note 38, at 151 (Pierce Butler: declining to give an opinion until the ratio of representation was determined), but especially those made when senatorial election was revisited before the Convention, see, e.g., Notes of James Madison (June 25, 1787), *supra* note 41, at 407 (Madison: moving to postpone decision on the mode of election and take up the issue of representation in the Senate). The issue of representation in the two branches later occupied the Convention for several weeks, Notes of James Madison (June 27, 1787), in 1 FARRAND'S RECORDS, *supra* note 38, at 436 n.2, and nearly ended it, see generally MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 94 (1913) (quoting Gouverneur Morris as stating, “the fate of America was suspended by a hair”); STEWART, *supra* note 77, at 125 (quoting Charles Pinckney as stating, “had the Convention separated without determining upon a plan, it would have been on this point”).

<sup>111</sup> Although Virginia and Pennsylvania reversed their stance after equal representation was looking more likely, see Notes of James Madison (June 25, 1787), *supra* note 41, at 408 n.\* (inserting a note immediately after recording the vote to explain that the large states viewed election by state legislatures “as opposed” to proportional representation), the point still carried by a strong majority (9-2), Journal (June 25, 1787), *supra* note 80, at 395.

Constitution upon which the ratifiers deliberated elected its Senators by state legislatures.<sup>112</sup>

The ratifiers heard significant discussion regarding the distinctness of the Senate. Some lamented that the second branch would not constitute a more direct representation of the people.<sup>113</sup> Others understood the need for some removal from the people but argued that the Convention delegates, in empowering state legislatures to elect Senators, had overcompensated.<sup>114</sup>

But proponents of the Constitution prevailed. Wilson found it particularly necessary to detail the benefits of bicameralism, as some Pennsylvanians were quite fond of their state's unicameral legislature.<sup>115</sup> He first responded to critics by reminding them that both branches "ultimately flow[ed] from the people" and that the Framers had remembered the people by instituting a popular branch in the House.<sup>116</sup> But setting all that aside, the genius of distinct bodies was their increased ability to check each other.<sup>117</sup> Bills passed under the influence of a momentary passion, warped prejudice, or the like "must be submitted to a distinct body," a body not under those same influences.<sup>118</sup> This check would lead to at least three important benefits: (1) laws that are sufficiently considered and deliberated, (2) a more stable body of law because well-considered laws are less likely to face repeal, and (3) more precise laws, the opposite of which

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<sup>112</sup> See Virginia M. McInerney, *Federalism and the Seventeenth Amendment*, 7 J. CHRISTIAN JURIS. 153, 180 (1988) ("[T]he use of representation provided the means by which the House and the Senate would check each other." (emphasis added)).

<sup>113</sup> See GEORGE MASON, OBJECTIONS TO THE CONSTITUTION OF GOVERNMENT FORMED BY THE CONVENTION (1787), reprinted in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 85, at 11 (criticizing the Senate's participation in government expenditures despite the fact that Senators do not represent the people); Centinel I, INDEP. GAZETTEER (Phil.), Oct. 5, 1787, reprinted in 1 DEBATE, *supra* note 58, at 61; Cincinnatus, *Essay IV*, N.Y. JOURNAL, Nov. 22, 1787, reprinted in 6 THE COMPLETE ANTI-FEDERALIST 18 (Herbert J. Storing ed., 1981); Republicus, *Essay*, KY. GAZETTE (Lexington), Mar. 1, 1788, reprinted in 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 68, at 166–67 (arguing that any particular senator will represent only a small part of that state's electorate).

<sup>114</sup> See Centinel II, FREEMAN'S JOURNAL (Phil.), Oct. 24, 1787, reprinted in 1 DEBATE, *supra* note 58, at 86 ("[F]rom their constitution, [Senators] may become so independent of the people as to be indifferent to its interests . . ." (emphasis in original)).

<sup>115</sup> See A CITIZEN OF AMERICA, *supra* note 58, at 130 (noting the presence of bicameralism's opponents in Pennsylvania).

<sup>116</sup> See Wilson's Response, in 1 DEBATE, *supra* note 88, at 823–24.

<sup>117</sup> *Id.* at 824.

<sup>118</sup> *Id.*

can work destruction of the people's liberties.<sup>119</sup> But Wilson's most ingenious point, in my view, is his argument from deterrence. Because each chamber will anticipate the embarrassment from the other chamber's rejection of bad bills, "they will act with more caution" *in the first place*.<sup>120</sup> Distinct bicameralism doesn't just mean fewer bad *laws*; it means fewer bad *bills*. That is a powerful check. And it saves money to boot: not only will both houses use time more efficiently, by focusing on better laws,<sup>121</sup> but also the people's monitoring costs are reduced by placing the immediate burden on the other chamber.<sup>122</sup>

In the press, the Federalist Papers were particularly successful in arguing that the degree of distinctness was appropriate. On one occasion, Madison argued that the critics' assessment, i.e., that the benefits of direct accountability to the people outweighed the benefits of such distinct branches, misjudged the value of direct accountability and so resulted in the wrong conclusion. In fact, he argued, to reduce accountability, and implement distinct branches, would be a better protection of the people's liberties. Madison tipped the scales by reminding readers of two ingenious points. First, republics inherently suffer from the agency problem<sup>123</sup>: "It is a misfortune incident to republican government . . . that those who administer it may forget their obligations to their constituents . . . ."<sup>124</sup> In its strongest form, this first point suggests that the very concept of a democratic republic is an oxymoron—that people must either represent themselves in government or expect representatives who pursue their own desires. In a more modest form, this point suggests that there is some limit on the ability of a representative body to represent accurately the views of its constituents.<sup>125</sup> Attempting to push beyond that limit is fruitless

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<sup>119</sup> *See id.*

<sup>120</sup> *Id.*

<sup>121</sup> Wilson's Response, in 1 DEBATE, *supra* note 88, at 824.

<sup>122</sup> *See id.* at 823 (stating that the check of bicameralism "operates constantly"). As we will see, the Framers envisioned the states fulfilling a similar monitoring role. *See infra* notes 189–201 and accompanying text.

<sup>123</sup> *See generally* Clifford W. Smith, Jr., *Agency Costs*, in 1 THE NEW PALGRAVE DICTIONARY OF ECONOMICS 39–40 (John Eatwell et al. eds., 1987).

<sup>124</sup> THE FEDERALIST NO. 62, *supra* note 90, at 378.

<sup>125</sup> *See* THE FEDERALIST NO. 51, *supra* note 2, at 322 ("A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions."); *see also* Wilson's Response, in 1 DEBATE, *supra* note 88 (agreeing that constituents restrain their representatives but arguing that bicameralism



and wasteful, but even just nearing the limit incurs increasingly greater costs. On this point alone, Madison reduced the value of direct accountability such that some might deem the scales tipped. But he proceeded to make his second point: The Senate is “a second branch of the legislative assembly . . . dividing the power with a first.”<sup>126</sup> In other words, one cannot weigh the direct accountability of the Senate alone. In isolation, the Senate need not be feared because it possesses only half the legislative power; Congress, on the other hand, ought to be feared. But Congress, it turns out, is directly accountable to the people—in the House of Representatives. Thus, direct accountability is satisfied, and to popularize the Senate will do nothing to increase that accountability. So rendered, the benefits of a directly accountable Senate are trivial, heavily outweighed by the benefits of distinct branches. Madison concluded the argument with force: “It doubles the security to the people by requiring the concurrence of two distinct bodies . . . . [I]t must be politic to distinguish them from each other by every circumstance which will consist with a due harmony in all proper measures, and with the genuine principles of republican government.”<sup>127</sup>

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would be the “most useful restraint”).

<sup>126</sup> THE FEDERALIST NO. 62, *supra* note 90, at 378.

<sup>127</sup> *Id.* at 378–79; *see also* THE FEDERALIST NO. 51, *supra* note 2, at 322 (“The remedy for [legislatures’ predominance in republican governments] is to divide the legislature into different branches; and to render them, by different modes of election . . . , as little connected with each other as the nature of their common functions and their common dependence on the society will admit.”); *cf.* A CITIZEN OF AMERICA, *supra* note 58, at 137 (“The proposed senate in America is constituted on principles more favorable to liberty [than those of Rome’s senate]: The members are elective, and by the separate legislatures . . . .”); THE FEDERALIST NO. 60, at 367–68 (Alexander Hamilton) (arguing that the people could trust the federal government to regulate its own elections because of the different election modes for the House, Senate, and President). At the Virginia Convention, Madison made a particular argument that indicates his strong feelings about distinct branches. Patrick Henry argued throughout the Convention that the national government would be poised to overthrow the state governments. *See, e.g.*, Patrick Henry, Speech in Response to Governor Edmond Randolph (June 7, 1788), in 2 DEBATE, *supra* note 81, at 635 (arguing that the federal government could tax the people such that no revenues remained for the states). Madison’s first retort was the right one: the Senate would rely on state legislatures for their appointment and so would defend the states’ existence. *See* James Madison, Speech Regarding Direct Taxation by the Federal Government (June 11, 1788), in 2 DEBATE, *supra* note 81, at 658–59. But his second response exhibited a different logic: “[A coalition of the President, Senate, and House] could be supposed only from a similarity of the component parts. A coalition is not likely to take place, because its component parts are heterogeneous in their nature.” *Id.* at 659. In other words, setting aside the fact that the states comprised an entire branch of Congress (which would seem to settle the matter), the houses (and the President) were so distinct that they would never successfully agree on measures intended to eviscerate

Hence, the founding generation deliberately determined that Congress would be divided into two distinct houses, distinguishable even in their mode of election. In doing so, they laid down a wise structure that contributed to the protection of liberty for more than a century.

### 3. *A Modern Assessment*

The Founders' provision for two distinct Congressional houses proved to be wise. As Todd Zywicki describes, the senatorial mode of election created a frustrating obstacle for the special interest groups, which achieved much easier success in the House.<sup>128</sup> Because of the House's direct connection with the people, an interest group could provide Representatives with campaign support that translated directly into votes—an incentive Representatives responded to.<sup>129</sup> But Senators were responsible to a large number of distinct state legislatures, each of which housed representatives accountable to their own constituents: the translation of campaign support into votes was far less direct.<sup>130</sup> Accordingly, interest groups had a much harder time rallying Senate support on their issues of choice,<sup>131</sup> and a multitude of House special interest legislation failed in the Senate.<sup>132</sup> This was bad news for special interest groups, but great news for liberty. Indeed, Madison had argued that the Framers had hoped to design a government that obstructed these groups,

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the states. Thus, a distinctly divided Congress was unable to encroach on the rights of the people or the states.

<sup>128</sup> See Todd J. Zywicki, *Senators and Special Interests: A Public Choice Analysis of the Seventeenth Amendment*, 73 OR. L. REV. 1007, 1039–40 (1994); see also POLE, *supra* note 39, at 170 (“It was structure as much as party or class interest that tended to produce conservative results in terms of policy.”).

<sup>129</sup> See Zywicki, *supra* note 128, at 1039–40 (“Special-interest legislation frequently passed the House . . .”).

<sup>130</sup> See HOEBEKE, *supra* note 8, at 103 (“[T]he possibility of controlling the Senate through state campaign donations was somewhat remote. It would have entailed paying the election expenses of a majority of the legislators in a majority of states.”); Zywicki, *supra* note 128, at 1039–40 (referring to the costs of funneling lobbying through state legislatures).

<sup>131</sup> See 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, 178 (1997) (“[The] costs [of putting together two distinct winning coalitions] will increase further if the two houses are drawn from different constituencies.”).

<sup>132</sup> See HOEBEKE, *supra* note 8, at 116; Zywicki, *supra* note 128, at 1039–40.

which he called “factions.”<sup>133</sup>

That Senate lobbying was particularly expensive yielded two additional benefits. First, because Senate lobbying required a certain level of expenditure to be successful, no law that yielded benefits less than that cost was worth an interest group’s time—on a host of measures, they just stopped trying.<sup>134</sup> Such a benefit is an indirect manifestation of Wilson’s prediction that bicameralism would result in fewer bad bills.<sup>135</sup> Another manifestation, perhaps the more powerful one yet, is the second benefit: if a bill was not worth the cost of lobbying the Senate, then the interest group had no reason to lobby *the House either*.<sup>136</sup>

The historical evidence is likely unsurprising to most readers because the benefits of bicameralism are so intuitive.<sup>137</sup> Dividing the

<sup>133</sup> See THE FEDERALIST NO. 10, at 78, 80 (James Madison) (defining a “faction” as a group of citizens whose interest is adverse to that of the community and arguing that a government must control factions’ effects).

<sup>134</sup> See Zywicki, *supra* note 128, at 1040 (“[T]he Senate’s reluctance to follow the House’s lead in passing redistributive legislation drove down the marginal return of lobbying either house.”).

<sup>135</sup> See *supra* text accompanying note 120.

<sup>136</sup> See Zywicki, *supra* note 128, at 1040. Needless to say, Representatives were just as unhappy as the interest groups. See *id.* at 1041 (noting that, between 1893 and 1911, the House initiated six proposals to reform the senatorial mode of election).

<sup>137</sup> Sanford Levinson is one of a growing number of scholars who argue that party politics dominates our legislative process to such a degree that unicameralism would provide a better structure for our legislature. See SANFORD LEVINSON, FRAMED: AMERICA’S FIFTY-ONE CONSTITUTIONS AND THE CRISIS OF GOVERNANCE 140–41 (2012). The general counterargument regarding parties will be addressed shortly, see *infra* note 154 and accompanying text, but Levinson’s specific argument deserves a brief response now. He bases his contention on two prongs: (1) unicameralism is not significantly less effective than bicameralism, and (2) bicameralism has become increasingly more costly. See LEVINSON, *supra* at 140–41. But neither prong is accurate. Setting aside the deluge of evidence in favor of bicameralism, see *infra* notes 128–136, 141–143 and accompanying text, Levinson’s argument for unicameralism is unfounded. He asserts that there is no evidence that Nebraska or New Zealand, the two most prominent entities with unicameral legislatures, suffer from their legislative structure. See LEVINSON, *supra*, at 140. But in so stating, Levinson commits the logical fallacy of appealing to ignorance (besides the fact that the contention seems doubtful, see, e.g., A CITIZEN OF AMERICA, *supra* note 58, at 133–34 (criticizing specific results from Pennsylvania’s unicameral legislature)). His statement of bicameralism’s increasing costliness is also flawed. Levinson states, “serious costs [are] imposed by institutional vetoes that make difficult the passage of what a majority might well view as ‘necessary’ legislation.” LEVINSON, *supra*, at 141. His word choice, though, employs some sleight of hand. No proponent of bicameralism, past or present, has ever suggested bicameralism is beneficial because it impedes “necessary” legislation. The argument all along has been that bicameralism impedes (some) “urgent” legislation, thus allowing time to filter out the “urgent” legislation that turns out not to be “necessary” after

legislature into chambers, at the least, adds costs to passing legislation, which will cause factions to think twice about any particular measure.<sup>138</sup> And, as Noah Webster argued, the division alone will compartmentalize discussion in order to isolate undue influence in one house or the other.<sup>139</sup>

And intuition accords with the Founders' further decision to make the houses distinctive. Then-Professor Joseph Story commented, "[i]f each branch is substantially framed upon the same plan, the advantages of the division are shadowy and imaginative."<sup>140</sup> Modern-day scholarship justifies Story's, and the founding generation's, intuition. Buchanan and Tullock demonstrate that the ability of factions to form majority coalitions (through vote-trading among representatives<sup>141</sup>) is increasingly difficult because of the composition of the House and Senate.<sup>142</sup> Tsebelis and Money show both theoretically and empirically that bicameral legislatures are far superior in preserving the status quo,<sup>143</sup> which the Founders designed to be liberty.

It goes without saying then that the Seventeenth Amendment's alteration of senatorial election mode did great damage to Congress's internal checks. The precise level of damage would have been hard to predict because election mode is just one of several

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all.

<sup>138</sup> See JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* 235 (1962) ("It is evident that the two-house system will involve considerably higher decision-making costs than the single-house system . . ."); Zywicki, *supra* note 131, at 170.

<sup>139</sup> See A CITIZEN OF AMERICA, *supra* note 58, at 131–32.

<sup>140</sup> 1 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* 519 (Melville M. Bigelow ed., 5th ed. 1995); see also *id.* ("[A] single branch is quite as good as two, if their composition is the same and their spirits and impulses the same."). In fact, Story makes a compelling argument that dividing the legislature into indistinct branches is *worse* than leaving the legislature undivided in the first place. See *id.* at 520. His argument weighs the costs and benefits: (1) indistinct bicameralism yields no benefits to the cause of liberty because both houses are so similar that special interest legislation that passes either house, passes both, but (2) indistinct bicameralism does add costs to passing legislation, which only serves to obstruct the majority from repealing that same special interest legislation. See *id.*; cf. BUCHANAN & TULLOCK, *supra* note 138, at 236 ("[U]nless the bases for representation are significantly different in the two houses, there would seem to be little excuse for the two-house system.").

<sup>141</sup> See BUCHANAN & TULLOCK, *supra* note 138, at 236.

<sup>142</sup> See *id.* at 247–48. They also cite the potential of a Presidential veto, another institutional choice of the Framers, as a means of further improving the legislature's ability to reflect the public will. See *id.* at 248.

<sup>143</sup> GEORGE TSEBELIS & JEANETTE MONEY, *BICAMERALISM* 216 (1997).

differentiating characteristics.<sup>144</sup> But as it turns out, state legislative election was the most important by far: “[D]irect election rendered the Senate less sedate and more closely tied to the people, synchronizing it with the House and the presidency; in fact, it often looks much like a smaller version of the House.”<sup>145</sup> The great victory of the Progressive Movement<sup>146</sup> single-handedly obliterated an important protection of liberty.<sup>147</sup>

In my view, the strongest counterargument to a call for the Seventeenth Amendment’s repeal is the predominance of political parties in our legislative system, i.e., that repeal would make no difference. In an extraordinarily insightful piece, Professors Daryl Levinson and Richard Pildes argue that the importance of separating parties has far surpassed that of separating powers.<sup>148</sup> Although I do not find their argument persuasive that separation of powers is now irrelevant,<sup>149</sup> I am persuaded that the influence of parties on government decisions is significant and growing.<sup>150</sup> But even if the strongest form of their argument were accurate, it would not obviate the need for repealing the Seventeenth Amendment. Most importantly, their thorough research targets the interrelationship between the executive and legislative branches,<sup>151</sup> a relationship

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<sup>144</sup> See *supra* note 38.

<sup>145</sup> Sara Brandes Cook & John R. Hibbing, *A Not-So Distant Mirror: The 17<sup>th</sup> Amendment and Congressional Change*, 91 AM. POL. SCI. REV. 845, 852–53 (1997); see also McInerney, *supra* note 112, at 177 (“Senators simply do not represent the states.”); Zywicki, *supra* note 131, at 217 (“Senators now represent a variety of national interest groups—a role identical to that of House members.”); Zywicki, *supra* note 28, at 88 (“[S]enators today act all but identically to House members . . .”).

<sup>146</sup> Zywicki, *supra* note 128, at 1011 (“[M]any aspects of the Progressive Era, and its later cousins, the New Deal and Great Society, may not have been possible without the institutional reform of the direct election of senators.”).

<sup>147</sup> See Zywicki, *supra* note 145, at 89 (“[T]he Seventeenth Amendment substantially watered down bicameralism as a check on interest-group rent-seeking, laying the foundation for the modern special-interest state.”). But see Sean M. Theriault & David W. Rohde, *The Gingrich Senators and Party Polarization in the U.S. Senate*, 73 J. POL. 1011, 1011 (2011) (“By virtue of its design and practice over the last 220 years, the Senate has been less likely to be captured by the trends of the day than the House.”).

<sup>148</sup> See Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2315–16 (2006).

<sup>149</sup> See *id.* at 2385.

<sup>150</sup> See Richard A. Epstein, *Why Parties and Powers Both Matter: A Separationist Response to Levinson and Pildes*, 119 HARV. L. REV. F. 210, 210 (2006) (“It is futile to argue that political parties do not influence relations between the legislative and executive branches.”).

<sup>151</sup> See Levinson & Pildes, *supra* note 148, at 2315.

entirely distinct from that between two chambers of the legislature.<sup>152</sup> Indeed, the chambers' relationship appears to be less defined by party differences than those of the executive and legislative branches.<sup>153</sup> Second, the Seventeenth Amendment increased the power of parties in electing Senators,<sup>154</sup> so repeal ought to reverse that trend in some measure. Finally, contrary to the authors' contention,<sup>155</sup> separation of powers can work in tandem with other measures to continue to check government activity.<sup>156</sup>

## B. State Representatives

In his famous *Federalist Paper Number 39*, Madison engaged some critics of the Constitution who purposely scrutinized the document under a double standard. These critics, Madison reports, require that the federal government both represent the American people as a national republic and preserve the dignity of the states as a confederacy.<sup>157</sup> Yet perhaps because plenty of Americans agreed with one or the other standard, Madison set out to demonstrate that the new government would meet *both* standards—that it was both “national” and “federal.”<sup>158</sup> He then proceeded to describe point after point in the proposed plan that met one standard or the other or, at times, both.<sup>159</sup> One such point was the curious character of Congress: the House would derive directly from the people and so was clearly national, but “[t]he Senate, on the other hand, [would] derive its powers from the States as political and coequal societies” and so was,

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<sup>152</sup> See TSEBELIS & MONEY, *supra* note 143, at 1 (“The existence of a second chamber appears to have little effect on the relationship between the legislature and the executive.”).

<sup>153</sup> See Theriault & Rohde, *supra* note 147, at 1011.

<sup>154</sup> See Bybee, *supra* note 50, at 551; McInerney, *supra* note 112, at 171.

<sup>155</sup> See Levinson & Pildes, *supra* note 148, at 2325–26 (summarizing some of Woodrow Wilson’s critiques of our federal governmental structure).

<sup>156</sup> See Epstein, *supra* note 150, at 212–14 (describing the executive and legislative branches’ continued need to negotiate and debate the degree to which a particular measure will go, even if the same party controls and supports the measure generally); see also *id.* at 216 (“No one can dismiss checks and balances as a nonstarter just because we live in an age of greater party discipline.”).

<sup>157</sup> See THE FEDERALIST PAPERS NO. 39, at 242–43.

<sup>158</sup> See *id.* at 246 (concluding the paper by describing the Constitution as both “national” and “federal”).

<sup>159</sup> See, e.g., *id.* at 243–44 (arguing that the ratification process would be federal because the people would ratify the Constitution within their respective states).

according to Madison, clearly federal.<sup>160</sup>

Madison's description of the Senate implicates another reason the Founders thought it beneficial to elect Senators through state legislatures—the Senate would thereby represent the states. Among other benefits, the Founders believed that a Senate with states for its constituents would constitute a tremendous foil for the people's representation in the House. This was because the states brought two advantages to their role as constituents: (1) they have an incredible ability to gather, process, and act on information about the national government, and (2) their motive for checking federal overreach is self-executing.<sup>161</sup> Before delving into the historical debates on this front, and assessing the result, this Section addresses the Convention's compromise on state representation.

### 1. *The Compromise*

It would be inaccurate to state that a majority of the Constitution's proponents wanted the states to be represented in the Senate.<sup>162</sup> Note the careful wording above that the Founders "thought it beneficial." The founding generation recognized advantages to state representation in the Senate, but many were not happy about it—indeed, it was the result of compromise.<sup>163</sup>

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<sup>160</sup> *Id.* at 244.

<sup>161</sup> To be clear, my intent is not to debate the intended role of the Senate in the scheme of federalism. In fact, my intended argument assumes the Senate was to be an instrument of federalism and then extrapolates from that assumption: if the Senate would naturally defend states' prerogatives, this would result in a more divided Congress that was less likely to trample on citizens' rights generally. As to the federalism debate, I recommend to the reader a large body of research from numerous, far more capable scholars. *See generally* ROSSUM, *supra* note 8; Vikram David Amar, *Indirect Effects of Direct Election: A Structural Examination of the Seventeenth Amendment*, 49 VAND. L. REV. 1347 (1996) [hereinafter Amar, *Indirect Effects*]; Vik D. Amar, *The Senate and the Constitution*, 97 YALE L.J. 1111 (1988); Bybee, *supra* note 50; Laura E. Little, *An Excursion into the Uncharted Waters of the Seventeenth Amendment*, 64 TEMP. L. REV. 629 (1991); McInerney, *supra* note 112; William H. Riker, *The Senate and American Federalism*, 49 AM. POL. SCI. REV. 452 (1955); Zywicki, *supra* note 131; Zywicki, *supra* note 128; Roger G. Brooks, Comment, *Garcia, The Seventeenth Amendment, and the Role of the Supreme Court in Defending Federalism*, 10 HARV. J.L. & PUB. POL'Y 189 (1987).

<sup>162</sup> And yet I would consider it quite accurate to say so for the other subsections of this Note. A majority of proponents did want a bicameral Congress with distinct houses, *see supra* Section II.A, as well as an independent Senate comprised of distinguished Senators, *see infra* Section II.C.

<sup>163</sup> *See, e.g.*, THE FEDERALIST NO. 62, *supra* note 90, at 377–78 (finding no theory to justify equal representation fully but acknowledging that its inclusion was a compromise to

The Virginia Plan that Edmund Randolph proposed to the Convention resolved that both branches of Congress would have proportional representation.<sup>164</sup> That resolution was an object of contention the next day<sup>165</sup> (when the Committee of the Whole<sup>166</sup> began reviewing the Plan) and continued to be for many weeks thereafter.<sup>167</sup>

The tension over state representation was in full swing at the time the Framers debated the Senate's mode of election. The very first comment on Dickinson's proposal<sup>168</sup> was that of Roger Sherman as he seconded it.<sup>169</sup> Sherman argued that allowing the states to participate in the federal government would thereby increase their support of it and facilitate harmony between the two.<sup>170</sup> Sherman and others favored preserving some part of the Articles of Confederation,

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save the Union). To be clear, election by state legislatures was *not* the compromise—state representation was. *See id.* (referring to the states as parties to the constitution that were granted an equal share of representation therein). The two are certainly intertwined, but opponents of state representation had little argument with state legislative election; their overriding concern was proportional versus equal representation, and any disfavor toward state legislative election was because of its incompatibility with proportional representation (and a small Senate). *See supra* note 105. Two thoughts. First, the compromise does not taint the arguments of Sections II.A or II.C. Those benefits would have attached to state legislative election with or without the equal representation compromise, and many proponents would have argued for state legislative election. Thus, when Publius and others outlined these virtues, they were not simply making the best of it but arguing with conviction. Second, the compromise does taint any argument that Senators ought to represent the states on principle. Instead, my view, as reflected in this section's thesis, is that because the Senate would represent the states, *see* U.S. CONST. art. V (“[N]o State, without its Consent, shall be deprived of its equal Suffrage in the Senate.”), the Founders set out to discover the benefits of that compromise—and they were successful (though not convinced that equal representation was superior). Assuming that same baseline, the benefits discussed in this section also remain untainted by the compromise from which they stem.

<sup>164</sup> Notes of James Madison (May 29, 1787), *supra* note 78, at 20.

<sup>165</sup> *See* Notes of James Madison (May 30, 1787), *supra* note 81, at 36–38.

<sup>166</sup> *See supra* note 80.

<sup>167</sup> *See, e.g.*, Notes of James Madison (June 15, 1787), *supra* note 71, at 242 n.\*.

<sup>168</sup> *See supra* note 96 and accompanying text.

<sup>169</sup> *See* Notes of James Madison (June 7, 1787), *supra* note 38, at 150.

<sup>170</sup> *Id.* The primary purpose of Sherman's comment was, no doubt, to indicate that state representation was a requirement if the large states wished the small states to assent to the formation of this new government. *See* Notes of James Madison (June 15, 1787), *supra* note 71, at 242 n.\* (indicating that delegates from the small states, including Connecticut—Sherman's home state, drafted the New Jersey Plan in response to their disapproval of the Virginia Plan). Hence, his discussion of “support” refers less to the importance of federal and state governments' continued support of each other and more to the initial support of the states, without which the national government would never be able to form.



in which only the states were represented.<sup>171</sup> On the other hand, some delegates blamed the states (and a weak Confederation) for the country's obvious troubles.<sup>172</sup>

The ultimate decision on the issue was Benjamin Franklin's Great Compromise:<sup>173</sup> the states would have equal voting in the Senate,<sup>174</sup> and the House, proportionally represented, would have sole power to originate money bills.<sup>175</sup>

The ratifiers' debate regarding Senators as state representatives was a peculiar one because the Anti-Federalists, the largest group of the Constitution's opponents by far,<sup>176</sup> were pro-state.<sup>177</sup> For that reason, when they spoke about state representation in the Senate, it was not to criticize the mode of election<sup>178</sup> but to propose ways to *increase* the states' power over the Senate.<sup>179</sup>

<sup>171</sup> See ARTICLES OF CONFEDERATION OF 1781, art. V, para. 1 (providing for state legislatures to direct the election of the states' representatives to the unicameral Continental Congress).

<sup>172</sup> See, e.g., STEWART, *supra* note 77, at 19 ("For Washington and Madison, the problem with the Articles was the states.").

<sup>173</sup> See Notes of James Madison (July 5, 1787), in 1 FARRAND'S RECORDS, *supra* note 38, at 526 n.\*.

<sup>174</sup> See Journal (July 7, 1787), in 1 FARRAND'S RECORDS, *supra* note 38, at 548–49.

<sup>175</sup> See Journal (July 6, 1787), in 1 FARRAND'S RECORDS, *supra* note 38, at 538–39. Ultimately, the concession amounted to nothing. See, e.g., HOEBEKE, *supra* note 8, at 116 (describing the Senate's amendment of House-initiated bills to circumvent the restriction). But it would be inaccurate to say the Federalists got the short end of the stick: most importantly, they averted disaster and secured a far more nationalistic government than the Articles of Confederation provided for, but more specifically, the states control over Senators turned out to be more troublesome than anticipated. See *infra* notes 344–345 and accompanying text.

<sup>176</sup> See STORING, *supra* note 27, at 3 (implying that the Anti-Federalists were "those who opposed the Constitution").

<sup>177</sup> See *id.* at 15 (characterizing the Anti-Federalists' position as one that emphasized the "primacy of the states"); see also, e.g., Federal Farmer XI, *supra* note 85, at 287 ("In this . . . [combination of the federal and state governments,] the state governments [are] an essential part, which ought always to be kept distinctly in view, and preserved . . .").

<sup>178</sup> See, e.g., Federal Farmer XI, *supra* note 85, at 288 (stating that one of the "several advantages" of the Senate was that by "the mode of its appointment, [it] will probably be influenced to support the state governments").

<sup>179</sup> Perhaps the most common suggestion was the ability to recall Senators. See, e.g., Brutus XVI, *supra* note 85, at 445; Cornelius, *Essay*, HAMPSHIRE CHRONICLE (n.p.), Dec. 11, 1787, reprinted in 4 THE COMPLETE ANTI-FEDERALIST 140 (Herbert J. Storing ed., 1981); Federal Farmer XI, *supra* note 85, at 289; Melancton Smith & Alexander Hamilton, Debate Regarding Rotation in the Senate at the New York Ratifying Convention (June 25, 1788), in 2 DEBATE, *supra* note 81, at 805, which the Articles of Confederation had included, ARTICLES OF CONFEDERATION OF 1781, art. V, para. 1. And perhaps a close second is to reduce term length and/or require Senators to rotate out of the position for a few years and

Madison, Hamilton, and others seized on this alignment of interests. Although they opposed equal representation on principle, they accepted the need for the compromise and consistently reminded the Anti-Federalists that the Senate's mode of election would protect the states from desuetude.<sup>180</sup>

For the purposes of this Note, the correctness of the Founders' compromise is irrelevant.<sup>181</sup> Regardless of whether states as states deserve a seat in government, the fact is that our Constitution incorporates that principle in the deepest way.<sup>182</sup> With that as a

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some number of successive terms. *See, e.g., Brutus XVI, supra* note 85, at 444–45 (4-year terms and 3-year rotation after 1 term); *Federal Farmer XI, supra* note 85, at 288, 290–92 (3- or 4-year terms and 2-year rotation after 1 term); Gilbert Livingston, *Speech Regarding the Senate's Power at the New York Ratifying Convention* (June 24, 1788), *in* 2 *DEBATE, supra* note 81, at 791 (6-year rotation after 1 term). Publius explicitly defended the proposed term length of six years, *see THE FEDERALIST NO. 63, supra* note 89, at 388–89. He also rebutted calls for rotating the President's position with several counterarguments, some of which apply to the case of Senators, *see THE FEDERALIST NO. 72, at* 437–40 (Alexander Hamilton) (arguing that categorically forbidding reelection reduces incentives for good behavior, deprives the people of the President's accumulated experience, etc.).

<sup>180</sup> *See THE FEDERALIST NO. 9, at* 76 (Alexander Hamilton) ("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 . . ."); *THE FEDERALIST NO. 62, supra* note 90, at 377 (arguing that state legislature election of Senators "giv[es] to the State governments such an agency in the formation of the federal government as must secure the authority of the former").

<sup>181</sup> Plenty of proponents and opponents of the Constitution criticized the theoretical underpinnings of equal representation. *See, e.g., THE FEDERALIST NO. 62, supra* note 90, at 377–78 (proponent); Patrick Henry & James Madison, *Debate Regarding Henry's Main Objections to the Constitution at the Virginia Ratifying Convention* (June 12, 1788), *in* 2 *DEBATE, supra* note 81, at 683–84. And that practice continues today. *See, e.g., Reynolds v. Sims, 377 U.S. 533, 574, 576* (1964); Misha Tseytlin, *The United States Senate and the Problem of Equal State Suffrage*, 94 *GEO. L.J.* 859, 863–67 (2006) (critiquing the principle but also citing several other sources that do the same). For myself, I embarked on this project largely convinced that the sovereign states deserved representation in Congress. *See, e.g., Reynolds, 377 U.S. at* 574 ("[I]n establishing our type of federalism a group of formerly independent States bound themselves together under one national government. Admittedly, the original 13 States surrendered some of their sovereignty in agreeing to join together 'to form a more perfect Union.'"). However, during the course of my research, the arguments of some fellow federalists have persuaded me that federalism's justification lies not in its protection of *states'* rights but the *peoples'*. *See, e.g., New York v. United States, 505 U.S. 144, 181* (1992) (O'Connor, J.) ("The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities . . . . To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals.").

<sup>182</sup> Assuming state consent to be an impossibility (as the Framers did), only a new Constitutional Convention could ever change the Senate's representative composition. *See U.S. CONST. art. V* ("[N]o State, without its Consent, shall be deprived of its equal Suffrage in the Senate.")

baseline, election of Senators by state legislatures is a necessary (though probably not sufficient) component of state representation.<sup>183</sup> And as it turns out, having states for constituents does wonders for the Senate as a Congressional check.

## 2. “A Convenient Link”

Most supporters of senatorial election by state legislatures argued that the states deserved representation in Congress, but they also raised other arguments for why state representation would be beneficial. Dickinson argued that “the sense of the States would be better collected through their Governments.”<sup>184</sup> Although the delegates did not much debate this assertion, it’s an important one: Purportedly, the state governments can do a better job of communicating the people’s needs<sup>185</sup> to the federal government *than can the people themselves*.

One manifestation of this claim is efficiency. There was no conceivable way that a Senator could canvass the state in search of citizens’ opinions. The distance would be too large. Those concerns have largely diminished in our day with improvements of technology, but distance wasn’t the only concern. Gathering opinions costs time and money. Senator’s would need to devote considerable time to the job they were elected to do—govern—but that left less time for

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<sup>183</sup> Riker, *supra* note 161, at 455 (“Election by state legislatures implied accountability to them.”).

<sup>184</sup> Notes of James Madison (June 7, 1787), *supra* note 38, at 150.

<sup>185</sup> Couched within Dickinson’s statement is another layer of meaning. He was also trying to preserve the voice of states as states, thus explaining his reference to the “sense of the States,” not the “sense of *the people of* the States.” *Id.* There is little doubt that he chose those words carefully. See Notes of James Madison (June 15, 1787), *supra* note 71, at 242 n.\* (stating that the small states refused to yield on equal representation and thus subject themselves to the large states); John Dickinson, *Letters of Fabius*, in PAMPHLETS OF THE CONSTITUTION (P.L. Ford ed., 1788), reprinted in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 appx. A, CCI, at 304 (Max Farrand ed., rev. ed. 1937) [hereinafter 3 FARRAND’S] (reporting that the delegates had agreed “that for the securer preservation of these [state] sovereignties, they ought to be represented in a body by themselves, and with equal suffrage”). Indeed, the notes of other delegates use different wording that clarifies Madison’s recording. See Notes of Rufus King (June 7, 1787), *supra* note 100, at 158 (“[T]he mind & body of the State *as such* shd. be represented in the national Legislature.” (emphasis added)); Notes of Alexander Hamilton (June 7, 1787), in 1 FARRAND’S RECORDS, *supra* note 38, at 160 (“[Dickinson] would have the state legislatures elect senators, because he would bring into the general government the sense of the state *Governments* . . . .” (emphasis added)).

speaking with constituents. And even if, somehow, a Senator could gather the entire constituency together to discuss an issue, the project would still be inefficient because of the number of opinions to process. Here was a chance for state legislatures to help. State legislators represent far smaller districts, and although their time includes governing also, they can hear from a greater proportion of their jurisdiction with less time (by definition). Furthermore, state legislators need to consolidate those opinions for their own work. That consolidation provides valuable information that a Senator can use.

A second manifestation of the claim is refinement. As will be addressed later in regard to Senators themselves, the Framers believed it was a representative's duty to filter through the desires of constituents and weed out those that were shortsighted and made in the heat of the moment.<sup>186</sup> State legislators could perform that function at the state level as they gathered constituents' opinions. Indeed, the Senator might then engage in a further refinement once the state legislature communicated its findings.<sup>187</sup>

The ratifiers also did not much debate Dickinson's point. They did, however, pick up on his general proposition that a centralized state legislature is far better at gathering, processing, and communicating information than a diffuse body of people. Madison eloquently referenced this point in writing that the Senate's mode of election would "form a convenient link between the two systems."<sup>188</sup>

Hamilton discussed the advantage of the states in more detail, but he focused on the flow of information in the opposite direction. The states would keep Senators on their toes and fighting for liberty because the states could detect danger and communicate it to the

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<sup>186</sup> See *infra* Section II.C.2.

<sup>187</sup> The ability of state legislatures themselves to be temperate was the subject of some debate. Dickinson managed to begin the argument about as weakly as possible; he conceded that the states had engaged in some poor, short-sighted decisions but then argued that only state representation would prevent the federal government from doing the same. See Notes of James Madison (June 7, 1787), *supra* note 38, at 153. Madison recognized his advantage and argued that, as the state legislatures had indeed indulged a great many of the people's short-sighted requests, they were likely to promote the same conduct in the national government. See *id.* at 154. Thankfully, Elbridge Gerry saved Dickinson's point by rejecting the latter's factual concession: the legislatures had often been against the people's shortsighted measures, particularly when they were bicameral and had a more refined second branch. See *id.* at 154–55.

<sup>188</sup> THE FEDERALIST NO. 62, *supra* note 90, at 377.

people quickly.<sup>189</sup> In the penultimate *Federalist Paper*,<sup>190</sup> Hamilton explained the importance of the Senate's mode of election to the states' information-gathering.

According to him, some Americans objected to granting the federal government "such large powers" when most people would live too far from the Capitol to monitor its operation.<sup>191</sup> Among other clever responses,<sup>192</sup> Hamilton countered that state governments, in their role as monitors, would eliminate any alleged effects of distance.<sup>193</sup> He wrote that state officials would serve as "sentinels,"

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<sup>189</sup> Although he did not touch on the importance of the Senate's mode of election, Hamilton described this process forcefully in one of the earlier papers:

It may safely be received as an axiom in our political system, that the State governments will, in all possible contingencies, afford complete security against invasions of the public liberty by the national authority. Projects of usurpation cannot be masked under pretenses so likely to escape the penetration of select bodies of men, as of the people at large. The legislatures will have better means of information. They can discover the danger at a distance; and possessing all the organs of civil power and confidence of the people, they can at once adopt a regular plan of opposition, in which they can combine all the resources of the community. They can readily communicate with each other in the different States, and unite their common forces for the protection of their common liberty.

THE FEDERALIST NO. 28, at 181 (Alexander Hamilton); *see also* THE FEDERALIST NO. 26, at 172 (Alexander Hamilton) ("[T]he State legislatures . . . will constantly have their attention awake to the conduct of the national rulers, and will be ready enough, if anything improper appears, to sound the alarm to the people . . ."); Smith & Hamilton, *supra* note 85, at 767 (referring to the states as "bodies of perpetual observation"). But Hamilton did not explain at that time what the legislatures' "means of information" was.

<sup>190</sup> *See* THE FEDERALIST NO. 84, at 515–17 (Alexander Hamilton).

<sup>191</sup> *Id.* at 515–16. Hamilton used quotation marks to introduce the objection but stated that it comes from "objectors," so he was not likely quoting a particular publication or speaker. Among others, though, Brutus had pointed to the size of a country as an insurmountable obstacle in keeping citizens informed about their representatives' actions and motives (and his criticisms were published in the New York Journal contemporaneously with the *Federalist Papers*' publication). *See* Brutus, *Essay I*, N.Y. Journal, Oct. 18, 1787, *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 85, at 371.

<sup>192</sup> His immediate response was that the critique proved too much: if distance really limits government accountability, as argued, then the people should not just withhold "large" powers—they should withhold *all* powers, yet most everyone agreed there ought to be some powers delegated to the Union. *See* THE FEDERALIST NO. 84, *supra* note 190, at 516. His second riposte was that only those living in the immediate vicinity of government can monitor it directly, so those living away from state capitols face the same problem. *See id.* But this large majority of citizens manages just fine: They read the laws and news; they correspond with their representatives; they communicate with the few citizens that personally observe the government's operations. *See id.*

<sup>193</sup> *Id.*

that they would be aware of all the national government's conduct, and that they would quickly pass along their learning.<sup>194</sup> This process benefits the people because they can continue to focus on their occupations and families, thus developing and growing America's economy and culture. And furthermore, state officials can condense, summarize, analyze, and explain the data they collect to improve and ease the people's understanding.<sup>195</sup>

But thus far, Hamilton failed to address a glaring flaw in his theory: assuming, as we must, that the state officials also live at some distance from the Capitol, he did not yet provide an explanation for the state officials' information source. Here, Hamilton shines. "[I]t will be in [the state governments'] power to adopt and pursue a regular and effectual system of intelligence."<sup>196</sup> The "intelligence" and "power" to which Hamilton referred are more than publicly printed laws, newspapers, or communications from nearby residents (information sources he listed a few sentences earlier),<sup>197</sup> which are available to the layman.<sup>198</sup> Included among the earlier list also are "correspondences from . . . representatives." The states, it turns out, under the Constitution's prescribed mode of election, have representatives too—Senators.<sup>199</sup> Hamilton's reference is to informants. The state legislatures would be in continual communication with their Senators; they would require reports; they would read their representatives' votes. And Senators, to at least some degree,<sup>200</sup> would be loyal to those legislatures,<sup>201</sup> bringing back

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<sup>194</sup> *See id.*

<sup>195</sup> Hamilton did not address the obvious risk that state officials will also editorialize the information for their own benefit. The probable reason for this forbearance is his audience. Anti-Federalists sang the praises of their state governments, and their bias played right into Hamilton's hand. My instinct is that Hamilton viewed the checks of federalism as running in both directions. *See, e.g.,* THE FEDERALIST NO. 51, *supra* note 2, at 323 ("[T]he different governments will control each other," such that the federal government would do its own part to correct misinformation).

<sup>196</sup> THE FEDERALIST NO. 84, *supra* note 190, at 516; *see also* THE FEDERALIST NO. 52, at 330 (James Madison) (stating that Congress will be "watched" by "several collateral legislatures").

<sup>197</sup> THE FEDERALIST NO. 84, *supra* note 190, at 516.

<sup>198</sup> Although, as stated, state governments will also have the time, intelligence, and experience to process and analyze this data for their constituents' benefit.

<sup>199</sup> *Id.*

<sup>200</sup> *See infra* Section II.C (explaining that the founding generation also intended for Senators to have a degree of independence).

<sup>201</sup> *See* THE FEDERALIST NO. 46, at 296 (James Madison) (arguing that federal government

necessary information for the states' protection.

### 3. *A Rivalship of Power*

In defending his proposal, Dickinson stumbled upon a second argument for representing the states in Congress, one that altered the course of history: "The preservation of the States in a certain degree of agency is indispensable [sic]. [State legislative election of Senators] will produce that collision between the different authorities which should be wished for in order to check each other."<sup>202</sup> In a word, federalism. Dickinson introduced also the two most important aspects of the theory. First and foremost, he referred to the states in their agency role. In its legitimate forms, federalism theory is geared toward the protection of the freedoms of the people, i.e., the principals.<sup>203</sup> Thus, Dickinson wisely refrained from suggesting that states (and their leaders) deserved a role in order to protect their own interests. Second, he described the concept of the vertical levels of government competing against one another such that each checked the other to secure the people's liberties. Dickinson's proposal, though, went one step further than simply creating two government levels—it gave the lower (and in his mind, weaker) level a place in the upper level where the former could more directly check the infringements of the latter.<sup>204</sup>

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representatives will be biased toward the states); Samuel Huntington, Governor of Connecticut, Speech Regarding the Need for a Strong National Government at the Connecticut Ratifying Convention (Jan. 9, 1788), in 1 DEBATE, *supra* note 58, at 887 (stating that his experience with the Continental Congress was strong advocacy for the representative's respective state, and that he expected the same for the Constitution's Congress). Indeed, Madison expected all Senators to have served in their state's legislature and thought some might even serve in both roles concurrently, see THE FEDERALIST NO. 56, at 348 (James Madison), something the Convention voted not to forbid, Notes of James Madison (June 26, 1787), *supra* note 92, at 429.

<sup>202</sup> Notes of James Madison (June 7, 1787), *supra* note 38, at 152–53 (statement of John Dickinson).

<sup>203</sup> See, e.g., *New York v. United States*, 505 U.S. 144, 181 (1992) (O'Connor, J.) ("The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities . . . . To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals.").

<sup>204</sup> George Mason appears to have recognized this unique trait in Dickinson's argument. Mason, who had the last (powerful, as usual) word before the Committee voted unanimously to recommend election of Senators by state legislatures, argued that there was no "better means" for defending the states against the federal government's encroachments than "giving them some share in, or rather to make them a constituent part of, the Natl.

Dickinson had no need to explain the state motivations that would lead to his predicted “collision.” Those who wished to debate him on this point were more interested in whether the states really needed protecting,<sup>205</sup> or whether the states were actually a trustworthy check.<sup>206</sup> No one told Dickinson that the states would not be motivated to preserve their power against federal encroachment.<sup>207</sup>

During the ratification debates, though, proponents were quick to note the states’ inherent motivations to defend themselves. Indeed, what the ratifiers noticed was that bicameralism could harness those motivations, thus, Congress would be less likely to pass oppressive legislation than with Senators who directly represented the people.

Hamilton’s most obvious explication of the concept came during his earlier-mentioned description of the states’ intelligence network.<sup>208</sup> His description of the network itself was already impressive, but Hamilton took the argument one step further and showed readers that, from the people’s viewpoint, the system is self-executing. Even if the people were to stop pressuring their state legislators for information, the system “may be relied upon, if it were only from rivalry of power.”<sup>209</sup> In other words, state leaders like

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Establishment.” Notes of James Madison (June 7, 1787), *supra* note 38, at 155–56 (statement of George Mason); *see also* Notes of James Madison (June 25, 1787), *supra* note 41, at 407 (statement of George Mason) (similar remarks in front of the Convention).

<sup>205</sup> *See id.* *See* Notes of James Madison (June 7, 1787), *supra* note 38, at 153 (statement of James Wilson); *see also* Notes of James Madison (June 21, 1787), in 1 FARRAND’S RECORDS, *supra* note 38, at 355–56 (statement of James Wilson) (making a similar argument when the Convention prepared to vote on the Committee’s recommendation). Hamilton and Madison agreed wholeheartedly. *See, e.g.,* THE FEDERALIST NO. 25, at 163–64 (Alexander Hamilton); THE FEDERALIST NOS. 46–47, at 294–308; *cf.* Notes of James Madison (June 21, 1787), *supra* note 38, at 357 (statement of James Madison) (arguing that, even if the national government tends to overpower the state governments, the phenomenon makes no difference as long as the people are free).

<sup>206</sup> After all, the state legislatures had instigated some of the states’ “great evils,” including paper money schemes. *See* Notes of James Madison (June 7, 1787), *supra* note 38, at 154 (statement of James Madison). Madison’s distaste for the states, however, did not prevent him from becoming federalism’s most famous advocate. *See* THE FEDERALIST NO. 51, *supra* note 2, at 323; THE FEDERALIST NO. 62, *supra* note 90, at 377 (contending that state legislatures’ election of Senators “giv[es] to the State governments such an agency in the formation of the federal government as must secure the authority of the former”).

<sup>207</sup> *See* Amar, *Indirect Effects*, *supra* note 161, at 1380 (“[T]he Framers counted on [the selfishness of State legislatures] in the way they devised institutions to protect liberty overall . . .”).

<sup>208</sup> *See supra* notes 190–201 and accompanying text.

<sup>209</sup> THE FEDERALIST NO. 84, *supra* note 190, at 516–17; *see also id.* at 516 (arguing that



power too. They will do all they can to maintain a piece of the pie, the bigger the better.

Madison made a similar claim in an earlier paper. Objectors to the Constitution argued that the House of Representatives would be far too small to be “trusted with so much power.”<sup>210</sup> After demonstrating that the small number of Representatives would soon become a nonissue,<sup>211</sup> Madison went on to suggest that America’s situation is such that a small number of Representatives will never be a risk anyway.<sup>212</sup> He noted, among other things, “the spirit which actuates the State legislatures.”<sup>213</sup> Elaborating just a few sentences later, he remarked, “I am unable to conceive that the State legislatures, *which must feel so many motives to watch . . . the federal legislature*, would fail either to detect or to defeat a conspiracy of the latter against the liberties of their common constituents.”<sup>214</sup>

Hamilton and Madison’s proposed benefit is a powerful one. Like Wilson’s bicameralism, which would be “the most useful restraint upon the legislature, because it operates constantly,”<sup>215</sup> the rivalry of power would motivate the states as constituents to continually press their Senators for votes that minimized federal power. And that focus would reduce the opportunity for the federal government to trample on the rights of the people.

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operating the intelligence system will be in a state’s “disposition”); Smith & Hamilton, in 2 DEBATE, *supra* note 85, at 767 (statement of Alexander Hamilton) (referring to the states as “perpetual observers”); cf. James Iredell et. al, Debate Regarding Congressional Control of Elections at the North Carolina Ratifying Convention (July 25, 1788), in 2 DEBATE, *supra* note 81, at 857 (arguing that Congress’s control of elections was not a concern because the state legislatures would “immediately resent” any abuse). Recognizing the agency problem, Hamilton later pointed out that, when Senators go astray, the state legislatures can legislate directly on the national level—through the Amendment process. See THE FEDERALIST NO. 85, *supra* note 46, at 525–26; see also Oliver Ellsworth, Speech Regarding the Dual Sovereignty and Taxing Powers of the Federal and State Governments at the Connecticut Ratifying Convention (Jan. 7, 1788), in 1 DEBATE, *supra* note 58, at 883–84 (“But perhaps at some time or other there will be a context, the states may rise against the general government. If this does take place, if all the states combine, if all oppose, the whole will not eat up the [page break] members, but the measure which is opposed to the sense of the people, will prove abortive.”).

<sup>210</sup> THE FEDERALIST NO. 55, at 343 (James Madison).

<sup>211</sup> *Id.*

<sup>212</sup> *Id.* at 343–44.

<sup>213</sup> *Id.* at 344.

<sup>214</sup> *Id.* (emphasis added).

<sup>215</sup> Wilson’s Response, *supra* note 88, at 823.

#### 4. *A Modern Assessment*

Both benefits that the founding generation recognized came to pass. As to the states maintaining an intelligence network, it is clear that state legislatures required reports from their Senators regarding voting records, among other things.<sup>216</sup> Two factors, though, have certainly diminished the need for a state's information-gathering abilities: technology and the press. The average citizen today can access a great deal of information about the government, and although he or she lacks the time or experience to process that information, certain members of the press have developed such expertise in politics that they can interpret the information. On the other hand, this proliferation of information has depersonalized the relationship entirely. Hamilton envisioned Senators returning home and personally reporting to state legislatures on what they had seen, and then the two could plan a response together. With today's impersonal network of information, the people do not enjoy that privilege. Indeed, it would seem Dickinson's point has become the more important one in that the state legislatures could provide a single location for Senators to seek the consolidated opinions of the people. But, the Seventeenth Amendment succeeded in effecting that depersonalization.

It also succeeded in stripping the Senate's constituency of self-motivated monitoring. The mechanism was certainly working after the Constitution's ratification. Indeed, it worked so well that the states dragged the country into a civil war. Even today, states continue to monitor the federal government,<sup>217</sup> but they have lost

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<sup>216</sup> See, e.g., 46 CONG. REC. 2244 (1911) (statement of Sen. Elihu Root) (opposing the Seventeenth Amendment because reporting his actions to laymen would be more difficult than the current state of affairs—reporting to the state legislatures). Indeed, there is at least one documented example of a Senator in the first Congress being invited by a state legislature to appear and explain a particular vote. See Riker, *supra* note 161, at 457. But the relevance of that invitation is questionable because he refused to appear, and the state did not reelect him. See *id.*

<sup>217</sup> Consider, for example, the challenge to the Patient Protection and Affordable Care Act by twenty-seven states. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012). Nonetheless, in a world of public choice theory, Michael Greve and others have mounted a compelling campaign to demonstrate that the states welcome increased federal power because it reduces horizontal competition and preserves surplus to distribute among factions. See, e.g., MICHAEL S. GREVE, *THE UPSIDE-DOWN CONSTITUTION* 7–8 (2012); see also Ilya Somin, *Why Repealing the Seventeenth Amendment Won't Curb Federal Power*, 12 ENGAGE 88, 91 (2011), available at [www.fed-soc.org/aboutus/DownloadLibrary?id=3670](http://www.fed-soc.org/aboutus/DownloadLibrary?id=3670). If one

their primary outlet for action (instructing Senators). This has prompted a renewed interest in the Senate's role in federalism,<sup>218</sup> and many scholars recognize the potential self-motivation that states would bring to the table as constituents.<sup>219</sup> For now, states must sound the alarm to the people and hope that the people will pressure their Senators into action. In a perverted reversal of roles, it is no longer the state as intermediary between the Senator and the people, but the people as intermediaries between the Senator and the state. And as has become all too clear, the people rarely have the time, resources, and knowledge for effective collective action.<sup>220</sup>

### C. Distinguished and Independent

The word "tyranny" possesses only half the meaning it once did. Today, when one thinks of tyranny, one thinks of a tyrant. A Hitler, Julius Caesar, or King George III. A tyrant is a ruler who exerts dominion over others to diminish their freedom. The founding generation knew such tyranny all too well. They had lived under the taxes of King George III; their suffering under his rule had driven them to sign the Declaration of Independence and separate themselves from their Mother Country.<sup>221</sup> It drove them to war.

But "tyranny" can take another form. "Tyranny" can also refer to a group. And it need not be a small group, like an oligarchy. The group can be much larger. In fact, the group could comprise the *majority* of the population. And it is this half of the meaning that many have forgotten—the "tyranny" of the majority.<sup>222</sup>

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carries that theory to its ultimate conclusion, it would suggest that granting states representation in Congress was actually dangerous to our rights; accordingly, the Seventeenth Amendment should have increased the protection of our liberties. Yet that conclusion contradicts Greve's *own view*. See, e.g., *id.* at 181–82 (associating federalism's failure with the Progressive and New Deal Movements). Admittedly, though, that dissonance may have more to do with the Senate's allotted degree of independence from the states. See generally Section II.C.2.

<sup>218</sup> See Zywicki, *supra* note 131, at 166–67. For a list of examples, see *supra* note 161.

<sup>219</sup> See, e.g., ROSSUM, *supra* note 8, at 1–3 (arguing that the Supreme Court's New Federalism is in error because federalism depended on state "vigilance" through their Senators).

<sup>220</sup> See Ilya Somin, *When Ignorance Isn't Bliss*, in POLICY ANALYSIS 2 (Sept. 22, 2004), available at <http://object.cato.org/sites/cato.org/files/pubs/pdf/pa525.pdf>.

<sup>221</sup> THE DECLARATION OF INDEPENDENCE para. 3 (U.S. 1776) (referring to King George III as a "Tyrant" who is unfit to rule the American people).

<sup>222</sup> The credit for coining the phrase appears to go to Tocqueville. TOCQUEVILLE, *supra*

The founders, like most people today, believed wholeheartedly in majority rule (although they, like us, reasonably disagreed on what degree of consensus is required, and for what types of decisions).<sup>223</sup> However, the founders, perhaps unlike most people today, were not fond of democracy.<sup>224</sup> They chose to elect Senators by state legislatures because they believed this would result in (1) a body of distinguished men<sup>225</sup> (2) that was removed enough from the people (and the states) that it could serve as a check on the vacillations of democracy. This section recounts the historical debates regarding each of those points in turn.

### 1. *Distinguished Men*

Returning to Dickinson's motion before the Committee of the Whole, we learn that Dickinson quickly explained his proposal for state legislature election of Senators with "two reasons."<sup>226</sup> The first focused on the presumed constituency of such elections—it invoked the states' information-collecting ability,<sup>227</sup> as discussed previously,<sup>228</sup> but the second focused on the elected:

[H]e wished the Senate to consist of the most distinguished characters, distinguished for their rank in life and their weight of property, and bearing as strong a likeness to the British House of Lords as

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note 29, at 239–42. But the Framers knew the concept well. *See, e.g.*, THE FEDERALIST NO. 10, *supra* note 133, at 77 (“[M]easures are too often decided . . . by the superior force of an interested and overbearing majority.”).

<sup>223</sup> *See, e.g.*, Notes of James Madison (Aug. 29, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 449 (Max Farrand ed., rev. ed. 1937) [hereinafter 2 FARRAND’S] (statement of Charles Pinckney) (proposing that laws relating to the regulation of commerce require a two-thirds majority of each House).

<sup>224</sup> *See, e.g.*, THE FEDERALIST NO. 10, *supra* note 133, at 81. Note that those who subscribe to a distinction between democracy and majority rule do not find a contradiction therein. *See, e.g.*, TOCQUEVILLE, *supra* note 29, at 239–42.

<sup>225</sup> Notes of James Madison (June 7, 1787), *supra* note 38, at 150 (statement of John Dickinson). It goes without saying that most people today would find the Framers’ vision somewhat flawed for its exclusion of women from voting and government leadership. Although they envisioned Senators as the wisest *men* among us, our citizenry has long since learned that the Senate is only wisest when it includes our greatest *women* as well. The filter of election by state legislatures is just as compatible with our, more enlightened view as it was with theirs.

<sup>226</sup> *See id.*

<sup>227</sup> *See id.*

<sup>228</sup> *See supra* notes 189–201 and accompanying text.

possible; and he thought such characters more likely to be selected by the State Legislatures, than in any other mode.<sup>229</sup>

The reader would not likely be surprised to learn that Dickinson's opinion provoked disagreement, but the reader may be surprised to learn that the point of disagreement had little if anything to do with the desire for "distinguished characters" and more to do with whether state legislatures were the right medium for fulfilling that desire.

As to the first point, Dickinson did not explain at the time why he wished for distinguished Senators, but his colleagues were quick to expound on that hope.<sup>230</sup> Elbridge Gerry<sup>231</sup> referred to the process as a "refinement" and viewed it as a means of separating out the interests of the landed class with those of the commercial.<sup>232</sup> And in case the implication of protecting the interests of the rich is too subtle at first, Gerry later clarified that the commercial interest was synonymous with the "monied interest."<sup>233</sup> With that opinion (which others shared) out in the open though, we can now view it more closely. Gerry and others<sup>234</sup> recognized that the majority of

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<sup>229</sup> Notes of James Madison (June 7, 1787), *supra* note 38, at 150 (statement of John Dickinson).

<sup>230</sup> As mentioned, several aspects of the Senate are beyond the scope of this paper, including membership numerosity. *See supra* note 38. The debate on keeping the Senate small, and thus less prone to the volatility of large decision bodies, intertwined with the debate on electing refined Senators. *See, e.g.*, Notes of James Madison (June 7, 1787), *supra* note 38, at 151 (statement of James Madison).

<sup>231</sup> Gerry ultimately elected not to sign the Constitution. Notes of James Madison (Sept. 17, 1787), *in* 2 FARRAND'S, *supra* note 223, at 648–49. Indeed, among other concerns, he ultimately found the Senate to be *too* aristocratic. *See* Notes of James Madison (Aug. 14, 1787), *in* 2 FARRAND'S, *supra* note 223, at 285–86. Still, his concern was never specific to the mode of election but the combination of other factors (e.g., term length and inability for states to recall senators). *See id.*

<sup>232</sup> Notes of James Madison (June 7, 1787), *supra* note 38, at 152 (statement of Elbridge Gerry).

<sup>233</sup> *See id.* at 154 (statement of Elbridge Gerry); *see also* POLE, *supra* note 39, at 170 (finding the Senate to "subtly incorporate[] undertones of class").

<sup>234</sup> *See* Notes of James Madison (June 7, 1787), *supra* note 38, at 154 (statement of Roger Sherman) (agreeing that election by state legislatures was far more likely to produce "fit men" than direct, popular election in larger districts, per Wilson's proposal). Oliver Ellsworth's support was also strong. Ellsworth actually rejected the notion that state legislative election of Senators would make Senators any more representative of state interests (he assumed citizenship was sufficient to engender such representation), yet he believed that mode necessary because it was more likely to result in wise senators. *See* Notes of James Madison (June 25, 1787), *supra* note 41, at 406 (statement of Oliver Ellsworth).

American citizens were cash-poor and often in debt.<sup>235</sup> Accordingly, the majority, when left to its own devices, would vote to (1) redistribute wealth, supplementing its lack of cash, and (2) inflate the currency, easing the ability to repay its debts.<sup>236</sup> The minority of citizens, who tended to be the wealthier creditors, could not depend on raw voting power to protect their property. This is not to say that Gerry and others rejected the concept of majority rule.<sup>237</sup> Consider his exact words: “The elections being carried thro’ this refinement, will be most likely to provide some check in favor of the commercial interest agst. the landed . . . .”<sup>238</sup> Unless “refinement” is code for “corruption,” Gerry did not intend to thwart the majority’s will. Rather, he wanted a refined body to provide a “check,”<sup>239</sup> to provide feedback to the majority on the long-term ramifications of their proposal and to slow down the process long enough for cool consideration.<sup>240</sup> In regard to inflation, a salient concern due to the

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<sup>235</sup> See Notes of James Madison (June 7, 1787), *supra* note 38, at 152 (statement of Elbridge Gerry).

<sup>236</sup> See *id.* at 154–55 (statement of Elbridge Gerry) (distinguishing between the people, who were in favor of paper money, and the state legislatures, which were against it).

<sup>237</sup> Their conception of property rights would probably have considered some laws out of bounds per se, whether preferred by a majority or not. See Locke, *supra* note 47, at 163 (arguing that taxes must be authorized by the consent of the majority, or else the sovereign violates natural laws of property).

<sup>238</sup> Notes of James Madison (June 7, 1787), *supra* note 38, at 152 (statement of Elbridge Gerry).

<sup>239</sup> However, Robert Yates’ recollection of Gerry’s speech is somewhat different. Yates records Gerry’s opining that the election by state legislatures would provide the commercial interest “better represent[ation].” Notes of Robert Yates (June 7, 1787), in 1 FARRAND’S RECORDS, *supra* note 38, at 157. The statement is particularly condemning because it does not refer to representation of the commercial interest’s views or desires but of the interest itself, which implies a greater proportion of merchant-friendly Senators in the Senate than merchants in the population. If this was Gerry’s intent, then the foundation for his argument is much weaker. See Notes of Rufus King (June 7, 1787), *supra* note 100, at 158 (statement of James Madison) (arguing that a national government is distinct from a confederation and must abandon the notion that the Senate represents only the “Wealth of the nation”). To be fair, though, his concerns about debtors’ shortsightedness were justified—a deadly mob had recently terrorized his home state in a movement now known as Shays’ Rebellion. See generally STEWART, *supra* note 77, at 11–15 (summarizing the Rebellion’s motives and violence). But distorting the minority’s representation in a proportionally represented body (which was the proposal on the table at that point, see Notes of James Madison (June 7, 1787), *supra* note 38, at 151 (statement of James Madison)) seems a rough and perverse way to protect their rights. Our Framers wisely chose a host of sounder structural checks to accomplish that purpose, including the Presidential veto, judicial review, and super-majority voting requirements for constitutional amendments.

<sup>240</sup> In this, Gerry’s vision was no different from that of James Madison. See Notes of James Madison (June 7, 1787), *supra* note 38, at 151 (statement of James Madison)

states' paper money rage,<sup>241</sup> Gerry likely had in mind a refined Senate to remind debtors that creditors need a return on investment in real dollars, and the result of inflation is not cheating debts but higher interest rates and, if the uncertainty surpasses a certain threshold, frozen credit markets. In other words, the Senate's role would be to engage in a dialogue with the majority to aid in looking past momentary desires and discovering their true will.<sup>242</sup> Otherwise, Congress would become an instrument of oppression against the minority.<sup>243</sup>

Gerry's sentiments fleshed out Dickinson's initial reference to the House of Lords. That body, too, was composed of distinguished men—specifically the nobility and clergy. These distinct interests stood as barriers to the ability of the Commons to tax and oppress the minority at will.<sup>244</sup> But the analogy had obvious limits, and it was left to James Wilson to articulate them: Britain's government presupposed certain laws (such as primogeniture), culture, and most obviously, *a nobility*.<sup>245</sup> To be clear, though, Wilson rejected only the idea of basing the Senate on an aristocratic constituency; he readily concurred that Senators ought to be “men of intelligence & uprightness.”<sup>246</sup>

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(describing the Senate as one that would review proposed laws with “more coolness” than the House).

<sup>241</sup> See *id.* at 154 (statement of James Madison). See generally STEWART, *supra* note 77, at 20–21 (describing the country's currency problems).

<sup>242</sup> See Notes of James Madison (June 7, 1787), *supra* note 38, at 154 (statement of Elbridge Gerry) (arguing that the legislatures, and thus their elected Senators, are more restrained by their “sense of character” than are the people).

<sup>243</sup> See *id.* at 152 (statement of Elbridge Gerry).

<sup>244</sup> See Notes of Robert Yates (June 7, 1787), *supra* note 239, at 156–57 (statement of John Dickinson) (describing the houses of Parliament as “mutual checks on each other,” which promote the country's “real happiness and security”).

<sup>245</sup> See Notes of James Madison (June 7, 1787), *supra* note 38, at 153 (statement of James Wilson); see also HOEBEKE, *supra* note 8, at 123 (“The states were left to determine their own ‘natural aristocracy’ . . . .”); POLE, *supra* note 39, at 168 (“[T]he [Virginia] senate lacked a natural constituency; the question could be generalized for America.”).

<sup>246</sup> Notes of James Madison (June 7, 1787), *supra* note 38, at 153–54. When the Convention later debated the Committee's proposed mode of election, Charles Pinckney gave a lengthy speech distinguishing between Britain's need for a House of Lords and America's need for a refined Senate. See Notes of James Madison (June 25, 1787), *supra* note 41, at 399–404. Oddly, though, it appears that he concluded that speech by reintroducing a plan, see Notes of Robert Yates (June 25, 1787), in 1 FARRAND'S RECORDS, *supra* note 38, at 412 (statement of Charles Pinckney), he had proposed earlier to the Committee, compare *id.* (statement of Nathaniel Gorham) (considering Pinckney's plan because it departed from proportional representation to a degree), with The Pinckney Plan,

Nevertheless, Wilson (and Madison) had a yet stronger argument that state legislative election was unwise. If state legislatures were guilty of yielding to the people's temporary fervors, and subjecting the commercial class to the landed one, then they were incapable of electing Senators who could constrain those same fervors.<sup>247</sup> As stated, the argument does not demonstrate the superiority of the people as the electorate, but Madison did so by making a further factual contention: the legislatures had inflated paper currency, at times, without the people's encouragement.<sup>248</sup> If such was the case, then popular election in large districts was the superior mode.<sup>249</sup>

The Committee, and later the Convention, sided with Dickinson and Gerry—election of Senators by state legislatures was most likely to result in a distinguished, cool-headed second house. The ratifiers could now debate the topic.

Some opponents of the Constitution were appalled by the aristocratic nature of the Senate. The Framers had found it easy to discuss the House of Lords and a potential American analog, but they belonged to the inner circles that could populate such a house. The public did not share that background, and Anti-Federalists sarcastically exposed the Framers' intent to the public.<sup>250</sup> The tactic

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reprinted in 3 FARRAND'S RECORDS, *supra* note 185, appx. D; Notes of James Madison (June 7, 1787), *supra* note 38, at 155 (statement of Charles Pinckney) (proposing to divide the Senate into three classes in which the largest was represented by three Senators, the middle by two, and the smallest by one), which elected Senators by the House of Representatives so they would be more "permanent & independent," *see id.*; The Pinckney Plan, *supra*, appx. D, at 596, 605.

<sup>247</sup> See Notes of Madison (June 7, 1787), *supra* note 38, at 154 (statement of James Wilson); *see also id.* (statement of James Madison).

<sup>248</sup> See *id.* at 154 (statement of James Madison). Gerry specifically refuted this factual claim and contended that, if either side had ever stood against the allure of debasing the currency, it was those states that had an aristocratic second branch. See *id.* at 154-55 (statement of Elbridge Gerry).

<sup>249</sup> See *id.* at 154 (statement of James Wilson) (arguing that election by the people in large districts was "most likely" to elect the most able Senators).

<sup>250</sup> See Centinel I, *supra* note 113, at 60 (supposing that Senators will be "the better sort, the well born, &c" (emphases removed)); Letter IV from the Federal Farmer to the Republican (Oct. 12, 1787), in *Observations Leading to a Fair Examination of the System of Government Proposed by the Late Convention; and to Several Essential and Necessary Alterations in It*, reprinted in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 85, at 249 (same). Interestingly, not all Anti-Federalists focused their efforts on the Senate's election mode. In what is now known as the *Cornelius Letter*, Cornelius argues that the size of the House's electoral districts will result in *Representatives* who favor the merchant class. See Cornelius, *supra* note 179, at 143. Senate elections are less troublesome, then, because each



was fair game, but it raised an interesting quandary: the Framers needed to convince the people that a significant threat to liberty was the people themselves—that's not easy to swallow. Indeed, it was a smack in the face for a people that through bloodshed had recently earned the right to govern themselves. The Constitution's proponents' success depended, in part, on their ability to underscore the importance and impact of the moment.<sup>251</sup> Here was a chance to show that the American people could unite and make hard choices that would bless their lives and those of their posterity.<sup>252</sup>

The opponents' more principled argument was that mode of election, combined with other aspects, removed the Senate too far from the people.<sup>253</sup> They argued that the Senate was destined to become a "permanent aristocracy."<sup>254</sup> If well founded, the concern was valid.<sup>255</sup> Unlike Britain with its House of Lords, and in line with Wilson's argument at the Convention,<sup>256</sup> America had no nobility to comprise a permanent, elected body as of right: the people were

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state legislator's district would be much smaller. See Kenyon, *supra* note 27, at 13.

<sup>251</sup> See HOEBEKE, *supra* note 8, at 136 ("The notion that every citizen ha[s] an equal, and thus direct, voice in commanding the government has been the most consistent and perhaps the strongest force for change in American history . . . . Not since 1787 ha[s] there been a group of statesmen sufficiently capable of persuading the American people otherwise.").

<sup>252</sup> See THE FEDERALIST NO. 1, *supra* note 5, at 33 ("[I]t seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice . . . ."). See generally BRUCE ACKERMAN, 1 WE THE PEOPLE 6–7 (1991) (describing the general difficulty associated with marshaling the people for constitutional decision-making). Hamilton tried a different tack in a later *Paper*, in which he treated the people's ability to err as common public knowledge, almost as if to persuade those who disagreed that they had long since lost the argument. See THE FEDERALIST NO. 71, at 432 (Alexander Hamilton).

<sup>253</sup> See Centinel I, *supra* note 113, at 60–61.

<sup>254</sup> *Id.* at 61 (emphasis removed); see also Kenyon, *supra* note 27, at 27 ("[M]ost Anti-Federalists feared the Senate more than the President . . . .").

<sup>255</sup> Although many Framers had borrowed the House of Lords as a model for the Senate, few of them supported a permanent Senate. Madison later wrote that such a concept was "repugnant to the genius of America," THE FEDERALIST NO. 63, *supra* note 89, at 385, and even Elbridge Gerry eventually became disillusioned with Senators' term lengths and ability to serve consecutively for life, see *supra* note 231. The small group that advocated for a permanent aristocracy (during "good behavior") included Alexander Hamilton, see Notes of James Madison (June 18, 1787), *supra* note 81, at 291 (statement of Alexander Hamilton), Charles Pinckney (whose position, again, seemed to contradict a later monologue, see *supra* note 246), see Notes of James Madison (June 7, 1787), *supra* note 38, at 155 (statement of Charles Pinckney), and George Read, see Notes of James Madison (June 25, 1787), *supra* note 41, at 409 (statement of George Read).

<sup>256</sup> See *supra* notes 245–246 and accompanying text.

sovereign. Thus, distinguished Senators were only useful to the degree that they actually refined the majority's temporary passions into its true will;<sup>257</sup> a totally insulated Senate was far more likely to replace the will of the majority with its own will.

The objection required significant treatment. First of all, the objection alleged that the sum of all the Senate's characteristics resulted in a permanent aristocracy, so proponents sometimes defended the propriety of each characteristic separately.<sup>258</sup> Second, the effects of electing Senators by state legislatures are varied and many (this Note only focuses on the bicameral effects and still only addresses some), so justifications for the mode of election needed to be equally so.<sup>259</sup> Some of these various arguments were described earlier among the objections to bicameralism generally,<sup>260</sup> and some have yet to be.<sup>261</sup> For now, though, it's appropriate to review responses to the objection that "distinguished" Senators, chosen through state legislative election, would be too far removed from the people.<sup>262</sup>

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<sup>257</sup> I find the argument strongest when limited to the aristocratic minority's ability to hold up the majority in passing legislation. Centinel apparently thought the Senate would be able to go one step further by forcing inferior legislation into law. See Centinel II, *supra* note 114, at 86. James Wilson responded to this claim with the obvious rejoinder that the House of Representatives provided a means for the people to check such measures (and the President's veto provided a second check). See James Wilson, Speech Regarding Centinel's Critiques at a Public Meeting (Oct. 6, 1787), in 1 DEBATE, *supra* note 58, at 66; cf. THE FEDERALIST NO. 63, *supra* note 89, at 388 (arguing that, in order for a corrupt Senate to reign in tyranny, it would need to corrupt also the state legislatures, the House of Representatives, and the people themselves). Centinel rejected Wilson's argument because he thought the House (and President) would be beholden to the power of the Senate and thus an insufficient check. See Centinel II, *supra* note 114, at 86–87. The argument is that Congress will rig elections that result in a House that is indifferent to the people, but this suffers from circularity in that it assumes an indifferent House that permits the rigging of elections in the first place. See *id.*

<sup>258</sup> See, e.g., *supra* note 179 (introducing some literature on the debate over term length and rotation out of office).

<sup>259</sup> As mentioned earlier, one such effect was an augmented federalism, which various modern-day scholars have addressed, referring to historical debates along the way. See *supra* note 161.

<sup>260</sup> To review briefly those objections, see *supra* notes 113–114 and accompanying text, and to review some of the Federalists' responses, see *supra* notes 115–127 and accompanying text.

<sup>261</sup> See *infra* notes 310–337 and accompanying text.

<sup>262</sup> The focus of this Note on bicameralism limits the universe of worthwhile responses. Note, though, that the founding generation recognized a host of reasons for establishing a distinguished Senate that reached beyond augmentation of bicameralism, including that branch's role in foreign affairs. See, e.g., THE FEDERALIST NO. 64, *supra* note 91, at 390

Madison provided both a direct and general response.<sup>263</sup> His direct response was that history proved the critics wrong. He referred critics to the example of Britain.<sup>264</sup> The House of Lords also sought a “distinguished” membership.<sup>265</sup> Indeed, the example even stacks the deck in the objectors’ favor: that House was hereditary, permanent, and stocked with actual nobility.<sup>266</sup> Surely, then, this permanent aristocracy proved the evils of the proposed Senate.<sup>267</sup> In fact, the result had been exactly the opposite: “Unfortunately, however, for the anti-federal argument, the British history informs us that this hereditary assembly has not been able to defend itself against the continual encroachments of *the House of Representatives . . .*”<sup>268</sup> The popular branch of Parliament, as the ratifying generation well knew, had entirely overtaken the power of the Lords.<sup>269</sup> Accordingly, the American Senate, which would temper its desire for “distinguished” characters with term lengths and actual elections, was far more likely to be overtaken by the first House than vice versa.

Madison’s general response was a defense of representative government. He rejected wholesale the notion that representatives’ votes should reflect the outcome of a vote by the entire constituency.<sup>270</sup> Representatives, then, are not simply proxies whose occupation derives solely from the inefficiencies of referenda. Their

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(stating that election by state legislatures will ensure Senators who are “best qualified” for making treaties).

<sup>263</sup> Madison was not the only proponent to rebut the objection. Noah Webster responded with a mild form of denial. See A CITIZEN OF AMERICA, *supra* note 58, at 135 (arguing that the Senate will not be “composed of a different order of men”). To be fair, though, he was trying to distinguish Senators from Europe’s nobility, see *id.* at 134–35; Webster earlier praised the age qualifications and term lengths of Senators because these would lead to wise, experienced, respectable men who were “not liable to the bias of passions that govern the young,” *id.* at 132. Another response of that era praised the Constitution’s focus on a Senator’s merits—a stark contrast from the focus on parentage and wealth in the House of Lords. See An American Citizen (Pseudonym for Tench Coxe) II, IND. GAZETTEER (Phil.), Sept. 28, 1787, *reprinted in* 1 DEBATE, *supra* note 58, at 25–26.

<sup>264</sup> See THE FEDERALIST NO. 63, *supra* note 89, at 388–89, 91.

<sup>265</sup> See *id.*

<sup>266</sup> *Id.*

<sup>267</sup> See *id.*

<sup>268</sup> *Id.* at 389 (emphasis added).

<sup>269</sup> See THE FEDERALIST NO. 63, *supra* note 89, at 388–89, 91; *cf. id.* at 389–90 (surveying a few other historical examples in which the popular branch dominated the other).

<sup>270</sup> See THE FEDERALIST NO. 10, *supra* note 133, at 82 (“[I]t may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for the purpose.”).

purpose instead is to “refine and enlarge the public views.”<sup>271</sup> That is, representatives are to gather the opinions of their constituents, like a proxy would, but not automatically vote as the majority (or plurality) of constituents would.<sup>272</sup> Rather, they are to “refine” those views by purging them of biases and prejudices that taint them. And they are to “enlarge” those views by exposing the long-term and wide-ranging effects of each. Such a mandate requires wisdom.<sup>273</sup> In later papers, Madison argued that senatorial election by state legislatures will produce wise Senators.<sup>274</sup> And because of their wisdom, senators present an ideal, specific application of the general principles of proper representation.<sup>275</sup>

Madison recognized, though, that a Senator might soon forget the constituency and prefer his or her own opinion in every case.<sup>276</sup> He wrote several counterpoints to assuage that very concern.<sup>277</sup> But the most important response, in my view, derives simply from the way Madison stated the problem, that these deceivers “*first obtain the suffrages*, and then betray the interests of the people.”<sup>278</sup> If Senators obstinately continue to assure constituents that their view is in fact a more refined one, and the unworthy just need time to recognize that truth, then their inferiors have the very real ability to remove them from office by seeking redress from the state legislature.<sup>279</sup>

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<sup>271</sup> *Id.*

<sup>272</sup> Madison later surveyed the reputedly best historical senates and notes that these shared the legislative power with the people in some direct capacity. See THE FEDERALIST NO. 63, *supra* note 89, at 386–87. For this reason, he argued, the American Senate, which fully excluded the people from governing in their collective capacity, will have the “most advantageous superiority.” *Id.* at 387. Note, though, that he qualified the contention based on the country’s size. See *id.* See generally THE FEDERALIST NO. 10, *supra* note 133, at 83–84 (making his famous argument that a larger country would actually create too diverse a mix of interests for any one faction to dominate).

<sup>273</sup> See *id.* at 82 (stating that the legislature’s “wisdom may best discern the true interest of their country”).

<sup>274</sup> See THE FEDERALIST NO. 62, *supra* note 90, at 377 (writing that the mode of election will “favor[] a select appointment”).

<sup>275</sup> See THE FEDERALIST NO. 63, *supra* note 89, at 384 (describing again the refinement process—this time with the Senators, a “respectable body of citizens,” as the refiners).

<sup>276</sup> See THE FEDERALIST NO. 10, *supra* note 133, at 82; cf. THE FEDERALIST NO. 71, *supra* note 252, at 433 (“The representatives of the people, in a popular assembly, seem sometimes to fancy that they are the people themselves . . .”).

<sup>277</sup> See THE FEDERALIST NO. 10, *supra* note 133, at 82–84.

<sup>278</sup> *Id.* at 82 (emphasis added).

<sup>279</sup> Without doubt, the process is a slow one, but this is by design. The time lag provides us, the electorate, the chance to consider whether a Senator is being obstinate or wise. See

Beyond his methodical responses to the objection of an aristocratic Senate, Madison added a novel, positive argument worth our consideration. The point surfaces during a related argument that America's need for respect among foreign nations<sup>280</sup> is best met by a "select" (and stable) Senate designed for that purpose.<sup>281</sup> Amidst that discussion, Madison mentioned that the "select" Senators' familiarity with foreign laws and customs will provide an impartial guide *domestically* when Congress legislates on tough or novel issues.<sup>282</sup> Herein lies a device for protection of the people's liberty: Senators chosen by state legislatures will ensure laws that promote the public good because they will judge those measures against, not only their own wisdom, but the accumulated wisdom of other nations.<sup>283</sup>

Madison and his comrades were ultimately successful in convincing the people of the need for a distinguished Senate that could refine public views and promote the good of society.

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*infra* Section II.C.2. Until then, an allegedly rogue Senator is, of course, unable to force personal views into law. *See supra* note 257. And Madison argues that the size of our country will lead to few such instances in the first place. *See* THE FEDERALIST NO. 10, *supra* note 133, at 82 (arguing that America's large population entails a larger pool from which to choose its representatives, which in turn entails "a greater probability of a fit choice").

<sup>280</sup> Although the theme of foreign affairs recurred throughout the debates over the Senate, *see supra* notes 91–92, 262 and accompanying text, the arguments justifying America's need to establish herself among her foreign peers are beyond the scope of this Note. John Jay, a legend in the field of foreign relations, addressed this topic early and thoroughly in *The Federalist Papers*. *See generally* THE FEDERALIST NOS. 2–5 (John Jay).

<sup>281</sup> *See* THE FEDERALIST NO. 63, *supra* note 89, at 382.

<sup>282</sup> *See id.*

<sup>283</sup> In the wake of *Lawrence v. Texas*, 539 U.S. 558 (2003), *Roper v. Simmons*, 543 U.S. 551 (2005), and the backlash against the internationalist perspective in those and similar cases, *see, e.g., Roper*, 543 U.S. at 608 (Scalia, J., dissenting); *Lawrence*, 539 U.S. at 598 (Scalia, J., dissenting); Ernesto J. Sanchez, *A Case Against Judicial Internationalism*, 38 CONN. L. REV. 185, 188–90 (2005); Janella Ragwen, *The Propriety of Independently Referencing International Law*, 40 LOY. L.A. L. REV. 1407, 1430–34 (2007) (detailing some of the backlash), perhaps Madison's comments are controversial. In my view, though, Madison's suggestion is significantly distinct from the criticized approach of *Roper* and its ilk. First, Madison's discussion bears no relation to judicial methods; he suggested that a legislator can benefit from considering the views of other nations before passing laws that might tread on the rights of the people. *See* THE FEDERALIST NO. 63, *supra* note 89, at 382. Second and relatedly, a legislator's consideration of foreign views only impacts the public if that consideration results in some form of prospective codification, subject to the constitutional requirements of bicameralism, presentment, and other requirements. The argument seems entirely independent of an interpretation process that approaches an already enacted text and retroactively modifies it to fit perceived contemporary values.

## 2. *Independence from the People (and the States)*

The first delegate to criticize John Dickinson's proposal for state legislature election of the second branch was Charles Pinckney.<sup>284</sup> From the average reader's viewpoint, though, his criticism might seem odd: Pinckney argued that the proposal was faulty because it would result in too many Senators<sup>285</sup> (by his calculations, at least eighty).<sup>286</sup> He neither explained his reasons for desiring a small Senate, nor even acknowledged the fact that he was assuming one to be beneficial.<sup>287</sup> More odd still is the fact that Dickinson's subsequent response, although in disagreement, made no mention of Pinckney's point being unfounded or novel;<sup>288</sup> and the next two speakers (Hugh Williamson and Pierce Butler) appear to agree entirely with Pinckney's premise.<sup>289</sup> It was not until Madison's response to Dickinson that the unstated assumptions of the previous speakers emerged. A small Senate was desirable because it accorded with the Senate's purpose—cool deliberation of the people's often hasty proposals.<sup>290</sup> Through that paradigmatic view of the Senate, Pinckney's and so many other comments come into focus.

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<sup>284</sup> See Notes of James Madison, (June 7, 1787), *supra* note 38, at 150 (statement of Charles Pinckney).

<sup>285</sup> As a reminder, the Framers at this point viewed the Senate through the lens of proportional representation. See *supra* note 105. Thus, Pinckney began his comment by positing the minimum possible representation ratio, i.e., the smallest state be represented by one Senator, and calculated the number of Senators who would then be allotted to the remaining states based on their populations. See Notes of James Madison, (June 7, 1787), *supra* note 38, at 150 (statement of Charles Pinckney).

<sup>286</sup> See Notes of James Madison, (June 7, 1787), *supra* note 38, at 150 (statement of Charles Pinckney).

<sup>287</sup> See *id.* It's possible that Madison's note-taking is to blame for Pinckney's laconic statement. But this seems unlikely considering Yates' and King's omission of Pinckney's statement entirely. See Notes of Robert Yates (June 7, 1787), *supra* note 239, at 156; Notes of Rufus King (June 7, 1787), *supra* note 100, at 158. Furthermore, even if Madison's foreknowledge influenced the terse record, that fact still proves the point that the Framers understood the Senate to be a small, cool-headed, deliberative check on the larger, more passionate popular branch.

<sup>288</sup> See Notes of James Madison, (June 7, 1787), *supra* note 38, at 150 (statement of John Dickinson).

<sup>289</sup> See *id.* at 150–51 (statement of Hugh Williamson); *id.* at 151 (statement of Pierce Butler).

<sup>290</sup> See *id.* (statement of James Madison) (stating that cool deliberation was the “use” of having a senate in the first place).

The Convention's baseline, the Virginia Plan,<sup>291</sup> presumed an independent Senate. It proposed a Senator's term length in qualitative terms: "a term sufficient to ensure their independency."<sup>292</sup> Election by state legislatures simply continued the paradigm by injecting a layer of elections between the people and Senators, thereby increasing the Senate's independence. Indeed, Dickinson's explanation for his proposal was that it would "check the Democracy."<sup>293</sup>

Apart from Dickinson's comment and Madison's explicit explanation, most Framers seem to have taken it for granted that the Senate ought to be independent<sup>294</sup> and that the mode of election was a means of establishing that independence. Their debate centered less on the need for independence and more on the best election mode for attaining independence. On one end of the spectrum stood Alexander Hamilton, a staunch critic of democracy.<sup>295</sup> He advocated that the people elect electors to choose their Senators, but that the Senators serve for life.<sup>296</sup> On the other end of the spectrum stood (as always) James Wilson, refusing to relent on the importance of the people electing their national leaders.<sup>297</sup> But even he acknowledged the need for a steadier second branch<sup>298</sup> and ultimately modified his proposal so that, as in Hamilton's proposal, the people elected electors, who in turn elected Senators.<sup>299</sup> In the middle were delegates like Madison, debating whether a state legislature was the best means of securing

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<sup>291</sup> See *supra* notes 77–80 and accompanying text.

<sup>292</sup> Notes of James Madison (May 29, 1787), *supra* note 78, at 20. It is interesting to note that the Committee of the Whole debated a number of years for the term but never so much as proposed that the actual requirement of independency be removed. See Notes of James Madison (June 12, 1787), in 1 FARRAND'S RECORDS, *supra* note 38, at 218–19. It wasn't until a few weeks later, after the Convention had settled on a term of six years, that striking the phrase was agreed upon without debate (though not unanimously). See Notes of James Madison (June 25, 1787), *supra* note 41, at 408.

<sup>293</sup> Notes of Rufus King (June 7, 1787), *supra* note 100, at 158.

<sup>294</sup> See, e.g., Notes of James Madison, (June 7, 1787), *supra* note 38, at 155 (statement of Charles Pinckney).

<sup>295</sup> See, e.g., Notes of James Madison (June 18, 1787), *supra* note 81, at 291 (statement of Alexander Hamilton) (predicting that the "evils operating in the States [would] soon cure the people of their fondness for democracies").

<sup>296</sup> See *id.*

<sup>297</sup> See Notes of Madison, (June 7, 1787), *supra* note 38, at 154 (statement of James Wilson).

<sup>298</sup> See *id.* (advocating popular election because it would yield "upright[]" Senators).

<sup>299</sup> See Notes of James Madison (June 25, 1787), *supra* note 41, at 406 (statement of James Wilson).

independency. Madison was unconvinced that a constituency of states would result in an independent Senate when the states themselves had often indulged in the momentary demands of the people.<sup>300</sup> Pinckney agreed with the benefits of independence<sup>301</sup> but thought election by the House accorded better with first principles.<sup>302</sup> And some, like Oliver Ellsworth, were adamant that the state legislatures would do the job best.<sup>303</sup>

The debate was largely an empirical one,<sup>304</sup> but one can compare the theories. Utilizing electors might result in more independent Senators because the electors would have little anticipated reward for adhering to the people's wishes.<sup>305</sup> Moreover, the Electoral College would dissolve after the election, leaving the Senators with no direct constituency to pander to. State legislatures cannot claim either benefit: (1) the legislators' career might be on the line for deviating from the people's wishes,<sup>306</sup> and (2) the legislatures were in constant existence, enabling them to influence continually the votes of Senators. But the legislatures, on the other hand, processed so many popular requests that to think a particular legislator's career was determined solely by his or her senatorial vote is incredibly

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<sup>300</sup> See Notes of Madison, (June 7, 1787), *supra* note 38, at 154 (statement of James Madison). Madison's arguments were likely slanted by his overwhelming insistence on proportional representation in both houses of Congress, *see supra* note 105 and accompanying text. A few days later, as the Committee debated term lengths, Madison was happy to point out that Maryland, as opposed to those states that popularly elected their legislature's second house, provided a model of "stable & firm Govt." See Notes of James Madison (June 12, 1787), *supra* note 292, at 218–19 (statement of James Madison).

<sup>301</sup> See Notes of James Madison (June 25, 1787), *supra* note 41, at 400 (statement of Charles Pinckney).

<sup>302</sup> See *id.* at 403 (arguing that a Senate elected by any other means would have no "order" of society to represent).

<sup>303</sup> See Notes of Robert Yates (June 25, 1787), *supra* note 246, at 414 (statement of Oliver Ellsworth) (arguing that the states were more competent to choose Senators whose "weight and wisdom may check the inconsiderate and hasty proceedings of the first branch").

<sup>304</sup> For a brief comparison of the Senate's independence pre-and post-Seventeenth Amendment, see *infra* notes 344–352 and accompanying text.

<sup>305</sup> Cf. THE FEDERALIST NO. 68, at 412–13 (Alexander Hamilton) (arguing that the electors of the President will be largely immune to corruption, in part, because they are chosen for the "temporary and sole purpose of making the appointment"). But see *Who Are the Electors?*, NATIONAL ARCHIVES, <http://www.archives.gov/federal-register/electoral-college/electors.html> (last visited Feb. 3, 2015) ("Throughout our history as a nation, more than 99 percent of Electors have voted as pledged.").

<sup>306</sup> Indeed, Madison's doubts stemmed from evidence of this dependence. See Notes of James Madison, (June 7, 1787), *supra* note 38, at 154 (statement of James Madison).



unlikely.<sup>307</sup> Moreover, the benefits of an electoral college are debatable: (1) electors were to be capable, and presumably well-known, men in the community,<sup>308</sup> which means they had reputations on the line and could easily submit their loyal voting history as evidence of their own qualifications for a particular public office, and (2) the dissolution of the college removed any barrier that momentarily existed between the Senators and the people.

For a multitude of reasons, the Committee was unanimous and the Convention largely convinced that electing the Senate by state legislatures was best.<sup>309</sup> The more arduous task of convincing the people remained, and the people were not as quick to admit the follies of democracy.

The ratifiers' debate over an independent Senate, and the contribution of election by state legislatures to that independence, included by definition the objection of a too far removed Senate.<sup>310</sup> Anti-Federalists were opposed to the lodging of so much power in such an independent body.<sup>311</sup>

The Framers had viewed this decision positively (although they certainly disagreed, at times strongly, about the degree of power and independence<sup>312</sup>) and, as mentioned, effectively assumed the virtues of such an intent;<sup>313</sup> proponents of the ultimate proposal now needed to elaborate on the reasons for strengthening the Senate's

<sup>307</sup> *But see* HOEBEKE *supra* note 8, at 109 (reporting that, prior to the Seventeenth Amendment, state legislature candidates pledged to vote for particular senatorial candidates); Riker, *supra* note 161, at 463 (same).

<sup>308</sup> *Cf.* THE FEDERALIST NO. 68, *supra* note 305, at 412 (describing presidential electors as "capable" men).

<sup>309</sup> *See* Journal (June 7, 1787), *supra* note 96, at 149 (Committee of the Whole's 11-0 vote); Journal (June 25, 1787), *supra* note 80, at 395 (Convention's 9-2 vote).

<sup>310</sup> *See* text accompanying notes 253-257.

<sup>311</sup> *See* Republicus, *supra* note 113, at 167 (questioning the extensive powers of a body that is "independent of the people, not in any instance responsible to them"); *see also* Centinel I, *supra* note 113, at 60-61. *But see* Kenyon, *supra* note 27, at 27 (reporting that Anti-Federalists did not propose direct election for the Senate and that many agreed on the Senate's stability as a requirement for good government). The Federal Farmer acknowledged and praised the cool deliberation that would pervade the Senate due to the independence derived from its mode of election but advocated for, among other changes, a reduction in term length to tone down the degree of independence. *See* Federal Farmer XI, *supra* note 85, at 288. Luther Martin actually promoted the independence of the Senate as an argument for the presidential veto's dispensability. *See* Martin, *supra* note 85, at 53-54.

<sup>312</sup> *See* *supra* note 231 (noting Elbridge Gerry's ultimate dissatisfaction with the chosen degrees of power and independence).

<sup>313</sup> *See* *supra* text accompanying notes 284-290.

independence.

Publius did not shrink from taking up the cause, and Madison's *Federalist Paper No. 63* is the best on-point example of the Federalist response. The beginning of the *Paper* enumerates reasons that people (whether influenced by a temporary democratic delusion or not) would desire Congress to include a more stable branch, the most prominent of which is maintaining foreign relations.<sup>314</sup> At the halfway point, though, Madison shifted gears: "Thus far I have considered the circumstances which point out the necessity of a well-constructed Senate only as they relate to the representatives of the people. . . . [S]uch an institution may be sometimes necessary as a defense to the people against their own temporary errors and delusions."<sup>315</sup> The statement touched on two important themes. First, and perhaps most important for overcoming the barriers a reader would naturally erect at the hint of anti-democratic notions, Madison labels the people's errors as "temporary."<sup>316</sup> He did not mean to suggest that the people are in need of a leader (read: tyrant) to correct their continual errors and direct their activities. Rather, the image is more like a trusted friend whom the people empower to provide a sounding board, and even legislative bottleneck, in the heat of the moment. Second, he reminded the reader that this structural choice, like all others, is a "defense" of the people's natural rights. The majority, of course, wishes for the defense of their rights, but in a hasty moment they may at times demand legislation that infringes on the rights of themselves or others.<sup>317</sup> This is not to say that the majority's will is

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<sup>314</sup> For more on that discussion, see *supra* notes 280–283 and accompanying text. The other general reason in the *Paper*'s first half is to locate responsibility in a stable branch, which the people can then hold accountable for bad (or good) decisions. See THE FEDERALIST NO. 63, *supra* note 89, at 383–84.

<sup>315</sup> See *id.* at 384; cf. THE FEDERALIST NO. 71, *supra* note 252, at 432 (arguing that the President will be able to promote the "public good" by "withstand[ing] the people's] temporary delusion[s]").

<sup>316</sup> The passage is rife with statements and tones that seek to subdue the defensive reader. See, e.g., *id.* (stating that, because readers are not "blinded by prejudice or corrupted by flattery," they will not take offense at this necessary safeguard); *id.* (characterizing the influences that lead to democratic errors as "irregular passion" or, shifting the blame, "the artful misrepresentations of interested men").

<sup>317</sup> See *id.* (stating that "[the people] themselves will afterwards be the most ready to lament and condemn" the measures they once requested); see also Barry Friedman, *The Wages of Stealth Overruling (with Particular Attention to Miranda v. Arizona)*, 99 GEO. L.J. 1, 57 (2010) (stating that the Framers instituted bicameralism because Madison recognized

nonauthoritative;<sup>318</sup> rather, it is a reconceptualization of the definition of “will,” which Madison suggested to be the “cool and deliberate sense of the community.”<sup>319</sup> The Senate’s ability to fill that institutional role was set forth in a rhetorical question:

In these critical moments, how salutary will be the interference of some temperate and respectable body of citizens, in order to check the misguided career and to suspend the blow meditated by the people against themselves, until reason, justice, and truth can regain their authority over the public mind?<sup>320</sup>

Democracy provides the guiding principle in that the people are naturally permitted to rule themselves, but republicanism provides the operating principle in that the people sometimes need a moment of pause as they issue rulings. The Senate can provide that moment of pause, but only if it is sufficiently independent of the people such that Senators need not fear for their livelihoods (and perhaps more) while they ask the people to hold off on a particular measure. The Senate’s independence derives from several measures that led to Madison’s descriptions of “well-constructed,” “temperate,” and “respectable,”<sup>321</sup> one of which is a barrier between the people and their Senators, viz. the state legislatures.

Madison later mentioned an actual example of his theory among the states—the senate of Maryland.<sup>322</sup> He praised the lofty reputation of that state’s Senate and deemed its electoral process a successful experiment.<sup>323</sup> But he omitted the background details, presumably because his audience knew them. It fell then to Noah

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“the problem *was* the people” (emphasis added)).

<sup>318</sup> See THE FEDERALIST NO. 63, *supra* note 89, at 384 (agreeing that a necessary condition for free government is that the people’s will “ultimately prevail[s] over the views of its rulers”).

<sup>319</sup> *Id.*

<sup>320</sup> *Id.*; cf. A CITIZEN OF AMERICA, *supra* note 58, at 131 (praising bicameralism because either house can check the other if one “should appear to be under any undue influence, either from passion, obstinacy, jealousy of particular men, attachment to a popular speaker, or other extraordinary causes”); THE FEDERALIST NO. 10, *supra* note 133, at 82 (writing that wise representatives can parse through the people’s “temporary or partial considerations” and “discern the true interest of their country”).

<sup>321</sup> THE FEDERALIST NO. 63, *supra* note 89, at 384.

<sup>322</sup> See *id.* at 388–89. For a description of the election process for Maryland’s Senate, see *supra* notes 62–64 and accompanying text.

<sup>323</sup> THE FEDERALIST NO. 63, *supra* note 89, at 388–89.

Webster to fill in the context. Webster explained that Maryland's senate was largely spared the atrocities of the paper money rage thanks to its firm, independent Senate.<sup>324</sup> The House of Delegates, Maryland's popular branch, had passed a measure to issue £500,000 in paper money,<sup>325</sup> a law that Webster argued would have collapsed the economy.<sup>326</sup> But the second branch obstructed the bill's passage: "The senate, like honest, judicious men, and the protectors of the interests of the state, firmly resisted the rage, and gave the people time to cool and to think."<sup>327</sup> In time, the people relented, and the state was saved.<sup>328</sup> Webster's description aligns perfectly with Madison's theory.<sup>329</sup> The people, in the heat of the moment, proposed a measure that was not actually in their best interest. The Senate, on the other hand, was sufficiently removed from the people (and elected through a refining process that sought out distinguished senators) such that it could consider the matter more calmly. Note their yardstick: "the interests of the state." These senators did not prevent a measure to protect selfish interests; they prevented a measure that would have destroyed the constituency they had promised to protect. And after the Senate had postponed the bill's passage for some time, the heat of the moment passed, and the people realized their folly.

Having illustrated the checking process, Madison now needed to respond to the concern that the risks of senatorial independence would not outweigh the benefits. He first suggested that, based on the United States' circumstances, American liberty is more at risk from "abuses of *liberty*" than it is from "abuses of *power*."<sup>330</sup> By "abuses of liberty," Madison referred to the democratic evils just discussed.<sup>331</sup> But this answer, as he recognized, is too general<sup>332</sup>: the

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<sup>324</sup> See A CITIZEN OF AMERICA, *supra* note 58, at 133.

<sup>325</sup> *Id.*

<sup>326</sup> See *id.* (opining that "every shilling of specie would have been driven from circulation, and most of it from the state," resulting in a "loss [that] would not have been repaired in seven years").

<sup>327</sup> *Id.*

<sup>328</sup> See *id.*

<sup>329</sup> Webster goes on to cite Connecticut as a similar example, (A CITIZEN OF AMERICA, *supra* note 58, at 133), and to contrast it and Maryland with the lesser examples of Pennsylvania and the Continental Congress, both unicameral legislatures, see *id.* at 132–34.

<sup>330</sup> See THE FEDERALIST NO. 63, *supra* note 89, at 387–88 (emphases added).

<sup>331</sup> See *id.* at 387 (using the term in response to objections against his recently concluded discussion of the benefits of an independent Senate).

United States' circumstances are the key. The United States Constitution divides the power among so many branches that the Senate would need to corrupt the state legislatures,<sup>333</sup> the House, and the people themselves to abuse its power successfully.<sup>334</sup> This compartmentalization works to quarantine corruption so the people can eliminate it. But most importantly of all, the House provides a proactive check because of its direct connection to the people.<sup>335</sup> Even if the Senate were to succeed in usurping power, the House

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<sup>332</sup> See *id.* at 387–88.

<sup>333</sup> Throughout the debate on independence, one must keep in mind that nationalists were just as concerned with state legislatures corrupting their Senators. See, e.g., HOEBEKE, *supra* note 8, at 45 (finding evidence that “Senate actions were ideally to be as free from state coercion as they would be from popular whims”); *supra* notes 247–249 and accompanying text (describing Madison’s and Wilson’s objections at the Convention). Proponents of the Constitution continued to fall back on these arguments while defending Senators’ independence from the states (in addition to the people) through the omission of a recall despite lengthy terms and the potential for successive reelections. Compare Livingston, *supra* note 179, at 791 (proposing among other things, that the state be able to recall their senators, and that senators only be permitted to serve for six years in any twelve-year period), Smith & Hamilton, *supra* note 179, at 803 (statement of Melancton Smith) (“As the clause now stands, there is no doubt that the senators will hold their office perpetually . . .”), and *id.* at 805 (“When a state sends an agent commissioned to transact any business, or perform any service, it certainly ought to have a power to recall him.”) with Robert Livingston, Speech Responding to Gilbert Livingston’s Concerns at the New York Ratifying Convention (June 24, 1788), in 2 DEBATE, *supra* note 81, at 792–93 [hereinafter Robert Livingston] (arguing that because “[t]he state legislatures [are] frequently subject to factious and irregular passions . . . a senator may be appointed on one day and recalled the next”), and Smith & Hamilton, *supra* note 179, at 801–11 (statement of Alexander Hamilton) (providing examples of state legislatures that had indulged the people’s momentary frenzies and concluding, “[t]o prevent this, it is necessary that the senate should be so formed, as in some measure to check the state government”). They argued that Senators, although state representatives, also represented national concerns to some degree. See A CITIZEN OF AMERICA, *supra* note 58, at 139–40 (“A delegate is bound to represent the true local interest of his constituents . . . but when each provincial interest is thus stated, every member should act for the aggregate interest of the whole confederacy.” (emphasis in original)); Robert Livingston, *supra*, at 792 (“The senate are [sic] indeed designed to represent state governments; but they are also the representatives of the United States, and are not to consult the interest of any one state alone . . .”). See generally ROSSUM, *supra* note 8, at 95–102 (outlining the rationale for denying states certain powers over Senators); Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 224 n.33 (2000). (“The Senate was designed from the start to serve contradictory ends: to protect state interest, but also to be a republican analogue to the House of Lords and take the longer, more ‘national’ view of policy.”); Riker, *supra* note 161, at 457–63 (describing the inefficacy of instructing senators without a sufficient substitute for recalling them).

<sup>334</sup> See THE FEDERALIST NO. 63, *supra* note 89, at 388.

<sup>335</sup> See *id.* at 389 (recounting that the British House of Lords was “crushed by the weight of the popular branch”); see also THE FEDERALIST NO. 66, at 403–04 (Alexander Hamilton) (listing several counter-powers of the House).

would have the power and the guidance of the people in restoring free government.<sup>336</sup> Thus, the Senate could never become a “permanent aristocracy.”<sup>337</sup>

The ratifiers, in a truly extraordinary moment, ultimately embraced the notion of an independent Senate, elected by state legislatures. That decision was a great boon to the protection of American liberties—at least until the people changed their minds.

### 3. *A Modern Assessment*

History vindicates the Framers’ intent. Their choice for state legislatures to elect senators resulted in the precise outcomes they hoped for: distinguished Senators coolly deliberating laws in an independent branch.

The Senate quickly gained a reputation as a chamber for distinguished men. Recall from earlier the adulation bursting from Tocqueville in his description of that body.<sup>338</sup> Among other terms, he referred to Senators as “celebrities,”<sup>339</sup> for that is what they were.<sup>340</sup> But simply to populate a chamber with celebrities does little for the American people unless those distinguished representatives prove good governors. It is a different passage from Tocqueville that

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<sup>336</sup> See THE FEDERALIST NO. 63, *supra* note 89, at 389–90; *cf.* THE FEDERALIST NO. 39, *supra* note 157, at 242 (explaining how every branch of government is elected by the people in some way). C.H. Hoebeke argues the point thus:

[I]n the event that the wisdom and probity of the Senate, like all things mortal, should temporarily subside, it would be checked by a coequal branch of the legislature, drawn in its immediate respects from an essentially different constituency. In factious times, ‘the dissimilarity in the genius of the two bodies,’ each with a reciprocal hold on the other, reduced the likelihood that the same interests could gain the upper hand in both houses, and thus monopolize the legislative power for their own ambitions.

HOEBEKE, *supra* note 8, at 17; *see also id.* at 128 (“[L]est, in all these electoral intricacies, the popular will was lost from view, the entire apparatus could be brought to a halt by the House, whose members answered immediately to the people.”).

<sup>337</sup> Compare Centinel I, *supra* note 113, at 61 with THE FEDERALIST NO. 63, *supra* note 89, at 389 (“[T]he conclusive evidence resulting from this assemblage of facts [is] that the federal Senate will never be able to transform itself, by gradual usurpations, into an independent and aristocratic body . . .”).

<sup>338</sup> See *supra* notes 31–33 and accompanying text.

<sup>339</sup> TOCQUEVILLE, *supra* note 29, at 191.

<sup>340</sup> William Riker uses resignation statistics to argue that the prestige of serving as a Senator grew over time. See Riker, *supra* note 161, at 462–63.

captures this point: “[I]t suffices that the popular will pass through this chosen assembly for it to be worked over in some way, and it comes out reclothed in more noble and more beautiful forms. The men so elected . . . represent only the elevated thoughts that are current in the midst of [the majority of the nation] . . . .”<sup>341</sup> Due to the Senate’s mode of election, as Tocqueville surmised,<sup>342</sup> Senators were the type of refined individuals who would filter out the people’s momentary passions. Madison’s argument proved right.<sup>343</sup>

Furthermore, the Senate indeed gained an important degree of independence such that it could deliberate coolly without immediate repercussion. The very first Senators debated the weight that instructions carried and concluded it was very little.<sup>344</sup> The states, realizing that perhaps they ought to have pressed harder for a recall power during ratification, scrambled to find means of influencing their Senators.<sup>345</sup> That reaction alone suggests the Framers successfully insulated Senators to some degree.

More historical evidence exists. As C.H. Hoebeker reports, the Senate became a barrier to even popular legislation.<sup>346</sup> House bills struggled to work themselves through senatorial committees, and those that did then likely faced a significant amount of debate on the Senate floor.<sup>347</sup> He describes the lengthy period required for the Senate to agree finally to tariff reform in the decades immediately preceding the Progressive Movement’s rise.<sup>348</sup> As Hoebeker explains, the Senators were rightly skeptical of calls for tariff reform from groups that had sung tariffs praises not too many years earlier.<sup>349</sup> The Senate approached the measure cautiously, and the groups’ zealous

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<sup>341</sup> TOCQUEVILLE, *supra* note 29, at 192.

<sup>342</sup> *See id.*

<sup>343</sup> *See* Zvi S. Rosen, *The Irony of Populism: The Republican Shift and the Inevitability of American Aristocracy*, 18 REGENT U. L. REV. 271, 271 (2006) (arguing that the Seventeenth Amendment’s primary effect was the “diminution of the Senate” as an aristocratic body).

<sup>344</sup> *See* Riker, *supra* note 161, at 456–57. Perhaps not surprisingly, the Senate was mostly comprised of Federalists. *See id.* at 457.

<sup>345</sup> *See id.* (“Republicans and state legislatures alike searched for a better substitute [of recall than simply refusing to reelect disobedient Senators].”); *see also id.* at 457–62 (describing the states’ search for a substitute through the late nineteenth century).

<sup>346</sup> *See* HOEBEKE, *supra* note 8, at 116.

<sup>347</sup> *See id.*

<sup>348</sup> *See id.* at 117–19 (stating that “[d]uring twenty years of reform discussion, senators seemed willing to adopt the principle of reduction, except where their own constituents were concerned”).

<sup>349</sup> *See id.* at 118–19.

“devotion” to the principles of free trade diminished in the meantime.<sup>350</sup> It appears that the Senate did not finally assent to proposed reforms until the measures commanded an actual majority of the people.<sup>351</sup> It was Noah Webster’s account of the Maryland Senate<sup>352</sup> writ large.

On the other hand, Madison had also argued that the Senate’s independence would not lead to a usurpation of power.<sup>353</sup> For one thing, Tocqueville himself observed that the people’s control over the state legislatures provided a satisfactory process for replacing truly obstinate Senators.<sup>354</sup> More importantly, though, laws that represented the majority’s will (and not democratic passions) always overcame the Senate’s deliberative process. As Hoebeke reports, “historians are at a loss to cite a single proposition, supported by persistent public opinion, which was ultimately defeated at the hands of the U.S. Senate.”<sup>355</sup>

The Senate functioned exactly as intended. By retarding the progress of legislation, Senators were able not only to debate the virtues of a bill but also provide the American people some time to reconsider. Thus, the Senate was able to discern, and shape, the majority’s will. Such a system does not quickly respond to the volatile wishes of the majority. Indeed, the Seventeenth Amendment was likely a calculated first volley in the Progressive Movement’s fight for other governmental reform.<sup>356</sup>

The democratization of the federal government is now the status quo. Indeed, society now defines a republic differently than the Framers did. Whereas the Framers emphasized representatives’ independence and refinement of ideas, most people today think representatives should simply vote with a majority of their

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<sup>350</sup> See HOEBEKE, *supra* note 8, at 119.

<sup>351</sup> See *id.* (explaining that the Senate’s shift paralleled the change in opinion of the manufacturing sector).

<sup>352</sup> See *supra* notes 324–329 and accompanying text.

<sup>353</sup> See *supra* notes 330–337 and accompanying text.

<sup>354</sup> See TOCQUEVILLE, *supra* note 29, at 192 (“The Senators . . . do represent the result, albeit the indirect result, of universal suffrage . . . . [T]hey can always control [a state legislature’s] choice by giving it new members.”).

<sup>355</sup> HOEBEKE, *supra* note 8, at 121.

<sup>356</sup> See *id.* at 110 (describing the Amendment as a “fundamental step” for Progressives); Zywicki, *supra* note 128, at 1011 (“[M]any aspects of the Progressive Era . . . may not have been possible without the institutional reform of the direct election of senators.”).



constituency.<sup>357</sup> In the same breath, though, most are surprised to learn of the federal government's massive infringement on our liberties.<sup>358</sup> Repeal of the Seventeenth Amendment would increase the independence of the Senate.<sup>359</sup> And that increased independence would better protect our liberties because it would sharpen the bicameral nature of Congress.

An important counterargument on this front regards the practice of the states up until the Seventeenth Amendment's passage. As William Riker points out, many states reformed their senatorial election procedures such that their Senators were effectively elected by popular vote.<sup>360</sup> Indeed, during the first year of direct elections, all twenty-five Senators facing reelection prevailed.<sup>361</sup> Thus, some scholars argue that repeal of the Seventeenth Amendment would have only a negligible effect.<sup>362</sup> I have two responses. First, several academics have praised the Senate's federalism-mindset right up to the point of amendment.<sup>363</sup> Indeed, at the time Congress debated the Amendment, at least some Senators were still reporting directly to state legislatures about their voting record.<sup>364</sup> Second, the logic of the

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<sup>357</sup> See, e.g., *Reynolds*, 377 U.S. at 565 (“[R]epresentative government is in essence self-government through the medium of elected representatives of the people . . .”).

<sup>358</sup> See, e.g., Jennifer Stisa Granick & Christopher Jon Sprigman, Op-Ed., *The Criminal N.S.A.*, N.Y. TIMES (June 27, 2013), [http://www.nytimes.com/2013/06/28/opinion/the-criminal-nsa.html?pagewanted=all&\\_r=1&](http://www.nytimes.com/2013/06/28/opinion/the-criminal-nsa.html?pagewanted=all&_r=1&) (describing how the government has interfered into our privacy).

<sup>359</sup> Cf. Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1071 n.98 (1988) (“Repeal of the Seventeenth Amendment might help to . . . enhance national governmental deliberations.”); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 79 (1985) (“[T]he original constitutional framework was based on an understanding that national representatives should be largely insulated from constituent pressures. Such insulation, it was thought, would facilitate the performance of the deliberative functions of government. That system of insulation has broken down with [, among other things], direct election of senators . . .”).

<sup>360</sup> See Riker, *supra* note 161, at 463–67 (describing a progression that led up to the Oregon Plan and, ultimately, the Seventeenth Amendment).

<sup>361</sup> Zywicki, *supra* note 131, at 189.

<sup>362</sup> See, e.g., Amar, *Indirect Effects*, *supra* note 161, at 1360 n.51 (“[A]ny repeal of the Seventeenth Amendment, to be meaningful, would also have to disable States from enacting versions of the ‘Oregon Plan.’ ”); Somin, *supra* note 217, at 92 (“[A] straight-up repeal of the amendment would probably have little effect of any kind, since popular election of senators would persist in most states even if it were no longer constitutionally mandated.”).

<sup>363</sup> See, e.g., ROSSUM, *supra* note 8, at x (arguing that a Senate elected by state legislatures would never have enacted the New Deal legislation).

<sup>364</sup> See 46 CONG. REC. 2244 (1911) (statement of Sen. Elihu Root).

response can be reversed: if the Seventeenth Amendment's repeal would have no effect, that suggests its passage did not either. But if that were the case, it leaves unexplained the force behind a nationwide movement.<sup>365</sup> Election by state legislatures must have been doing its job,<sup>366</sup> even if not as purely as in early history of the Union. And a repeal of the Seventeenth Amendment would return us to that time when liberties were better protected.

### III. CONCLUSION

In the fervor that led up to the ratification of the Seventeenth Amendment, proponents of the proposal to directly elect Senators proffered a host of arguments in support of the change. Each of these arguments was unsatisfying, but making poor arguments was not the Progressives' worst mistake. Their gravest error was to ignore the specific arguments of the Founders in favor of state legislature election and to presume themselves more worthy of structuring the federal government.

This Article has argued that the Founders of our Union specifically intended for Senators to be elected by state legislatures because, among other reasons, it would result in a truly bicameral Congress that was less likely to infringe on the liberties of the people. Indeed, it was considered by them to be an auxiliary protection for the people in their relationship with the government. The Seventeenth Amendment foolishly overruled that intent. Thus, the logical outcome of this Article's argument is that the Seventeenth Amendment ought to be repealed, and the founding generation's intended structure restored.

Unfortunately, the Seventeenth Amendment is itself only one example of society's increasing forgetfulness of the Framers' wisdom. This trend, thankfully, has not reached the point of conscious disrespect for those great men—our debt to them for the liberty and freedom we enjoy is immense, and it would be a shame to ever forget that. For now, the disrespect remains subconscious every

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<sup>365</sup> See Zywicki, *supra* note 131, at 193 (“The unsolved puzzle for the advocates of the Progressive model . . . is to explain why the voters in one state cared how the voters in another state elected their Senators.”).

<sup>366</sup> Indeed, as mentioned above, the Seventeenth Amendment made possible a host of legislation that followed, *see supra* note 356 and accompanying text, which indicates the Senate continued to present a barrier of some type.

time we fail to accord their decisions due weight.

The Founders faced great challenges in their day. They fought a war against the most formidable country then on Earth and won; they studied, pondered, debated, and prayed as they laid out the design for a united republic, the likes of which the world had never seen; and they consciously worked to leave behind a world that was freer, and hence better, than they had found it. It is only because of their efforts that the United States of America continues to enjoy such liberty and prosperity today. And for that, they deserve our deepest respect.