The Heritage Foundation

BACKGROUNDER

No. 3326 | JULY 19, 2018

Revised and Updated JULY 23, 2018

Would Repealing the 17th Amendment Revive Federalism?

John W. York, PhD

Abstract

Many believe that repealing the 17th Amendment is key to reinvigorating federalism and reining in federal overreach. In the highly unlikely event that the 17th Amendment were to actually be repealed, it would bring about only marginal change—as some advocates of repeal frankly admit. Post-repeal, Senators and state legislators alike would still have strong incentives to keep grant money flowing to the states, with power centralized in Washington. In fact, state legislators would have strong incentives to give up their power over senatorial selection by instituting de facto elections, as 19th-century legislators did. Given the low likelihood of success, supporters of constitutional federalism should focus instead on more feasible reforms.

The morning after the so-called "skinny repeal" of Obamacare failed in the United States Senate, former Arkansas Governor Mike Huckabee took to Twitter to say: "Time to repeal 17th Amendment. Founders had it right—Senators chosen by state legislatures. Will work for their states and respect 10th [Amendment]."[1] Huckabee's claim—that repealing the 17th Amendment, which provides for the direct election of United States Senators, and returning responsibility for the selection of Senators to state legislatures would keep the federal government within its constitutional bounds—is shared by many conservatives and libertarians.

Senator Mike Lee (R–UT), Senator Jeff Flake (R–AZ), Senator Ted Cruz (R–TX), and the late Justice Antonin Scalia are among those who see the ratification of 17th Amendment in 1913 as a critical turning point in the relationship between the state and federal governments. The popular election of Senators, they maintain, side-

Key Points

- Repealing the 17th Amendment is not likely the key to restoring limited constitutional government that many have come to believe it is.
- While the 17th Amendment may have played an important role in facilitating the expansion of the federal government and the erosion of federalism, repealing it today would bring about only marginal change—as some advocates of repeal frankly admit.
- A repeal of the 17th Amendment would not necessarily change the current method of senatorial selection in practical terms. Even after repeal, popular elections for the Senate could still be held, and state legislators could merely ratify the popular vote—a common practice prior to the 17th Amendment's ratification.
- While advocates of repeal assume that states have clear incentives to fight federal laws that preempt state policy, interest group demands and ideological commitments often lead state lawmakers to support federal policies that encroach on their powers.

This paper, in its entirety, can be found at **http://report.heritage.org/bg3326**

The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002
(202) 546-4400 | heritage.org

lined state legislatures in the senatorial selection process and decreased their influence in Congress. As Senator Cruz has said, "There's no doubt that was a major step toward the explosion of federal power and the undermining of the authority of the states."[2]

Advocates of repeal believe that returning to the Founders' original design for senatorial selection would make the Senate more responsive to the interests of states. As Chapman University Law Professor John Eastman told members of the American Legislative Exchange Council: "If U.S. Senators were elected by state legislatures, they would be dependent on state legislatures, they would look to all the people in this room for guidance, and they would want to keep you happy because they would all be looking to their own re-elections or their own legacies."[3]

Deference to state legislatures, advocates of repeal claim, would therefore lead the Senate to stop passing legislation that encroaches on the constitutional powers of the states (either by preempting state policies, conditioning federal funds on state lawmakers abiding by federal directives, or imposing unfunded mandates on the states).[4] Ratcheting back the roles and responsibilities of the federal government, they claim, would have the ancillary benefit of shrinking the exorbitantly expensive federal apparatus—which undergirds this centralization of power. It would also, we are told, make the Senate more responsive to the wishes of the people and less likely to be captured by special interests.

Despite repeated calls to repeal the 17th Amendment, efforts to change the means of senatorial selection have not made much headway—at least not directly. No repeal amendment has ever been proposed in Congress. Even state legislatures seem hesitant to act: Only one state, Utah, has passed a resolution calling for Congress to repeal the 17th Amendment. It is true that repealing the 17th Amendment—along with a balanced budget amendment—is one of the most oft-cited objectives of the push to convene an Article V convention to amend the Constitution, an effort 12 state legislatures have so far endorsed. (Another 22 states must also call for such a convention for it to happen.)[5]

In the unlikely event that such a convention were ever to convene, it could well produce an amendment to repeal the 17th Amendment. To go into effect, however, that amendment would still have to be ratified by 38 states. Such an outcome, while conceivable, would be a hard sell—as even staunch advocates of repeal admit.[6] In fact, some political candidates who once publicly advocated repealing the 17th Amendment flip-flopped once their stance became a bludgeon against them on the campaign trail.[7] This is unsurprising. We live in a democratic age, and it will be exceedingly difficult to convince Americans to endorse a measure that appears anti-democratic and has been branded as such by its opponents. As Alexis de Tocqueville predicted, the arc of history bends toward more democracy.[8]

Given the magnitude of any endeavor to amend the Constitution, carefully assessing any proposal to do so is of the utmost importance. If the 17th Amendment stands as a fundamental impediment to reinvigorating federalism and to decreasing the size of the federal government, then repealing it deserves a more robust effort from elected officials—in spite of the great difficulty of doing so. If, however, there are easier paths to the same objective, or if repealing the 17th Amendment would have a negligible impact on the root causes of the erosion of federalism and the growth of the national government, the time and resources devoted to this effort might be better spent elsewhere.

In fact, repealing the 17th Amendment may not be the key to restoring limited constitutional government that many have come to believe it is. While the 17th Amendment may have played an important role in facilitating the expansion of the federal government and the erosion of federalism, repealing it today would bring about only marginal change—as some advocates of repeal frankly admit.[9]

It is, first of all, important to remember that a repeal of the 17th Amendment would not necessarily put an end to the popular election of Senators. States would remain free to hold popular elections and to strongly incentivize state legislators to abide by their results. In fact, prior to the ratification of the 17th Amendment, almost all state legislatures had voluntarily established some test of public sentiment that informed the selection of Senators.[10]

If public sentiment shifted dramatically against the popular election of Senators—a precondition for the repeal of the 17th Amendment—it may well be that state legislators would retain their power to select their state's Senators (for a time at least). But, even under these difficult-to-imagine circumstances, the relationship between the state governments and the federal government would not be completely transformed, as many hope. At best, we would most likely witness only modest change in certain areas.

Repealing the 17th Amendment would not change most of the incentives that lead Senators to support policies that centralize power in Washington, drive up federal spending, and erode federalism. While advocates of repeal assume that states have clear incentives to fight federal laws that preempt state policy, interest group demands and ideological commitments often lead state lawmakers to support federal policies that encroach on their own powers. Similarly, changing the means of senatorial selection might lead to fewer unfunded and partially funded mandates, but it would likely not considerably decrease the number or size of grants to the states.

Likewise, certain restrictions on the way states spend federal grant money could be stripped out of spending bills, but state legislators would probably not take serious steps to reduce their states' reliance on federal funds—which constitute, on average, one-third of state budgets—nor to reduce the ballooning expense of the federal government overall.[11] Last, comparatively well-informed state legislators may be able to more effectively monitor Senators than the average citizen, but they might not use their newfound power to drag the upper chamber away from K Street and back to Main Street. Instead, state legislators might use their power to aid interest groups close to home.

Paradoxically, a repeal of the 17th Amendment could also unintentionally weaken federalism. Should there be states in which the legislators do not merely ratify the popular vote but actually *select* Senators using their own discretion, repeal could turn state legislative elections into referendums on national politics. Prior to the 17th Amendment, and after the development of national political parties, voters often cast their ballots in state legislative elections on the basis of whom their pick would select for the national Senate.[12] Thus, state legislators were often elected on the strength of their party's senatorial candidate rather than the strength of their own policy proscriptions. Given the increasingly high profile of national politics, it is a distinct possibility, if not a likelihood, that state legislative elections would become referenda on federal—rather than state—policy.

Therefore, given the great difficulty of repealing the 17th Amendment and the rather limited impact it would likely have on the operations of the federal government, those who care about constitutional government might wish to consider directing most of their attention toward more achievable objectives.

The Case for Repeal

Supporters of a constitutional amendment to repeal the 17th Amendment believe that a restoration of the original means of senatorial selection would primarily yield two important benefits. First, they claim the Senate would serve as an institutional check on federal overreach. Repeal advocates believe state legislators would use their leverage over their senatorial delegation to safeguard state power. Second, they claim state legislators would ensure that Senators represent the interests of their constituents back home rather than interest groups and donors in Washington. Unlike individual citizens, state legislators typically follow Washington politics closely enough to know when Senators are disregarding the public interest. Since state legislators presumably share their constituents' views on most policy questions, repealing the 17th Amendment—and, in so doing, empowering state legislators to oversee the Senate—could actually lead the upper chamber to better represent the public.

Argument 1: The Senate Will Limit the Size, Scope, and Reach of the Federal Government

The primary hope of repeal advocates is that U.S. Senators would serve as a check against federal encroachments on the state's sovereign powers if they rely on state legislatures for their selection and tenure in office. Since the passage of the 17th Amendment, the Founders' federalism—emphasizing separate spheres of state and central government authority—has been replaced by a new model, disingenuously referred to as "cooperative federalism."[13] Under this new paradigm, states are largely relegated to carrying out policy set at the federal level.

The federal government encroaches on the states and restricts their realm of action primarily in three ways: preemption; direct order mandates (which include so-called "unfunded mandates"); and conditions attached to federal grants.

Under the doctrine of preemption, federal statutes and regulations essentially deprive the states of establishing public policy in a given area. Sometimes the federal government expressly preempts state law and, at other times, the federal government's laws and regulations become so dense and all-encompassing that there is simply no room left for state policymaking. Preemption, in and of itself, is not a perversion of constitutional federalism:

The Supremacy Clause of the Constitution establishes that federal treaties and statutes "shall be the supreme Law of the Land."[14] But the Founders meant for the federal authority to stay within certain prescribed limits—namely, the specific powers delegated to Congress in Article I, Section 8 of the Constitution. But, instead of keeping within its enumerated powers, the federal government oftentimes reads into certain provisions of the Constitution—like the Commerce Clause and the Necessary and Proper Clause—extraordinary ability to intervene in almost any policy space, passing laws that preempt state and local policies.

Congress also often instructs states to act on its behalf, giving them direct orders, known as *mandates*, to follow or execute a federal policy or program that they cannot disregard.[15] The Congressional Budget Office, tasked with tracking intergovernmental mandates, found 342 such enactments put in place from 2006 to 2017.[16] Many of these bear on municipal governments and public utilities, rather than the states directly.[17]

In recent years, the Supreme Court has taken steps to limit some forms of direct-order mandates. The Court has protected the states from laws that affect their "integral operations in areas of traditional government functions" including setting wages and even workplace safety standards for state employees.[18] The Supreme Court has also clarified that: "While Congress has substantial powers to govern the nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions."[19] Known as the anti-commandeering doctrine, it forbids the federal government from directly ordering state and local governments to enforce its laws and regulations.[20]

Although directly ordering state governments to both follow and enforce federal laws and regulations is increasingly off the table, the federal government frequently *conditions the receipt of federal grant money* on a state's willingness to implement its favored policies. While the Supreme Court has imposed some restrictions on how much the federal government can require of states that accept its funds, the federal government still has significant authority to determine how and when it gives money to state governments.[21] There are now over 1,000 federal grant programs.[22] While these programs differ greatly in the amount of latitude they allow states in determining how to spend the money, they all come with some strings attached.[23]

Many nationwide policies have been established voluntarily by states eager to secure these federal grants. For instance, the National Minimum Drinking Age Act of 1984 threatened to cut by 10 percent the annual federal highway apportionment of any state that did not raise its legal drinking age to 21. While setting a national drinking age is well outside of the federal government's constitutional authority, all 50 states eventually chose to comply in order to continue receiving these funds. No Child Left Behind and Common Core used a similar tactic—making federal funds available only to states that adopt national standards—to expand the role of the federal government in education.

Though grant money is often used to induce state cooperation, the cost of implementing direct-order mandates and new conditions placed on the receipt of federal grant money are not always fully funded. While wholly unfunded mandates have dropped since the implementation of the Unfunded Mandates Reform Act of 1995, many unfunded mandates passed before 1995 remain on the books, and the Congressional Budget Office has identified 21 that have been passed since.[24] Even today, the federal government often covers only a portion of the cost of a new regulation or program, leaving states to make up the difference.

The state's share of the burden of many federal programs is often significant. According to the National Association of State Budget Offices, Medicaid—a program for which the federal government sets the eligibility and benefit standards, but only partially funds—will cost states $6.2 billion in 2017.[25] This equates to *29 percent* of the average state's expenditures.[26] The entire cost that Congress shifted to the states between 2004 and 2008 alone is $131 billion, according to the National Council of State Legislatures.[27] According to this group, "the growth of federal mandates and other costs that the federal government imposes on states and localities is one of the most serious fiscal issues confronting state and local government officials."[28]

According to advocates of repeal, the Senate's complicity in these various arrangements that encroach on the sovereign powers of the states is a direct consequence of the fact that Senators are no longer selected by state legislators. As Professor Todd

Zywicki of the Antonin Scalia Law School at George Mason University writes:

> Before the Seventeenth Amendment, the now-widespread Washington practice of commandeering the states for federal ends—through such actions as "unfunded mandates," laws requiring states to implement voter-registration policies that enable fraud (such as the "Motor Voter" law signed by Bill Clinton), and the provisions of Obamacare that override state policy decisions—would have been unthinkable.[29]

By mandating the popular election of Senators, the 17th Amendment took away the impetus of the upper chamber to represent states *qua* states. As a result of popular election, Zywicki writes, "Senators today act all but identically to House members, treating federalism as a matter of political expediency rather than constitutional principle."[30] Like Members of the House of Representatives, Senators today focus on meeting the demands of their constituents who, by and large, are more interested in policy outcomes than in the balance of power between federal and state government.

Advocates of repeal expect that as state legislatures, working through the Senate, constrain the reach of the federal government, they will also reduce its size and expense. Many view the passage of the 17th Amendment as a critical antecedent to the growth of the federal government and the ballooning national debt that both accompany and underwrite the expansion of federal authority. As Georgia state representative Kevin Cooke (R–Carrollton), a proponent of repeal, has said: "The federal government has grown exponentially since the amendment was ratified.... This would restore the Constitution to what it was in 1913."[31]

If the 17th Amendment were repealed today, Cooke and others assume that states would view the federal government—the spending it authorizes, the army of bureaucrats it employs, and the taxes it collects from their citizens—as not only superfluous, but threatening. According to repeal advocates, state legislators would direct the delegates to constrain the federal government's size and scope, allowing them latitude to govern as they see fit.[32]

To support this supposition, they rely on the Founders' writings, the logic behind the Constitution's design, and American political developments since the passage of the 17th Amendment. The Founders understood that both horizontal and vertical divisions of power were a more effective means of controlling government overreach than the "mere parchment barriers" of the Constitution's enumerated powers.[33] As Chapman University Law Professor John Eastman writes: "What the Founders did is come up with this counterintuitive notion that adding an extra layer of government would provide less government and greater liberty. And it only worked if those governments were in competition with and in conflict with each other."[34]

Once state governments no longer had representation at the federal level, they were no longer able to counteract the centralizing tendency of the federal government. While the most rapid growth of federal power did not occur until 50 years after its ratification, many believe the 17th Amendment was a necessary precondition for later developments. Without this fundamental change in the way Senators are selected, advocates of repeal believe the upper chamber would have stood as a bulwark against preemptions, mandates, and string-laden federal funds. According to Zywicki and others, repealing the 17th Amendment would make such legislation unthinkable again because, as Senator Ted Cruz has said, "[i]f you have the ability to hire and fire me, I'm a lot less likely to break into your house and steal your television."[35]

Argument 2: The Senate Will More Faithfully Represent the Public Interest

Most advocates of repeal readily admit that repealing the 17th Amendment would reduce the general public's control over the federal government. An overreliance on the wisdom and judgment of the *demos* was, according to many repeal advocates, the chief failing of the progressive reformers who pushed for the amendment. But they also believe that abolishing direct elections may actually make the Senate more responsive to the public interest. Though state legislators and the public may put a different priority on maintaining state power, when it comes to substantive policy, a state's electorate and elected representatives will presumably agree most of the time. While state legislators and the public at large may share many of the same policy preferences, state legislators are much more capable of holding Senators accountable since most state lawmakers are significantly better informed than the average citi-

zen about what their home-state Senators are actually doing—and the impact on their state. Most average citizens have a difficult time naming the three branches of government, much less the bills being debated on the floor of the Senate.[36]

In the absence of close oversight by their current electoral constituency, Senators are free to court the favor of donors and interest groups, who are considerably more attentive to the state of affairs on Capitol Hill. According to Ned Ryun, CEO of American Majority: "Senators would be more inclined to be responsive to state legislators, knowing that this educated, engaged, and empowered electorate [state legislators] watches them more closely than normal voters ever could."[37]

While state legislators and a state's citizenry may share a sense of what policies serve the public interest, there is a third constituency—greatly empowered by the 17th Amendment—that does not primarily consider the public welfare: interest groups. While Progressive reformers pushed for the 17th Amendment by arguing that state legislatures were selecting Senators on the basis of bribery, graft, and interest group pressure—charges that some political historians argue were much exaggerated—popular senatorial elections open up other opportunities for undue influence.[38] Counterintuitively, requiring direct elections has created even greater incentives to cater to special interests rather than the public interest.

Direct elections require Senators to build a statewide electioneering machine to win office. This is an expensive proposition. In fact, the average cost to win a Senate seat is $10.4 million—10 times the average expense of a successful House of Representatives race.[39] The large amount of money necessary to win and hold a seat requires Senators to curry favor with interest groups, corporations, and big-dollar donors. Many argue that campaign contributors receive much greater access and influence than the average citizen in exchange for their donations.[40]

Thus, a decreased focus on the public interest is an ironic unintended consequence of the 17th Amendment. As former Utah state senator Al Jackson (R–Highland), a chief proponent of his state's joint resolution calling for the repeal of the 17th Amendment, argued: "Today, Senators are more beholden to special interest groups than to their states because special interests give them money for their re-election campaigns."[41] Jackson and others suggest that, by curtailing the need for campaign contributions, ending the direct election of Senators would actually increase the Senate's focus on the public welfare.

Challenges to Repealing the 17th Amendment

Before discussing the likely impact of putting senatorial selection back in the hands of state legislatures, it is important to ask whether this is an attainable goal in the first place. There are two paths to ratifying amendments, and both are very difficult. Amendments may be proposed by either two-thirds of both chambers of Congress or two-thirds of state legislatures and must then be ratified by three-quarters of the states (either the state legislatures or in special ratifying conventions). Unsurprising, given these high procedural hurdles, only 17 amendments have been ratified since the passage of the Bill of Rights in 1791, although one of them (the 18th Amendment) implemented Prohibition while another (the 21st Amendment) repealed it—the only time a constitutional amendment has been repealed.

Complicating the repeal of the 17th Amendment is the fact that support appears to be, at least thus far, restricted to the Republican Party. Republicans would therefore have to control two-thirds of both houses of Congress or two-thirds of state legislatures to propose a repeal of the 17th Amendment—and three-quarters of state legislatures to actually ratify it.

Today, Republicans control 32 state legislatures—just two states short of the 34 necessary to propose such an amendment, but still six short of the number necessary to ratify it.[42] Only once since the turn of the 20th century has a party controlled more than 34 state legislatures.[43] The Republican Party has never been sufficiently powerful to ratify an amendment on its own.

Some would like a repeal of the 17th Amendment to be considered along with other proposals like a balanced budget amendment and term limits as part of an Article V constitutional convention, which could be convened by a vote of two-thirds of the states. However, any amendments emerging from this convention would still need to be ratified by three-quarters of the states. While such a convention may present an easier route to proposing a repeal amendment—since both red and blue states may support calling a convention, albeit for very dif-

ferent reasons—it would not make ratification more likely. Each amendment proposed in such a convention would still need to be ratified on its own by three-quarters of all states. Thus, no matter what avenue is followed, a repeal of the 17th Amendment would rely on the Republican Party holding nearly unprecedented power at the state level or this proposed amendment gaining a level of bipartisan support it has never enjoyed and is unlikely ever to garner.

Indeed, high as these procedural hurdles are, the greatest challenge to repealing the 17th Amendment is the democratic spirit of the American public. Long before the 17th Amendment was ever proposed, Alexis de Tocqueville observed that the indirect selection of Senators, like the power of the states generally, would lose in public esteem as the nation matured. Tocqueville points out that political equality tends to breed impatience for procedures and institutions that mediate the public will. As he explained in *Democracy in America*:

> The idea of secondary power, placed between sovereign and subjects, naturally presented itself to the imagination of aristocratic peoples because those powers contained within them individuals or families whom birth, enlightenment, and wealth held up as without peer and who seemed destined to command. For contrary reasons, this same idea is naturally absent from the minds of men in centuries of equality; it can only be introduced artificially then, and it is retained only with difficulty; whereas they conceive, so to speak without thinking about it, the idea of a lone central power that leads all citizens by itself.[44]

Since Tocqueville visited our shores, impatience with institutions that are perceived to be less than fully democratic—like the Senate and the Electoral College—has only increased. As Jonathan Rauch and Benjamin Wittes of the Brookings Institute write: "For several generations, reform and rhetoric have been entirely one-directional: always more direct democracy, never less."[45]

In keeping with the democratic *zeitgeist*, support for the 17th Amendment and popular election of Senators is strong. A 2013 Yougov/*Huffington Post* survey found that 71 percent of those polled supported the current mode of senatorial selection. Only 11 percent stated they preferred their state legislators to select their Senator for them.[46] Given weak public support, some candidates who voice support for repealing the 17th Amendment eventually recant. For instance, when a pledge to support repeal was used against him on the campaign trail, Ohio House of Representatives candidate Steve Stivers (R–15th Dist.) claimed, "I made a mistake, I answered that question wrong. It was not intentional."[47]

Senatorial Selection Without the 17th Amendment

The argument against the 17th Amendment is rooted in a generally accurate perception that this change in the Constitution's design was out of step with Founding thought and presaged the growth of the federal government. While many repeal advocates' account of the 17th Amendment's historic impact is clear and forceful, their predictions as to what would likely follow a contemporary repeal are not as well developed.

A repeal of the 17th Amendment would not necessarily change the current method of senatorial selection in practical terms. Even after repeal, popular elections for the Senate could still be held and state legislators could merely ratify the popular vote.[48] Under such a scenario, the state legislatures would play a role akin to that of the Electoral College in selecting the President: They would not be expected to exercise their own independent judgment but would essentially channel the popular will.

In the decade before the 17th Amendment, many states began to institute *de facto* popular elections. By the time the 17th Amendment was ratified, 28 states had some form of popular general election and all but two had some form of popular primary.[49] This was done, in part, as a concession to public pressure, but also due to self-interested career motivations.

State legislators of the late 19th and early 20th centuries were willing to divest their power over senatorial selection for several reasons. With the development of the two-party system and the increasing importance of national politics, voters began to cast their ballot in state legislative elections with a view to party strength in the U.S. Senate, not the campaign appeals of their state legislator.[50] Even if voters preferred an individual state legislative candidate, their party's candidate for the Senate—whom co-partisan state legislators were all but bound to support—was likely to determine their votes. State legislators at the turn of the 20th century sought to

take their electoral fate back into their own hands by severing the link between state legislative elections and senatorial selection.[51]

It is likely that state legislators would have even stronger professional incentives to give up their power over senatorial selection today. The focus of the national mass media on Washington, combined with the increased importance of foreign policy, immigration, and trade—all of which are the province of the federal government—would only increase the likelihood that voters would choose their state legislators with a view to senatorial selection rather than state policy.

All in all, it appears highly implausible—though not impossible—that a repeal of the 17th Amendment would be successfully proposed and ratified and that a considerable number of state legislatures would then actually use their power over senatorial selection instead of divesting it to the people, as many 19th-century legislatures did.

Would the Senate Limit the Size, Scope, and Reach of the Federal Government?

While it may well be true that the 17th Amendment's passage contributed to federal overreach, excessive tax-and-spend fiscal policies, and undue interest-group influence, it does not necessarily follow that repealing the 17th Amendment would address the contemporary causes of overweening federal power. Repeal, it is true, would give states some ability to resist federal overreach, but it would not address the strongest incentives that lead state governments to eagerly welcome federal largesse and federal regulations. Repealing the 17th Amendment would give states more power to keep the federal government within its constitutional limits, but it would not necessarily give them the will to do so.[52]

This is not to say that repealing the 17th Amendment and empowering state legislatures would have no impact. Recent history demonstrates that states are sometimes willing to push back against federal laws they believe preempt their authority, establishing public policy in an area that is rightly within the states' purview. For instance, after Obamacare's passage, 28 Republican-dominated state governments challenged the constitutionality of the Affordable Care Act's (ACA) individual insurance mandate that greatly constrained states' ability to establish their own health care policies. Though state Attorneys General and Governors were chiefly responsible for bringing these legal challenges, state legislatures took steps of their own. Eighteen state legislatures passed legislation stipulating that the state government would not enforce the Affordable Care Act, and another 10 passed other restrictions on compliance.[53]

Were the 17th Amendment to be repealed and were the state legislatures to actually select their Senators, it seems likely that state legislators would, in certain cases at least, use their newfound power over senatorial selection to prevent and push back against federal overreach. In many cases, state legislators prefer latitude to set policy within their own state. When federal laws and regulations preempt state policy, it becomes difficult for state lawmakers to respond to the demands of their own citizens or tailor policy to fit the particular circumstances of their state. This is a regular refrain of state legislators across the country and the National Conference of State Legislatures that represents their interests in Washington. According to former Georgia state senator Don Balfour (R–Dist. 9), chair of the National Conference of State Legislatures' Standing Committees: "Federal preemption of state authority is a growing concern. These unwarranted power grabs by the federal government subvert the federal system, choke off innovation and ignore diversity among states."[54]

If U.S. Senators were selected by state legislators like Senator Balfour, states would likely have more space to craft policies of their own. Preemptions that cost states money, for instance, federal bans on taxing Internet sales and premiums on certain prescription drug plans, would be certain casualties after repeal of the 17th Amendment.

There are, however, strong incentives that lead states to favor at least some federal preemption. Like private corporations, state governments are locked in competition with one another. Instead of customers and investors, though, states compete for residents and businesses. Like corporations, some states support government policies that impose high burdens on their competitors in order to gain an advantage, or at least level the playing field. As Professor Michael Greve of the Antonin Scalia Law School has explained: "Just as firms in competitive markets often seek to restrict competition, states will attempt to form anti-competitive cartels, with the help and under the umbrella of the federal government."[55] According to Greve, such states often join interest groups and activists in calling for new federal rules and regulations "both to off-

set their marginal disadvantage *vis-à-vis* competing states and with an eye towards transferring a portion of the visible cost to the national government."[56] In other words, for states like California, New York, and Maryland with vast regulatory codes and high tax rates, imposing similar burdens nationwide makes more sense than fighting for greater autonomy from the federal government.

State-level politicians have principled as well as financial and strategic reasons for supporting federal government overreach. Like national politicians and members of the general public, what state legislators believe is in their state's interest is bound up tightly with their partisan allegiance and political ideology. For instance, Democratic governors applauded President Obama's Environmental Protection Agency (EPA) when it imposed strict new carbon emissions limits on state energy providers. Then, when the Supreme Court issued a stay, California's Democratic Governor Jerry Brown wrote: "As the world gets hotter and closer to irreversible climate change, these justices appear tone-deaf as they fiddle with procedural niceties."[57] President Trump's repeal of an Obama-era requirement that state schools allow transsexuals to use the restrooms and locker rooms of their choice prompted liberal Governor Mark Dayton (D) of Minnesota to state: "This is not a 'state's rights' issue, this is a human rights issue. And it should be a constitutionally protected right."[58] In each of these cases, state politicians have demonstrated that their policy preferences and sense of social justice is a higher priority than federalism.

While Democrats most vocally advocate increased federal preemption, all state legislators have their own incentives for doing the same. Large corporations, which hold considerable sway over both parties, typically prefer policies to be set at the national level, allowing them to learn and follow one set of regulations rather than 50. This gives them a strong incentive to support federal preemption and oppose devolving power to the states. For instance, the U.S. Chamber of Commerce opposed the Federalism Accountability Act of 1999 that would have prohibited any federal bureaucracy from construing any statute as preempting state laws and policies unless Congress explicitly stated its intent to do so and the constitutional justification for such a preemption.[59] In a press release, the Chamber argued this bill would have "put an extraordinary burden on the Congressional power to regulate interstate commerce" that could have led "to a patchwork of state legislation and regulation that [would] increase costs to consumers and decrease the competitiveness of American made [sic] goods in international markets."[60]

For many of the same reasons state governments might choose not to direct the Senate to oppose all preemptions, they might also support some direct mandates.[61] Like preemptions, mandates that direct state governments to abide by federal guidelines and enforce federal policies are often advantageous to highly regulated states, large corporations, and committed ideologues alike. It is impossible to imagine state governments using their power over the Senate to, for example, exempt themselves from the Equal Opportunity Employment Act (which prohibits job discrimination on the basis of race, color, religion, sex, or national origin) or the Marine Protection Research and Sanctuaries Act (which bans dumping sludge and sewage directly into the ocean). Public outcry would be predictable and fierce.

It is very likely, on the other hand, that state governments would forbid the Senate from passing into law—or maintaining in the U.S. Code—any unfunded mandates. While states may prefer the federal government to set policy even if they are tasked with implementation, they are unlikely to accept subservience without subsidy.

When it comes to federal grants, the impact of a repeal of the 17th Amendment could fulfill some of the expectations of repeal advocates. It is likely that state legislators would use their leverage over the Senate to strip away many of the conditions attached to federal grant money today. Common Core, which state teacher unions and school boards bridle against, would likely be eliminated, allowing states to manage their own public school curricula again.[62] Not all federal strings, however, are bad. Programs like the Supplemental Nutritional Assistance Program that now clearly specify how states are to spend federal money would likely be turned into loosely worded block grants, allowing blue states to relax eligibility requirements (and certain red states, it is true, to tighten them).

While state lawmakers would probably prefer to receive the federal money they increasingly rely upon with fewer strings attached, they would be unlikely to use their leverage over the Senate to reduce the number and size of federal grants to their states. This is especially true now, as state governments have become increasingly dependent on federal funds. According to

the Census Bureau's 2015 Annual Survey of State Government Finances, the most recent available, nearly one-third of the average state budget comes from the federal government.[63] This money flows into states via a thousand grant programs, funding everything from Medicaid (about 57 percent of all federal grant money goes to fund this one program) and K–12 education, to widening sidewalks and building museums honoring local film stars.[64]

Changing the way members of the U.S. Senate are selected would not, in and of itself, lead states to eschew pork barrel projects, turn away social welfare spending, and wean themselves off federal grants. As George Mason Law Professor Ilya Somin points out, "To the contrary, senators chosen by state legislators would face even stronger incentives to lobby for additional federal grants than popularly-elected senators do. The political survival of the former would be completely at the mercy of the very state governments that benefit from federal grants."[65] If state legislatures essentially controlled the Senate, they might pressure the federal government to cover the entire expense of unfunded or partially funded federal programs, rather than eliminating them. Politicians would face enormous political opposition and grim electoral consequences if they sought to eliminate programs like Medicaid or Temporary Assistance for Needy Families. A host of other requirements—like school lunch nutrition standards and the REAL ID law, which requires state-issued identification cards to contain certain anti-forgery features—would likely stay on the books as well. The National Council of State Legislatures does not generally oppose these policies outright; their primary objection is the lack of federal funding to meet the new requirements.[66] If state legislatures were to pressure the U.S. Senate to fully subsidize expenses currently borne by the states, this would shift, rather than shrink, the overall cost of government.

Unless the states were willing to force fiscal discipline on themselves post-repeal, the states would not truly become the autonomous laboratories of democracy that some envision. Instead, with federal grant money to fall back on, states would not need to bear the costs of their own policies. Instead, states would be able to continue benefitting from expensive social welfare programs and lavishing money on public-sector employees without raising the necessary revenue, knowing Congress would help foot the bill.

Cutting the strings attached to federal money, without cutting off the pipeline of federal grant money might revive the states' ability to craft policy solutions of their own, but it would not require them to consider or absorb fully the consequences of their policy choices. It could be argued that if the 17th Amendment were repealed, states would use their newfound power over the Senate to push for less federal spending and lower federal taxes, thereby enabling them to raise more revenue and design their own programs. It is, however, highly unlikely states would choose to follow this virtuous path to self-reliance.

According to a recent analysis, all but 14 states get more back in federal spending than their citizens pay in federal income taxes.[67] In other words, only a few states with rich commercial hubs like New York or California put more into the federal coffers per capita than they draw out. The vast majority of states are net tax consumers, and they would likely not support an arrangement under which their programs and infrastructure were funded entirely by their own tax base. For many of these states, infrastructure and popular social welfare programs like Social Security would be difficult or impossible to sustain without a share of the taxes collected from the wealthiest 1 percent, who cluster in a relatively small number of metropolitan areas.[68]

Even states that are currently net tax contributors would be unlikely to choose financial independence over federal largesse. This is true for several reasons. First, unlike state governments, the federal government can print more money and can increase the supply of dollars when it chooses. Also, the federal government can borrow more money at cheaper rates than most states. As former U.S. Senator (and federal judge) James L. Buckley (R–NY) writes, "States are required to balance their books and their ability to borrow is restricted. These restrictions impose a discipline on the states that is not to be found in Washington because the federal government has a virtually unlimited ability to borrow."[69] Despite a $20 trillion debt and climbing annual deficits, the federal government's bond rating remains high (AA+ or AAA, depending on the rating agency). Only 15 states can borrow money at a lower interest rate than the federal government, while 22 must pay a higher rate.[70] The ability to put state expenditures on the federal government's credit card or run up inflation in order to finance deficit spending will remain a temptation for state governments.

Outsourcing revenue collection to the federal government may also be preferable to state governments because the federal government can push tax rates higher without losing the citizens and businesses that make up its tax base. When it comes to the states, citizens can vote with their feet for the policies they prefer. Unsurprisingly, more people tend to migrate to states with lower tax rates.[71] The same is true for businesses, which have been fleeing high-tax states like California in record numbers.[72] While interstate competition for businesses and citizens limits the degree to which states can raise their tax rates, the federal government is not similarly constrained. Because it is much more difficult to become a citizen of another country than it is to become a resident of another state, the federal government can raise significantly more revenue with less fear that businesses and citizens will expatriate. Thus, blue states will prefer the federal government to raise revenue and then disburse the funds they collect rather than collecting the bulk of revenues themselves.[73]

Would Senators More Faithfully Represent the Public Interest?

Today, U.S. Senators know they have a relatively long leash to act as they wish or as interest groups demand once they get to Washington. Unlike state lawmakers, average citizens typically do not pay close attention to politics. For most Americans, busy with their vocations and avocations, family and friends, closely monitoring their elected officials requires too much time and effort.

Empirical evidence suggests that Senators were more closely tethered to their state's interest when they were monitored by state lawmakers rather than the general public. Seth Gailmard of the University of California, Berkeley, and Jeff Jenkins of the University of Southern California found that, prior to the passage of the 17th Amendment, the voting records of Senators from the same state were much more similar than they are today. From this, Gailmard and Jenkins conclude: "Senators appear to be less constrained by factors in their state political scene after the 17th Amendment than they were before it, and this is the implication of eliminating delegated monitoring of political experts."[74] They are quick to point out, though, that "we cannot say whether Senators are using their increased discretion to pursue their ideological agendas...or develop relationships with interest groups, assemble different reelection constituencies, etc."[75]

Whether empowering today's state legislatures would lessen the influence of K Street lobbyists is a question that historical examination cannot answer, but there is some reason to expect it would. For interest groups, securing policy change is an expensive proposition. A staff of lobbyists must be hired, campaign contributions must be made, and, often, a political action committee must be established. It is common for interest groups to spend several million dollars each election cycle to maintain access to as many of the 535 Members of Congress as they can. If interest groups and corporations had to dispatch lobbyists to each state capitol, contribute to the campaigns of tens of thousands of state legislators, and buy issue advertisements in nearly every media market in the country, their resources might be spread too thin to have a major impact on the policymaking process.

However, interest groups and lobbyists might find that they do not need to fight a long, uphill battle through every state legislature to garner influence on Capitol Hill. As Michael Greve points out, once interest groups win a policy victory in a few states where they are particularly influential, they may find those states become allies as they make their case to Congress. For reasons discussed earlier, states that impose environmental regulations at the behest of the Sierra Club, workplace safety standards at the behest of labor unions, or tax breaks for local industries may seek to impose those same policies on the rest of the country after imposing those policies on themselves. Further, state legislators would likely be as eager as Senators to subsidize and shield from competition industries or companies viewed as particularly important to their state's economy. Coal companies in West Virginia, tobacco companies based in North Carolina, and oil and gas companies in Texas may close up their lobbying operations in Washington, DC, but this would not necessarily decrease their political clout. Politicians defer to these groups not only because of campaign contributions, though this is an important factor, but also because they bolster employment, the local economy, and state budgets.

Possible Unintended Consequences

While most arguments against the 17th Amendment focus on the positive impact this change would have on state sovereignty, some argue that repealing it would actually weaken federalism. Were the

17th Amendment repealed, some argue, senatorial selection could become the determining factor in state elections, as it was prior to its passage.

By the mid-1800s voters had begun to cast their ballots in state legislative elections with each candidate's favored U.S. senatorial candidate at top of mind. Professor Seth Masket of the University of Denver writes: "By the turn of the 20th century, thanks to legislative selection of Senators, national politics were controlling state legislative elections, rather than states controlling their Senators."[76] As Yale Law Professor David Schleicher points out, state politicians supported the 17th Amendment, in part, because they saw "direct elections as a way of separating national and state politics" and encouraging "a precondition for the variety of benefits that come from republican federalism, the ability of state majorities to choose state policies."[77]

As a result of the advent of nationally circulated newspapers, syndicated talk radio shows, and nationally broadcasted television news shows, the visibility of national politics is far greater now than it was 150 years ago. Thus, senatorial selection would likely be an even greater determinant in state legislative races today. This would diminish, rather than enhance, the ability of state legislators to run on, enact, and be judged by a policy agenda tailored to their own state.

According to Schleicher, "Rather than serving to enhance the values of federalism, repealing the Seventeenth Amendment would turn state legislative elections into referenda on U.S. Senators[,] meaning state legislators would be free from almost [all] accountability.... To the extent that a constitutional change makes it harder for state residents to use the apparatus of their state government to achieve policy ends, it should be considered a move away from realizing the benefits of federalism."[78]

Today, voters are free to choose the state legislative candidates they think will best serve their state knowing their votes will not influence the partisan balance of power in Washington. It is important that voters select state and federal elected officials separately because state and federal governments face separate problems. If one's vote for state legislator affected the balance of power in the Senate, however, voters might well consider national politics instead of their state's particular interest when casting their ballots in state elections.

Conclusion

Given the procedural hurdles, a repeal of the 17th Amendment would require nothing short of a sea change in public sentiment. A large majority of the public would need to be convinced that their own judgment is inferior to the judgment of state legislators. This new consensus would need to endure: If the democratizing spirit were ever rekindled, state legislators could easily establish *de facto* popular elections as many legislatures did prior to the 17th Amendment. For state legislators, devolving the power to select Senators to the people would not only accord with democratic sentiment but also ensure that their electoral fortunes are not tied to their party's senatorial candidate.

Were a repeal of the 17th Amendment to surmount these rather important obstacles and were state legislators to actually select their Senators and not merely ratify a popular vote, it would likely have only a modest impact on the operations of the federal government, as even some advocates frankly admit. As Todd Zywicki, a leading proponent of repeal, writes:

> Would repealing the Seventeenth Amendment be a panacea for America's constitutional ills? No, of course not.... But could reinstating the Founders' design for the Senate provide a *marginal* step toward restoring constitutional government and deepening citizen understanding about the Constitution? I believe it could.[79]

Changing the way Senators are selected would not, in and of itself, lead states to become more financially self-sufficient or less desirous of federal funds. It would likely not lead to considerably less federal preemption. It would not necessarily lead to less interest group influence. Nor would it lead state legislators or the Senators they select to ignore their ideological convictions and abstain from setting nationwide policy on issues like gay marriage, gun rights, or abortion on demand.

However, repeal would likely result in fewer federal mandates—especially mandates that are not adequately funded. And it would surely lead to fewer strings being placed on federal funds—for better or for worse—but not to fewer federal dollars going to the states. To the contrary, since states are addicted to federal dollars and are unlikely to impose fiscal discipline on themselves, they might well spend more than they could ever hope to raise in revenue and layer on industry-stifling regulations without serious concern for the fiscal consequences.

So long as repeal efforts do not detract from other potentially more efficacious efforts or convince conservatives that there is no hope for reviving federalism short of repeal, there is little risk in continuing to point out the ill effects of the 17th Amendment. In fact, keeping the debate about the wisdom of this 113-year-old amendment alive may have a valuable educative function. But to the extent that repealing the 17th Amendment is viewed as the *sine qua non* for reinvigorating federalism, it is important to remember the implausibility of this course and the incremental improvement it portends.

Scaling back the size and reach of the ever-expanding federal government may be at once more achievable and more daunting than those who advocate repealing the 17th Amendment suggest. On one hand, there is no single amendment that will ensure that Congress and the other two branches of the federal government respect their constitutional bounds. Nor will any single amendment give the states the will to fight whenever their sovereignty is challenged. Further, many state governments, and an increasing percentage of the American people, seem to prefer a powerful federal government and well-funded welfare programs.[80]

On the other hand, conservatives do not have to hold out for a constitutional amendment to start rebalancing federal and state power. That effort can start today. Issue by issue, citizens committed to limited government should look for ways of devolving power back to the states. There are many proposals already on the table for re-empowering the states *vis-à-vis* health care, education, financial services, marriage, and many other policy areas.[81]

Nor do states need to wait for a constitutional amendment to start monitoring their state's Senators. States may not be able to unseat a Senator, but they can certainly embarrass them. State legislators can and should summon their state's U.S. Senators before their chambers to explain votes that they believe harm the interests of their state and its residents. Such a hearing would give state legislatures an opportunity to air their complaints before the state's electorate. If a Senator refused to attend, state legislators could decry both their vote and their lack of courage.

More holistic actions must be considered as well. Bills like the REINS Act and the Article One Restoration Act that are intended to reduce the number of federal regulations, which not only stymie the economy but also circumscribe state sovereignty, should be seen as critical steps to restoring true federalism.[82] The same is true for innovative ideas like capping federal spending, which the federal government uses to buy the complicity of state governments, below a certain proportion of the gross domestic product.[83]

State governments must be weaned off federal dollars or they will never be reliable partners in the fight to control the size and scope of federal government.[84] Even with the repeal of the 17th Amendment, the states may not readily give up an arrangement in which the federal government does the taxing while they largely dole out the benefits. Further, the federal government will always have more access to capital than the states because it can print money and borrow in large quantities. For this reason, changing the way Senators are selected will not reduce the temptation for states to continue driving up the national debt and siphoning money off for themselves. However, the states would likely use their newfound power on Capitol Hill to reduce the restrictions, requirements, and caveats that the federal government frequently attaches to federal grants.

While many conservatives and libertarians point to the passage of the 17th Amendment as an important pivot point in the growth of the federal government's power and the attenuation of state sovereignty, it does not necessarily follow that repealing the 17th Amendment is the solution we need more than a century later. The public's impatience with institutions perceived to be undemocratic (like the Electoral College); the strength of national parties; the importance of political ideology in shaping how state elected officials view their state's interests; and the financial stake state governments now have in big-spending federal government suggest that even if Senators were selected by their respective state legislatures, they may not be the bulwark against federal encroachments they once were.

*—**John W. York, PhD,** is Policy Analyst in the B. Kenneth Simon Center for Principles and Politics, of the Institute for Constitutional Government, at The Heritage Foundation.*

Endnotes

1. John Bowden, "Huckabee Calls for Repeal of the 17th Amendment After Healthcare Failure," *The Hill*, July 28, 2017, http://thehill.com/policy/healthcare/344275-huckabee-calls-for-repeal-of-17th-amendment-after-healthcare-failure (accessed June 12, 2018).
2. Alan Greenblatt, "Rethinking the 17th Amendment: An Old Idea Gets Fresh Opposition," National Public Radio, February 5, 2014, https://www.npr.org/sections/itsallpolitics/2014/02/05/271937304/rethinking-the-17th-amendment-an-old-idea-gets-fresh-opposition (accessed December 12, 2017).
3. Amy Furr, "Law Professor: 17th Amendment 'Disenfranchised the States,'" CNS News, https://www.cnsnews.com/news/article/amy-furr/law-prof-17th-amendment-altered-constitutional-system-checks-balances (accessed December 12, 2017).
4. Mark Levin, *The Liberty Amendments: Restoring the American Republic* (New York: Threshold Editions, 2013); Randall Holcombe, "Repeal the 17th Amendment," *The Beacon*, February 6, 2013, http://blog.independent.org/2013/02/06/repeal-the-17th-amendment/ (accessed June 12, 2018); and Glenn Beck, "James Madison and the 17th Amendment," http://www.glennbeck.com/content/articles/article/198/41793/ (accessed: October 17, 2017).
5. Doug McKelway, "Push for Convention of the States to Rein in Government Gains Steam," *Fox News*, May 15, 2017, http://www.foxnews.com/politics/2017/05/15/push-for-convention-states-to-rein-in-government-gains-steam.html (accessed October 23, 2017).
6. As Senator Mike Lee (R–UT) stated in an interview with Judge Andrew Napolitano, "In practical terms, I don't that it's likely that in our lifetime [sic] there will be the political will necessary to abolish the 17th Amendment." See Andrew Napolitano, "Freedom Watch with Judge Napolitano," Fox Business Network, November 6, 2010.
7. Evan McMorris-Santoro, "Tea Party-Backed Repeal of the 17th Amendment Gets Republicans into Trouble," Talking Points Memo, May 14, 2010, http://talkingpointsmemo.com/dc/tea-party-backed-repeal-of-the-17th-amendment-gets-republicans-into-trouble (accessed June 26, 2017).
8. As Alexis de Tocqueville writes: "It is not necessary that God himself speak in order for us to discover sure signs of his will; it suffices to examine the usual course of nature and the continuous tendency of events; I know without the Creator's raising his voice that the stars follow the arcs in space that his finger has traced.... To wish to stop democracy would then appear to be to struggle against God himself, and it would only remain for nations to accommodate themselves to the social state that Providence imposes on them." See Alexis de Tocqueville, *Democracy in America*, Harvey Mansfield and Delba Winthrop, eds. (Chicago and London: University of Chicago Press, 2000), pp. 6–7.
9. Todd Zywicki, "Federalism and the Separation of Powers: Ramifications of Repealing the 17th Amendment; An Exchange Between Todd Zywicki and Ilya Somin," *Engage*, Vol. 12, No. 2 (September 2011), p. 89, https://fedsoc.org/commentary/publications/ramifications-of-repealing-the-17th-amendment (accessed December 8, 2017).
10. William H. Riker, "The Senate and American Federalism," *American Political Science Review*, Vol. 49, No. 2 (1955), pp. 452–469.
11. Nor would it diminish public support for entitlements—one of the main drivers of federal spending. Many voters would still demand cradle-to-grave welfare services and a redistributive tax code, and many states would still prefer the federal government to meet these demands.
12. Riker, "The Senate and American Federalism," pp. 463–464.
13. This has become a popular term in both law journals and textbooks. In their popular W.W. Norton and Company textbook, William Bianco and David Canon define cooperative federalism this way: "Whereas dual federalism specifically defines the boundaries of state and national responsibilities, a more nebulous form of federalism emerged during the Progressive Era and blossomed in the late 1930s with New Deal legislation. Under cooperative federalism, or 'marble cake' federalism, national and state governments work together to provide services efficiently. Cooperative federalism provided a practical approach to intergovernmental relations as more complex problems arose that could not be addressed at one level of government." William T. Bianco and David T. Canon, *American Politics Today*, 2nd ed. (New York: W.W. Norton & Company, Inc., 2010), http://www.wwnorton.com/college/polisci/american-politics-today2/full/ch/03/outline.aspx (accessed June 15, 2018).
14. See *Cooper v. Aaron*, 358 U.S. 1 (1958).
15. There are many competing definitions of the term "mandate." Some, like the National Council of State Legislatures (NCSL), define mandates to include any federal requirement or preemption that imposes a cost on the states, any additional condition placed on federal grant money, or any federal law or regulation that decreases the amount of revenue a state can collect. This is the most comprehensive definition of the term. The Congressional Budget Office (CBO), tasked with tracking intergovernmental mandates by the Unfunded Mandates Reform Act has attempted to narrow the definition. (See Unfunded Mandates Reform Act of 1995, Public Law 104–4). It interprets the term to mean "actions by public and private entities that would be either required or prohibited." It clarifies that "[d]uties that arise from conditions of federal assistance or that are tied to participating in voluntary federal programs are not considered mandates as defined in Unfunded Mandates Reform Act (UMRA) unless they are one of the large mandatory programs" that states have very little discretion over, like the Supplemental Nutrition Assistance Program, money for which comes to the states via a categorical grant that gives the states very little latitude to tailor the program. On the other hand, conditions attached to federal subsidies for Medicaid and Temporary Assistance for Needy Families, which give states significantly more leeway, are not considered mandates. The bipartisan Advisory Committee on Intergovernmental Relations (ACIR) adopted a still narrower definition. It did not include conditions placed on federal funds as part of its definition, reasoning that "although it is difficult for many jurisdictions to forego substantial financial benefits, the option remains real." Thus, such conditions are rightly considered voluntary rather than mandatory. The ACIR eventually abandoned the term mandates altogether, opting for the term "federally induced costs" due to the "pejorative and definitional baggage associated with the term." I adopt the narrower definition of the term mandate proffered by the ACIR over the more comprehensive definition used by the NCSL or CBO. See National Council of State Legislatures, *Unfunded Mandate*

Principles (Washington, DC: 1994), p. 1, cited in Sandra S. Osbourn, "Mandates and the Congress," Congressional Research Service *Report for Congress*, March 17, 1995 (out of print; available upon request). For more information on this resource, see https://www.worldcat.org/title/mandates-and-the-congress/oclc/33600388&referer=brief_results (accessed June 19, 2018); Congressional Budget Office, "CBO's Activities Under the Unfunded Mandates Reform Act," https://www.cbo.gov/publication/51335 (accessed January 10, 2018); Advisory Committee on Intergovernmental Relations, *Regulatory Federalism: Policy, Process, Impact, and Reform* (Washington, DC: Government Printing Office, February 1984), p. 4; and Advisory Committee on Intergovernmental Relations, *Federally Induced Costs Affecting State and Local Governments* (Washington, DC: ACIR, 1994), p. 3.

16. Robert Jay Dilger, "Unfunded Mandates Reform Act: History, Impact, and Issues," Congressional Research Service *Report for Congress*, January 5, 2018, p. 22, https://fas.org/sgp/crs/misc/R40957.pdf (accessed June 12, 2018).
17. Congressional Budget Office, "CBO's Activities Under the Unfunded Mandates Reform Act."
18. *National League of Cities v. Usery*, 422 U.S. 833 (1976).
19. *New York v. United States*, 488 U.S. 1041 (1992).
20. Lately, this has become a major roadblock to effective enforcement of immigration and drug laws, as some state and local governments have instructed their law enforcement officers not to enforce or assist with the enforcement of federal law.
21. In the 1937 case *Steward Machine Company v. Davis*, the Supreme Court ruled that Congress could use its spending power to reward or discourage state policies regardless of whether it has the Constitutional authority to act on its own to set policy. The Court reasoned that since states can choose to accept or reject federal financial aid, conditions placed on those who accept federal grants are not truly coercive, so long as the spending power was not "used to induce the States to engage in activities that would themselves be unconstitutional," such as "the infliction of cruel and unusual punishment." Lately, however, the Supreme Court has also begun to limit the conditions that can be placed on a state's receipt of federal grant money. In *National Federation of Independent Business et al. v. Sebelius* (2012), the Supreme Court determined, for the first time, that a federal spending program was unconstitutionally coercive. The federal government could not compel states to expand Medicaid by threatening to withhold funding for Medicaid programs already in place. As Chief Justice Roberts wrote in that decision, "The legitimacy of Congress's exercise of the spending power 'thus rests on whether the State voluntarily and knowingly accepts the terms of the contract.' *Pennhurst, supra*, *at 17*. Respecting this limitation is critical to ensuring that Spending Clause legislation does not undermine the status of the States as independent sovereigns in our federal system" (emphasis in original). See also *Printz v. United States*, 521 U.S. 898 (1997), and, much earlier, *Prigg v. Pennsylvania*, 42 U.S. 539 (1842), as well as Justice Sandra Day O'Connor's powerful dissent in *South Dakota v. Dole*, 483 U.S. 203 (1987). For a summary of these and other related cases, see Brian T. Yeh, "The Federal Government's Authority to Impose Conditions on Grant Funds," Congressional Research Service *Report for Congress*, March 23, 2017, https://fas.org/sgp/crs/misc/R44797.pdf (accessed January 8, 2018).
22. James L. Buckley, *Saving Congress from Itself: Emancipating the States and Empowering the People* (New York: Encounter Books, 2014), p. 14.
23. Advisory Commission on Intergovernmental Relations, *Regulatory Federalism: Policy, Process, Impact, and Reform* (Washington, DC: ACIR, 1984), p. 4, http://www.library.unt.edu/gpo/acir/Reports/brief/B-7.pdf (accessed June 12, 2018).
24. The UMRA has not banned all unfunded mandates, nor was it intended to. It requires the CBO to review legislation passed out of committee and identify the number and expense of intergovernmental mandates contained within. Congress is forbidden to bring to the floor a bill that contains an intergovernmental mandate that the CBO projects will cost state, local, or tribal governments $78 million in implementation costs or lost revenue. Unfunded mandates that fall under this threshold are permitted. Even mandates that are above this threshold sometimes pass into law because the unfunded mandate ban is not self-enforcing; a Member of Congress must raise a violation of the UMRA as a point of order. Once a point of order is raised, the House can still vote to proceed to a vote and the Senate can vote to waive the point of order or the chair can simply overrule it. As the CBO has found, this is a rare—but not unprecedented—occurrence. The UMRA also requires executive agencies to submit a report to the CBO when a new rule will impose costs of $156 million or more on the states. Still, some unfunded regulations still go into effect like, for instance, the Department of Agriculture's nutrition standards rule pursuant to the Healthy, Hunger-Free Kids Act of 2010. See also Dilger, *Unfunded Mandates Reform Act: History, Impact, and Issues*.
25. National Association of State Budget Officers, *State Expenditure Report: Examining Fiscal 2015–2017 State Spending* (Washington, DC: NASBO, 2017), https://higherlogicdownload.s3.amazonaws.com/NASBO/9d2d2db1-c943-4f1b-b750-0fca152d64c2/UploadedImages/SER%20Archive/State_Expenditure_Report__Fiscal_2015-2017_-S.pdf (accessed June 12, 2018).
26. Ibid.
27. National Council of State Legislatures, "Total Cost Shift for FY 2004 Through FY 2008 and Projected Cost Shift for FY 2009," *Mandate Monitor*, Vol. 6, No. 1, (April 1, 2008).
28. National Council of State Legislatures, "State and Federal Budgeting: Federal Mandate Relief," 2011, p. 1, http://www.ncsl.org/documents/standcomm/scbudg/FedMandateSF2011.pdf (accessed January 11, 2018).
29. Zywicki, "Federalism and the Separation of Powers: Ramifications of Repealing the 17th Amendment."
30. Ibid.
31. Meredith Jessup, "Georgia Lawmakers Want to Repeal the 17th Amendment," *The Blaze*, February 20, 2013, http://www.theblaze.com/news/2013/02/20/georgia-lawmakers-want-to-repeal-the-17th-amendment/ (accessed October 16, 2017). See also Greg Richter, "Utah Senate Wants to Stop Direct Election of U.S. Senators," Newsmax, February 25, 2016, http://www.newsmax.com/Politics/utah-senate-stop-election/2016/02/25/id/716123/ (accessed October 23, 2017).

32. As Randall Holcombe, a professor at Florida State University who supports repeal, writes: "If the Senate represented the state legislatures, it is unlikely that the federal government would be able to pass laws that constrained states, or imposed costs on them, as the federal government now does." See Holcombe, "Repeal the 17th Amendment." Some repeal advocates point to legislation like Obamacare as the sort of legislation a U.S. Senate selected by state legislatures would have stopped. "A Senator looking out for the interest of their [sic] state would likely not even consider anything with an unfunded federal mandate attached to it," radio host Glenn Beck said of the Affordable Care Act. "Think of a state like Massachusetts: Why would they pay more taxes for mandated health care that they already currently have?" Beck, "James Madison and the 17th Amendment."
33. James Madison, *The Federalist* No. 48, https://www.congress.gov/resources/display/content/The+Federalist+Papers#TheFederalistPapers-48 (accessed June 13, 2018).
34. Furr, "Law Professor: 17th Amendment 'Disenfranchised the States.'"
35. Noah Rothman, "Ted Cruz: Before the 17th Amendment, Politicians 'Less Likely to Break into Your House and Steal Your TV,'" *Mediaite*, December 6, 2013, https://www.mediaite.com/online/ted-cruz-before-17th-amendment-politicians-less-likely-to-break-into-your-house-and-steal-your-tv/ (accessed December 12, 2017).
36. According to a poll conducted by the Annenberg Public Policy Center of the University of Pennsylvania, only one in four respondents could correctly identify the executive, legislative, and judicial as the three branches of the federal government. See "Americans' Knowledge of the Branches of Government Is Declining," Annenberg Public Policy Center, September 13, 2016, https://www.annenbergpublicpolicycenter.org/americans-knowledge-of-the-branches-of-government-is-declining/ (accessed October 23, 2017).
37. Ned Ryun, "To Deliver Real Senate Rule Changes, Repeal the 17th Amendment," *The Federalist*, May 12, 2017, http://thefederalist.com/2017/05/12/deliver-real-senate-rule-changes-repeal-17th-amendment/ (accessed December 12, 2017).
38. Jay S. Bybee, "Ulysses at the Mast: Democracy, Federalism, and the Sirens' Song of the Seventeenth Amendment," *Northwestern University Law Review*, Vol. 91, No. 1 (1997), and Todd J. Zywicki, "Senators and Special Interests: A Public Choice Analysis of the Seventeenth Amendment," *Oregon Law Review*, Vol. 73, No. 1 (1994).
39. Soo Rin Kim, "The Price of Winning Just Got Higher, Especially in the Senate," OpenSecrets.org, November 9, 2016, https://www.opensecrets.org/news/2016/11/the-price-of-winning-just-got-higher-especially-in-the-senate/ (accessed December 12, 2017).
40. See Joshua L. Kalla and David E. Broockman, "Campaign Contributions Facilitate Access to Congressional Officials: A Randomized Field Experiment," *American Journal of Political Science*, Vol. 60, No. 3 (2016), pp. 545–558, and Martin Gilens and Benjamin Page, "Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens," *Perspectives on Politics*, Vol. 12, No. 3 (2014). But also see John York, "Does Rising Income Inequality Threaten Democracy?" Heritage Foundation *Backgrounder* No. 3227, June 30, 2017, https://www.heritage.org/sites/default/files/2017-06/BG3227.pdf.
41. Richter, "Utah Senate Wants to Stop Direct Election of U.S. Senators."
42. National Conference of State Legislatures, "State Partisan Composition," January 30, 2018, http://www.ncsl.org/research/about-state-legislatures/partisan-composition.aspx (accessed June 13, 2018).
43. Though they did not use the opportunity to propose an amendment, the Democratic Party held control of 38 state legislatures for two years following the landslide 1974 elections that immediately followed the Watergate scandal. Carl E. Klarner, "Measurement of the Partisan Balance of State Government," *State Politics and Policy Quarterly*, No. 3 (Fall 2003), pp. 309–319, http://journals.sagepub.com/doi/abs/10.1177/153244000300300305?journalCode=spa (accessed December 7, 2017); Walter Dean Burnham, "Partisan Division of American State Governments: 1834–1985 (ICPSR 16)," Massachusetts Institute of Technology (Ann Arbor, MI: Inter-university Consortium for Political and Social Research, 1985), https://doi.org/10.3886/ICPSR00016.v1 (accessed June 13, 2018); and Sean Trende and David Byler, "Measuring the Strength of the Two Parties," *Real Clear Politics*, September 18, 2014, https://www.realclearpolitics.com/articles/2014/09/18/measuring_the_strength_of_the_two_parties.html (accessed September 24, 2017).
44. Alexis de Tocqueville, *Democracy in America*, Harvey Mansfield, trans. and ed. (Chicago: University of Chicago Press, 2000), p. 640.
45. Jonathan Rauch and Benjamin Wittes, "More Professionalism, Less Populism: How Voting Makes Us Stupid, and What to Do About It," Brookings Institute, May 2017, https://www.brookings.edu/wp-content/uploads/2017/05/more-professionalism-less-populism.pdf (accessed June 26, 2017).
46. YouGov/Huffington Post survey, conducted November 4–5, 2013, https://today.yougov.com/news/2013/11/06/poll-results-senators/ (accessed August 21, 2017). Margin of error 4.7 percent.
47. Evan McMorris-Santoro, "Tea Party-Backed Repeal of the 17th Amendment Gets Republicans Into Trouble," Talking Points Memo, May 14, 2010, http://talkingpointsmemo.com/dc/tea-party-backed-repeal-of-the-17th-amendment-gets-republicans-into-trouble (accessed December 12, 2017).
48 Ilya Somin, "Why Repealing the 17th Amendment Won't Curb Federal Power," *Engage* (Vol. 12, Iss. 2).
49. Starting with Oregon in 1904, 16 state governments required candidates for state legislature to pledge ahead of time whether or not they would support the winner of a statewide popular vote. Unsurprisingly, nearly all candidates for state legislatures vowed to validate the public's choice. Twelve other states adopted diluted versions of the Oregon model. For instance, some states had popular elections but did not publicly pressure state legislators to pledge their support for the victor. Other states instituted tests of popular sentiment in some counties and regions, but not statewide. While many states did not institute *de facto* general elections, all but two required primary

elections by 1910. In states where one party dominated, such as the states of the old Confederacy, the popular party primary essentially determined who would represent the state in the U.S. Senate. See Kris W. Kobach, "Rethinking Article V: Term Limits and the Seventeenth and Nineteenth Amendments," *Yale Law Journal*, Vol. 103, No. 7 (May 1994), pp. 1976–1980; Riker, "The Senate and American Federalism," p. 466; *Congressional Record*, May 31, 1910, pp. 7113–7120; and C. H. Hoebeke, *The Road to Mass Democracy: Original Intent and the Seventeenth Amendment* (New Brunswick, NJ: Transaction Publishers, 1995), p. 74.

50. Riker, "The Senate and American Federalism."
51. Ibid.
52 Somin, "Why Repealing the 17th Amendment Won't Curb Federal Power."
53. Richard Cauchi, "State Laws and Actions Challenging Certain Health Reforms," National Conference of State Legislatures, March 25, 2017, http://www.ncsl.org/research/health/state-laws-and-actions-challenging-ppaca.aspx (accessed June 15, 2018).
54. Andrew G. Simpson, "States Balk at Growing Trend of Federal Preemption," *Insurance Journal*, April 17, 2006, https://www.insurancejournal.com/magazines/currents/2006/04/17/69249.htm (accessed January 11, 2018).
55. Michael S. Greve, "Two Models of Federalism Highlight Growing Divide Among States," Mercatus Center, July 20, 2015, https://www.mercatus.org/publication/two-models-federalism-highlight-growing-divide-among-states (accessed June 15, 2018). See also Somin, "Why Repealing the 17th Amendment Won't Curb Federal Power."
56. Ibid.
57. "State Statements Following the Supreme Court's Decision to Stay the Clean Power Plan," Georgetown Climate Center, February 10, 2016, http://www.georgetownclimate.org/articles/state-statements-following-the-supreme-court-s-decision-to-stay-the-clean-power-plan.html (accessed June 15, 2018).
58. Rachel E. Stassen-Berger, "Governor Mark Dayton Blasts Trump Administration Over Transgender Bathroom Edict," *Twin Cities Pioneer Press*, February 23, 2017, http://www.twincities.com/2017/02/23/gov-mark-dayton-blasts-trump-administration-over-transgender-bathroom-edict/ (accessed December 12, 2017).
59. Federalism Accountability Act of 1999, S. 1214, June 10, 1999, 106th Cong., 2nd Sess., https://www.govtrack.us/congress/bills/106/s1214 (accessed June 15, 2018).
60. U.S. Chamber of Commerce, "U.S. Chambers Asks Senate to Block Federalism Bill," August 2, 1999, https://www.uschamber.com/press-release/us-chambers-asks-senate-block-federalism-bill (accessed December 15, 2017).
61. As discussed above, owing largely to the Supreme Court's anti-commandeering doctrine, the federal government has already been forced to rely less on direct orders to compel state action.
62. "Teachers' Unions Threaten Common Core Implementation," *Washington Post*, May 11, 2014, https://www.washingtonpost.com/opinions/teachers-unions-threaten-common-core-implementation/2014/05/11/d5a0bc22-d6f3-11e3-95d3-3bcd77cd4e11_story.html?utm_term=.609dbced818a (accessed June 20, 2018), and Stephanie Simon, "NEA Slams 'Botched' Common Core," *Politico*, February 19, 2014, https://www.politico.com/story/2014/02/national-education-association-common-core-103690 (accessed June 20, 2018).
63. U.S. Census Bureau, *2015 Annual Survey of State Government Finances* (Government Printing Office, 2017), https://www.census.gov/newsroom/press-releases/2017/cb17-tps46-government-finances.html (accessed August 14, 2017). Federal grants to state and local governments represent about 17 percent of total federal outlays. See Congressional Budget Office, *Federal Grants to State and Local Government*, March 2013, https://www.cbo.gov/publication/43967 (accessed March 2013), and The White House, Office of Management and Budget, "Historical Tables," https://obamawhitehouse.archives.gov/omb/budget/Historicals (accessed August 31, 2017).
64. National Association of State Budget Officers, *State Expenditure Report: Examining Fiscal 2015–2017 State Spending*, and Buckley, *Saving Congress from Itself: Emancipating the States and Empowering the People*, pp. 9–10.
65 Somin, "Why Repealing the 17th Amendment Won't Curb Federal Power."
66. Representative Donna Stone and Speaker Joe Hackney, letter to Senator Daniel K. Akaka and Senator John E. Sununu, April 4, 2004 http://www.ncsl.org/ncsl-in-dc/standing-committees/sctran/ncsl-letter-of-support-for-s-717-repealing-the-re.aspx (accessed January 12, 2017), and Molly Ramsdell, letter to Jill Brewer, Chief, Policy and Program Development Branch, Child Nutrition Division, April 13, 2011, http://www.ncsl.org/research/human-services/ncsl-letter-on-proposed-national-school-lunch-and.aspx (accessed June 15, 2018).
67. John Tierney, "Which States Are Givers and Which Are Takers," *The Atlantic*, May 5, 2014, https://www.theatlantic.com/business/archive/2014/05/which-states-are-givers-and-which-are-takers/361668/ (accessed December 12, 2017).
68. Howard Wial, "Where the One Percent Live," *Brookings Institute*, October 31, 2011, https://www.brookings.edu/articles/where-the-one-percent-live/ (accessed December 15, 2017).
69. James L. Buckley, *Saving Congress from Itself: Emancipating the States and Empowering the People* (New York: Encounter Books, 2014), p. 16.
70. This figure is based on Standard and Poor's General Obligation and ICR ratings as of June 9, 2016. See Robin Prunty, "AAA: Making the Grade in State Credit Ratings," National Conference of State Legislatures, Legislative Summit 2016, https://comm.ncsl.org/productfiles/83453001/2016_Prunty_Presentation.pdf (accessed June 27, 2017).
71. Arthur B. Laffer, Jonathan Williams, and Stephen Moore, *Rich States, Poor States: ALEC–Laffer State Economic Competitiveness Index*, 9th ed. (Washington, DC: American Legislative Exchange Council, 2016).

72. Ibid.
73. Zywicki, "Federalism and the Separation of Powers: Ramifications of Repealing the 17th Amendment."
74. Sean Gailmard and Jeffery A. Jenkins, "Negative Agenda Control in the Senate and House: Fingerprints of Majority Party Power," *The Journal of Politics*, 2007, pp. 689–700, https://www.journals.uchicago.edu/doi/full/10.1111/j.1468-2508.2007.00568.x (accessed June 15, 2018).
75. Ibid.
76. Seth Masket, "Why Repealing the 17th Amendment Wouldn't Fix the Senate," *Vox*, August 1, 2017, https://www.vox.com/mischiefs-of-faction/2017/8/1/16069872/repealing-17th-amendment-bad-idea (accessed June 15, 2018).
77. Ibid.
78. David Schleicher, "The Seventeenth Amendment and Federalism in an Age of National Political Parties," *Faculty Scholarship Series* No. 4962 (2014), p. 5, http://digitalcommons.law.yale.edu/fss_papers/4962 (accessed December 12, 2017).
79. Zywicki, "Federalism and the Separation of Powers: Ramifications of Repealing the 17th Amendment" (emphasis added).
80. According to a 2017 poll conducted by the Pew Research Center, for the first time, more Americans favor a "bigger government [and] more services" to "smaller government [and] fewer services." See "With Budget Debate Looming, Growing Share of Public Prefers Bigger Government," Pew Research Center, April 24, 2017, http://www.people-press.org/2017/04/24/with-budget-debate-looming-growing-share-of-public-prefers-bigger-government/ (accessed December 8, 2017).
81. Edwin Feulner, "Solutions for America: Reembracing Federalism," Heritage Foundation *Solutions for America*, Vol. 17 (August 17, 2010), http://thf_media.s3.amazonaws.com/2010/pdf/Solutions_10.pdf; John Barry, "Federalism and Financial Services," Heritage Foundation *Backgrounder* No. 1160, May 1, 1998, http://thf_media.s3.amazonaws.com/1998/pdf/bg1160.pdf; Edwin Meese, "Marriage Amendment Protects Federalism," Heritage Foundation *WebMemo* No. 531, July 12, 2004, https://www.heritage.org/marriage-and-family/report/marriage-amendment-protects-federalism; and Dan Lips and Evan Feinberg, "Utah's Revolutionary New School Voucher Program," Heritage Foundation *WebMemo* No. 1362, February 16, 2007, https://www.heritage.org/education/report/utahs-revolutionary-new-school-voucher-program.
82. John York, "How Congress Can Drive a Stake Through Bureaucracy's Heart," *The Federalist*, June 30, 2017, https://thefederalist.com/2017/06/30/congress-can-drive-stake-bureaucracys-heart-heres/ (accessed June 15, 2018), and James Gattuso, "Taking the REINS on Regulation," Heritage Foundation *WebMemo* No. 3394, October 13, 2011, http://thf_media.s3.amazonaws.com/2011/pdf/wm3394.pdf.
83. Kay Coles James, "Let's Make Washington Work Like We Do," *The Daily Signal*, February 15, 2018, https://www.dailysignal.com/2018/02/15/lets-make-washington-work-like/ (accessed June 15, 2018).
84. Sven Larson, "Federal Funds and State Fiscal Independence," Heritage Foundation *Backgrounder* No. 2136, May 15, 2008, https://www.heritage.org/budget-and-spending/report/federal-funds-and-state-fiscal-independence.