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# The Seventeenth Amendment: The United States Senate and the Transformation from Legislative Selection to Direct Popular Election

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State University of New York  
College at Buffalo  
Buffalo, New York  
Department of History and Social Studies Education

**The Seventeenth Amendment:  
The United States Senate and the Transformation from  
Legislative Selection to Direct Popular Election**

by

John J. Janora

*Submitted to the Faculty of State University of New York, College  
at Buffalo, in Partial Fulfilment of the Requirements for the degree  
of*

**Master of Arts in History  
August 2018**



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## **DEDICATION**

To my beautiful wife, Valerie, the only person willing, and with a smile, to put up with my eclectic selection of career choices and spur of the moment decision-making processes. You truly are a saint.

## **ACKNOWLEDGMENTS**

I would like to thank Nick Gedraitis and Millington Lockwood, fellow public school teachers and adjunct professors for Syracuse University. Their analysis and thoughtful critiques have allowed me to make this document that much the better.

This is also an opportunity to admit that this paper would not have been possible without the lifelong work of United States Senator from New York, Charles Schumer. Observing his use of politics and his public persona over the course of the last twenty plus years as both a United States representative and a United States senator have given me the inspiration to start researching how the Senate selection/election process has evolved since the establishment of the United States Constitution.

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## **ABSTRACT**

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Title: An Analysis Considering the Significance of the Seventeenth Amendment: The United States Senate and the Transformation from Legislative Selection to Direct Popular Election

Major Professor: Dr. David Carson

The passage of the Seventeenth Amendment helped to democratize the United States Senate and tied the legislative branch closer to the people, but it undermined the links between the state and the federal systems. Any thoughtful discussion on the Progressive Era will generally lead towards the idea of increased involvement of both the government, at all levels, in the lives of the general population, and the increased involvement of the general population in the functioning of the government at large. One seemingly obvious decision made in the early part of the 20<sup>th</sup> century was the implementation of the Seventeenth Amendment, which led to the direct election of United States senators. No longer would deals made in “smoky backrooms” and with

corrupt state legislators have a say on who would represent state interests best at the national level. In its place would be an individual who would be more representative of the people's will and ideological bend. The debates over the adoption and ratification of the Seventeenth Amendment, in the popular press, the public, in state legislatures, and in Congress focus almost entirely on the expansion of democracy and the elimination of corruption, but did not have any real discussion on the impact on federalism and the original intent of the United States Constitution.

The motivation of this document is the discussion of the corruption in the era preceding the adoption of the Seventeenth Amendment. The subsequent issue, and the primary problem to be considered, will be the issues of corruption that have happened since the adoption of the amendment, and if its adoption has had a positive, negative, or neutral effect on the Senate. Through the comparison of the pre-Seventeenth and post-Seventeenth Amendment eras, with assessments of moral, ethical, and legal issues senators have faced, it will be determined whether the Seventeenth Amendment had the effect on American society as it was calculated to accomplish, or if it was of minimal, or even detrimental, consequence on the comportment of the United States Senate and the actions of the federal government. These ideas will be investigated in order to see if malfeasance was and still is as common a concern as is typically understood.

Information and analysis was completed by using a wide array of primary and secondary sources. There are numerous newspaper and news magazine articles concurrent to specific situations from the eras debated. Historical, political science, and law journals give a wide range of contemporaneous attitudes and discussions among

several professional fields, along with more current interpretations of past events. Traditional scholarly research, the venerated text *The Federalist Papers*, along with commentary from various senators, presidents (particularly Theodore Roosevelt), Supreme Court members, and primeval versions of investigative journalists add to the discussion through public dialogues, the consistent introduction of new laws, and the exposure of underhanded dealings that allowed corruption to apparently thrive for decades.

Ideas as to how to fix issues with the selection process of United States senators could have possibly lowered external influence on the legislative process without dramatically changing the Constitution, changes that will be shown to have had little real effect on how senators act. Instead of the “Captains of Industry” of years past, there are now lobbyists, corporate interests, and special interests doing much the same, but now referring to the system as fundraising instead of bribery. In conflict to most modern perceptions, it was seen as important to have direct elections of United States not because of fraud, nepotism, or blatant disregard of the law or tradition, but primarily because some states, at times, had years of no proper representation. Many state legislatures simply saw the amendment as was way to ensure proper representation for their state.

## CHAPTER 1. INTRODUCTION

If you look at the minutes of the Constitutional Convention - which we have – Madison, who was the main framer, proceeded to develop a system in which - as he put it - power would be in the hands of the wealth of the nation, the more responsible set of men and who recognize the need to protect the rights of property owners. That's why in the constitutional system, the most powerful part of the whole system is the Senate.

- Noam Chomsky<sup>1</sup>

### **An August Selection of Gentlemen**

The name Senate on its own can cause a reader to recall the distinguished body that helped to build Rome into a world superpower. Historical notables such as Brutus, Publius, Cincinnatus, Scipio, Cato, amongst many others, sat at the vanguard of Roman greatness, ensuring stability and wisdom were available to the subjects of the emperor, that foreign threats were minimized, and probably just as important, that popular opinion was allowed to cool before impulsive laws took effect.<sup>2</sup> Its modern version, the upper house of the United States legislature, has been referred to as both the world's greatest debating society and at the same time a huge road block to the efficient accomplishment of governmental responsibilities. In *The Federalist Papers* opponents and supporters wrote under Roman senator *nom de plumes*, debating the Senate's development and arguing its proper role in a democratic/republican society.<sup>3</sup>

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<sup>1</sup> Jegan Vincent de Paul. "Noam Chomsky interviewed by Jegan Vincent de Paul." *Compare and Contrast: Codes of Conduct*, with support from the National Endowment for the Arts. August 15<sup>th</sup>, 2012. <https://chomsky.info/20120815/>. Accessed online 29 December 2017.

<sup>2</sup> Daniel Wirls and Stephen Wirls. *The Invention of the United States Senate*. Baltimore, Maryland and London: The Johns Hopkins University Press, 2004. p. 1.

<sup>3</sup> Alexander Hamilton, John Jay, and James Madison. *The Federalist Papers*. New York: Fall River Press. 2017.

There has traditionally been an argument that the United States Senate is highly unrepresentative of the American people, and this is easy enough to argue if it is assumed that the goal of the Founders was to have the Senate represent the general population. State populations in the late 18<sup>th</sup> century were generally relatively close to each other, with outliers such as Virginia (much larger than the norm) and Delaware (much smaller than the norm) being the only significant differences to the model.<sup>4</sup> Modern senators represent a significantly diverse and dissimilar number of people, with Wyoming having a population one seventieth the population of California. It can be reasoned this was done purposefully by the Founders in order to ensure States were treated as equals in one branch of the government, something that would be much more difficult to accomplish on a representational basis. This allows smaller, or minority population states, to protect themselves against bad acts attempted by larger states.<sup>5</sup> The United States Senate has been described as a majestic deliberative body, and as a black hole of argument, the passage of the Seventeenth Amendment did nothing real to change this idea.<sup>6</sup>

The Senate was designed for three distinct, yet related, purposes. First, it was instituted to act as a representative of the corporate interests of the many states. Secondly, it was to act as a connection or bridge between the executive and legislative branches, with responsibilities of both branches morphed into one group. Third, it was to counterbalance the fiery hot actions it was assumed the democratically elected

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<sup>4</sup> Frances E. Lee and Bruce Oppenheimer. *Sizing Up the Senate: The Unequal Consequences of Equal Representation*. Chicago: The University of Chicago Press. 1999. p. 16.

<sup>5</sup> Frances E. Lee and Bruce Oppenheimer. *Sizing Up the Senate: The Unequal Consequences of Equal Representation*. Chicago: The University of Chicago Press. 1999. p. 19.

<sup>6</sup> Daniel Wirls and Stephen Wirls. *The Invention of the United States Senate*. Baltimore, Maryland and London: The Johns Hopkins University Press, 2004. p. 214.

House of Representatives would constantly find itself immersed in. The House was assumed to be the direct, fast acting mouth piece of the general public, constantly pushing for action, while the Senate was supposed to act as the more even-tempered, erudite body, using time and debate to solve the issues presented to it in a way that would benefit the states.<sup>7</sup>

Note: For the purposes of this paper, the use of the term “Progressive Era” will signify the intensification of the Populist movement in the 1890s and will peak with the passage of the Nineteenth Amendment in 1919.

During its history the Senate found itself subject to the weakness of men, with various scandals, if not plaguing the body, being omnipresent nonetheless. To solve this issue Progressive Era politicians, and the public at large, pushed for a more representative body, one which would mirror the opinion of the general public more closely, and one that would remove the perception that senatorships could be bought and sold, favors gained, and any number of other undemocratic principles. A potential concern with this idea was that the problems, though in existence to a point, were not as pervasive as is commonly currently believed. The issues that were present were also not necessarily because of structural deficiencies in how senators were selected by their various states, but because of the general fallibility of men. Problems that existed before the Seventeenth Amendment still exist to this day, over a century after the United

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<sup>7</sup> C. Herman Pritchett. "Congressional Membership." *Encyclopedia of the American Constitution*, edited by Leonard W. Levy and Kenneth L. Karst, 2nd ed., vol. 2, Macmillan Reference USA, 2000, pp. 500-501. <http://link.galegroup.com/apps/doc/CX3425000566/GVRL?u=buffalostate&sid=GVRL&xid=ba06789e>. Accessed 25 June 2018.

States Constitution was altered and individual states lost their ability to get proper representation at the national level.

There is remarkably little historical documentation tied to the passage of the Seventeenth Amendment, and even the initial development of the United States Senate. What does exist is in a form that seems to agree with the modern belief that the primary goal of the amendment's passage was to ensure that big businesses, trusts, and other bad actors were limited in the influence they had over individual United States senators.<sup>8</sup> The debates over the implementation of the Seventeenth Amendment, in the press, the public, at the state level, and in Congress focus almost entirely on the expansion of democratic principles and the goal of eliminating corruption, but did not have any real discussion on the impact on federalism and the original intent of the United States Constitution. The long term effects of the amendment are typically described in statistical analyses and similar type articles, showing how voting trends may or may not have changed due to the direct election of United States senators. This stark edict showed the Progressive Era's wholesome goal of restraining the influence business had at all levels of government. There is even less information about the long term effects the amendment has had on modern society, and the material that is

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<sup>8</sup> Dennis J. Mahoney. "Seventeenth Amendment." *Encyclopedia of the American Constitution*, edited by Leonard W. Levy and Kenneth L. Karst, 2nd ed., vol. 5, Macmillan Reference USA, 2000, pp. 2387-2388. *Gale Virtual Reference Library*, <http://link.galegroup.com/apps/doc/CX3425002278/GVRL?u=buffalostate&sid=GVRL&xid=80ede9ea>. Accessed 25 June 2018; David Graham Phillips. *The Treason of the Senate*. *Original: 1906. Edited with an introduction by George E. Mowry and Judson A. Grenier*. Chicago: Quadrangle Books, 1964. p. 628-638. [https://www.senate.gov/artandhistory/history/minute/Treason\\_of\\_the\\_Senate.htm](https://www.senate.gov/artandhistory/history/minute/Treason_of_the_Senate.htm). Accessed online 5 January 2018.

available appears to show a tendency to treat it more as an insignificant, add-on activity to the Progressive Era, seeming to assume that it was an obvious decision to make and not deserving of further analysis.

A host of questions need to be answered in order to properly ascertain why the Seventeenth Amendment was needed, if it was needed at all. What was the Founding Fathers' goal in selecting rather than electing United States senators? Did this goal supersede any potential issues that might arise with corruption with specific senators? Did the Senate properly reflect the will of the American people better after the amendment's passage, and does this even matter, since the Senate's original purpose was to represent greater state interests? Was the corruption of the Senate in the late 19<sup>th</sup> and early 20<sup>th</sup> centuries large enough as to force a structural change to the United States Constitution? If so, was the amendment effective in fixing this corruption? Or, was the Seventeenth Amendment a solution in search of a problem? The primary question that needs to be answered is: Was the Seventeenth Amendment a necessary action, a violation of the Founders well-reasoned intent, or something different entirely? The simple idea that state legislatures, who essentially initiated at state governmental levels the idea of direct elections, were almost eager to give away their basic Constitutional duties of selecting senators and did so with little relatively little discussion of federalism or proper representation of the corporate interests of their individual states can be seen as an almost unthinkable relinquishment of authority and power.<sup>9</sup>

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<sup>9</sup> David Schleicher. "The Seventeenth Amendment: Federalism in an Age of National Political Parties." *Hastings Law Journal*. Hastings College of Law. May 2014. p. 1043. [http://proxy.buffalostate.edu:2053/hottopics/lnacademic/?shr=t&csi=7341&sr=TITLE\('The+Seventeenth+Amendment+federalism+in+an+age+of+national+political+parties'\)+and+date+is+2014](http://proxy.buffalostate.edu:2053/hottopics/lnacademic/?shr=t&csi=7341&sr=TITLE('The+Seventeenth+Amendment+federalism+in+an+age+of+national+political+parties')+and+date+is+2014). Accessed online January 11, 2018.



This paper will specifically research and analyze the events and opinions leading up to the implementation of the Seventeenth Amendment to the United States Constitution, including the censures and impeachments of United States Senators before and after the amendment was ratified, possibly the only real way to differentiate the ante and post direct election eras. The objective is to integrate these concepts with more recent texts, journal, magazine, and newspaper articles that expose some of the issues that are tied directly to the implementation of Seventeenth Amendment, the founders' idea of states' rights, and the reasoning of the importance of equal representation between the many states.

In answering the previous series of questions it will become evident that the Seventeenth Amendment was an unnecessary action leading to the weakening of the supremacy the individual states and creating a flawed relationship between the state and federal governments. The original intent of the Constitutional Convention and its innovative plan for the United States Senate was senators acting as representatives to the states, not directly for the people of those states. The ratification of the Seventeenth Amendment has weakened a needed check against popular opinion and hasty decision making. Instead of the celebrated deliberative body it was designed to be, the Senate has been reduced to an ordinary representative body, little different from the House of Representatives, which it was intended to counter. The Seventeenth Amendment completed the most noteworthy and significant change in the Senate's history and formed a deviation from the Constitution's original intent, which was the corporate representation of the individual states on the national stage.<sup>10</sup>

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<sup>10</sup> Daniel Wirls and Stephen Wirls. *The Invention of the United States Senate*. Baltimore, Maryland and London: The Johns Hopkins University Press, 2004. p. 216.

Though counterintuitive to the modern voter and average citizen, personal decisions at the ballot box do not always line up with long term benefits that the legislative branch might very well be attempting to accomplish. One of the Founding Fathers' original ideas when authoring the United States Constitution was to have an upper house, known as the Senate, be a representative body for the individual states. Whereas members of the House of Representatives had to continually run for office and keep the majority of the voting population relatively happy, senators did not have to worry about momentary public opinion before 1913. Selected to their positions, they were insulated from the news cycle, dealt primarily with state and national level politicians, and served a six year term, which further protected them from the capricious and ever changing attitudes of the public. Not directly responsible to the people of the many states, the general idea of the Senate was to give the states direct representation on the national stage, along with a potential for a "long view" as to the importance of specific legislation without each senator having to worry as much about public opinion. With each state given equal representation it can be argued the Senate might very well be the most important part of any of the branches of government; it allowed the states to have their voices heard in both legislation and ruling authority. Since population numbers were not considered in its formation the members, and the debates they would have, were seen as more substantial, and states were forced to be accommodating towards the others since steamrolling through sheer size of congressional contingent was not possible.<sup>11</sup>

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<sup>11</sup> William Smith White. *Citadel: The Story of the United States Senate*. New York: Harper and Brothers, Publishers, 1956. p. 22.

The idea of indirect senatorial selections had been controversial since the Constitutional Convention in 1789 and consistent pressure was applied to Congress to change the system from very early on. It came to a crest in the late 19<sup>th</sup> and early 20<sup>th</sup> centuries, with the House of Representatives passing popular election amendments in each session from 1893 to 1911, but failing to gain traction in the Senate. The selection of United States Senators occurred for the final time in November 1912. Within the year the Seventeenth Amendment to the United States Constitution was adopted.<sup>12</sup>

By the time the Seventeenth Amendment was adopted many states had already established mechanisms that essentially allowed voters to choose the senators of their state. A common practice was having the legislature appoint the winners of party primaries as senators. This allowed the citizenry to have a certain say in senate representation, but also maintained the state legislatures' ability to choose who would be sent to the Senate. The amendment was widely seen as necessary to reduce the apparent influence of big business and other special interests on the selection of senators and to prevent vacancies or frequent turnover in the Senate caused by party wrangling or changes of party leadership at the state level.<sup>13</sup>

William Jennings Bryan enjoyed a day of victory as the newly minted Secretary of State early in the Woodrow Wilson administration. On May 31, 1913, Bryan signed the proclamation declaring the 17th Amendment, requiring direct election of U.S. senators, duly ratified and incorporated into the Constitution of the United States. Bryan had long

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<sup>12</sup> Sara Brandes Crook, and John R. Hibbing. "A Not-so-Distant Mirror: the 17th Amendment and Congressional Change." *The American Political Science Review*, vol. 91, no. 4, 1997, p. 845. *JSTOR*, JSTOR, [www.jstor.org/stable/2952168](http://www.jstor.org/stable/2952168).

<sup>13</sup> Brian Duignan. "Seventeenth Amendment. Encyclopædia Britannica, *Britannica Academic*." 2017. [proxy.buffalostate.edu:2793/levels/collegiate/article/Seventeenth-Amendment/474646](http://proxy.buffalostate.edu:2793/levels/collegiate/article/Seventeenth-Amendment/474646). Accessed 24 Jul. 2017.

been in the vanguard of the fight for the amendment, as United States Representative and United States Senator from Nebraska, and the three time losing candidate for president of the United States. His statement, an early version of the theory of the United States Constitution being a living document, succinctly describes the populist mindset of the era:

What with our daily newspapers and our telegraph facilities we need not delegate our powers," declared the Great Commoner. Whatever reasons the Founders may have had for requiring election by state legislatures, "today under present conditions, those statesmen and patriots would undoubtedly be of another opinion.<sup>14</sup>

### **The Founding Fathers' Original Intent for the United States Senate**

The modern American President is an extremely powerful figure, but this idea might be considered an anathema to the men who gathered in Philadelphia in the summer of 1787. After fighting a war against a man seen as a tyrant, it became increasingly important that one man never be given such powers, and the idea of separation of powers was born. Instead of the British tradition of one man rule, with a parliament called at the pleasure of his majesty, the American system was purposely set up with three equal branches, with a purposeful tendency towards inertia and stalemate.<sup>15</sup> A bicameral legislature with equal authority but different responsibilities was developed to mirror most state legislatures of the time. The House of Representatives would be based on a version of direct democratic principles. The Senate was to emulate an aristocratic class. In the executive branch the office of

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<sup>14</sup> Jack Kenny. "The Seventeenth: the worst of all amendments? The 17th Amendment, putting the election of U.S. senators in the citizens' hands, instead of the state legislatures, was meant to empower citizens. It had the opposite effect." *Opposing Viewpoints in Context: The New American*, 1 Apr. 2013, p. 35. [http://link.galegroup.com.proxy.buffalostate.edu/apps/doc/A326854317/OVIC?u=nysl\\_we\\_bsc&xid=8b7c4dc6](http://link.galegroup.com.proxy.buffalostate.edu/apps/doc/A326854317/OVIC?u=nysl_we_bsc&xid=8b7c4dc6). Accessed 25 Mar. 2018.

<sup>15</sup> Gail Collins. *William Henry Harrison*. New York: Times Books; Henry Holt and Company. 2012. p. ix.

President would reflect the monarchs of Europe. These positions were argued and a version of these ideas were eventually accepted by the newly created nation. This was all to be balanced in a way that led to an almost equilibrium, with no individual element dominant over the other.<sup>16</sup> Historian George Galloway even goes as far as to argue that the primary reason for the legislature and the executive branches in general was to “confine itself, for the most part, to external affairs of the new nation, leaving the conduct of internal affairs to the states and communities.”<sup>17</sup> The federal government was set up to be the international representative of the nascent country, with most internal decisions and obligations centered as close to the people as possible.

The original intent of the Founding Fathers’ and the United States Constitution was to have a legislatively selected Senate be the representative body for these many states, not of the people in general. The House of Representatives was to be popularly elected by the individual voter, with frequent elections, campaigning, and the proverbial “kissing of babies.” The Senate was supposed to be the longer term measure of stability that would potentially dampen the tyranny of the majority, having a long term, more professional political class answering to the state they were selected to represent.<sup>18</sup>

In either manifestation it is important to understand that though serving at the pleasure of the people or the legislature, they were guaranteed, unless removed from

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<sup>16</sup> John C. Miller. *The Federalist Era*. New York: Harper Brothers Publishers. 1960. p. 114.

<sup>17</sup> George B. Galloway. *History of the House of Representatives*. New York: Thomas Y. Crowell Company. 1961. p. 119.

<sup>18</sup> C. Herman Pritchett. "Congressional Membership." *Encyclopedia of the American Constitution*, edited by Leonard W. Levy and Kenneth L. Karst, 2nd ed., vol. 2, Macmillan Reference USA, 2000, pp. 500-501. <http://link.galegroup.com/apps/doc/CX3425000566/GVRL?u=buffalostate&sid=GVRL&xid=ba06789e>. Accessed 25 June 2018.

office through an arduous process, their entire two or six year term. They were not delegates, following instructions from individual districts or states, as the members of the Convention nominally were, but more of a trustee, and able to act as a free agent in order to gain the most benefit for their state and the nation at large.<sup>19</sup>

The specific wording for the selection of United States senators in Article 1, Section 3 of the United States Constitution states “The Senate of the United States shall be composed of two senators from each state, chosen by the legislature thereof, for six years;”<sup>20</sup> According to Oppenheimer three characteristics not expressly stated in the Constitution, but in existence nonetheless, make the United States Senate unusual among the world’s upper chambers in that:

- It shares legislative power equally with its lower partner, in this case, the House of Representatives.
- It operates under a set of rules that rest enormous power in each senator.
- When majorities rule in the Senate it is only by leave of minorities.<sup>21</sup>

Whereas Article I, Section 3, Clause 1 of the United States Constitution specifically called for individual state legislatures to choose a state’s senators, the Seventeenth Amendment called for, and eventually mandated, the direct election of United States senators by each states’ general electorate. The Senate and the House were designed to act as mutual checks on each other, with the upper house advocating

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<sup>19</sup> Norman C. Thomas and Karla Lamb. *Congress: Politics and Practice*. New York: Random House, 1964. p. 38.

<sup>20</sup> *The United States Constitution*. Article 1, Section 3.

<sup>21</sup> Bruce I. Oppenheimer. *United States Senate Exceptionalism*. Columbus, OH: The Ohio State University Press, 2002. p. 3.

for a more long term, disputably more sophisticated outlook of legislative activities and embody the idea of federalism and equality amongst the states. The lower house was to align closer to the opinion of the general public.<sup>22</sup> Even though the body of laws typically discussed as being attached directly to the Progressive Era is at the national level (examples include: the Pure Food and Drug Act, various “trust busting measures,” and a set of four constitutional amendments covering income taxes, the prohibition of alcohol, the direct election of senators, and women’s suffrage), most of the laws enacted during this era started typically as grassroots, local initiatives, eventually making their way into the state level governments, and ultimately to the federal level.

### **Debate at the Constitutional Convention**

James Madison wrote extensively of the Constitutional Convention debates referring to what eventually became equal representation of the states in the United States Senate and the corporate representation of the states in the upper house. He stated in his notes that many delegates feared one of two extremes resulting from the failure to give states representation at the national level. The first fear was a “perfect separation” of the thirteen states into independent nations, subject only to the law of nations. The second fear was “perfect incorporation,” where the states “would be mere counties of one entire republic.” These fears could only be mitigated by the states having representation that was present at the national level, but an argument ensued as to whether the states would be represented by population, as the Assembly (or House

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<sup>22</sup> Daniel Wirls and Stephen Wirls. *The Invention of the United States Senate*. Baltimore, Maryland and London: The Johns Hopkins University Press, 2004. p. 4.

of Representatives) would be, or if there would be equality amongst the states, or if something else entirely would be designed.<sup>23</sup>

Early in the convention Madison bandied about different wording such as “an equitable ratio of representation” in order to keep open the possibility of counting slaves as people for purposes of representation.<sup>24</sup> This opened a new debate amongst the delegates as to whether states should have equal representation, as they had under the Articles of Confederation, or if it should be population based. Larger states such as Pennsylvania and Virginia wanted proportional representation in both houses, while delegates from Delaware and Connecticut proposed proportional in the lower house and equal representation in the upper. Most large state delegates, including Madison, had little interest in compromising. Larger states even pushed for what now seem as rather radical ideas, such as the lower house selecting members of the upper house, and senators being selected without regard to state boundaries. When John Dickinson of Delaware advocated for state legislators to select senators, Madison opposed on the grounds this would mean every state had representation in the Senate, and that a proportional upper house would be much too large. To Madison the idea of state legislatures choosing senators interposed the state governments between the people and the national government. He wanted the federal government to be independent of the states, and he feared that too much influence by state legislatures might compromise the sovereignty of the nascent government. Several other ideas were

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<sup>23</sup> James Madison, edited by James Brown Scott. *James Madison's Notes of Debates in the Federal Convention of 1787 and their Relation to a More Perfect Society of Nations*. 1918, 2001. p. 34-36.

<sup>24</sup> Jeff Broadwater. *James Madison: A Son of Virginia and a Founder of the Nation*. Chapel Hill: University of North Carolina Press, 2012. p. 48.



debated in the interim, including having each state start with a minimum of one senator, with numbers rising as populations got larger.<sup>25</sup>

Notes from the Constitutional Convention by William Jackson, the official secretary, follow along much the same narrative as Madison's, though without some of the personal invective Madison displayed to the idea of equal representation of the states and senator selection by state legislatures. Jackson discusses motions by John Lansing of New York and William Johnson of Connecticut. Lansing pushed for the federal principle of equality in representation. Johnson stated that state governments needed representation so that they would not be overruled and that since the lower house was chosen by the American people, the states must have a voice in the upper house.<sup>26</sup>

Madison's writings show that by the end of the convention Gouverneur Morris "moved to render forever impossible the inequality of the States under the Constitution of the United States," and "that no State, without its consent, shall be deprived of its equal suffrage in the Senate." Morris, a delegate from a large state, helped to ensure that all of the states were on board with the equal and corporate representation of the states.<sup>27</sup> Though Madison was adamant that state legislatures should not have a say as to who represented a state in either house of Congress, when the issue was presented to the entire convention the ten states that had delegates present unanimously voted to

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<sup>25</sup> Jeff Broadwater. *James Madison: A Son of Virginia and a Founder of the Nation*. Chapel Hill: University of North Carolina Press, 2012. p. 48-49.

<sup>26</sup> Max Farrand and David Maydole Matteson (editors). *The Records of the Federal Convention of 1787*. Rev. ed. New Haven: Yale University Press. 1966. p. 410-415.

<sup>27</sup> James Madison, edited by James Brown Scott. *James Madison's Notes of Debates in the Federal Convention of 1787 and their Relation to a More Perfect Society of Nations*. 1918, 2001. p. 37-38.

allow state legislators to select senators, though by the end of the convention Madison wrote:<sup>28</sup>

In republican government, the legislative authority, necessarily predominates. The remedy for this inconvenience is, to divide the legislature into different branches; and to render them by different modes of election, and different principles of action, as little connected with each other, as the nature of their common functions and their common dependencies on the society, will admit.<sup>29</sup>

The result of the Constitutional Convention was that the voters in each state would play an indirect role through their selection of state legislative representatives. As a result, Senators were to act as direct agents of the state legislatures, not specifically the citizens of a state. The idea was to secure the interests of states at the national government level. As George Mason stated during the debates, “the state legislatures also ought to have some means of defending themselves against encroachments of the national government.”<sup>30</sup>

By the time of the Constitutional Convention most states had already established bicameral legislatures, so the concept of an upper house was recognized and even generally accepted as the norm throughout the former colonies. The exceptions to this rule were Pennsylvania and Georgia, though Georgia had discussed the idea of forming an upper house between the end of the American Revolution and the signing of the

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<sup>28</sup> Jeff Broadwater. *James Madison: A Son of Virginia and a Founder of the Nation*. Chapel Hill: University of North Carolina Press, 2012. p. 49-51; Ralph A. Rossum "California and the Seventeenth Amendment," *Nexus - A Journal of Opinion* 6, 2001. p. 102.

<sup>29</sup> Todd J. Zywicki. "Beyond the Shell and Husk of History: The History of the Seventeenth Amendment and Its Implications for Current Reform Proposals." *Cleveland State Law Review*. Volume 45:165, 1997. p. 176. <https://engagedscholarship.csuohio.edu/clevstlrev/vol45/iss2/3>

<sup>30</sup> Donald J. Kochan. "State Laws and the Independent Judiciary: an analysis of the effects of the Seventeenth Amendment on the number of Supreme Court cases holding state laws unconstitutional." *Albany Law Review*, Summer 2003, p. 1023. <http://link.galegroup.com.proxy.buffalostate.edu/apps/doc/A109029832/LT?u=buffalostate&sid=LT&xid=906c1b5c>. *LegalTrac*. Accessed 25 Mar. 2018.

Constitution on several different occasions. The shortcomings of the unicameral style of legislature were well known, even in the states that practiced it, so little real debate over the Senate's existence got in the way of its establishment. The idea of the bicameral legislature was seen as a check on an all too powerful Parliament. In conjunction with regular elections that would ensure poor office holders would move on,<sup>31</sup> splitting legislative authority would also protect against dominance by one faction.<sup>32</sup>

James Madison, in *Federalist 45*, indicated that state governments should be regarded as constituent parts of the federal government, and even more importantly, Madison noted that states could very well operate without the national government, while the opposite argument of a successful national government without the individual states was not seen to be true. Madison, in a dramatic change of view from the early parts of the Constitutional Convention, went on to make the point that the choice of senator was wholly in the prerogative of the state legislature, "absolutely and exclusively," forcing one half of one branch of government to be dependent on the individual states.<sup>33</sup> Information regarding this extreme change in Madison's thought process could not be found but after the Convention had ended Madison, Hamilton, and Jay wrote a series of articles that became known as *The Federalist Papers*, encouraging the adoption of the Constitution by the state legislatures. It is quite

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<sup>31</sup> Julian E. Zelizer. *The American Congress: The Building of Democracy*. New York: Houghton Mifflin Company. 2004. p. 2-3.

<sup>32</sup> David Schleicher. "The Seventeenth Amendment: Federalism in an Age of National Political Parties." *Hastings Law Journal*. Hastings College of Law. May 2014. p. 1051.  
[http://proxy.buffalostate.edu:2053/hottopics/lnacademic/?shr=t&csi=7341&sr=TITLE\("The+Seventeenth+Amendment+federalism+in+an+age+of+national+political+parties"\)+and+date+is+2014](http://proxy.buffalostate.edu:2053/hottopics/lnacademic/?shr=t&csi=7341&sr=TITLE(). Accessed online January 11, 2018.

<sup>33</sup> Alexander Hamilton, John Jay, and James Madison. *The Federalist Papers*. New York: Fall River Press. 2017. p. 212.

possible that Madison put his interest in equal representation on the side in order to ensure the documents passage. In *Federalist 63* Madison goes on to enforce the idea of a bicameral legislature by stating that:

The people will never willfully betray their own interests; but they may possibly be betrayed by the representatives of the people; and the danger will be evidently 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.<sup>34</sup>

The fundamental issues to arise in the debate and development of the United States Senate came down to what specific powers, privileges, and authorities it would have, and representation numbers. Larger states typically wanted the representation to be population based, while smaller states generally wanted a more level, if not fully equal, body. Interestingly, the idea of larger and smaller states had less to do with the current state populations than it had to do with the potential expansion the states saw. A state with a smaller population like North Carolina had delegates that were more apt to support proportional representation, as they realized that they had the proverbial “room to grow,” while states such as Massachusetts, with an already relatively large population, leaned a bit more towards equal representation since they logically thought that they might be at the end of their growth. Antifederalists in the larger states argued that equal representation was unnecessarily oppressive towards their populations. Federalists would argue that without equality the small states would be overpowered by the larger states and that the body would simply be a different version of the House of Representatives.<sup>35</sup>

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<sup>34</sup> Alexander Hamilton, John Jay, and James Madison. *The Federalist Papers*. New York: Fall River Press. 2017. p. 290.

<sup>35</sup> John P. Kaminski and Richard Leffler. *Federalists and Antifederalists: The Debate Over the Ratification of the Constitution*. Madison, Wisconsin: Madison House, 1989. p. 67- 68.

At the Constitutional Convention Charles Pinckney of South Carolina argued that the composition of the Senate as proposed would express the sovereignty of the states.

James Madison defended this thought process with justifications written in the

*Federalist 62*:

...a people thoroughly incorporated into one nation every district ought to have a proportional share in the government and that among independent and sovereign States, bound together by a simple league, the parties, however unequal in size ought to have an equal share in the common councils... the government ought to be founded on a mixture of the principles of proportional and equal representation.<sup>36</sup>

The idea of representation for the individual states was tied to the “Connecticut Compromise” negotiations that took place during the Constitutional Convention. The Connecticut Compromise, as it eventually became known, provided Congress with the bicameral legislature it still enjoys. This was done, in part, to avoid the seemingly unstable and unbalanced conditions many colonial legislatures had with their royal governors.<sup>37</sup> By the time the Constitutional Convention started most states had already established some version of a two chamber legislature, the exceptions being Pennsylvania and Georgia, and little real debate was held as to the legitimacy of the idea.<sup>38</sup>

The House of Representatives was established to be a popularly elected body. The belief was that representatives chosen directly by the people was necessary for a

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<sup>36</sup> Frances E. Lee and Bruce Oppenheimer. *Sizing Up the Senate: The Unequal Consequences of Equal Representation*. Chicago: The University of Chicago Press. 1999. p. 23-24.

<sup>37</sup> Norman C. Thomas and Karla Lamb. *Congress: Politics and Practice*. New York: Random House, 1964. p. 19.

<sup>38</sup> Daniel Wirls, and Stephen Wirls. *The Invention of the United States Senate*. Baltimore, Maryland and London: The Johns Hopkins University Press, 2004. p. 22.

free government to function properly.<sup>39</sup> It was to be responsive to public opinion, could potentially be innovative in its actions, and was nominally designed to quickly and efficiently legislate. The Senate was basically designed to be to opposite of this.<sup>40</sup> As representatives of the specific state legislatures, the Senate would place a vital check on the popularly elected branch and allow the many states to look beyond the next election cycle.<sup>41</sup> Representation at the state level was intended to ensure the federal nature of the American governmental system, institutionalizing a place for the states in the national government.<sup>42</sup>

As part of the Connecticut Compromise, Luther Martin argued that each state should have equal instead of proportional representation in at least one of the legislative houses, since states were looked at as sovereign nations and independent in almost all aspects of how they governed themselves.<sup>43</sup> The states had equal representation under the Articles of Confederation, and had maintained the idea of equal votes at the Constitutional Convention, and it seemed obvious to many, especially from the smaller states, that the Senate should be structured in a way as to keep that ideal. Smaller states did not want to give up the power that they already had accrued as equals on the battlefield now that the political realities were becoming apparent.<sup>44</sup>

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<sup>39</sup> Norman C. Thomas and Karla Lamb. *Congress: Politics and Practice*. New York: Random House, 1964. p. 19.

<sup>40</sup> David Brian Robertson. *Federalism and the Making of America*. New York: Routledge, Taylor Francis Group. 2012. p. 172-175.

<sup>41</sup> Norman C. Thomas and Karla Lamb. *Congress: Politics and Practice*. New York: Random House, 1964. p. 19.

<sup>42</sup> Frances E. Lee and Bruce Oppenheimer. *Sizing Up the Senate: The Unequal Consequences of Equal Representation*. Chicago: The University of Chicago Press. 1999. p. 23.

<sup>43</sup> John P. Kaminski and Richard Leffler. *Federalists and Antifederalists: The Debate Over the Ratification of the Constitution*. Madison, Wisconsin: Madison House, 1989. p. 75.

<sup>44</sup> Frances E. Lee and Bruce Oppenheimer. *Sizing Up the Senate: The Unequal Consequences of Equal Representation*. Chicago: The University of Chicago Press. 1999. p. 26, 34.

Some options discussed at the Constitutional Convention dealing with the establishment of the Senate and its selection process reduce down to three overarching ideas: selection by state legislatures, the direct election of senators in large, multistate districts, and selection by the House of Representatives from a list that individual state legislatures developed. An idea that was discussed initially, but eventually discarded, was apportioning Senate positions proportionally based on state population, similar to the House. It was quickly realized that this would lead to too big of a Senate, one that would make debate difficult at best, as well as remove the advantages equal representation would give the smaller states.<sup>45</sup>

Even into the more current era the idea of equality of representation is still seen by many as needed in order to ensure each state has a place on the political stage. Lee and Oppenheimer cited Senator John Melcher (D-MT), in the 1987 version of the *Congressional Record*, where Melcher praised the Great Compromise, saying “On behalf of Montana and all States like it, with small populations, we thank those Connecticut Yankees for their foresight and their genius; their compromise permitted great States such as Montana and all the rest of the West, so diverse in a land of plains, mountains and rivers, so rich in agriculture and minerals and forests but limited in population, to become partners with other states on a footing of equality in the Senate.”<sup>46</sup>

Contrary to its name, the Connecticut, or, Great Compromise was not really a compromise, at least in the traditional sense of the word. The only thing of significance

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<sup>45</sup> Frances E. Lee and Bruce Oppenheimer. *Sizing Up the Senate: The Unequal Consequences of Equal Representation*. Chicago: The University of Chicago Press. 1999. p. 30.

<sup>46</sup> Frances E. Lee and Bruce Oppenheimer. *Sizing Up the Senate: The Unequal Consequences of Equal Representation*. Chicago: The University of Chicago Press. 1999. p. 2.

that the small states gave up in order to get the equal Senate that they wanted was to allow the House of Representatives to have origination rights to all spending bills, with the Senate only having advisory and veto powers. Threats of joining in league with foreign entities or splitting into individual nation states also put extreme pressure on the members of the Convention. This put enough pressure on the body as to ensure the ultimate decision of having equal representation for each of the member states and caused the large state block to collapse.<sup>47</sup>

In *Federalist 62*, James Madison wrote that having state legislatures appoint senators and this idea had a “double advantage” over a popular election for a senator. If done correctly it would lead to an educated decision process by professional legislatures choosing a United States senator and giving state governments an agency to secure an authoritative link between states and the national government. The Senate, being the direct representative of the states, would also allow smaller states to have a form of check on larger states. If a block of more populous states would attempt to push legislation through the House of Representatives, the majority of states would still be able to challenge them through actions in the Senate. States could also ensure effective senators would be able to be returned to their position even if popular opinion may seem against such an act.<sup>48</sup>

Referring again to *Federalist 62, section II*, James Madison, as Publius, seems to concur with Martin, acknowledging the advantage of Senate appointments as securing the authority of the States in the Federal system and allowing the senator to act as “a

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<sup>47</sup> Frances E. Lee and Bruce Oppenheimer. *Sizing Up the Senate: The Unequal Consequences of Equal Representation*. Chicago: The University of Chicago Press. 1999. p. 39.

<sup>48</sup> Alexander Hamilton, John Jay, and James Madison. *The Federalist Papers*. New York: Fall River Press. 2017. p. 283-5.



convenient link between the two systems,"<sup>49</sup> or, the state and national governments. John Adams, at the time of the Constitutional Convention, saw the House of Representatives and the Senate as a "diplomatic assembly" and not a true legislature. He thought that the House of Representatives should be a miniature version of the society as a whole, with every section of the country embodied proportionally in its halls. The Senate existed to aggressively defend the rights of the states and were to act as representatives of their respective legislatures.<sup>50</sup>

From the initial debates during the Constitutional Convention there were myriad deliberations as to the establishment and organization of the United States Senate. Edmund Randolph's Virginia Plan called for the appointment of the upper chamber, though with a twist on the idea of state legislatures making the decision: he initially called for the House of Representatives to select the upper based on nominations by state legislatures.<sup>51</sup> The standing committee that was charged with discussing and resolving issues with the Virginia Plan initially went for proportionally weighted senators having a seven year term and that the position would be selected at the discretion each individual state legislature.<sup>52</sup>

On June 7, 1787 the "small" states won the idea that the individual state legislatures should choose the senators that would represent them at the national level. The primary leaders of this argument were John Dickenson of Delaware, William

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<sup>49</sup> John P. Kaminski and Richard Leffler. *Federalists and Antifederalists: The Debate Over the Ratification of the Constitution*. Madison, Wisconsin: Madison House, 1989. p. 79.

<sup>50</sup> Julian E. Zelizer. *The American Congress: The Building of Democracy*. New York: Houghton Mifflin Company. 2004. p. 6- 7.

<sup>51</sup> Julian E. Zelizer. *The American Congress: The Building of Democracy*. New York: Houghton Mifflin Company. 2004. p. 13.

<sup>52</sup> Clinton Rossiter. *1787: The Grand Convention*. New York: Collier-Macmillan Limited. 1966. p. 174.

Paterson of New Jersey, Oliver Ellsworth of Connecticut, and Roger Sherman, also of Connecticut. They had initially argued for equal representation of the states, with an identical number of senators from each, something large states such as Virginia and New York were against, favoring the same proportional representation seen in the House of Representatives. James Wilson of Pennsylvania wanted Senate representation to be based on population, but politicked aggressively to ensure senators were chosen by the individual state legislatures.<sup>53</sup> The small states did not win the dispute at that time as to representation, but did win the general idea that the states “would be represented as equal corporate entities.”<sup>54</sup>

Debate ensued on and off throughout the summer of 1787 as to the ultimate structure of the Senate. Roger Sherman felt that the Senate should be chosen by the various state level legislatures in order to counter the popular election of U.S. Representatives. In what could be termed a rather reprehensible comment in the modern political scene, Sherman stated: “The people should have as little to do as may be about the government. They lack information and are constantly liable to be misled.”<sup>55</sup> Delegates to the Constitutional Convention disagreed on many details of how the federal government should be designed, and many arguments about the Senate itself, but there was a general consensus that the Senate should follow a specific ideal:

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<sup>53</sup> Davis O. Stewart. *The Summer of 1787: The Men Who Invented the Constitution*. New York: Simon and Schuster. 2007. p. 66.

<sup>54</sup> Julian E. Zelizer. *The American Congress: The Building of Democracy*. New York: Houghton Mifflin Company. 2004. p. 13.

<sup>55</sup> Joel H. Sibley. *The Congress of the United States 1789-1989*. New York: Carlson Publishing. 1991. p. 137.

- It should be smaller in size than the House of Representatives. This idea is related to the fact that the institution was set up to encourage debates and have a more collegial atmosphere. A relatively small size would allow senators to know each other on a more personal level, hopefully allowing for thorough, yet respectful, discussions on governance.
- The Senate should be more distinguished than the lower house of the legislature. Having more experienced politicians, already respected by state level peers, would allow for an almost automatic comradery with both peers, and with high level government official, both domestic and international.
- It was also important that the Senate be less reactionary than the House of Representatives. Since terms were assumed to be long, and appointments were dependent on the class of professionals that were supposed to represent the people at the state level, it was assumed that the Senate would only react and legislate after thoroughly deliberating a subject.<sup>56</sup>

The United States Senate initially was modeled on the rather recently vacated colonial governors' executive councils that were common during the pre-Revolutionary period. The Senate was expected to work as a whole and support the established regime, of the state legislatures in this case, but were also highly independent in the range and scope of what they would attempt to accomplish. They were to conduct free and unlimited debate, with the voice of the minority always in a position to slow, if not

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<sup>56</sup> Frances E. Lee and Bruce Oppenheimer. *Sizing Up the Senate: The Unequal Consequences of Equal Representation*. Chicago: The University of Chicago Press. 1999. p. 29.

outright cease discussion and action. They were also to act as a revisory body on initiatives developed in the House of Representatives.<sup>57</sup>

None of the delegates at the Convention thought the position of senator should be hereditary, though an idea of it imitating an aristocratic approach was seen by a sizable segment as potentially beneficial for proper international dealings with European entities more used to the supposed stability that a permanent ruling class gave. Against this idea were the Antifederalists, who argued that long terms of six years and no mandatory rotation in office seemed too patrician and an abhorrence to the reason for separating from Great Britain in the first place. They also argued about some of the base structural ideas being discussed deep into the Convention. The idea of senators working so close with the President on various governmental appointments and with international treaties seemed on its face to violate the sacrosanct idea of separation of powers. The same disagreement arose with having the Vice President serve as the president of the Senate and be used to vote in the legislative process.<sup>58</sup> “The Antifederalists were not merely willing to suffer a Senate- they were glad to see it, because it was a federal feature.”<sup>59</sup> Some delegates and those in the public did complain about the idea of senators being selected by state legislatures, particularly “Cincinnatus,” the pseudonym for Arthur Lee of Virginia, but the common opinion was generally for appointment of these positions in order to ensure the individual States had a seat at the national table.

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<sup>57</sup> Joel H. Sibley. *The Congress of the United States 1789-1989*. New York: Carlson Publishing. 1991. p. 136.

<sup>58</sup> John P. Kaminski and Richard Leffler. *Federalists and Antifederalists: The Debate Over the Ratification of the Constitution*. Madison, Wisconsin: Madison House, 1989. p. 67- 68.

<sup>59</sup> Jackson Turner Main. *The Antifederalists: Critics of the Constitution, 1781-1788*. Chapel Hill, North Carolina: The University of North Carolina Press. 1961. p. 137.

At the Constitutional Convention there was no real push for popular elections other than some low key complaining that was quickly overcome by larger events. Some primary complaints came from length of terms, and initially not even about the aforementioned six or seven years, as there was a sizable contingent of Antifederalists who thought all elections should be held on an annual basis. To a lesser extent there were criticisms of no mandated rotation of office, as it was presumed by many of the era that political careers would be short, and to the specific powers assigned to it that combined aspects of the legislative and executive branches.<sup>60</sup>

Alexander Hamilton went as far as to say that the position should be lifelong selection, but had no real support on this. Edmund Randolph thought a seven year appointment was desirable in order to ensure the Senate could properly counterbalance the House. James Madison agreed to longer terms as it would appear more respectable to foreign entities if the members were more experienced and longer serving. Madison saw frequent elections as extremely important for the lower house, but as blatantly problematic for the upper chamber. The responsiveness of the House is good to the general overall functioning of government, but in the Senate too much would be detrimental to minority rights as the majority will always assert their naked interests, something the long terms and demanding procedures for moving and passing legislation in the Senate were supposed to discourage.<sup>61</sup>

Fear of a senator gaining too much power or serving for too long a period of time was argued against by most delegates since each position was the responsibility of the

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<sup>60</sup> Jackson Turner Main. *The Antifederalists: Critics of the Constitution, 1781-1788*. Chapel Hill, North Carolina: The University of North Carolina Press. 1961. p. 137.

<sup>61</sup> Julian E. Zelizer. *The American Congress: The Building of Democracy*. New York: Houghton Mifflin Company. 2004. p. 10.

respective state legislature, guaranteeing in theory that they would be restrained. The Convention eventually agreed to the current six year term and a two year election cycle.<sup>62</sup>

At the Convention the vote for legislative selection was 9-2, with two large states opposing, Pennsylvania and Virginia.<sup>63</sup> Lee and Oppenheimer have researched and found that from the First Congress in 1789 to the late 1800s, when early progressive parties and politicians started pushing for the direct election of United States senators, there was no evidence that senators representing a minority of the population tended to vote together against senators representing a majority.<sup>64</sup> Studying roll-call voting results have shown that party, ideology, cue taking, presidential leadership, and constituency interests are much more important factors. After the Constitutional Convention no major political issue has divided small states from large states at any point in United States history.<sup>65</sup>

The Senate emerged from the founding era as a secretive, contentious, and at times, transient body. The transient quality of the Senate, and much government at all levels of the young nation, was tempered after the first several election cycles as the newly formed federal and state governments filled in positions and people seemed to find comfortable roles. The institution steadily evolved into a legislative body with

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<sup>62</sup> Joel H. Sibley. *The Congress of the United States 1789-1989*. New York: Carlson Publishing. 1991. p. 137- 140.

<sup>63</sup> Frances E. Lee and Bruce Oppenheimer. *Sizing Up the Senate: The Unequal Consequences of Equal Representation*. Chicago: The University of Chicago Press. 1999. p. 32.

<sup>64</sup> Frances E. Lee and Bruce Oppenheimer. *Sizing Up the Senate: The Unequal Consequences of Equal Representation*. Chicago: The University of Chicago Press. 1999. p. 3.

<sup>65</sup> Frances E. Lee and Bruce Oppenheimer. *Sizing Up the Senate: The Unequal Consequences of Equal Representation*. Chicago: The University of Chicago Press. 1999. p. 8.

substantial influence upon Washington politics and national policy making.<sup>66</sup> The individual senator was responsible for pleasing the legislators from their home state, but they were expected to vote independently of any direct pressures or mandates from their appointers. Due to the structural design of the Senate that was quickly established during the First Congress, senators were not obligated to listen to state legislatures on individual votes. Six year terms and pay from the Federal government helped to insulate them to direct pressure.<sup>67</sup> The general objection to the Senate was counterbalanced by the Senate being responsible to the state legislatures.<sup>68</sup>

Alexander Hamilton stated in a six hour long speech on the Convention floor that the people will regulate the national representatives directly through voting, in the form of the House of Representatives, or by electing or failing to reelect state legislators that make good or poor decisions on United States senators. He thought that states should be able to instruct their senators, but saw them as pretty much independent actors.<sup>69</sup> The Senate was expected to play its role at arm's length from the people, and longer terms of office and selection by legislatures, fellow professional politicians, would insulate them from the ebb and flow of public opinion. This also helped to limit the campaigning and the related fundraising that has become a stain on modern politics.<sup>70</sup>

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<sup>66</sup> Bruce I. Oppenheimer. *United States Senate Exceptionalism*. Columbus, OH: The Ohio State University Press, 2002. p. ix.

<sup>67</sup> Joel H. Sibley. *The Congress of the United States 1789-1989*. New York: Carlson Publishing. 1991. p. 138.

<sup>68</sup> Jackson Turner Main. *The Antifederalists: Critics of the Constitution, 1781-1788*. Chapel Hill, North Carolina: The University of North Carolina Press. 1961. p. 184.

<sup>69</sup> Bruno Leone. *The Creation of the Constitution: Opposing Viewpoints*. American History Series. San Diego, California: Greenhaven Press. 1995. p. 147.

<sup>70</sup> Frances E. Lee and Bruce Oppenheimer. *Sizing Up the Senate: The Unequal Consequences of Equal Representation*. Chicago: The University of Chicago Press. 1999. p. 224.

Early in the history of the United States Senate, specifically the first three Congresses ending in 1795, turnover of senators was quite large. Some seats were open to election as often as House seats with replacements needed for senators that resigned once positions in state government opened up to them. With newly developing political alliances, state level positions opening, and the private sector beckoning, many politicians chose a life closer to home than the early United States capitals of New York City or Philadelphia. A senator leaving office after one term, or even before its completion continued unabated once the prospect of life in a slowly developing backwater of what is now Washington D.C. limped into view.<sup>71</sup>

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<sup>71</sup> Daniel Wirls and Stephen Wirls. *The Invention of the United States Senate*. Baltimore, Maryland and London: The Johns Hopkins University Press, 2004. p. 210.



## **CHAPTER 2. CONCERNS WITH THE SENATE**

### **Potential Evidence of Corruption in the pre-Progressive Era United States Senate**

Even though there was much evidence of corrupt practices in the selection of United States senators in late 19<sup>th</sup> century America, this corruption was by no means either across the board or exclusive to the United States Senate and in the end factored very little into the actual passage of the Seventeenth Amendment. There is no doubt that there has been corruption and malfeasance witnessed in the storied history of the United States Senate. From almost the nation's beginning it was evident that as an institution developed by man, it was also potentially attractive to those who had in mind bad intentions. Just a decade after the ratification of the United States Constitution the United States Congress had to decide on the fate of one of its members, accused of high crimes against the nascent country.

William Blount of North Carolina/Tennessee, who served in the North Carolina militia during the American Revolution, was elected to six terms in the North Carolina legislature, represented his state in Congress under the Articles of Confederation, and was a delegate to the Constitutional Convention. After losing the election for United States senator he secured an appointment as territorial governor of the lands west of the Alleghenies ceded to the United States by Great Britain and awarded to North Carolina. In 1796, when this territory became the state of Tennessee, Blount was elected one of its first two senators. Almost immediately upon entering office, and already in financial difficulties arising from his land speculations in western lands, Blount became involved in a plan whose aim was to organize an armed force of frontiersmen and Native Americans, and with the help of the British fleet, to eject the Spanish from

Florida and Louisiana. The final goal was to transfer control to Great Britain and secure the financial viability of his landholdings. When the plot came to the attention of the United States government, Blount was expelled from the Senate, and impeachment proceedings were started. He was impeached from the Senate but never officially removed from office as it became apparent he was going to willingly leave the Senate. Blount returned to Tennessee, where there was actually a base of support for ridding the Spanish from the Mississippi River basin, keeping his reputation intact. He was elected in 1798 to the Tennessee State Senate and even served as speaker until his death in 1800.<sup>1</sup>

One needs to take into account that, as the number of these government officials has grown over the last two centuries, the relative frequency of impeachment proceedings has declined across the board. In the first three federal impeachments, William Blount in 1797–99, Federal District Judge John Pickering in 1803–04, and Supreme Court Associate Justice Samuel Chase in 1804–05, were tied to one of the most volatile and malicious eras in American political history. This fact may well make this quick succession of impeachments atypical events as to both occurrence and political partisanship.<sup>2</sup>

The extremeness and novelty of Blount's impeachment may have influenced observers, all the way to modern Constitutional scholars. It is commonly believed that the senator's removal from office was a singular event, and barred the impeachments of

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<sup>1</sup> Mark Grossman (edited). "William Blount (1749-1800)." *The Encyclopedia of The Continental Congresses*. 2015. [https://proxy.buffalostate.edu:2443/login?url=https://search.credoreference.com/content/entry/greycc/william\\_blount\\_1749\\_1800/0?institutionId=2571](https://proxy.buffalostate.edu:2443/login?url=https://search.credoreference.com/content/entry/greycc/william_blount_1749_1800/0?institutionId=2571). Accessed 05 Apr. 2018.

<sup>2</sup> Buckner F. Melton. Let Me Be Blunt: In Blount, the Senate Never Said that Senators Aren't Impeachable. *Quinnipiac Law Review*, Vol. 33, 2014. October 14, 2014. p. 42.

senators. It is a fact that since Blount, no senator has ever again been impeached, but this circumstance cannot be viewed in isolation though. Since 1789 there have literally been thousands of members of higher levels of the United States government that served in positions where it was theoretically possible to pursue impeachment should the need arise. More than three thousand people have served in a judicial capacity on various Article III courts. An additional five hundred or more individuals have served in the Presidency, the Vice Presidency, and the Cabinet, along with other lower level executive positions that are conceivably subject to policing by removal from office. Nearly two thousand others have served in the Senate. Given such numbers of potentially impeachable individuals, and accepting in the course of an argument that senators are impeachable, the handful of actual impeachments throughout the history of the entire United States government is a small sample for determining such trends.<sup>3</sup>

Contrary to the modern opinion that senators in the 19<sup>th</sup> century could blatantly get away with various bad acts with little to no repercussion, as early as 1807 Senator John Smith of Ohio, a close ally to then deposed Vice President Aaron Burr, was tried by the Senate for treason and came within one vote of being removed. Even though his seat in the Senate was safe for him to keep for the duration of his term, Smith's own state legislature was less than impressed by his actions and demanded his resignation from the United States Senate.<sup>4</sup> An additional example of the Senate policing its own, or other form of punishment being meted out, is tied to the American Civil War and the secession of states from the Union. Almost the entire Southern contingent of

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<sup>3</sup> Buckner F. Melton. Let Me Be Blunt: In Blount, the Senate Never Said that Senators Aren't Impeachable. *Quinnipiac Law Review*, Vol. 33, 2014. October 14, 2014. p. 42. <https://ssrn.com/abstract=2509665>

<sup>4</sup> Marshall Smelser. *The Democratic Republic*. Prospect Height, Illinois: Waveland Press, Inc. 1968. p. 123.

representatives and senators left the service of the Federal government and transferred en masse, minus Andrew Johnson, to the newly established Confederacy.<sup>5</sup>

Traditionally, academics and historians have documented, and the general American population have learned in school, of the presumed massive amounts of corruption and dishonesty in late 19<sup>th</sup> and early 20<sup>th</sup> Century United States Senate politics. Corrupt actions were evident in many state legislatures from the time of President Andrew Jackson in the late 1820s and 1830s, and there are examples of less than ethical actions even before this time.

Though there might be disagreement as to the exact timing of the direct election movement, it clearly was in motion by the mid-1870s. Between 1893 and 1912, the year before the Seventeenth Amendment was ratified, members of Congress, in every single session, presented legislation to change how senators gained office. The state legislatures, in conjunction with the House of Representatives, started the push for a constitutional amendment that would establish the process at the national level. Many senators protested this idea and at some points even attempted to remove Congress's ability to change in any way the Election Clause of Article 1. Of their own accord many states started to implement primary elections for senators, where voters could decide the candidate of their choice, and the party who won the majority of legislative seats would then choose the candidate their supporters had decided on. The popularity, or lack thereof, became much more important to the state level elections. This would

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<sup>5</sup> William Smith White. *Citadel: The Story of the United States Senate*. New York: Harper and Brothers, Publishers, 1956. p. 125.

eventually force state governments to be a prime mover on the direct election process, in order to remove their names from the process all together.<sup>6</sup>

To reinforce that troubles with the United States Senate were not specifically tied just to the Senate, one has to look at the actual criminal cases brought against members of the federal government during and before the era. Criminal activity among United States representatives and senators, along with members of the executive and judicial branches, were typically not prosecuted in the state or federal court systems unless extreme crimes were committed, and these crimes were typically of a personal felonious nature, and not directly related to government activities. Up to the end of the Progressive Era, softly dated for this thesis as 1920 and the ratification of the Nineteenth Amendment, only nine federal government officials were charged with impeachable offenses, and only three were actually fully impeached and removed from office, all three being either district judges or other federal level magistrates.<sup>7</sup> Judges and government prosecutors showed an “inability or unwillingness to put a stop to the wrongdoing of very rich men.”<sup>8</sup>

### **United States Senate Expulsion and Censure Cases, 1797 to 2018**

Censures, expulsions, and impeachments are exceedingly rare in the Senate. In the course of the United States Senate’s history, expulsion has been threatened (as evidenced by actual proceedings, not just the politicizing and editorializing of base

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<sup>6</sup> David Schleicher. “The Seventeenth Amendment: Federalism in an Age of National Political Parties.” *Hastings Law Journal*. Hastings College of Law. May 2014. p. 1055-6.

<sup>7</sup> *United States History*. “Impeachment.” <http://www.u-s-history.com/pages/h231.html>. <http://www.u-s-history.com/pages/h231.html>. Accessed online 4 April, 2015.

<sup>8</sup> Elizabeth Sanders. *Ohio State Law Journal*. “Reflections on Progressive Constitutionalism: Theory, Practice, and Critique: Rediscovering the Progressive Era.” 2011. p. 4 (1287). <http://heinonline.org>, 72 Ohio St. L.J. 1281 2011. Accessed online February 16, 2015.

ideological issues) or actually used only in cases of treason and felony convictions. Of the twenty-three cases in which senators were actually voted on and in point of fact expelled, all involved charges of treason or disloyalty, and all but one dealt with senators who sided with the Confederacy in the Civil War. Ten other senators, although not expelled, have been the subject of senatorial expulsion proceedings: four for suspected treason or disloyalty; five for allegedly accepting bribes or receiving compensation for services rendered before a department of the Government. One was tried for his alleged membership in a "religious hierarchy that countenanced and encouraged polygamy and united church and state contrary to the spirit of the constitution ...." The most recent senators to face the threat of expulsion were Senator Harrison Williams of New Jersey and Senator Robert Packwood of Oregon. The outcomes in their cases are representative of the modern trend. Like several senators before them, both men resigned their seats only after several months of incessant media scrutiny and the obviousness of no imaginable recovery from the cases against them.<sup>9</sup>

On July 10<sup>th</sup>, 1861 a total of ten senators were expelled because they "failed to appear in their seats in the Senate and to aid the Government in this important crisis... engaged in said conspiracy for the destruction of the Union." Senator Breckenridge of Kentucky was expelled that December.<sup>10</sup> More senators would be removed in 1862.

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<sup>9</sup> Timothy Zick. The Consent of the Governed: Recall of United States Senators. *Dickinson Law Review*. Volume 103, Issue 3. Published 22 March 1999. p. 567. <http://heinonline.org/HOL/LandingPage?handle=hein.journals/dlr103&div=25&id=&page=>. Accessed 23 December 2017.

<sup>10</sup> Clarke F. Hunn. "Precedents For Purifying Congress." *The Advocate of Peace (1894-1920)*, vol. 79, no. 10, 1917. p. 295. *JSTOR*, JSTOR, [www.jstor.org/stable/20667903](http://www.jstor.org/stable/20667903).

To properly understand pre-Seventeenth Amendment and the post-Seventeenth Amendment corruption issues in the United States Senate, it is important to be able to compare impeachments, expulsions, and censures both before and after the passage of the amendment. It is necessary to also make obvious that a large number of expulsions happened in the early days of the American Civil War, when a large proportion of the Southern contingent of senators were expelled because they chose to support the secession of their home states and turn their backs on the United States government. The following list is inclusive of all impeachment, expulsion, and censure proceedings, successful or not, that have taken part in United States Senate history, with annotations describing the issues at hand as they are applicable. This information comes directly from the United States Senate website and is reinforced by research by Anne M. Butler and Wendy Wolff of the Government Accounting Office.<sup>11</sup>

### **Overall Expulsions from the United States Senate**

Article I, Section 5, of the United States Constitution provides that "Each House of Congress may determine the Rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member." Since 1789, the Senate has expelled only twenty-three of its entire membership. Of that number, fourteen were accused of supporting the Confederacy during the American Civil War. In several other cases, to be discussed on the following pages, the Senate considered expulsion proceedings but either found the member not guilty or failed to act before the senator left office. In those cases, corruption was the principal reason of

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<sup>11</sup> Anne M. Butler and Wendy Wolff. *United States Senate Election, Expulsion and Censure Cases, 1793-1990*. Washington, DC: Government Printing Office, 1995.

complaint. Over the course of the Senate's history, only four members have been convicted of crimes. Joseph R. Burton (1905), John Hipple Mitchell (1905), Truman H. Newberry (1920), and Harrison Williams (1981). Newberry's conviction was later overturned. Mitchell died before a vote on his expulsion proceedings could officially take place so is not in the official numbers of attempted expulsions or censures. Burton, Newberry, and Williams resigned before the Senate could act on their expulsion. The men may have never officially been expelled from the Senate, but the resignations must be seen as some combination of either tacit admission of guilt or an overwhelming obstacle that was no longer worth fighting for.

*Unless otherwise noted, the following expulsions and censures, along with subsidiary information, listed through the rest of the chapter come directly from the History section of the United States Senate website.<sup>12</sup>*

### **Pre-Seventeenth Amendment Expulsions**

- In 1797, William Blount of Tennessee was expelled and impeached. As previously presented his charges were anti-Spanish conspiracy and treason.
- In 1808, John Smith of Ohio was tried but not expelled for disloyalty and treason. Smith's expulsion failed 19 to 10, under the required two-thirds majority. At the request of the Ohio legislature, Smith resigned two weeks after the vote.

The following cohort were expelled from the United States Senate in a short time span from early 1861 through early 1862 because they “failed to appear in their

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<sup>12</sup> United States Senate. “Expulsion and Censure.” [https://www.senate.gov/artandhistory/history/common/briefing/Expulsion\\_Censure.htm](https://www.senate.gov/artandhistory/history/common/briefing/Expulsion_Censure.htm)



seats in the Senate and to aid the Government in this important crisis... engaged in said conspiracy for the destruction of the Union.” Simply, they left for the Confederacy.

- In 1861, James M. Mason of Virginia was expelled for supporting the Confederate rebellion.
- In 1861, Robert M.T. Hunter of Virginia was expelled for supporting the Confederate rebellion.
- In 1861, Thomas L. Clingman of North Carolina was expelled for supporting the Confederate rebellion.
- In 1861, Thomas Bragg of North Carolina was expelled for supporting the Confederate rebellion.
- In 1861, James Chesnut, Jr. of South Carolina was expelled for supporting the Confederate rebellion.
- In 1861, Alfred O.P. Nicholson of Tennessee was expelled for supporting the Confederate rebellion.
- In 1861, William K. Sebastian of Arkansas was expelled for supporting the Confederate rebellion.

On March 3, 1877, the Senate reversed its decision to expel Sebastian.

Sebastian had died in 1865, so his children were paid an amount equal to his Senate salary between the time of his expulsion and the date of his death.

- In 1861, Charles B. Mitchel of Arkansas was expelled for supporting the Confederate rebellion.

- In 1861, John Hemphill of Texas was expelled for supporting the Confederate rebellion.
- In 1861, Louis T. Wigfall of Texas was expelled for supporting the Confederate rebellion.

In March 1861, the Senate took no action on an initial resolution expelling Wigfall because he represented a state that had seceded from the Union, but he had not officially claimed allegiance to the Confederacy. Three months later, on July 10, 1861, he was expelled for supporting the Confederacy.

- In 1861, John C. Breckinridge of Kentucky was expelled for supporting the Confederate rebellion.
- In 1862, Lazarus W. Powell of Kentucky was tried, but not expelled for supporting the Confederate rebellion.
- In 1862, Trusten Polk of Kentucky was expelled for supporting the Confederate rebellion.
- In 1862, Lazarus W. Powell of Kentucky was tried, but not expelled for supporting the Confederate rebellion
- In 1862, Waldo P. Johnson of Missouri was expelled for supporting the Confederate rebellion.
- In 1862, Jesse D. Bright of Indiana was expelled for supporting the Confederate rebellion.

Bright was the only senator from a state that remained in the Union to be expelled for support of the Confederacy. He had written a letter to Confederate

President Jefferson Davis in an attempt to get the Confederacy to purchase a new style of firearms from one of his constituents.<sup>13</sup>

Senator Bright was the last senator to be expelled under the auspices of support of the Confederate rebellion.

- In 1862, James F. Simmons of Rhode Island was charged with corruption. On July 14, 1862, the Judiciary Committee reported that the charges against Simmons were essentially correct. The Senate adjourned three days later, and Simmons resigned on September 5 before the Senate could take action.
- In 1873, James W. Patterson of New Hampshire was charged with corruption. A Senate select committee recommended expulsion on February 27<sup>th</sup>. On March 1<sup>st</sup>, a Republican caucus decided that there was insufficient time remaining in the session to deliberate the matter. Patterson's term expired March 3<sup>rd</sup>, and no further action was taken.
- In 1893, William N. Roach of North Dakota was charged with embezzlement. He was not expelled. After extensive deliberation, the Senate took no action, assuming that it lacked jurisdiction over members' behavior before their election to the Senate. The alleged embezzlement had occurred 13 years earlier and did not have anything to do with Roach's service in the United States Senate.
- In 1906, Joseph R. Burton of Kansas was charged with corruption. He was expelled, but fought the conviction of receiving compensation for intervening with

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<sup>13</sup> Clarke F. Hunn. "Precedents For Purifying Congress." *The Advocate of Peace (1894-1920)*, vol. 79, no. 10, 1917. p. 295. *JSTOR*, JSTOR, [www.jstor.org/stable/20667903](http://www.jstor.org/stable/20667903).

a federal agency. When the Supreme Court upheld his conviction, he resigned rather than face expulsion.

- In 1907, Reed Smoot of Utah was charged with Mormonism. He was not expelled. After an investigation spanning two years, the Committee on Privileges and Elections reported that Smoot was not entitled to his seat because he was a leader in a religion that advocated polygamy and a union of church and state, contrary to the U.S. Constitution. By a vote of 27 to 43, however, the Senate refused to expel him, finding that he satisfied the constitutional requirements for serving as a senator.

### **Post-Seventeenth Amendment Expulsions**

- In 1919, Robert M. La Follette of Wisconsin was charged with disloyalty. He was not expelled. The Committee on Privileges and Elections recommended that the Senate take no action as a speech La Follette gave in 1917 speech opposing U.S. entry into World War I. The Senate agreed 50 to 21 that the case had no merit.
- In 1922, Truman H. Newberry of Michigan was charged with election fraud. On March 20, 1920, Newberry was convicted on charges of spending \$3,750 to secure his Senate election. The United States Supreme Court overturned this decision on May 2<sup>nd</sup>, 1921 on the grounds that the United States Senate exceeded its powers in attempting to regulate primary elections. By a vote of 46 to 41, the Senate declared Newberry to have been duly elected in 1918. On November 18, two days before the start of the 3<sup>rd</sup> session of the 67<sup>th</sup> Congress,

Newberry resigned as some Senate members resumed their efforts to unseat him.

- In 1924, Burton Wheeler of Montana was charged with conflict of interest. He was not expelled.

Wheeler had been indicted for serving, while as a sitting senator, in causes in which the United States was a party. A Senate committee, however, found that his dealings related to litigation before state courts and that he received no compensation for any service before federal departments. The Senate exonerated him by a vote of 56 to 5.

- In 1934, John H Overton of Louisiana was charged with election fraud, but the Senate took no action.

The Committee on Privileges and Elections concluded that the charges and evidence were insufficient to warrant further consideration.

- In 1934, Huey P. Long of Louisiana was charged with election fraud, but the Senate took no action.

The Privileges and Elections Committee considered this case in conjunction with that against Senator Overton and reached the same conclusion.

- In 1942, William Langer of North Dakota was charged with corruption, but was not expelled.

Recommending that this case was properly one of exclusion, not expulsion, the Committee on Privileges and Elections declared Langer guilty of moral turpitude and voted, 13 to 2, to deny him his seat. The Senate disagreed, 52 to 30, arguing that the evidence was hearsay and inconclusive. Langer retained his seat.

- In 1982, Harrison A. Williams, Jr. of New Jersey was charged with corruption.

The Committee on Ethics recommended that Williams be expelled because of his "ethically repugnant" conduct in the "Abscam scandal," for which he was convicted of conspiracy, bribery, and conflict of interest. On March 11<sup>th</sup>, 1982, prior to a Senate vote on his expulsion, Williams resigned.

- In 1995, Robert W. Packwood of Oregon was charged with sexual misconduct and abuse of power.

The Committee on Ethics recommended that Packwood be expelled for abuse of his power as a senator "by repeatedly committing sexual misconduct" and "by engaging in a deliberate ... plan to enhance his personal financial position" by seeking favors "from persons who had a particular interest in legislation or issues" that he could influence, as well as for seeking "to obstruct and impede the committee's inquiries by withholding, altering, and destroying relevant evidence." On September 7, 1995, the day after the committee issued its recommendation, Packwood announced his resignation without specifying an effective date. On September 8, he indicated that he would resign effective October 1, 1995.

### **Overall Censures from the United States Senate**

A less severe form of discipline used by the Senate against its members is censure. This act is also occasionally referred to as a condemnation or a denouncement. A censure does not remove a senator from office. It is a formal statement of disapproval that can have a powerful psychological effect on a member

and their relationships in the Senate. Since 1789 the Senate has censured nine of its members. Censures only take a simple majority in order to become effective.

### **Pre-Seventeenth Amendment Censures**

- In 1811, Timothy Pickering of Massachusetts was charged with reading confidential documents in open Senate session before an injunction of secrecy was removed. He was censured. His selection bid the following year failed, but he was elected to the House of Representatives instead. The result of the vote was 20-7.
- In 1844, Benjamin Tappan of Ohio was charged with releasing a copy of President John Tyler's message to the Senate to the New York Evening Post. The message was in regard to the treaty of annexation between the United States and the Republic of Texas. He was censured and chose not to try to remain after his term expired. The result of the vote was 38-7.
- In 1902 Benjamin R. Tillman and John L. McLaurin, both of South Carolina, were charged with fighting in the Senate Chamber. Each was censured and suspended, retroactively, for six days. This incident led to the adoption of Rule XIX governing the conduct of debate in the chamber. Tillman was selected for the Senate again. McLaurin decided to leave at the expiration of his term. The result of the vote was 54-12; with 22 not voting.

### **Post-Seventeenth Amendment Censures**

- In 1929 Hiram Bingham of Connecticut was charged with retaining Charles Eyanson as a Senate staff member. Eyanson at the time was concurrently

employed by the Manufacturers Association of Connecticut. Eyanson had been hired to assist Bingham on specific tariff legislation. The issue broadened into the question of the government employment practices. Bingham was "Condemned" for conduct tending "to bring the Senate into dishonor and disrepute." He was consequently defeated for reelection. The result of the vote was 54-22; with 18 not voting.

- In 1954, Joseph R. McCarthy of Wisconsin was charged with abuse and non-cooperation with the Subcommittee on Privileges and Elections during a 1952 investigation of his conduct, along with abuse of the Select Committee to Study Censure. He was "condemned" for his actions. He died while still in office, but before he had faced reelection. The result of the vote was 67-22.
- In 1967, Thomas J. Dodd of Connecticut was charged with the use of his office to convert campaign funds to his personal benefit and conduct unbecoming of a United States senator. He was censured and consequently defeated for reelection. The result of the vote was 92-5.
- In 1979, Herman E. Talmadge of Georgia was charged with improper financial conduct, accepting reimbursements of \$43,435.83 for official expenses not incurred, and improper reporting of campaign receipts and expenditures. His conduct was "denounced" as reprehensible and tending to bring the Senate into dishonor and disrepute. He was defeated for reelection. The result of the vote was 81-15.
- In 1990, David F. Durenberger of Minnesota was charged with unethical conduct "in connection with his arrangement with Piranha Press, his failure to report



receipt of travel expenses in connection with his Piranha Press and Boston area appearances, his structuring of real estate transactions and receipt of Senate reimbursements in connection with his stays in his Minneapolis condominium, his pattern of prohibited communications respecting the condominium, his repeated acceptance of prohibited gifts of limousine service for personal purposes, and the conversion of a campaign contribution to his personal use." Durenberger was "Denounced" for reprehensible conduct, bringing the Senate into dishonor and disrepute. He did not run for reelection. The result of the vote was 96-0.

Of the twenty-seven pre-Seventeenth Amendment expulsions or censures attempted, a total of sixteen were tied directly to support for the Confederate cause in the American Civil War, and could reasonably be argued did not come under the more traditional political crimes of standard treason, election fraud, misuse of monies, and the like. The eleven non-Civil War related expulsions and censures attempted took place from the ratification of the United States Constitution through the ratification of the Seventeenth Amendment in 1913, a period of 124 years, would show an action approximately once every 11.3 years. If the American Civil War numbers are added in one would dramatically increase the frequency of this number to one event every 4.6 years. During the post-Seventeenth Amendment Era, from 1913 through 2018, a timeframe of 105 years, there have been a total of thirteen actions. This puts the modern rate at one event every 8 years. Not only does the post-Seventeenth Amendment Era show a more compressed timeframe between expulsion and censure events, it also shows a greater propensity for those expelled or censured to have taken part in the very acts of unethical conduct that that the pre-1913 Senate was accused of.

There has been a certain amount of corruption and other disreputable acts during the entire life of the Senate, with no era necessarily being either better or more unethical than the other. It can be contended that the larger gaps in time between expulsion and censure events and a lower tendency of accused senators from remaining in office before 1913 show that state legislatures were better at choosing senators than the public at large. The low bar of not being removed from office does not show if a senator was effective at their profession, but merely illustrates that there is a certain fallacy to the Progressive Era idea that corruption was tied to the selection process instead of human fallibility, something that elections have not totally solved either. It can be argued that some of the incidents might be due to a professionalization of politicians in general. No longer of the same mentality of short bouts of service that many of the Founders' generation typically adhered to, by the late 19<sup>th</sup> century political power had become the realm of graft and corruption, or so it might seem. Of the pre-Seventeenth Amendment era senators threatened with expulsion and that eventually survived the process, separating those related to supporting the Confederacy, only two stayed in office past the term they were tried in, including Reed Smoot of Utah, who was accused of "Mormonism." Smoot's marital and religious issues aside, this may have been of a social and legal misstep for many Americans in the early 20<sup>th</sup> century, but certainly was not the high crimes and misdemeanors that would necessitate removal from the United States Senate. State legislatures may well have been able to better determine the needs of their states and be more willing to jettison senators who either brought ill-repute or ineffectiveness to the position. Since the advent of the electoral process for senators in 1913, five of the eight senators accused of expulsion worthy

crimes were reelected to their positions and stayed in office to well after their trials. This shows that senators no longer need to worry about the potential wrath of the state legislatures they used to represent, but instead are able to stay in office due to the support that they receive from the public at large.

## CHAPTER 3. WHY ACTION WAS DEEMED NECESSARY

### The Material Reason Senatorial Selection Process Required Action

It is imperative to understand that most of the issues as to the selection of United States senators were centered on the inordinate amount of time some state legislatures argued about what appeared to be more national issues and how long the states took to choose senators.<sup>1</sup> It will be shown on the following pages that frequent deadlocks over the choice of senator made the process look broken to the average American. The highly inefficient process of selecting new senators was just as frustrating for state legislators as well, as minority parties (and sometimes factions within the majority) and interests would use quorum rules to force impasses. From 1891 to 1905 there were forty-five occurrences in twenty states of a seat going unfilled for at least a short amount of time. In fourteen cases the seat remained empty for an entire congressional session. Delaware had three instances of an unfilled senate seat for entire Congresses during this timeframe, with no senators seated at all from 1901 to 1903. This issue was the case in states across the entire country, particularly those with split representation in its legislative houses, or those with severe internal political fracturing.<sup>2</sup>

From the advent of the United States through the early portions of the 20<sup>th</sup> century, most state level legislative positions were not considered the fulltime

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<sup>1</sup> Zachary D. Clompton, and Steven E. Art. *Northwestern University Law Review*. "The Meaning of the Seventeenth Amendment and a Century of State Defiance." Northwestern University School of Law. 2013. Vol. 107, No. 3. p. 1189-1190.

<sup>2</sup> David E. Kyvig. "Redesigning Congress: The Seventeenth and Twentieth Amendments to the Constitution." *The American Congress: The Building of Democracy*, edited by Julian E. Zelizer. 2004. <http://link.galegroup.com.proxy.buffalostate.edu/apps/doc/A176869500/AONE?u=buffalostate&sid=AONE&xid=5a54f9e2>. Accessed 25 Mar. 2018; Todd J. Zywicki. "Beyond the Shell and Husk of History: The History of the Seventeenth Amendment and Its Implications for Current Reform Proposals." *Cleveland State Law Review*. Volume 45:165, 1997. p. 200. <https://engagedscholarship.csuohio.edu/clevstlrev/vol45/iss2/3>

occupations that most citizens are familiar with today. State level bodies were often plagued with relatively low pay and infrequent scheduling of meetings, and many states assembling once every two years, often times for only a few months, or even less if most significant legislative activities were complete. Many of these assemblies were mandated to be done with all legislative work within a tight window of time, or potentially have all the laws that were passed become null and void. Given the thanklessness of the position and the aforementioned other issues the turnover in these positions was naturally very high. This often led to a severe lack of consistency in selections, weak institutional knowledge and poor interpersonal familiarity, and a tendency for politicians to pursue aggressively their personal agendas with little worry about future sessions or people. This often led to political deadlocks as to the selection of United States senator, which could not be properly filled until after the next legislative elections, and in some cases, even longer periods of time.<sup>3</sup>

The inefficient selection processes saw state legislatures tasked with filtering potential political talent down to the most capable (most times) or best connected (sometimes) and readily ensure only loyal nominations were chosen. This was supposed to guarantee that the utmost important concerns of and benefits for the states were fully represented. This gave the state level legislatures an added interest in national politics, since proper future representation of their state was entirely up to them.<sup>4</sup> Through most of the 19th century state legislatures saw the importance of their selections as this model represented what had happened in the original role of state

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<sup>3</sup> Wendy J. Schiller, Charles Stewart III, and Benjamin Xiong. "U.S. Senate Elections before the Seventeenth Amendment: Political Party Cohesion and Conflict 1871- 1913." *The Journal of Politics*. July 2013, Volume 75, Number 3. p. 835-836.

<sup>4</sup> Kris E. Palmer. *Constitutional Amendments, 1789 to the Present*. Detroit, MI: Gale Group, 2000. p. 406.

delegates for the Constitutional Conventions and the Articles of Confederation Conventions, but by the early 20<sup>th</sup> century many state legislatures and activist groups such as Granges, early unionists, and other populists started looking at direct elections as the most logical choice, and started efforts of their own to effect constitutional change.<sup>5</sup> This continued pressure from some state level legislatures was initially ignored by the United States Senate as a whole, but would soon come to bear in the massive forces applied by the Progressive Era body of law toward all levels of government.

As independent political parties grew in power and stature, arguments arose over how individual states would choose their United States senators. Issues had often times arisen as legislative deadlocks resulted in seats being not properly filled, sometimes leaving a state without a senator for years at a time. By the time the Seventeenth Amendment had passed many state legislatures had been limited by state governments through the use of civil service regulations limiting patronage jobs, referendum and initiative processes sharing powers with the people, and other substantial limitations.<sup>6</sup> These legislators were not the full time politicians modern Americans are used to. They often times congregated only for biennial legislative sessions, and state legislative representatives were often ill-trained to make important decisions as significant as United States senators.

A series of contested elections in the mid-19<sup>th</sup> century and a change in public opinion saw it becoming increasingly important for a new method of selecting senators

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<sup>5</sup> Kris E. Palmer. *Constitutional Amendments, 1789 to the Present*. Detroit, MI: Gale Group, 2000. p. 412.

<sup>6</sup> Arthur S. Link and Richard L. McCormick. *Progressivism*. Arlington Heights, Illinois: Harlan Davidson, 1983. p. 60.

to be established, ensuring a more efficient transfer of power between different sessions of the United States Senate. In particular, the disputed 1865 election of Senator John P. Stockton, of New Jersey, created the ground work for standardizing the selection/election of United States senators. Before the election the New Jersey legislature changed the rules defining a quorum, illegally selecting a senator that did not have proper legislative support. The uproar in the New Jersey legislature was that Stockton had received only a plurality, rather than a majority, of the votes in the joint session. At the time of the election the joint session of legislature had voted, 41 to 40, to overturn the state level requirement that a senator had to have a majority of all the legislators in order to be properly chosen. The vote instead permitted the election by plurality of those present. The opponents contended that such a change required a majority vote by each house and that a majority of the state assembly members had not voted for the resolution. Stockton, who had initially been seated in the Senate, was removed in March of 1866. The seat remained open until the 1868 election cycle when Stockton legitimately received the majority of legislative votes and was returned to office.<sup>7</sup>

The state level deadlocks that eventually led to the Seventeenth Amendment helped to undermine the deliberations of the United States Senate and limited its effectiveness in carrying out their constitutional duties. It also degraded the public's

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<sup>7</sup> Ralph A. Rossum "California and the Seventeenth Amendment," *Nexus - A Journal of Opinion* 6, 2001. p. 110.  
[http://heinonline.org.proxy.buffalostate.edu/HOL/Page?handle=hein.journals/nex6&div=11&start\\_page=101&collection=journals&set\\_as\\_cursor=0&men\\_tab=srchresults#](http://heinonline.org.proxy.buffalostate.edu/HOL/Page?handle=hein.journals/nex6&div=11&start_page=101&collection=journals&set_as_cursor=0&men_tab=srchresults#); *United States Senate*. "The Election Case of John P. Stockton of New Jersey (1866)." April 24 2015.  
[http://www.senate.gov/artandhistory/history/common/contested\\_elections/047John\\_Stockton.htm](http://www.senate.gov/artandhistory/history/common/contested_elections/047John_Stockton.htm). Accessed April 24, 2015.

trust in the institution, even though the majority of senate selections were accomplished without any significant issues. A simple amending of the 1866 statute that removed Senator Stockton from office, either permitting a plurality of the vote or a run-off election could have virtually eliminated the impasses without having to resort to the constitutional amendment process.<sup>8</sup>

A second reason was the undermining of control by political machines. Probably the most known about the late 19<sup>th</sup> century to modern American society, was that in many states political machines became extremely powerful after the American Civil War Era. These political machines continued to increase in strength and reach well into the period that became known as the Gilded Age, from the end of the American Civil War to the first few years of the 20<sup>th</sup> century when populists started gaining power. This was a time of wide income disparity and a *laisse faire* attitude by the federal government and industry. The machines that ran the politics of the time could all but ensure specific political parties and other powerful entities would have the ultimate control over the United States Senate. The Senate would then supposedly serve as “millionaires club,”<sup>9</sup> filled with men willing to make decisions beneficial to special interests in exchange for the promise of wealth and power. These senators were perceived as serving the interests of a few private people and groups,<sup>10</sup> while putting the interests of their individual states and its citizens in a secondary position, treated almost as afterthoughts and even as inconveniences.

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<sup>8</sup> Todd J. Zywicki. “Beyond the Shell and Husk of History: The History of the Seventeenth Amendment and Its Implications for Current Reform Proposals.” *Cleveland State Law Review*. Volume 45:165, 1997. p. 198-200. <https://engagedscholarship.csuohio.edu/clevstlrev/vol45/iss2/3>.

<sup>9</sup> John R. Vile. *A Companion to the United States Constitution and Its Amendments*. Santa Barbara, CA: Praeger, 2010. p. 197.

<sup>10</sup> *17th Amendment to the U.S. Constitution*. National Archives and Records Administration. May 18, 2015.



Woodrow Wilson had called the Gilded Age, particularly during the Ulysses S. Grant administration, a time of “Congressional Government,” with the legislative branch superior to the executive. Congress pushed legislation that seemed to benefit a precise group of constituents and was soon seen as the home of corruption. The use of “spoils,” and lobbyists with open purses could easily give the impression that the Senate was essentially a corrupt institution. Countering this argument, Margaret Thompson has contended that this lobbying was a necessary and possibly even a beneficial force in the time after the end of the American Civil War. She wrote that lobbying “helped officials and citizens to function as the scope, procedures, and agenda of governance underwent dramatic transformation.”<sup>11</sup>

In the late 1870s Senator Roscoe Conkling of New York was the head of the so called “Stalwart Republicans” and openly took on President Rutherford B. Hayes as the executive branch attempted to institute much needed civil service reforms. In response to many federal positions being used as favors for loyal supporters, Hayes had issued an executive order banning political intimidation of civil servants by state party bosses. Conkling exercised enough power that he was able to generally disregard Hayes’ order and went as far as instructing Naval Officer Alonzo Cornell to pay no attention to President’s Hayes instructions as to who would be put in charge of the New York

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<sup>11</sup> Margaret Susan Thompson. “Corruption—or Confusion? Lobbying and Congressional Government in the Early Gilded Age.” *Congress and the Presidency*, Fall 1983; reprinted in *The United States Congress in a Partisan Political Nation, 1841-1896*, ed. Joel H. Silbey. Brooklyn: Carlson Publishing, Inc. 1991, Vol. III. <http://www.tandfonline.com/doi/abs/10.1080/07343468309508016>. Accessed online 5 January 2018.

Customs House. Hayes was forced to wait out Conkling and use a Congressional recess in order to embed his own selections.<sup>12</sup>

By 1881 Senator Conkling had played his hand too hard by so openly challenging the executive branch and opinion turned markedly against some of the more obvious issues with treating almost all federal positions as political appointments. He was forced to resign from the Senate when President James Garfield took office and immediately started more in depth reforms in the civil service system. Until that time most jobs were dispersed through the “spoils system,” where politicians would have the ability to appoint loyal followers to almost any governmental position. Garfield immediately initiated investigations into criminal activities related to the hiring of individuals for federal employment, including bribery, voter fraud, corruption, and intimidation. Conkling, an enthusiastic exploiter of using appointments and the inherent related potential criminal activities, left office before he could be charged with anything specific.<sup>13</sup>

In the late 1880s and early 1890s Matthew Stanley Quay of Pennsylvania rose in prominence at state level government positions, quickly becoming the state treasurer, and within three years of entering the scene, being selected as United States senator. After merely three years in the Senate, he managed to weave his way into Senate

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<sup>12</sup> Sean Dennis Cashman. *America in the Gilded Age: From the Death of Lincoln to the Rise of Theodore Roosevelt*. 3<sup>rd</sup> Edition. New York: New York University Press. 1993. p. 253-254.  
[https://books.google.com/books?hl=en&lr=&id=YMoVCgAAQBAJ&oi=fnd&pg=PR3&dq=senate+scandal+gilded+age&ots=1MUD7\\_QgrW&sig=Slnl09J1TdH5iAXFvLbEjFmcP2Q#v=onepage&q=senate%20scandal%20gilded%20age&f=false](https://books.google.com/books?hl=en&lr=&id=YMoVCgAAQBAJ&oi=fnd&pg=PR3&dq=senate+scandal+gilded+age&ots=1MUD7_QgrW&sig=Slnl09J1TdH5iAXFvLbEjFmcP2Q#v=onepage&q=senate%20scandal%20gilded%20age&f=false). Accessed online 5 January 2018.

<sup>13</sup> Sean Dennis Cashman. *America in the Gilded Age: From the Death of Lincoln to the Rise of Theodore Roosevelt*. 3<sup>rd</sup> Edition. New York: New York University Press. 1993. p. 245.  
[https://books.google.com/books?hl=en&lr=&id=YMoVCgAAQBAJ&oi=fnd&pg=PR3&dq=senate+scandal+gilded+age&ots=1MUD7\\_QgrW&sig=Slnl09J1TdH5iAXFvLbEjFmcP2Q#v=onepage&q=senate%20scandal%20gilded%20age&f=false](https://books.google.com/books?hl=en&lr=&id=YMoVCgAAQBAJ&oi=fnd&pg=PR3&dq=senate+scandal+gilded+age&ots=1MUD7_QgrW&sig=Slnl09J1TdH5iAXFvLbEjFmcP2Q#v=onepage&q=senate%20scandal%20gilded%20age&f=false). Accessed online 5 January 2018.

leadership and also became the Republican Party National Chairman. During this time it quickly came to the surface that he used a large number of federal level patronage jobs in order to grow and maintain his position of power in the party.<sup>14</sup> Though giving away patronage jobs was not abnormal for the era, Quay took it to a level that even fellow senators saw as almost egregious. In an 1890 quote against Senator Quay from Representative Berger, the Congressman stated,

If it is to be crucified, it is only because its chosen leaders have bartered away its principles for the tricks and petty schemes of politician. The Judas Iscariot of 2,000 years ago is to find a counterpart in the Judas Iscariot of today. Judas, who took thirty pieces of silver and went hanged himself, has left an example for the Matt Quays that is well worthy of their imitation.<sup>15</sup>

This caustic and dramatic statement by a sitting United States representative towards a sitting United States senator would be considered biting even today, but is even more so the case coming from an era when politicians, at least publicly, typically attempted to hold themselves above petty jealousies.

In 1898 Senator Quay was charged with conspiring with other politicians and private individuals to use public moneys for their own use. He came out claiming that this “dastardly attack of malevolent enemies,” would be shown to be of no truth.<sup>16</sup> Progressive activists considered Quay a leading target in their crusade to remove party bosses from all levels of government. They concentrated their efforts on defeating Quay

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<sup>14</sup> James A. Kehl. *Boss Rule in the Gilded Age: Matt Quay of Pennsylvania*. Pittsburgh, Pennsylvania: University of Pittsburgh Press. 1981. p. 138.  
<https://books.google.com/books?hl=en&lr=&id=VOe2P9TNb1EC&oi=fnd&pg=PR7&dq=senate+scandal+gilded+age&ots=8B0XxPgOPk&sig=1ybtcuveU2QXb41hmo6yJpf5QfM#v=onepage&q=senate%20scandal%20gilded%20age&f=false>. Accessed 5 January 2018.

<sup>15</sup> *The Atlanta Constitution*. "Bouncing Matt Quay." Sep 04, 1890. p. 9.  
<http://proxy.buffalostate.edu:2048/login?url=https://search.proquest.com/docview/193988540?accountid=7259>.

<sup>16</sup> *The Atlanta Constitution*. "Matt Quay Has Been Arrested." Oct 04, 1898. p. 1.  
<http://proxy.buffalostate.edu:2048/login?url=https://search.proquest.com/docview/495487708?accountid=7259>.

when he stood for reelection to a third term in 1899. They ultimately succeeded in deadlocking the Pennsylvania legislature and preventing his selection, but the governor reappointed Quay to the Senate. Immediately his ability to serve was challenged. The legislator held a vote, and by a single ballot he was denied his seat until he was finally recognized by a new legislature in 1901. Physically and mentally fatigued from this hostile confrontation, Quay never fully recovered, and in early 1904 he returned to his home in Beaver, Pennsylvania, where he soon died.<sup>17</sup>

An example of the power that political machines wielded can be tied to the Aldrich machine in late 19<sup>th</sup> and early 20<sup>th</sup> century Rhode Island, named after the long serving Senator Nelson Aldrich, the Senate Majority Leader. Though a small state physically and by population, senators from Rhode Island had an inordinate say in Washington due to the simple fact that the states constitution was set up to benefit an almost aristocratic population base where representation was set up on geographic areas versus equal populations. Small towns, generally home to prosperous farmers and businessmen, had approximately four times the representation than the cities that contained two thirds, and generally poorer segment, of the state's population. No matter how terrible a senator seemed to the general population of Rhode Island, the state legislature could not be forced to bring them home. Rural prejudices against urban areas and occurrences of bribery by the Aldrich machine ensured a small segment of the population gave a trifling number of men the ability to control the

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<sup>17</sup> James A. Kehl. "Quay, Matthew Stanley (1833-1904), politician." *American National Biography*. 2000-02. Oxford University Press.  
<https://books.google.com/books?hl=en&lr=&id=VOe2P9TNb1EC&oi=fnd&pg=PR7&dq=senate+scandal+gilded+age&ots=8B0XxPgOPk&sig=1ybtcuveU2QXb41hmo6yJpf5QfM#v=onepage&q=senate%20scandal%20gilded%20age&f=false>. Accessed 5 January 2018.

legislature, the courts, and ultimately who chose United States senators. “Interests,” corporations, or people who wanted to influence national level legislation, saw Rhode Island’s senators as an inexpensive purchase, and Senator Aldrich was a more than willing participant. Aldrich combined his corrupt practices with those of Senate Minority Leader Arthur Gorman and controlled any and all legislation that was to be introduced, protecting their benefactors in all but the most extreme of bad actions. This concentration of power in two men’s hands laid bare to the nation at large the inordinate influence special interests had in government.<sup>18</sup>

The United States Senate had a hearing of its own in 1909 deliberating the effect corporate and other private interests had on the actions of the Senate and towards individual senators. In an amazingly candid conversation, Henry Osborne Havemeyer, a president of the American Sugar Refining Company, simply stated “It is my impression that whenever there is a dominant party, wherever the majority is large, that is the party that gets the contribution, because that is the party which controls the local matters.”<sup>19</sup> He went on to state that these contributions were made specifically because companies and other organizations had large interests to protect, and had little or nothing to do with political ideologies or common interests other than maintain their positions.<sup>20</sup>

A third reason for the push for the direct election of senators was the activist journalists of the day. These “muckrakers” would leave an indelible mark on opinions of

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<sup>18</sup> David Graham Phillips. *The Treason of the Senate*. Original: 1906. Edited with an introduction by George E. Mowry and Judson A. Grenier. Chicago: Quadrangle Books, 1964. p. 628-638. [https://www.senate.gov/artandhistory/history/minute/Treason\\_of\\_the\\_Senate.htm](https://www.senate.gov/artandhistory/history/minute/Treason_of_the_Senate.htm). Accessed online 5 January 2018.

<sup>19</sup> United States Senate. Senate Report No. 606, 53rd Congress, 2nd session. p. 351-352.

<sup>20</sup> Henry Jones Ford. “The Direct Primary.” *The North American Review*, vol. 190, no. 644, 1909. p. 8. JSTOR, JSTOR, [www.jstor.org/stable/25106397](http://www.jstor.org/stable/25106397).

both politicians and the public. An entire industry developed around the basic idea that many senators were naturally corrupt as individuals and that the whole group entered office to only advance themselves and their moneyed benefactors. In 1906 a series of articles by David Graham Phillips were published in *Cosmopolitan* magazine, at the time a current interest publication and not the fashion/women's print it has since become. Titled "The Treason of the Senate" it helped to put the United States Senate at the middle of the Progressive push to make the government better representatives to the average voter. It bluntly started with "Treason is a strong word, but not too strong to characterize the situation in which the Senate is the eager, resourceful, and indefatigable agent of interests as hostile to the American people as any invading army could be." This frank declaration was just an introduction to the subject of Senate malfeasance and was followed with a nine part series that discussed the overbearing influence large corporations and wealthy sponsors had on the legislative process, how post-Civil War politics had led to a system that was becoming more susceptible to bribery, fraud, and gridlock, and the conviction of two senators on charges of corruption in the previous year.<sup>21</sup>

Unethical behavior by state level politicians added to the corroded patina of public trust as local and state politicians were consistently being found to have conducted themselves in less than honorable ways. Since these men were the ones that ultimately chose senators, it was readily believed that senators must be of the same cloth. There was much hostility towards Phillips and his "Treason of the Senate" serial.

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<sup>21</sup> David Graham Phillips. *The Treason of the Senate*. Original: 1906. Edited with an introduction by George E. Mowry and Judson A. Grenier. Chicago: Quadrangle Books, 1964. p. 628-638. [https://www.senate.gov/artandhistory/history/minute/Treason\\_of\\_the\\_Senate.htm](https://www.senate.gov/artandhistory/history/minute/Treason_of_the_Senate.htm). Accessed online 5 January 2018.

Other journalists and many politicians critiqued his writing as he liberally used inference and exaggeration in many parts of his story, though few would call him an outright liar. Criticisms from populist leaders such as President Theodore Roosevelt marked the series as something much less than fully truthful, even using the series to actually coin the term “muckraker.” Much of the public took Phillips at his word and saw criticisms of his writing as an almost protective racket from politicians protecting their turf and journalists trying to keep access to those in power. The general population held on to Phillips’ every word and public opinion quickly went against the selection of senators and the real push for direct elections gained purchase.<sup>22</sup> The eventual adoption of the Seventeenth Amendment seemed to reflect the popular dissatisfaction with the apparent corruption and inefficiency that had come to characterize the legislative election of United States senators in many states.

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<sup>22</sup> David Graham Phillips. *The Treason of the Senate*. Original: 1906. Edited with an introduction by George E. Mowry and Judson A. Grenier. Chicago: Quadrangle Books, 1964. p. 628-638. [https://www.senate.gov/artandhistory/history/minute/Treason\\_of\\_the\\_Senate.htm](https://www.senate.gov/artandhistory/history/minute/Treason_of_the_Senate.htm). Accessed online 5 January 2018.

## CHAPTER 4. CHANGES DURING THE PROGRESSIVE ERA

### Initiating Change in the Senate and in the Constitution

As early as 1826 there was a movement to make direct elections of United States senators the law. Legislation was pushed to the Senate as early as 1850, but it was met with “disfavor” and was not seriously brought up again until the end of the 19th century. Andrew Johnson of Tennessee pushed for reform of how senators gained office as a representative (1851), as a senator (1860), and as president (1868).<sup>1</sup> By 1887 leaders and members of the State Grange of Illinois, a fraternal order dedicated to the assistance of farmers and other various agricultural pursuits, started petitioning their state legislature, governor, and federal representatives to propose a Constitutional amendment calling for the direct election of United States senators.<sup>2</sup> Starting in 1892 the National People's, or Populist Party, included as part of their platform the popular election of U.S. Senators. After absorbing the Populist Party in 1896 the Democratic Party continued the call for reform. Progressive Republicans, including Theodore Roosevelt, also backed the idea.<sup>3</sup> In the following two decades, Utah (1897), the Illinois Grange (1898), Colorado (1901), and Louisiana (1907) made similar proposals.<sup>4</sup>

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<sup>1</sup> *Washington Post*. "ENDS 87 YEARS' FIGHT." 1913. May 21, 1913. <http://search.proquest.com/docview/145199191?accountid=7259>. Accessed online April 4, 2015.; David E. Kyvig. "Redesigning Congress: The Seventeenth and Twentieth Amendments to the Constitution." *The American Congress: The Building of Democracy*, edited by Julian E. Zelizer, Houghton Mifflin, 2004. <http://link.galegroup.com.proxy.buffalostate.edu/apps/doc/A176869500/AONE?u=buffalostate&sid=AONE&xid=5a54f9e2>. Accessed 25 Mar. 2018.

<sup>2</sup> *State Grange of Illinois*. "Petition of the State Grange of Illinois, December 29, 1887." Washington, DC: National Archives and Records Administration. <http://www.archives.gov/legislative/features/Seventeenth-amendment/illinois-1887.html>. Accessed May 18, 2015.

<sup>3</sup> Jack Kenny. "The Seventeenth: the worst of all amendments? The 17th Amendment, putting the election of U.S. senators in the citizens' hands, instead of the state legislatures, was meant to empower citizens. It had the opposite effect." *Opposing Viewpoints in Context: The New American*, 1 Apr. 2013, p. 35. [http://link.galegroup.com.proxy.buffalostate.edu/apps/doc/A326854317/OVIC?u=nysl\\_we\\_bsc&xid=8b7c4dc6](http://link.galegroup.com.proxy.buffalostate.edu/apps/doc/A326854317/OVIC?u=nysl_we_bsc&xid=8b7c4dc6). Accessed 25 Mar. 2018.

<sup>4</sup> *17th Amendment to the U.S. Constitution*. National Archives and Records Administration. May 18, 2015.



Starting in 1888 a system of direct primaries started to develop, and by 1910 forty-four of forty-six states had primary election laws and twenty-eight of those states provided for the nomination of candidates for the senate. This allowed the voting public a certain amount of say into who the state United States Senator would be, as the political party who received the most votes would also get to choose the next senator. By 1909 the “Oregon system” allowed for a straw poll to guide who a state would choose as a senator. The general idea of the straw poll was that the public would be allowed a vote during the normal election cycle as to who the next senator would be. Since it was up to the state legislatures to choose these positions, they were under no legal obligation to follow the results, but state level politicians quickly realized the dangers of going against public opinion in such a blatant way. This worked well enough that the Republican dominated state legislature chose a Democrat as senator since he won the poll at the general election. By this time thirty-seven states had some level of input from the public as to who would be chosen as senator. The Seventeenth Amendment formalized and made universal the senate selection/election processes, but in the process totally removed state legislature input on the method.<sup>5</sup>

Though most of a century passed between the initial idea of a popular election of senators and the passage of the Seventeenth Amendment, many states had already started pressuring the national government to change the method by which senators

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<sup>5</sup> Todd J. Zywicki. “Beyond the Shell and Husk of History: The History of the Seventeenth Amendment and Its Implications for Current Reform Proposals.” *Cleveland State Law Review*. Volume 45:165, 1997. p. 191-192. <https://engagedscholarship.csuohio.edu/clevstlrev/vol45/iss2/3>.

were selected.<sup>6</sup> This popular and state level pressure remains the only time in American history when a true grassroots movement forced the federal government's hand. Other Progressive Era amendments, especially Prohibition and Women's Suffrage, had a lot of popular support, but at the time of their passage not enough to cause a fear of a new Constitutional Convention.<sup>7</sup>

A myriad of different reasons pressured politicians at all levels of government to change the make-up of the Senate, or at minimum, change how these positions were to be filled. Some of the ideas came from what were nominally ideologically consistent, national political parties that were absorbing platforms from numerous third parties and forming what are now the dominant Republican and Democratic parties of the modern era. Many in the public started to see the state and federal level politics as becoming too intertwined and wanted to sever the direct connection between the state legislatures and the national legislature in order to ensure issues that were at the forefront of national interests did not come to control the direction of state level debates.<sup>8</sup>

As early as 1900 Pennsylvania had started pushing for an Article V convention, which specifically called for the direct election of senators, but could have done much more to alter the fabric of the Constitution. This signified the spread of the idea from the agriculturally based West and Midwest and into the industrial and population centers on

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<sup>6</sup> Daniel Wirls and Stephen Wirls. *The Invention of the United States Senate*. Baltimore, Maryland and London: The Johns Hopkins University Press, 2004. p. 211.

<sup>7</sup> Daniel Wirls and Stephen Wirls. *The Invention of the United States Senate*. Baltimore, Maryland and London: The Johns Hopkins University Press, 2004. p. 211.

<sup>8</sup> David Schleicher. "The Seventeenth Amendment: Federalism in an Age of National Political Parties." *Hastings Law Journal*. Hastings College of Law. May 2014. p. 1043.  
[http://proxy.buffalostate.edu:2053/hottopics/lnacademic/?shr=t&csi=7341&sr=TITLE\('The+Seventeenth+Amendment+federalism+in+an+age+of+national+political+parties'\)+and+date+is+2014](http://proxy.buffalostate.edu:2053/hottopics/lnacademic/?shr=t&csi=7341&sr=TITLE('The+Seventeenth+Amendment+federalism+in+an+age+of+national+political+parties')+and+date+is+2014). Accessed online January 11, 2018.

the East Coast. This displayed that the movement had enough momentum to counter the political machines. By 1912 thirty-one states, only one short of the needed two-thirds to call a convention, had either officially asked for a convention or had asked Congress to fix the problem or face the repercussions. This brought concern among many in the Senate and forced Congress act.<sup>9</sup>

Seeing the almost certain passage of a new amendment, with the individual states making significant headway towards initiating their separate Constitutional Conventions, the United States House of Representatives was left little choice but to issue its own direct election of senators resolution, named House Joint Resolution 39. House Joint Resolution 39 was initially passed on 1 May 1911 by the full House of Representatives, then heavily revised by Kansas Republican Senator Joseph L. Bristow, removing what was known as a "Race Rider." This "Race Rider" states, "The times, places, and manner of holding elections for Senators shall be as prescribed in each State by the legislature thereof." would have put all senatorial election law-making past the actual direct election of United States senators, into the individual states' hands, and would have banned any other federal actions against the states, even in the event of mass racial discrimination. After Senator Bristow's amendment was added to the Joint Resolution it became the face of the Seventeenth Amendment. Ensuring Federal election laws would be honored by the individual states, the new House Joint resolution passed both houses of Congress and was rather quickly ratified as the

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<sup>9</sup> David E. Kyvig. "Redesigning Congress: The Seventeenth and Twentieth Amendments to the Constitution." *The American Congress: The Building of Democracy*, edited by Julian E. Zelizer. 2004. <http://link.galegroup.com.proxy.buffalostate.edu/apps/doc/A176869500/AONE?u=buffalostate&sid=AONE&xid=5a54f9e2>. Accessed 25 Mar. 2018.

Seventeenth Amendment when the required number of states approved it over the next two years.<sup>10</sup>

Surprisingly, state level versions of this “Race Rider” survived in the South until the late 1940s in the form of “white primaries.” In many Southern states, particularly those from the old Confederacy, individual political parties were deemed to be private organizations, therefore able to include or exclude any particular person or groups of people at will. The Democratic Party, since it was politically in total control of Deep South politics until the late 1960s, was able to have closed primaries, where white voters would nominate their candidate and then run, often unopposed, in general elections. This gave African American voters no real choice in their representation, even though they technically, if not in practice, had the full right to vote in the general election. Once these “white primaries” were banned by the Supreme Court in *Smith v. Allwright*, (1944) other forms of electoral control rose up. “White primaries” were not the first, and would not be the last attempt at the disenfranchisement of African Americans.<sup>11</sup>

Once the House of Representatives issued its own resolution, and with senator Bristow’s continued assistance, the United States Senate was forced to finally realize that they had to go along with public opinion and help to develop what became the Seventeenth Amendment, and they needed to do as much as possible in order to control the potential damage that might be done to the United States Senate. Even

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<sup>10</sup> *United States House of Representatives*. “House Joint Resolution 39 proposing an Amendment to the Constitution, including the “Race Rider,” May 1, 1911.” Washington, DC: National Archives and Records Administration. <http://www.archives.gov/legislative/features/Seventeenth-amendment/hjres39.html>. Accessed May 18, 2015.

<sup>11</sup> Kris E. Palmer. *Constitutional Amendments, 1789 to the Present*. Detroit, MI: Gale Group, 2000. p. 400.

though there had been decades of attempts at making direct elections a reality, it took the threat of a Constitutional Convention to encourage enough senators to agree to this dramatic change.<sup>12</sup> Notwithstanding this huge change in Constitutional law, the initial effects of the Seventeenth Amendment appeared minimal to the public. The general lack of interest by the average American and the lack of distinction as to the before and after effects of the amendment were packaged in a way to elicit little apprehension. As Daniel and Stephen Wirls describe the situation,

The consequences of a directly elected Senate were fairly subtle not only because of the ways in which many senators were elected de facto, prior to the amendment, but also because national politics probably did little to make the distinction between the selection by state legislatures and direct elections very interesting.<sup>13</sup>

The legislative and daily activities of an average senator did not change much before or after the enactment of the amendment, but over time the influence of the individual states have become weaker and power more centralized with the national political parties over the concerns of the many states.<sup>14</sup>

The reassigning of power from state legislatures to the general American population was a dramatic turn from the Federalism the Founding Fathers intended, and an abandonment of the Senate as a representative body for the individual states. It was a major victory for the Progressive Era politicians and movement in attempting to align the Senate with the ideals of popular democratic government.<sup>15</sup> The Progressive movement wanted to move the United States Senate from its role as a great

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<sup>12</sup> John R. Vile. *A Companion to the United States Constitution and Its Amendments*. Santa Barbara, CA: Praeger, 2010. p. 197.

<sup>13</sup> Daniel Wirls and Stephen Wirls. *The Invention of the United States Senate*. Baltimore, Maryland and London: The Johns Hopkins University Press, 2004. p. 211.

<sup>14</sup> Daniel Wirls and Stephen Wirls. *The Invention of the United States Senate*. Baltimore, Maryland and London: The Johns Hopkins University Press, 2004. p. 211.

<sup>15</sup> Kris E. Palmer. *Constitutional Amendments, 1789 to the Present*. Detroit, MI: Gale Group, 2000. p. 411.

deliberative body responsible for longer term thinking than the House of Representatives, not bound to public pressures, into an organization that bent directly to the will of the people. Instead of patterning on the idea of the Roman Senate, with ranks of distinguished citizens, it was to act as a separate, and equal branch to the House of Representatives, though elected in the exact same way, with the exact same external pressures.<sup>16</sup> The Senate is no longer a direct link between the individual states and the federal government. Originally senators only had direct responsibility to the professional legislators that would keep them in office, people that could at least be reasoned with to understand long term implications of specific votes and have the benefit of experience and inside information on specific laws and regulations. After the passage of the Seventeenth Amendment senators were now subject to the impulse of public opinion, which can be difficult to ascertain at best, and is often capricious and fleeting.

Much of the argument for the passage of the Seventeenth Amendment was that senators gained their positions and retained an almost lifelong grip on power through some sort of nepotistic dealing. In reality, it has been shown that the passage of the amendment dramatically increased the propensity of a senator to stand for reelection and remain in a senatorial position for longer amounts of time than was evident pre-1913. In conjunction with longer tenures of office, a study by William Bernhard and Brian R. Sala in *The Journal of Politics* showed that the Seventeenth Amendment had a moderating effect on a senator's voting record. They show that the last two years of a senator's term seem to demonstrate a tendency to restrain themselves and take a more

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<sup>16</sup> Kris E. Palmer. *Constitutional Amendments, 1789 to the Present*. Detroit, MI: Gale Group, 2000. p. 415.

“middle of the road” decision making process, setting themselves up for the next reelection campaign.<sup>17</sup> It can be argued that this shift in “late-term roll-call behavior,” as the authors call it, is directly due to the general populations supposed relatively short term memories as to a senators voting record. Theoretically, the professional politicians in a state legislature that formerly chose the senators would be more apt to remember a specific United States senators total voting record for their entire term, and reselect/reelect, or not, based on the total picture of a their record, and not just what has happened in the very recent past.

Many of the current ideas on the impact of the Seventeenth Amendment rely on information available from more conservative leaning websites and news related groups tied to attempting to overturn the Sixteenth Amendment (Income Taxes) and the Seventeenth Amendment. In researching a large number of sources for this thesis it proved difficult to find any real commentary on the Seventeenth Amendment from a liberal or progressive perspective. It is not certain whether this is due to a general acceptance of the provisions involved or just a lack of concern on the subject all together. In contrast, conservative politicians and dignitaries have openly critiqued the idea of the Seventeenth Amendment.

Senator Mike Lee of Utah has stated that he would favor repeal of the amendment. Former Arkansas governor Mike Huckabee has called it “one of the dumbest things we ever did.” Former Supreme Court Justice Antonin Scalia stated in 2010 that he would be for overturning the amendment. “The 17th Amendment has

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<sup>17</sup> William Bernhard and Brian R. Sala. *The Journal of Politics*. “The Remaking of an American Senate: The Seventeenth Amendment and Ideological Responsiveness.” February 2004. April 2015.

changed things enormously," Scalia said, "We changed that in a burst of progressivism in 1913, and you can trace the decline of so-called states' rights throughout the rest of the 20th century."<sup>18</sup> At minimum, many of the opponents of these amendments have goals of severely limiting or even shutting down many of the regulatory bodies that are seen as restrictive to both individual citizen's rights and States' rights per the Ninth and Tenth Amendments of the United States Constitution. This mass of unseemly regulatory issues includes bodies of law from the Progressive Era and many agencies and laws developed since that time, not limited to, but often centered on the regulation of various types of businesses and all levels of government. It is easy enough to see the argument opponents of the amendment have made, specifically about the issue of the diminishment of state authority over the federal government when it comes to powers enumerated in the United States Constitution.

### **The Evolution of the Senate and the Lead Up to the Seventeenth Amendment**

The establishment of the United States Senate was tied directly to the Founders' opinion that the idea of federalism and states' rights were intertwined in the development of the nation. James Madison was explicit about this idea as he wrote in the *Federalist Papers* various opinions such as the simple idea that states, were not subservient to the nation at large, but in reality independent nations tied to each other by larger policy. He saw that, and appreciated, the idea that a small number of states would be able to place "great obstacles to the concert and accomplishment of the secret

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<sup>18</sup> Jack Kenny. "The Seventeenth: the worst of all amendments? The 17th Amendment, putting the election of U.S. senators in the citizens' hands, instead of the state legislatures, was meant to empower citizens. It had the opposite effect." *Opposing Viewpoints in Context: The New American*, 1 Apr. 2013, p. 35. [http://link.galegroup.com.proxy.buffalostate.edu/apps/doc/A326854317/OVIC?u=nysl\\_we\\_bsc&xid=8b7c4dc6](http://link.galegroup.com.proxy.buffalostate.edu/apps/doc/A326854317/OVIC?u=nysl_we_bsc&xid=8b7c4dc6). Accessed 25 Mar. 2018.



wishes of an unjust and interested majority.”<sup>19</sup> He had a fear that the “autonomy, power, and selfish parochialism” were a fundamental flaw in the nascent American form of government and could eventually subvert national interests and pose threats towards individual rights. A solution to the problem of too much power to the individual states was to form an upper house that would give each state an equal say in the process of governance, hopefully mitigating some of the potential issues that could easily lead to an anarchic or nihilistic type state of government.<sup>20</sup>

There were three primary differences in the composition of the House of Representatives and the United States Senate. The length of the term of office was six years, three times longer than that of a Representative. With more infrequent potential to lose a seat, the senator was supposedly more able to escape the political and societal pressures that were assumed to come down on someone that would constantly be running for office. The staggered terms structured into the selection of senators allowed for a more gentle transition of power between ideologies, at least in theory, and ensured a more solid base of historical precedent than the House, where wave elections have sometimes thrown leadership and policy into disarray. The mode of appointment was, at the time the Constitution was designed, probably the most distinct dissimilarity from the House, and possibly even distinct from almost any other office on the United States political landscape. Being chosen by each state legislature instead of the general population insured an almost insular mindset from many of these senators, as they did not have to worry as much about public perceptions, instead they had to

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<sup>19</sup> David Brian Robertson. *Federalism and the Making of America*. New York: Routledge, Taylor Francis Group. 2012. p. 4.

<sup>20</sup> David Brian Robertson. *Federalism and the Making of America*. New York: Routledge, Taylor Francis Group. 2012. p. 22.

ensure that they properly and faithfully acted as trustees not only for the nation as a whole, but for the individual states themselves.<sup>21</sup>

From early in its history the Senate generally mirrored, closely, if not perfectly, the partisan composition of the House of Representatives. Even though the Senate had rather obvious differences in structure and in culture, so many senators left office early in order to enter a variety of other pursuits that replacements often times bore little resemblance politically to those that they had replaced as state legislatures were also subject to rapid change, as elections were held annually in many states.<sup>22</sup> Though theoretically independent of traditional political pressures, senators in the 19<sup>th</sup> century were still subject to many of the same public pressures. This is especially so as the idea of doctrine of instruction by state legislatures started to fade away and campaigning by prospective senators started to replace this idea. The idea of doctrine of instruction was simply the concept that state legislative leaders should be able to tell United States Senators how to vote on specific pieces of legislation. Throughout the early history of the Senate some senators would take the advice to heart, others would do as they pleased, potentially facing the wrath of state level legislatures. As time progressed senators became highly independent, at least publicly.<sup>23</sup> As these potential senators helped get state level legislators elected promises made to the general population had to be upheld, at least to a point. It soon became apparent that the

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<sup>21</sup> Daniel Wirls and Stephen Wirls. *The Invention of the United States Senate*. Baltimore, Maryland and London: The Johns Hopkins University Press, 2004. p. 210-211.

<sup>22</sup> Daniel Wirls and Stephen Wirls. *The Invention of the United States Senate*. Baltimore, Maryland and London: The Johns Hopkins University Press, 2004. p. 210-211.

<sup>23</sup> T. M. B. "The Doctrine Of Instruction." *Hartford Daily Courant (1840-1887)*, February 27, 1841. p. 2. <http://proxy.buffalostate.edu:2048/login?url=https://search.proquest.com/docview/552677770?accountid=7259>. Accessed online 19 January 2018.

population had a lot of control over the Senate, though in a decidedly filtered way. State level officials that chose national officers unwisely were quickly replaced, leading to many one term senators.<sup>24</sup>

Progressive Era activists, starting in the late 19<sup>th</sup> Century and peaking in the second decade of the 20<sup>th</sup> century, pressed for government, cultural, and societal transformation at a pace faster than ever before that period of United States history. It has perhaps not been matched in the intensity of change since, barring potentially the certain portions of the Civil Rights and related movements of the 1950s and 1960s. The development of the Progressive movement traveled at a blistering pace, with a rapid expansion at the local and state level in many places during the 1890s. It started gaining traction on the federal level during the Theodore Roosevelt Administration, carried on with Howard Taft, and reached its apogee under Woodrow Wilson. This resulted in a large volume of new laws, regulations, statutes and other types of legislation.<sup>25</sup>

Reforms such as the Workman's Compensation Act, the nation's first direct primary system, the Pure Food and Drug Act, the Federal Reserve Act and Federal Trade Commission Act, along with an almost limitless list of other laws, actions, and regulations were initiated and passed during this timeframe that would have a tremendous effect of the track the United States would take into the future. This represents just a short list of political reforms of the period.<sup>26</sup> While these new actions

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<sup>24</sup> Daniel Wirls and Stephen Wirls. *The Invention of the United States Senate*. Baltimore, Maryland and London: The Johns Hopkins University Press, 2004. p. 210-211.

<sup>25</sup> Immanuel Ness. *Encyclopedia of American Social Movements*, Taylor and Francis, 2004. Throughout text; David Mervin. "Progressive Movement." *The Concise Oxford Dictionary of Politics*. Oxford University Press, 2009. *Oxford Reference*. 2009. <https://ebookcentral.proquest.com/lib/buffalostate/detail.action?docID=3569966>.

<sup>26</sup> Lewis L. Gould. *The Progressive Era*. Syracuse, New York: Syracuse University Press, 1974. p. 181.

were being passed, other, existing parts of the Federal government were being strengthened, such as the Interstate Commerce Commission, and the United States Post Office. The nation even saw the admission of two new states directly before the Seventeenth Amendment's passage, Arizona and New Mexico, based loosely on their promise to support the passage of an amendment concerning the direct election of senators.<sup>27</sup> The era led to the rapid implementation of four new amendments in a historically short seven year time frame, the most active timeframe for amendment adoption since the initial ratification of the original Bill of Rights in the 1790s, and arguably the most impactful barring possibly the enactments of the Thirteenth through Fifteenth Amendments in the late 1860s and early 1870s.

By the early 1910s thirty-one state legislatures had already developed and sent resolutions to Congress demanding a constitutional amendment providing for the direct election of senators, rather than the preexisting method of selection by the state legislatures. This overwhelming support forced Congress' hand and ensured that this overhaul of the United States Constitution was pushed through in a rapid pace. During this time veritable armies of reformers were pushing a myriad of ideas for changes at every level of government, trying for a more democratic method of governance, along with more professional management of cities and states, and even the change of the capitalistic mindset.<sup>28</sup>

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<sup>27</sup> Fon Wyman Boardman. *America and the Progressive Era, 1900-1917*. New York: H. Z. Walck, 1970. p. 77-78.

<sup>28</sup> David Brian Robertson. *Federalism and the Making of America*. New York: Routledge, Taylor Francis Group. 2012. p. 97-98.

## Legislators Argue to Shed Their Constitutional Responsibility

State level legislatures, or at least individual legislators, started discussing the idea of direct elections as early as 1872, when the Nebraska Republican Party added the idea to their official platform and continued through the ratification of the Seventeenth Amendment. During the ensuing 41 years 220 state party platforms and 19 national party platforms called for direct elections of some sort. State legislatures started calling for action as well during this era. In 1874, the California State Legislature called for a change to the system, and by 1913 the United States Congress had received 175 letters or other actions from various state legislatures. By 1912 thirty-three states had some sort of direct primary set up, though faithless electors in the legislature were not legally bound to stick by public votes, and the only real repercussion would be at the next election cycle one or two years down the road.<sup>29</sup>

One of the watershed moments for the national push for direct elections of United States senators occurred in 1909 when Senator William “The Blond Boss” Lorimer of Illinois was embroiled in a scandal that caused such a furor that the Senate had little choice but to change their method of gaining office. The Illinois legislature had been deadlocked for five months, finally deciding to choose six term United States Representative William Lorimer to become their new senator. Charges of bribery and corruption were leveled immediately. A yearlong investigation showed that four state level politicians, members of what became known as the “Jackpot Legislature,” had

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<sup>29</sup> Rossum, Ralph A. "The Irony of Constitutional Democracy: Federalism, the Supreme Court, and the Seventeenth Amendment," *San Diego Law Review* vol. 36, no. 3, Summer 1999. p. 705-712. <http://heinonline.org.proxy.buffalostate.edu/HOL/Page?handle=hein.journals/sanlr36&page=671&collection=journals#>

accepted payments from a \$100,000 corporate “slush fund.” The Senate investigated these charges and in 1912 declared Lorimer’s selection invalid. Since the selection was invalid Lorimer’s removal did not count as an expulsion.<sup>30</sup>

Lorimer’s removal from office encouraged sitting United States senators to finally start pushing for a change to the system. Even as Lorimer was being removed from office he had supporters argue that his removal was not necessary and that the selection process was still a valid method. Senator Gamble of South Dakota argued that keeping the status quo was desirable, but not as a defense over what transpired around the Lorimer selection, but more as a defense against actions against current and future senators, whom he saw as open for attack if a sitting senator was removed. Newly elected Senator Joseph Bristow of Kansas, trying to fulfill a major part of his election platform, proposed adding a provision for direct elections of senators to the income tax amendment resolution that was then being debated.<sup>31</sup> The Senate majority leader, Republican Nelson Aldrich, objected to the provision as not being pertinent to the original resolution and quashed the idea, but also did not publicly disavow the need for something to be done about the selection/election process. Though it was not

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<sup>30</sup> John D. Buenker. “Illinois and the Four Progressive-Era Amendments to the United States Constitution.” *Illinois Historical Journal*, vol. 80, no. 4, 1987. p. 210-211. *JSTOR*, JSTOR, [www.jstor.org/stable/40192167](http://www.jstor.org/stable/40192167). Accessed online 21 January 2018; David E. Kyvig. “Redesigning Congress: The Seventeenth and Twentieth Amendments to the Constitution.” *The American Congress: The Building of Democracy*, edited by Julian E. Zelizer. 2004. *Academic OneFile*, <http://link.galegroup.com.proxy.buffalostate.edu/apps/doc/A176869500/AONE?u=buffalostate&sid=AONE&xid=5a54f9e2>. Accessed 25 Mar. 2018.

<sup>31</sup> John Callan O’Laughlin. “Lorimer Scandal Is Bristow’s Plea For Direct Vote.” *Chicago Daily Tribune (1872-1922)*: 10 February 1911. p. 1. <http://proxy.buffalostate.edu:2048/login?url=https://search-proquest-com.proxy.buffalostate.edu/docview/173535012?accountid=7259>

added to what eventually became the Sixteenth Amendment, the seriousness of the issue was now evident to even the most recalcitrant senators.<sup>32</sup>

Press reports around the nation started adding tremendous pressure to the United States Senate. Writers and editors from many major, and minor, newspapers started calling for a change in the selection/election process, with almost all of the bitterness aimed at the Illinois legislature and the obvious malevolent dealings they took part in in 1909. The *Buffalo Courier* backed Senator Cummins of Iowa in his quest of prosecuting and removing Lorimer no matter the outcome of the Senate committee report. The *Kansas City Times* said that Lorimer and the United States Senate were on trial. The *Memphis Commercial-Appeal* stated that no matter the outcome of the investigation put the blame not only on Lorimer and Illinois, but squarely on the processes that the Senate used in both selection and in going after bad actors. The *Toledo Blade* went as far as to impugn the honor of several senators. The *Galesburg Republican-Register* used the entire issue as the primary example of why the Senate needed to be directly elected by the people.<sup>33</sup>

A number of states had already taken the initiative and implemented what was known as the "Oregon system."<sup>34</sup> Under this idea the legislature would still choose the

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<sup>32</sup> David E. Kyvig. "Redesigning Congress: The Seventeenth and Twentieth Amendments to the Constitution." *The American Congress: The Building of Democracy*, edited by Julian E. Zelizer. 2004. *Academic OneFile*, <http://link.galegroup.com.proxy.buffalostate.edu/apps/doc/A176869500/AONE?u=buffalostate&sid=AONE&xid=5a54f9e2>. Accessed 25 Mar. 2018.

<sup>33</sup> John Callan O'Laughlin. "Lorimer Scandal Stirs Agitation For Drastic Law." *Chicago Daily Tribune (1872-1922)*, Dec 30 1910. p. 1, 4. <http://proxy.buffalostate.edu:2048/login?url=https://search-proquest-com.proxy.buffalostate.edu/docview/173535012?accountid=7259>

<sup>34</sup> David Schleicher. "The Seventeenth Amendment: Federalism in an Age of National Political Parties." *Hastings Law Journal*. Hastings College of Law. May 2014. p. 1044. [http://proxy.buffalostate.edu:2053/hottopics/lnacademic/?shr=t&csi=7341&sr=TITLE\("The+Seventeenth+Amendment+federalism+in+an+age+of+national+political+parties"\)+and+date+is+2014](http://proxy.buffalostate.edu:2053/hottopics/lnacademic/?shr=t&csi=7341&sr=TITLE(). Accessed online January 11, 2018.

senator for their individual state, but in each election cycle they would have to state on their ballot whether or not they would abide by a legally non-binding vote by the voters on who should be the United States senator for their state. Though any individual legislator could ignore their publicly stated position, it was something that could very easily be used against them during the next election cycle, so there is no evidence of any legislator breaking his promise. By 1908, twenty-eight states used some version of the Oregon system or a related idea of direct election, including the initiative process and other various types of new legislation.<sup>35</sup>

Problems arose with the “Oregon system” frequently enough that it was soon seen as little more than a stop gap measure before something else had to be done in the selection/election process. By promising to vote for a specific candidate in late summer and early fall primaries senate candidates had plenty of time to either fall out of favor with the general voting public and/or state legislature, or to have unethical or illegal activities come to light and still theoretically have enough pledges to go the United States Senate. An example of this is was from 1909 in North Dakota when C.B. Little was the candidate of choice for a large number of incoming state legislators, but was eventually beaten by Martin Johnson. Not only did Little lose, he ended up placing fourth in the process. Though not legally obligated to put a specific person into office, several members of the North Dakota legislature had committed a breach of trust and

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<sup>35</sup> David Schleicher. “The Seventeenth Amendment: Federalism in an Age of National Political Parties.” *Hastings Law Journal*. Hastings College of Law. May 2014. p. 1056.  
[http://proxy.buffalostate.edu:2053/hottopics/lnacademic/?shr=t&csi=7341&sr=TITLE\('The+Seventeenth+Amendment+federalism+in+an+age+of+national+political+parties'\)+and+date+is+2014](http://proxy.buffalostate.edu:2053/hottopics/lnacademic/?shr=t&csi=7341&sr=TITLE('The+Seventeenth+Amendment+federalism+in+an+age+of+national+political+parties')+and+date+is+2014). Accessed online January 11, 2018.



caused debate both between politicians and in the general public, with many upset that their choice was ignored.<sup>36</sup>

The election season in 1910 saw a large number of new senators entering Congress, many replacing members who seemed to be leaving in order to not have to vote on a potential direct election provision. Some of the more powerful senators to leave included Beveridge, Warner, Burkett, and Young. Most of the replacement senators, except for Reed of Missouri, were expected to be willing to at least debate the merits of a constitutional amendment, and even Reed was seen as potentially on board given the proper circumstance.<sup>37</sup>

During the debates over the Seventeenth Amendment, Elihu Root, New York Senator, a former Secretary of State and Secretary of War, and future Nobel Peace Prize winner, recognized issues with its ratification. He said that in the original approach of selecting senators the people were as Ulysses, heroically bound to the mast that:

he might not yield to the song of the siren . . . so the American democracy has bound itself . . . and made it practically impossible that the impulse, the prejudice, the excitement, the frenzy of the moment shall carry our democracy into those excesses which have wrecked all our prototypes in history. No one," Root argued, "can foresee the far-reaching effect of changing the language of the Constitution in any manner which affects the relations of the States to the General Government. How little we know what any amendment would produce!<sup>38</sup>

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<sup>36</sup> Schiller, Wendy J., and Stewart III, Charles. *Electing the Senate: Indirect Democracy Before the Seventeenth Amendment*. Princeton: Princeton University Press, 2014.

<sup>37</sup> *Chicago Daily Tribune (1872-1922) "Direct Elections At Hand." Apr 15, 1911.*  
<http://proxy.buffalostate.edu:2048/login?url=https://search-proquest-com.proxy.buffalostate.edu/docview/173564204?accountid=7259>.

<sup>38</sup> Jay S. Bybee. "Ulysses at the Mast: Democracy, Federalism, and the Sirens' Song of the Seventeenth Amendment" 1997. *University of Nevada, Las Vegas- William S. Boyd School of Law; Scholarly Works*.  
<http://scholars.law.unlv.edu/facpub/350>.

The debates over the adoption and ratification of the Seventeenth Amendment, in the popular press, the public, in state legislatures, and in Congress focus almost entirely on the expansion of democracy and the elimination of corruption, but did not have any real discussion on the impact on federalism. A few exceptions to this exist. In 1894 Representative Franklin Bartlett, a New York Democrat, stated that the interests of the states needed to be preserved by keeping senators as representatives to the states. Senator Hoar, a Republican from Massachusetts, in 1893, defended the indirect elections of senators, saying “state legislatures are the bodies of men most interested of all others to preserve State jurisdiction... It is well that the members of one branch of the Legislature should look to them for their re-election, and it is a great security for the rights of the States.” In 1911 the aforementioned Senator Elihu Root argued against direct elections of senators. He claimed that selected senators were the only way to ensure the sovereignty of the states and elections would rob these states “of power, of dignity, of consequence” and would degrade their usefulness to their citizens. He feared that removing this power from the states would result in an expansion of the federal government, saying “the tide that now sets toward the Federal Government will swell in volume and in power.”<sup>39</sup>

California was the only state to put the direct election of United States senators, or any amendment, on a ballot and allow the general public to have a direct say in the

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<sup>39</sup> Rossum, Ralph A. "The Irony of Constitutional Democracy: Federalism, the Supreme Court, and the Seventeenth Amendment," *San Diego Law Review* vol. 36, no. 3, Summer 1999. p. 711-714. <http://heinonline.org.proxy.buffalostate.edu/HOL/Page?handle=hein.journals/sanlr36&page=671&collection=journals#>.

process. The amendment passed overwhelmingly and California became one of the first states to ratify the Seventeenth Amendment.<sup>40</sup>

Contrary to modern practice, prior to 1913 United States senators were selected by their state legislatures, the governor of a particular state in certain, specific situations, or a combination of the two. They were typically seasoned politicians, veterans of debates and the legislative process, and perhaps most importantly, fully in tune to the specific wants and needs of their home states. The overarching idea in the Senate's original arrangement was to ensure that the smaller states by population had representation equal to the more populated states, at least in one chamber of Congress.<sup>41</sup> An added benefit to this circumstance was that it also protected individual senators from the often unstable and even unhinged nature of public opinion, along with avoiding the direct pressures that the directly elected members of the United States House of Representatives were constantly open to.<sup>42</sup> Senators were expected to look at the long term benefits any individual piece of legislation would have on their home state, take whatever time was needed to debate the specific matters, and resolve any particular issues, and was deliberately arranged to move at what could be considered a glacial pace. Being able to disregard public pressures, a senator was supposed to be able to look at the big picture of what the national government was doing, especially so since they did not have to worry about running a traditional campaign. They had much

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<sup>40</sup> Ralph A. Rossum "California and the Seventeenth Amendment," *Nexus - A Journal of Opinion* 6, 2001. p. 114.  
[http://heinonline.org.proxy.buffalostate.edu/HOL/Page?handle=hein.journals/nex6&div=11&start\\_page=101&collection=journals&set\\_as\\_cursor=0&men\\_tab=srchresults#](http://heinonline.org.proxy.buffalostate.edu/HOL/Page?handle=hein.journals/nex6&div=11&start_page=101&collection=journals&set_as_cursor=0&men_tab=srchresults#).

<sup>41</sup> Kris E. Palmer. *Constitutional Amendments, 1789 to the Present*. Detroit, MI: Gale Group, 2000. p. 399.

<sup>42</sup> Wendy J. Schiller, Charles Stewart III, and Benjamin Xiong. "U.S. Senate Elections before the Seventeenth Amendment: Political Party Cohesion and Conflict 1871- 1913." *The Journal of Politics*. July 2013, Volume 75, Number 3. p. 835.

longer terms of office than representatives and the president, and they were responsible to and reported to other professional politicians at the state level, men who understood (or were supposed to at least) the long term outlook that was the Senate's purview. The many states' legislatures were to select a senator that they felt best benefitted their particular state.<sup>43</sup>

As previous excerpts from the United States Constitution have shown, the writers of the Constitution designed the United States Senate to be the representative body for the individual States,<sup>44</sup> seen as an almost amalgamation of independent countries under a common, singular national policy. It was assumed that a group of mature, professional politicians could be trusted in making educated decisions with the insider's information they had at hand would make more prudent and informed decisions than the general population.<sup>45</sup> As part of the Great, or Connecticut, Compromise of 1787, the House of Representatives favored states with larger populations, so those members would be chosen directly by the people, on a strict population centric formula, with specific geographically designated districts within each state. Since the idea of Federalism established the division of power between the federal government and the states,<sup>46</sup> it shows an equality of power between the different levels of federal and state governments, more akin to a husband and wife style relationship, instead of a connection more similar to that of a parent and child.

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<sup>43</sup> Frances E. Lee and Bruce Oppenheimer. *Sizing Up the Senate: The Unequal Consequences of Equal Representation*. Chicago: The University of Chicago Press. 1999. p. 224.

<sup>44</sup> Kris E. Palmer. *Constitutional Amendments, 1789 to the Present*. Detroit, MI: Gale Group, 2000. p. 399.

<sup>45</sup> Dean Gailmard and Jeffery A. Jenkins. *American Journal of Political Science*. "Agency Problems, the Seventeenth Amendment, and Representation in the Senate." April 2009, Volume 53, Number 2. p. 324.

<sup>46</sup> J. W. Davidson, & M.B. Stoff. *Prentice Hall America: History of Our Nation*. Boston, Mass: Pearson, 2011. p. 1044.

The earlier Virginia Plan would have had the House of Representatives choose the senators from a list provided by the individual states, but it was quickly decided that this choice should be up to the states entirely, and not representatives from other parts of the country.<sup>47</sup> The Founders' original intent was to have a central government for the most basic of tasks, such as defense and foreign policy, with little else remaining in their purview. States were to remain highly independent from each other and only give in to national pressures when absolutely necessary. To ensure that this power balance was maintained, it was important for senators to have the interests of their individual states in mind, and not the general election pressures that representatives had and continue to have to concern themselves with.

The national government was set up in the nation's early days as a safety net of sorts. Anything not directly related to international relations or matters of war were the responsibility of the lowest level of government possible. This "creative federalism" limited the numbers and types of programs the federal government could initiate. Often times the only influence that could be put on to state and lower levels was by the central government funding specific plans, but even then it was often difficult to force an issue once money was distributed among the states.<sup>48</sup>

### **An Era of Change at the Federal Government Level**

There is little doubt that the Progressive Era, and specifically the laws, rules, and regulations that resulted from it, led directly to a massive change in the association between the average American citizen and the government at every level, along with a

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<sup>47</sup> David Brian Robertson. *Federalism and the Making of America*. New York: Routledge, Taylor Francis Group. 2012. p. 23.

<sup>48</sup> David Brian Robertson. *Federalism and the Making of America*. New York: Routledge, Taylor Francis Group. 2012. p. 131.

different form of relationship between the various echelons of government. This era of great change transformed the political, social, and cultural outlook of the country, effecting it to this day. This time of rapid change is a dividing line between an era of laissez faire, individual responsibility, small “r” republicanism, and a relatively small federal government, with the modern era’s emphasis on group responsibility and federal dominance in many segments of contemporary society. From the introduction of city managers in place of what seemed to be hereditary mayoral positions, ballot initiatives, primaries, recalls, referendums, secret ballots, and the like, the “people” were given an increased ability to partake in an ostensibly more fair popular electoral process. These, and related, actions quickly began to show increased traction at the federal level, initially with new regulations on different businesses and industries, then into the realm of rapid, massive changes to the way the United States government communicates with and regulates increasingly larger segments of American society, along with an entire group of amendments the United States Constitution.<sup>49</sup>

Pressure for the popular election of senators came from many different quarters. Some legal scholars and historians have described this effort as a core feature of the Progressive movement’s drive for the democratization of the American government. Independent of its connection to any movement, the push for popular elections of United States senators can be traced to actual and perceived evils with the established system of selecting senators. Reformers have erringly emphasized that the legislative selection of Senators used a considerable amount of a state legislatures’ time and put national

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<sup>49</sup> Elizabeth Sanders. *Ohio State Law Journal*. “Reflections on Progressive Constitutionalism: Theory, Practice, and Critique: Rediscovering the Progressive Era.” 2011. p. 2 (1282). <http://heinonline.org>, 72 Ohio St. L.J. 1281 2011. Accessed online February 16, 2015.

issues in a superior position at the expense of local concerns. Though time was indeed used in the debates leading up to senatorial selections, no evidence is present that indicates that an unusual amount of time was used for the process. Keeping in mind that at the turn of the 20<sup>th</sup> century most state legislatures met for a matter of weeks or months, often on a biennial basis, saying that time was taken away from local issues is specious. It was also contended to have the effect of surrendering the right to choose senators to party bosses, ideologically driven caucuses, and the innumerable political machines that populated the period, but party insiders, specific ideologies, and political parties still have a tremendous say as to who is even in contention for a position. Merely moving the final choice to the voters does not remove the possibility of corruption and may only provide deniability to the corrupt.<sup>50</sup>

Legislative deadlocks, very common in the late 19<sup>th</sup> and early 20<sup>th</sup> centuries, meant that states were left without full representation in the Senate, sometimes for years at a time. To outside observers, stories of bribery and corruption became one of the significant and encompassing features of the selection process, making it seem that personal wealth and political contacts were preconditions to joining the Senate. Structurally, putting the state legislatures between the Senate and the people altered the notion of popular representation, even though in theory the general population had an indirect control of the senatorial selection situation through the simple act of either reelecting legislators that picked reasonable options for the Senate, or replace politicians who did not. It cannot be argued that voters have the aptitude to popularly

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<sup>50</sup> Zachary D. Clompton, and Steven E. Art. *Northwestern University Law Review*. "The Meaning of the Seventeenth Amendment and a Century of State Defiance." Northwestern University School of Law. 2013. Vol. 107, No. 3. p. 1189-1190.

elect senators, but not the capacity to choose state level representatives. Some states were seen as not being properly represented in the Senate when a minority party was able to select a senator because of infighting among larger parties, something not regularly done, but common enough to remain a threat. Similarly, state legislative districts were sometimes gerrymandered to a ridiculous extent in order to prevent equal representation in the state legislature, meaning that a selected senator might not represent the entire state in the traditional definition of the concept.<sup>51</sup>

One of the early advocates for changing the constitutionally mandated practice of selecting senators to an election process was James B. Weaver, a former Union Civil War General. Weaver was on the forefront of promoting the idea of the direct election of United States senators. In the early 1880s the former warrior, now politician, ran on the Greenback Party ticket for the presidency, but the party received little support on the national stage, and was soon absorbed almost wholly into the much more established Democratic Party, which shortly integrated some of its more populist ideas in its own platform. As a United States representative from 1884 to 1888, Weaver pushed for the free coinage of silver, forfeiture of a large percentage of railroad land grants, increased governmental spending on public projects and infrastructure, the creation of the Department of Labor, and stridently pushing for the electorate to directly choose senators. None of his ideas were wholly accepted by the United States Congress, at

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<sup>51</sup> Zachary D. Clompton, and Steven E. Art. *Northwestern University Law Review*. "The Meaning of the Seventeenth Amendment and a Century of State Defiance." Northwestern University School of Law. 2013. Vol. 107, No. 3. p. 1189-1190.



least while Weaver was in office, but he at least started the discussion that would blossom under the Progressive Era governments that were soon to follow.<sup>52</sup>

In the early portion of the 20<sup>th</sup> century the National Progressive League pushed for key reforms, reaching a platform of five key developments by 1911 that they centered their efforts on. These concepts were not exclusively just at the national level, instead running the gamut from the most basic positions at the local level, at state houses and governors' mansions, all the way through and including the position of President of the United States.

- Direct primaries, where candidates would be popularly chosen for each political party by the general electorate instead of the more common at the time selection of party insiders.
- Direct democracy, with a one man, one vote concept, and the idea that many laws and regulations could be voted on directly by the citizenry instead of a permanent political class.
- Popular election of United States senators, as shown with a number of existing and tentatively planned state level measures, and eventually the Seventeenth Amendment.
- Popular election of delegates to the GOP national convention, versus the more traditional appointments of party insiders.
- Effective anticorruption acts that would, amongst other ideals, keep business and politics separate, punish overt and covert episodes of fraud, embezzlement, and

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<sup>52</sup> Mark Wahlgren Summers. *Party Games: Getting, Keeping, and Using Power in Gilded Age Politics*. University of North Carolina Press: Chapel Hill, North Carolina. 2004. p. 208.

bribery, and any number of other supposed issues present at every level of government and society.<sup>53</sup>

In an analysis of the political economy origins of the Seventeenth Amendment, T.J. Zywicki notes that in the 1880s there was growing dissatisfaction with the indirect system of senatorial selections and public criticism began to escalate beyond low key grumblings and entered the public spotlight. During this timeframe, many states began to increase the use of extra-constitutional means to move towards popular election of senators.<sup>54</sup> Specific approaches, primarily the public canvass and pledged state legislators, allowed for direct public participations in Senate elections. The resulting legislative actions provide some indication that these preliminary efforts led to a change in ideology and attitude of the average senator, not necessarily the passage of the Seventeenth Amendment.<sup>55</sup>

During the Progressive Era a series of four constitutional amendments were passed, starting in 1913 with both the Sixteenth and Seventeenth Amendments (income taxes and the direct election of United States senators, respectively), to the Eighteenth Amendment (banning the manufacture and sale of alcohol) in 1919, and the Nineteenth Amendment (women's suffrage), finally taking effect in 1920. Of the three amendments passed during this era, and not eventually repealed, it could be reasoned the Nineteenth Amendment (women's suffrage) may very well be the only one with long

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<sup>53</sup> Thomas Goebel. *A Government by the People: Direct Democracy in America, 1890-1940*. Chapel Hill, North Carolina: The University of North Carolina Press. 2002. p. 124-125.

<sup>54</sup> W. Riker. The Senate and American Federalism, *The American Political Science Review*, Issue 49. p. 452-469. doi:10.2307/1951814.

<sup>55</sup> Danko Tarabar and Joshua C. Hall. The Seventeenth Amendment, Senate Ideology and the Growth of Government. *Applied Economic Letters*, Volume 22, 2015- Issue 8. Taylor & Francis Online. p. 637-640. <http://dx.doi.org/10.1080/13504851.2014.964824>. Accessed 25 July 2017.

term beneficial results, namely the expansion of the franchise to a large portion of the population. The Sixteenth Amendment (income taxes) and Seventeenth Amendment (direct elections of United States senators) were anathema to the original goals of the writers of the United States Constitution and have inarguably developed into an ever expanding federal government. In the century since the passage of these amendments the subject has been covered in few texts dedicated just to their passage, but tied in with many writings related to the general Progressive Era.<sup>56</sup>

Materials from the National Archives, the United States House of Representatives, the United States Senate, private organizations such as State Grange of Illinois and other such groups show some of the federal level, state level, and local level resolutions in places such as Utah and Louisiana. This assemblage is in addition to information located through private group grassroots movements in the Midwest, especially so from among Grange and Farmers groups in the 1880s and 1890s, all helping to eventually lead to the passage of the Seventeenth Amendment, along with untold other Progressive Era laws and regulations. There is a variety of newspaper and other articles that discuss the concept, but real examples of reasoning is typically glossed over, or seems second and third hand, sometimes anecdotal evidence. Since there have been a rather limited number of attempts at historical investigation into the lead up to, the implementation of, and resulting issues of the Seventeenth Amendment,

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<sup>56</sup> John D. Buenker. "Illinois and the Four Progressive-Era Amendments to the United States Constitution." *Illinois Historical Journal*, vol. 80, no. 4, 1987. p. 210-212. *JSTOR*, JSTOR, [www.jstor.org/stable/40192167](http://www.jstor.org/stable/40192167). Accessed online 21 January 2018.

the consolidated base of information gathered in this paper could add to the relatively small collection of information that is currently available.<sup>57</sup>

There were numerous other Progressive Era ideas that led to changes in the electoral processes and to the government in general. An idea still present from this era of change include the institution Australian Ballot, more commonly known as a secret ballot. The promise of anonymity was not present in the first century of the United States, with ballots typically given to voters by the actual political parties, making it difficult to avoid external pressures to vote for a specific candidate. Another idea was the implementation of commission based municipal governments with trained experts running cities instead of the more traditional political professional. Many forms of direct democracy such as referendums, initiatives, and recalls of elected officials were also initiated during this time frame.<sup>58</sup>

### **The Passage of the Seventeenth Amendment**

The Seventeenth Amendment to the Constitution of the United States, which took effect in 1913, provided for the direct election of U.S. senators by a traditional majority vote by the electorates of the individual states. It transformed the electoral methodology established in Article I, Section 3 of the Constitution, which had provided for the appointment of senators by the state legislatures. Adopted during the Progressive era of

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<sup>57</sup> *17th Amendment to the U.S. Constitution*. National Archives and Records Administration. <http://www.archives.gov/legislative/features/Seventeenth-amendment/>. Accessed May 18, 2015; The United States Senate website. <http://www.senate.gov/artandhistory/history/common/>; *State Grange of Illinois*. December 29, 1887. National Archives and Records Administration. <http://www.archives.gov/legislative/features/Seventeenth-amendment/illinois-1887.html>. Accessed May 18, 2015;

<sup>58</sup> Thomas Goebel. *A Government by the People: Direct Democracy in America, 1890-1940*. Chapel Hill, North Carolina: The University of North Carolina Press. 2002. p. 10.

the late 19<sup>th</sup> and early 20<sup>th</sup> centuries, it was seen as a means of democratic political reform and a huge change towards the ability of the people to have direct say in the selection of their senators. The amendment seemed to reflect the popular dissatisfaction with the apparent corruption and inefficiency that had come to characterize the legislative election of United States senators in many states.

The amendment transformed the phrasing of Article I, Section 3, Paragraph 1 to state that “two senators from each State” should be “elected by the people thereof” rather than “chosen by the Legislature thereof.” It also revised Paragraph 2 of Section 3 to allow the state governor, or other member of the executive branch, to fill vacancies in the Senate by making temporary appointments to serve until new elections could be held.

The full text of the amendment is as follows:

-The Senate of the United States shall be composed of two senators from each State, elected by the people thereof, for six years; and each senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

-When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, that the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

-This amendment shall not be so construed as to affect the election or term of any senator chosen before it becomes valid as part of the Constitution.<sup>59</sup>

By the time of the Seventeenth Amendment’s adoption, many states had already established mechanisms that effectively allowed voters to choose the senators of their state. For example, a common practice was having the legislature appoint the winners

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<sup>59</sup> *The Constitution of the United States*, Amendment 17; Article 1, Section 3;

of party primaries as senators. This allowed the citizenry to have a certain say in senate representation, but also maintained the state legislatures' ability to choose who would be sent to Washington. Nevertheless, the amendment was widely seen as necessary to reduce the presumed influence of big business and other special interests on the selection of senators and to prevent vacancies or frequent turnover in the Senate caused by party wrangling or changes of party leadership at the state level. By the late 20th century some conservative political scholars called for the repeal of the Seventeenth Amendment on the grounds that it undermined the proper balance of power between the federal government and the states.<sup>60</sup>

If the interests of state legislatures and the typical state voter sufficiently differed, you could expect to find evidence of a fundamental change in senator and winning policy outcomes on roll call votes at or near the time of adoption of the Seventeenth Amendment. Tarabar and Hall examined this hypothesis by looking at voting records both before and after the passage of the Seventeenth Amendment to determine if the general public's short term goals and a state legislatures longer term goals reflected the voting being done by the United States Senate. They took the time series of senator and winning policy philosophies and applied them to a battery of analyses. The evidence presented in their work suggests that a change most likely occurred during the

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<sup>60</sup> Brian Duignan. "Seventeenth Amendment. Encyclopædia Britannica, *Britannica Academic*." 2017. proxy.buffalostate.edu:2793/levels/collegiate/article/Seventeenth-Amendment/474646. Accessed 24 Jul. 2017.

54th Congress (1895–1897), suggesting that the Seventeenth Amendment merely codified what had already occurred through other means.<sup>61</sup>

MacKenzie focuses on the switch from legislative selection to direct election of senators and the change from less to more political experience as was evident from 1868 to 1944. Elections led to more professional, more experienced senators on the average, but contrary to the popular desire to have politicians who know their jobs well this is not necessarily beneficial to the country at large, since it tended to create an almost permanent class of senators. As senators became careerists they gained more seniority they also tended to gain access to the top committees. This was something they could then use in reelection campaigns as a positive benefit that they brought to the role that by mere lack of experience any challengers would not have for years. As résumés were built after the passage of the Seventeenth Amendment it became more common for senators to serve for decades instead of the more typical term or two that had been common in the first century of the United States Senate.<sup>62</sup> Remarkably, pre-Seventeenth Amendment senators with seniority in committee assignments and leadership, hence the most time in the Senate, typically came from the monolithic one party states from the South. Western states were underrepresented in positions of power as political party coalitions could and did fluctuate on regular basis. This led to a surplus of federal funding in the South and to a much lower rate of funding going to the

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<sup>61</sup> Danko Tarabar and Joshua C. Hall. The Seventeenth Amendment, Senate Ideology and the Growth of Government. *Applied Economic Letters*, Volume 22, 2015- Issue 8. Taylor & Francis Online. p. 637-640. <http://dx.doi.org/10.1080/13504851.2014.964824>. Accessed 25 July 2017.

<sup>62</sup> Scott A. MacKenzie. "From Political Pathways to Legislative Folkways: Electoral Reform, Professionalization, and Representation in the U.S. Senate." *Political Research Quarterly*. Vol 67, Issue 4, p. 743 – 757. <https://doi.org/10.1177/1065912914537711>.

West. This, along with the agrarian populist movement, put western state legislatures at the forefront of the direct election movement.<sup>63</sup>

Lee and Oppenheimer's work reflects on a discussion with an unnamed senator from a small state, who discusses what the American Senate was designed for. "The Senate brings with it the responsibility to represent the state governments. You must represent the state's interests in the major formula programs, such as Title I, Chapter I, Education, Medicaid, and Transportation. It is a special responsibility of senators, they are to give states an active policymaking role in federal policy. That is one of the purposes of the Senate envisioned from the beginning."<sup>64</sup>

In debating the efficacy of the direct election of United States senators, versus the selection process that was the mandate for over a century, it is important to understand the idealistic philosophies that were present at the Constitutional Convention. One of the prevalent reservations delegates had in Philadelphia was of their individual states losing their representative power, with the Articles of Confederation already guaranteeing an equal vote at the national assembly. The Senate was established to continue this idea of state equality. The framers of the Constitution could not comprehend senators acting as "representatives" of the general population of the country. James Madison argued in *Federalist 63* that the Senate was

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<sup>63</sup> Todd J. Zywicki. "Beyond the Shell and Husk of History: The History of the Seventeenth Amendment and Its Implications for Current Reform Proposals." *Cleveland State Law Review*. Volume 45:165, 1997. p. 205-206. <https://engagedscholarship.csuohio.edu/clevstlrev/vol45/iss2/3>.

<sup>64</sup> Frances E. Lee and Bruce Oppenheimer. *Sizing Up the Senate: The Unequal Consequences of Equal Representation*. Chicago: The University of Chicago Press. 1999. p. 193.



to “be sometimes necessary as a defense to the people against their own temporary errors and delusions.”<sup>65</sup>

As politics has modernized, the alignment of the House of Representatives and the Senate has converged and has arguably reversed the intentions of the architects of the Constitution. The job of the senator in many states is now less sheltered than that of a typical representative, who often times have used decennial census data to help carve out an electorally secure district. These “gerrymandered” districts, with a loyal constituency, can be counted on for an adequate number of votes to persist in office unless something dramatic in the voting population’s preferences changes. Pre-1913, the fundamental base of support for a senatorial position was a small group of state level legislatures, with a cadre of fellow policymakers that typically had an enhanced, more complex knowledge of the workings of government and in general a longer term view of the decision making processes. This allowed for a more nuanced view of possible repercussions of laws and regulations on the individual state. Instead of political professionals dealing directly with other political professionals the modern senator is now obligated to dedicate copious time and effort to constituent relations. The senator and the representative have seemingly merged into “the same kind of political actor, subject to the same forces.”<sup>66</sup>

Another potential drawback of the Seventeenth Amendment is that senators now have to continually fundraise for their next election campaign, along with the national

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<sup>65</sup> Frances E. Lee and Bruce Oppenheimer. *Sizing Up the Senate: The Unequal Consequences of Equal Representation*. Chicago: The University of Chicago Press. 1999. p. 224;  
Alexander Hamilton, John Jay, and James Madison. *The Federalist Papers*. New York: Fall River Press. 2017. p. 290.

<sup>66</sup> Daniel Wirls and Stephen Wirls. *The Invention of the United States Senate*. Baltimore, Maryland and London: The Johns Hopkins University Press, 2004. p. 212-213.

party system.<sup>67</sup> Far from removing the legal, moral, and ethical threat of corporations and wealthy individuals in the life of the senator, the cost of running a statewide, popular primary and general election campaign has forced senators that could have otherwise been highly independent of being influenced by the public into a situation that became rather similar to what many had been accused of before the ratification of the Seventeenth Amendment. Whereas a senator in the late 19<sup>th</sup> century may very well have accepted money or considerations illegally or unethically, it can be assumed that many others could just as easily turned down these attempts. There was substantial support by many state level corporations and local political machines for the idea of direct elections, most likely showing that what was detrimental to one group might very well be seen as a distinct benefit for another.<sup>68</sup>

With the modern electoral process of constant raising of funds for elections, the modern specimen of a senator now has little to no choice but to take money from these potentially bad actors, and these monies are now all above board. It may seem to not be of grave importance or consequence, but taking state level legislatures out of the manner of selection for United States senators and putting the process into the hands of the people has forced senators to raise enormous amounts of money for reelection campaigns, have fundraising meetings with lobbyists, and to partake in other activities that they had traditionally been insulated from.<sup>69</sup> Though lobbyist money and political

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<sup>67</sup> Frances E. Lee and Bruce Oppenheimer. *Sizing Up the Senate: The Unequal Consequences of Equal Representation*. Chicago: The University of Chicago Press. 1999. p. 226.

<sup>68</sup> David Schleicher. "The Seventeenth Amendment: Federalism in an Age of National Political Parties." *Hastings Law Journal*. Hastings College of Law. May 2014. p. 1060.  
[http://proxy.buffalostate.edu:2053/hottopics/lnacademic/?shr=t&csi=7341&sr=TITLE\("The+Seventeenth+Amendment+federalism+in+an+age+of+national+political+parties"\)+and+date+is+2014](http://proxy.buffalostate.edu:2053/hottopics/lnacademic/?shr=t&csi=7341&sr=TITLE(). Accessed online January 11, 2018.

<sup>69</sup> Frances E. Lee and Bruce Oppenheimer. *Sizing Up the Senate: The Unequal Consequences of Equal Representation*. Chicago: The University of Chicago Press. 1999. p. 75.

machine pressures were present in the pre-1913 era the ratification of the Seventeenth Amendment has merely shifted a portion of these pressures to a more public version of the same. It has also managed to add the undue pressure of a popular vote and the obligatory requirement justifying every vote to a public that may not understand the long term consequences of specific measures or the totality of the concerns an individual state might have.

The enactment of the Seventeenth Amendment in 1913 took away much of the perceived cushion that senators had from the electorate, and it started to force senators to act more as representatives of the people, something that had never been their job or prerogative. The enactment of the amendment was tied to alleged ethical issues, some of which did exist, but in reality did little to lessen. By removing the status of representation to the individual states, forcing its members to run traditional campaigns, and putting every decision in the public consideration, senators have removed their status as distinguished gentlemen and prudent decision makers and instead have become six year termed representatives. No longer eminent political professionals with honorable intentions, and even a certain level of aristocratic temperament, instead senators now harp about issues that a century ago would have been seen as something not appropriate for a person of a senator's status. Political stunts such as public protests of the prices at the local gas station,<sup>70</sup> or whether or not the Food and Drug

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<sup>70</sup> Washington Times. "How Chuck Schumer is Running on Fumes: His Latest Claims About the Price of Gasoline are Patently False." September 14, 2017. <https://www.washingtontimes.com/news/2017/sep/14/chuck-schumer-claims-on-gasoline-are-false/>. Accessed online December 26, 2017.

Administration should be investigating the latest fad in energy drinks<sup>71</sup> seem more purpose built for a member of the House of Representatives.

By the 1970s, as senators became more concerned about elections and less concerned about their individual states, representatives, who historically were typically only known inside of their districts, started to become more prominent national figures.<sup>72</sup> This sea change has equalized the approaches many national level politicians have. A representative could lie, exaggerate, or commit other bad acts, and still get reelected, as long as they ensured as many laws as possible were passed that showed beneficial results to their home district, while it was expected that senators had to be straight shooters with professional legislatures. The general thought was that state level professional politicians would not be as forgiving of broken promises, knowing the ins and outs of particular legislative acts and the actual work and effort the senator had to put into any particular activity.<sup>73</sup>

Although the Seventeenth Amendment's 1913 passage is regarded by many historians and political scientists as an enhancement of democratic accountability, the relationship between senators and special interests changed dramatically, and not necessarily for the betterment of the nation at large. An analysis of the aftereffects of the Seventeenth Amendment shows that the public now has potentially less say in the

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<sup>71</sup> Charles E. Schumer. Press Release. "Schumer: Dangerous & Snortable Powder—'Coco Loko'—Being Innocently Masked As Everyday 'Chocolate' Is About To Hit NY Store Shelves; Kids & Teens At Risk As Docs Cite Very Real Health Concerns; Senator Urges FDA To Immediately Launch An Official Investigation Into New Product Before The Damage Is Done." July 10, 2017. [https://www.schumer.senate.gov/newsroom/press-releases/schumer-dangerous-and-snortable-powdercoco-lokobeing-innocently-masked-as-everyday-chocolate-is-about-to-hit-ny-store-shelves-kids\\_teens-at-risk-as-docs-cite-very-real-health-concerns-senator-urges-fda-to-immediately-launch-an-official-investigation-into-new-product-before-the-damage-is-done](https://www.schumer.senate.gov/newsroom/press-releases/schumer-dangerous-and-snortable-powdercoco-lokobeing-innocently-masked-as-everyday-chocolate-is-about-to-hit-ny-store-shelves-kids_teens-at-risk-as-docs-cite-very-real-health-concerns-senator-urges-fda-to-immediately-launch-an-official-investigation-into-new-product-before-the-damage-is-done). Accessed online December 26, 2017.

<sup>72</sup> Daniel Wirls and Stephen Wirls. *The Invention of the United States Senate*. Baltimore, Maryland and London: The Johns Hopkins University Press, 2004. p. 213.

<sup>73</sup> Daniel Wirls and Stephen Wirls. *The Invention of the United States Senate*. Baltimore, Maryland and London: The Johns Hopkins University Press, 2004. p. 214.

choice in their United States senators, since the role has now gone from senior, experienced statesmen with some level of relationship to their state's elected leadership to now individuals who can get considerable fundraising numbers, campaign better than the opposition, and those that can make the most promises to the correct groups. Zywicki argues that the amendment helped to erode the idea of federalism, the rights of states to have full representation at the national level, and even the separation of power. There has been an increase in the average length of senatorial tenures, which has allowed lobbyists and other interests to engage in longer term relationships with specific members, and has basically eliminated the responsibility of state level legislatures to monitor the actions of individual senators. As senator commitment moved towards the electorate and away from protecting states' interests, the Senate became as populist and reactionary as the House of Representatives, thus paving the way for a much more rapid rate of government growth than was historically evident before the Progressive era. This has contributed to one of the biggest issues in public policy: the dramatic increase in the size and breadth of the federal government and a more centralized control in the United States during the 20<sup>th</sup> century.<sup>74</sup>

In the 1960s the Supreme Court started mandating that the one man one vote ideal was to be institutionalized at all levels of government. Cases such as *Baker v.*

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<sup>74</sup> Danko Tarabar and Joshua C. Hall. The Seventeenth Amendment, Senate Ideology and the Growth of Government. *Applied Economic Letters*, Volume 22, 2015- Issue 8. Taylor & Francis Online. Published: 08 October 2014. p. 637-640. <http://dx.doi.org/10.1080/13504851.2014.964824>. Accessed 25 July 2017; *Oregon Law Review*. Issue 73. Senators and Special Interests: a Public Choice Analysis of the Seventeenth Amendment. University of Oregon. 1994. p. 1055. <https://law.uoregon.edu/explore/OLR>; David Schleicher. "The Seventeenth Amendment: Federalism in an Age of National Political Parties." *Hastings Law Journal*. Hastings College of Law. May 2014. p. 1060-1061. [http://proxy.buffalostate.edu:2053/hottopics/lnacademic/?shr=t&csi=7341&sr=TITLE\("The+Seventeenth+Amendment+federalism+in+an+age+of+national+political+parties"\)+and+date+is+2014](http://proxy.buffalostate.edu:2053/hottopics/lnacademic/?shr=t&csi=7341&sr=TITLE(). Accessed online January 11, 2018.

*Carr*<sup>75</sup> (1961) and *Reynolds v. Sims*<sup>76</sup> (1964) forced state legislatures and other governmental bodies to reapportion representation along lines that largely represented equally the population of an area. The only segment of government that this did not apply to was the United States Senate, which is constitutionally protected in a way that easily leads to malapportionment.<sup>77</sup> By 2015 dissent comments by Chief Justice John Roberts of the United States Supreme Court on a case involving the Arizona State Legislature and the Arizona Independent Redistricting Commission showed some of the history that the state of Arizona played in the adoption of the Seventeenth Amendment, the potential abuse of constitutional law, and its effects of modern society. Chief Justice Roberts stated:

Just over a century ago, Arizona became the second State in the Union to ratify the Seventeenth Amendment. That amendment transferred power to choose United States senators from “the Legislature” of each State, Art. I, §3, to “the people thereof.” The amendment resulted from an arduous, decades-long campaign in which reformers across the country worked hard to garner approval from Congress and three-quarters of the States. What chumps! Didn’t they realize that all they had to do was interpret the constitutional term “the Legislature” to mean “the people”? The Court today performs just such a magic trick with the Elections Clause. Art. I, §4. That Clause vests congressional redistricting authority in “the Legislature” of each State... Indeed, several provisions expressly distinguish “the Legislature” from “the People.” See Art. I, §2; Amendment 17. This Court has accordingly defined “the Legislature” in the Elections Clause as “the representative body which makes the laws of the people.”... The majority

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<sup>75</sup> J. W. Peltason. "Baker v. Carr." *The Oxford Guide to United States Supreme Court Decisions*. : Oxford University Press, 2009. *Oxford Reference*. 2009. <http://proxy.buffalostate.edu:2299/view/10.1093/acref/9780195379396.001.0001/acref-9780195379396-e-29>>. Date Accessed 28 Jan. 2018; Franklin Sacha. "Excising Federalism: The Consequences of 'Baker V. Carr' Beyond The Electoral Arena." *Virginia Law Review*, vol. 101, no. 8, 2015. p. 2286–2288. JSTOR, JSTOR, [www.jstor.org/stable/24643545](http://www.jstor.org/stable/24643545).

<sup>76</sup> Barbara Phillips. "Reconsidering Reynolds v. Sims: The Relevance of Its Basic Standards of Equality to Other Vote Dilution Claims." *Howard Law Journal*, Summer, 1995. p. 561-564. . [http://proxy.buffalostate.edu:2053/hottopics/Inacademic/?shr=t&csi=7385&sr=TITLE\("Reconsidering+Reynolds+v+Sims+the+relevance+of+its+basic+standard+of+equality+to+other+vote+dilution+claims"\)+and+date+is+1995](http://proxy.buffalostate.edu:2053/hottopics/Inacademic/?shr=t&csi=7385&sr=TITLE(). Accessed online 28 January 2018.

<sup>77</sup> Frances E. Lee and Bruce Oppenheimer. *Sizing Up the Senate: The Unequal Consequences of Equal Representation*. Chicago: The University of Chicago Press. 1999. p. 159.

largely ignores this evidence, relying instead on disconnected observations about direct democracy, a contorted interpretation of an irrelevant statute, and naked appeals to public policy...<sup>78</sup>

Chief Justice John Roberts's opinion of the Seventeenth Amendment is that it forced the relinquishment of power by the states to the general voting population, something that has flowed naturally to legislatures redefining original intent in order to suit the needs of the moment. A small but vocal group of politicians, journalists, special interests, and regular citizens have in recent years remarked at the potential issues that the Seventeenth Amendment has given rise to. Former Texas Governor and current Presidential Cabinet member Rick Perry, former Supreme Court Justice Antonin Scalia, and columnist George Will have publicly discussed issues pertaining to the lack of federalism and state representation in the federal government over-all and in the United States Senate in particular. Though not truly a consistently discussed issue in research, articles, or television news programs, the idea of proper representation of state legislatures at the national level is in the background.<sup>79</sup>

Even with the passage of the Seventeenth Amendment, there have still been many incidents of malfeasance, even as recently as November of 2017 and the indictment of New Jersey United States Senator Robert Menendez for alleged corrupt activities, as covered in countless media sources such as the *New York Times*,<sup>80</sup>

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<sup>78</sup> United States Supreme Court. Arizona State Legislature, Appellant V. Arizona Independent Redistricting Commission, et al. Comments by Chief Justice John Roberts in Dissent. 29 June 2015. p. 2 of dissent. <https://www.supremecourt.gov/opinions/slipopinion/14>. Accessed online 28 July 2017.

<sup>79</sup> David Schleicher. "The Seventeenth Amendment: Federalism in an Age of National Political Parties." *Hastings Law Journal*. Hastings College of Law. May 2014. p. 1045. [http://proxy.buffalostate.edu:2053/hottopics/Inacademic/?shr=t&csi=7341&sr=TITLE\("The+Seventeenth+Amendment+federalism+in+an+age+of+national+political+parties"\)+and+date+is+2014](http://proxy.buffalostate.edu:2053/hottopics/Inacademic/?shr=t&csi=7341&sr=TITLE(). Accessed online January 11, 2018.

<sup>80</sup> Nick Corasaniti and Nate Schweber. "Corruption Case Against Senator Menendez Ends in Mistrial. *The New York Times*. Nov. 16, 2017. <https://www.nytimes.com/2017/11/16/nyregion/senator-robert-menendez-corruption.html>. Accessed online, 29 December 2017.

CNN,<sup>81</sup> the *Wall Street Journal*,<sup>82</sup> and almost any nationally syndicated news outlet.

Though at the time of this writing Senator Menendez's case had ended in a mistrial and the United States attorney determined to not to attempt another try at a conviction, the fact is that allegations of corruption are not proof of bad acts. Though not a perfect method of choosing a senator, it can be reasoned that the senatorial selection process, as set up in the original version of the United States Constitution, was not the primary reason acts of corruption happened, the primary concern itself being human infallibility.

Far from providing a panacea, the track record of the United States Senate since the passage of the Seventeenth has not been to any real extent different than the perceived issues of the pre-Amendment era. Select examples include a long ranging set of senators and people in affiliated positions that have been involved in less than ethical behavior.

- In 1924 Albert B. Fall, Republican of New Mexico, and the newly appointed Secretary of the Interior, was a principal character in the Teapot Dome scandal, transferring naval oil reserves in Wyoming to private interests that he had been allied with during his time in the Senate.<sup>83</sup>
- In 2004 the Democrat dominated Massachusetts state legislature voted to remove the governor's right to select a representative for an open Senate seat.

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<sup>81</sup> Laura Jarret and Sarah Jorgenson. "Menendez rests defense case after judge denies mistrial request. *CNN Politics*. October 30<sup>th</sup>, 2017. <http://www.cnn.com/2017/10/30/politics/mistrial-denied-robert-menendez-trial/index.html>. Accessed online 29 December 2017.

<sup>82</sup> *The Wall Street Journal*, Editorial Board. . "The Menedez Mistrial." Nov. 17, 2017. <https://www.wsj.com/articles/the-menendez-hung-jury-1510959789>. Accessed online 29 December 2017.

<sup>83</sup> S.H. Arthur. "Capital scandal brews in teapot dome deal." *Chicago Daily Tribune (1923-1963)* Original published: 18 January 1924. p. 1. <http://proxy.buffalostate.edu:2048/login?url=https://search.proquest.com/docview/180490293?accountid=7259>. Accessed online, 6 January 2018.



The governor was Republican Mitt Romney, and the legislators feared that if the then current Senator John Kerry was successful in his objective of being elected as the United States Vice President a Republican would be selected in his stead. In 2009 the legislature voted to return the right of Senate selection to the governor, by this time Democrat Deval Patrick. This was in response to the death of Edward (Ted) Kennedy's and his newly opened seat.<sup>84</sup>

- In 2008 a blatantly illegal activity came to light in Illinois as Governor Rod Blagojevich solicited bribes in exchange for the Senate seat opened up by the election of Barack Obama as United States President. He was recorded making expletive-laced statements commenting on the extreme value of the position and the need to be properly compensated for the appointment. He was eventually removed from office for his efforts and was sentenced to time in a federal prison.<sup>85</sup> This circumstance an unethical appointment of a senator by a governor

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<sup>84</sup> Daniel T. Shedd. "Money for Senate Seats and Other Seventeenth Amendment Politicking: How to Amend the Constitution to Prevent Political Scandal during the Filling of Senate Vacancies," *George Washington Law Review* vol. 79, no. 3, April 2011. p. 962. [https://scholar.google.com/scholar?hl=en&as\\_sdt=0%2C33&q=Shedd%2C+Daniel+T.+%22Money+for+Senate+Seats+and+Other+Seventeenth+Amendment+Politicking%3A+How+to+Amend+the+Constitution+to+Prevent+Political+Scandal+during+the+Filling+of+Senate+Vacancies%2C%22+George+Washington+Law+Review+vol.+79%2C+no.+3+%28April+2011%29%3A+p.+960-994.&btnG=](https://scholar.google.com/scholar?hl=en&as_sdt=0%2C33&q=Shedd%2C+Daniel+T.+%22Money+for+Senate+Seats+and+Other+Seventeenth+Amendment+Politicking%3A+How+to+Amend+the+Constitution+to+Prevent+Political+Scandal+during+the+Filling+of+Senate+Vacancies%2C%22+George+Washington+Law+Review+vol.+79%2C+no.+3+%28April+2011%29%3A+p.+960-994.&btnG=). Accessed online 7 January 2018.

<sup>85</sup> Daniel T. Shedd. "Money for Senate Seats and Other Seventeenth Amendment Politicking: How to Amend the Constitution to Prevent Political Scandal during the Filling of Senate Vacancies," *George Washington Law Review* vol. 79, no. 3, April 2011. p. 962. [https://scholar.google.com/scholar?hl=en&as\\_sdt=0%2C33&q=Shedd%2C+Daniel+T.+%22Money+for+Senate+Seats+and+Other+Seventeenth+Amendment+Politicking%3A+How+to+Amend+the+Constitution+to+Prevent+Political+Scandal+during+the+Filling+of+Senate+Vacancies%2C%22+George+Washington+Law+Review+vol.+79%2C+no.+3+%28April+2011%29%3A+p.+960-994.&btnG=](https://scholar.google.com/scholar?hl=en&as_sdt=0%2C33&q=Shedd%2C+Daniel+T.+%22Money+for+Senate+Seats+and+Other+Seventeenth+Amendment+Politicking%3A+How+to+Amend+the+Constitution+to+Prevent+Political+Scandal+during+the+Filling+of+Senate+Vacancies%2C%22+George+Washington+Law+Review+vol.+79%2C+no.+3+%28April+2011%29%3A+p.+960-994.&btnG=). Accessed online 7 January 2018.

has been the only documented case of allegations of corruption in an appointment since the ratification of the Seventeenth Amendment.<sup>86</sup>

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<sup>86</sup> Ben Pershing. "Illinois Scandal Spawns a Debate." *Washington Post*, 3/12/2009. p. A2.  
proxy.buffalostate.edu:2048/login?url=http://search.ebscohost.com/login.aspx?direct=true&db=rch&AN=WPT180778910409&site=ehost-live.

## CHAPTER 5. DISCUSSION OF FINDINGS

### **The Seventeenth Amendment: Needed Modification or a Violation of States Rights?**

The Seventeenth Amendment was an unneeded action leading to the weakening of the supremacy the individual states. The original intent of the Constitutional Convention and its original idea for the United States Senate was senators as representatives to the states, not directly for the people of those states. The ratification of the Seventeenth Amendment has degraded what was a genuine and needed check against popular opinion and spur of the moment decision making. Instead of the illustrious deliberative body it was designed to be, the Senate has been reduced to a pedestrian representative organization, little different from the House of Representatives, which it was designed to counter. The Seventeenth Amendment completed the most noteworthy and significant change in the Senate's history and formed a deviation from the Constitution's original intent, which was the corporate representation of the individual states on the national stage.<sup>1</sup>

With the passage of the Seventeenth Amendment there was hyperbole from both proponents and opponents of the change. Senator George F. Hoar of Massachusetts stated, "Let no man deceive himself into the belief that if this change is made, the Senate of the United States will long endure."<sup>2</sup> Senator Porter McCumber of North Dakota feared that direct elections would lead to the collapse of the political parties.

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<sup>1</sup> Daniel Wirls and Stephen Wirls. *The Invention of the United States Senate*. Baltimore, Maryland and London: The Johns Hopkins University Press, 2004. p. 216.

<sup>2</sup> Sara Brandes Crook and John R. Hibbing. "A Not-so-Distant Mirror: the 17th Amendment and Congressional Change." *The American Political Science Review*, vol. 91, no. 4, 1997, p. 845. *JSTOR*, JSTOR, [www.jstor.org/stable/2952168](http://www.jstor.org/stable/2952168).

Idaho Republican Weldon Heyburn, who issued the following challenge to his Senate colleagues:

I should like to see some Senator rise in his seat and say that the legislature of his state which elected him was not competent, was not fit, was not honest enough to be trusted. Then I should be interested to see him go back and say "I am a candidate for reelection."

Supporters stated that direct elections would eradicate graft, bribery, and corruption, so revitalizing the political system from the individual voter all the way up to the highest reaches of government.<sup>3</sup>

By compiling the available information, it is quite apparent that though there certainly was corruption present before 1913 in the United States Senate, along with other levels of government, this was not the primary reason for the passage of the Seventeenth Amendment. It has been maintained that the Seventeenth Amendment was a Progressive Era overreach that could have been resolved through legislative processes at the individual state level, and was decidedly not in need of the extreme measure of developing and ratifying a constitutional amendment.

Though not scholarly in any way, there is an interesting, though probably fictional, story frequently quoted to argue the differences between the House and Senate. There is no real evidence that this conversation actually took place, as its first mention seems to be in an 1884 edition of *Harper's New Monthly Magazine* and shortly thereafter in a work by M.D. Conway on Edmund Randolph.<sup>4</sup> It involves a discussion between George

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<sup>3</sup> Jack Kenny. "The Seventeenth: the worst of all amendments? The 17th Amendment, putting the election of U.S. senators in the citizens' hands, instead of the state legislatures, was meant to empower citizens. It had the opposite effect." *Opposing Viewpoints in Context: The New American*, 1 Apr. 2013, p. 35. [http://link.galegroup.com.proxy.buffalostate.edu/apps/doc/A326854317/OVIC?u=nysl\\_we\\_bsc&xid=8b7c4dc6](http://link.galegroup.com.proxy.buffalostate.edu/apps/doc/A326854317/OVIC?u=nysl_we_bsc&xid=8b7c4dc6). Accessed 25 Mar. 2018.

<sup>4</sup> StackExchange.com. "What is the source of the Senate-as-saucer story? StackExchange.com. October 12<sup>th</sup>, 2015. <https://history.stackexchange.com/questions/6148/what-is-the-source-of-the-senate-as-saucer-story>. Accessed online 29 December 2017.

Washington, who was supposed to have a favorable opinion of a bicameral Congress and Thomas Jefferson, who thought a second chamber was unnecessary. The gist of the story goes that the two men were discussing the issue while drinking coffee. Washington asked Jefferson, "Why did you pour that coffee into your saucer?" "To cool it," replied Jefferson. "Even so," said Washington, "we pour legislation into the senatorial saucer to cool it." It can easily be used to show in a basic sense the reasoning behind the establishment of the United States Senate and the rationale of its selection process and almost lethargic pace of legislating. This idea is supported by John Jay's discussion in *Federalist 64* where on the subject of the appointment of senators by state legislatures he states:

This mode has, in such cases, vastly the advantage of elections by the people in their collective capacity, where the activity of party zeal, taking advantage of the supineness, the ignorance, and the hopes and fears of the unwary and interested, often places men in office by the votes of a small proportion of the electors.<sup>5</sup>

Jay, who after helping to lead debates on the writing and adoption of the Constitution distinguished himself as the Chief Justice of the United States Supreme Court, goes on further to argue that the equal representation of states in the Senate, by the most able and willing men, will better represent their constituents, in this specific case, the state governments.<sup>6</sup>

The argument of states' rights has also been raised in conjunction with the elimination of the state representation that the Senate was supposed to provide along with the adoption of the Seventeenth Amendment. Advocates for this idea put a greater emphasis on regional and state governments over the federal, logically assessing that

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<sup>5</sup> Alexander Hamilton, John Jay, and James Madison. *The Federalist Papers*. New York: Fall River Press. 2017. p. 294.

<sup>6</sup> Alexander Hamilton, John Jay, and James Madison. *The Federalist Papers*. New York: Fall River Press. 2017. p. 297.

the lower the level of government involved, the more responsive it can be to any particular situation and closer to the people that will be effected the greatest by any particular decision.<sup>7</sup> States could have, on their own, come up with whatever policy they would have desired with either specific legislation or a less aggressive version of the Seventeenth Amendment that could have still allowed for an adaptation of the selection process or a some supplementary version of an elective route, but still allowing the individual states the ability to decide the proper route for their senatorial representatives. State legislatures that did not go along with their constituencies' wishes as to how to choose a senator could very well be pushed out in the next election cycle, so indirectly the people had always had the power over the choice of senator.

The Seventeenth Amendment itself was rapidly passed, allowing for the direct election of United States senators, but that idea belies the fact that the push for such an amendment was almost eighty years old in 1913. It remains the only fundamental change in constitutional structure of a national government institution that was the object of a popular movement for government reform. By removing the selection of senators from the state legislatures and giving the voting population the right to choose, the amendment removed the exclusivity of the Senate as a legislative body and became no different than the House of Representatives.<sup>8</sup> Though the idea was pushed for such a long period of time by various elements, the pressure grew in the twenty years leading up to the amendment's passage when proponents of populist government started to gain national influence.

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<sup>7</sup> Brian Duignan. "Seventeenth Amendment. Encyclopædia Britannica, *Britannica Academic*." 2017. proxy.buffalostate.edu:2793/levels/collegiate/article/Seventeenth-Amendment/474646. Accessed 24 Jul. 2017.

<sup>8</sup> Daniel Wirls and Stephen Wirls. *The Invention of the United States Senate*. Baltimore, Maryland and London: The Johns Hopkins University Press, 2004. p. 211.

Different scholars have reasoned that the Seventeenth Amendment has tipped the scales of federal-state power away from one of general equality and in favor of the federal government. A primary argument supporting this centers on the idea that the elimination of a direct voice for state legislatures in the United States Congress has decreased the protection of state interests at the federal level while giving the general public too much say in how government should operate. Discussion even goes as far as to say that the federal government is more apt to infringe on the sovereignty of the states since the adoption of the Seventeenth Amendment, with even the federal judiciary more willing to challenge state laws. It cannot be fully known if this is directly tied to the passage of the amendment, but the timing lines up and it can be reasoned that since federal judiciary appointments have to go through the Senate, having less influence by state legislatures reduces the potential influence states have over judges.<sup>9</sup>

This paper argues that the Seventeenth Amendment, and the direct election of United States senators, was an unnecessary alteration of the power the states were guaranteed under the original version of the United States Constitution and has diminished what was a legitimate and appropriate check against momentarily popular opinions, hot tempers, and the tyranny of the majority. Instead, what has developed is a rather conventional representative body, with few substantial legislative differences from the already existing House of Representatives, an institution that it was initially designed to moderate and even to counteract when it might be deemed necessary.

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<sup>9</sup> Donald J. Kochan. "State Laws and the Independent Judiciary: an analysis of the effects of the Seventeenth Amendment on the number of Supreme Court cases holding state laws unconstitutional." *Albany Law Review*, Summer 2003, p. 1023.  
<http://link.galegroup.com.proxy.buffalostate.edu/apps/doc/A109029832/LT?u=buffalostate&sid=LT&xid=906c1b5c>. *LegalTrac*. Accessed 25 Mar. 2018.

With the passage of the Seventeenth Amendment, state legislatures willingly, some even enthusiastically, relinquished control over the selection of senators, undoubtedly one of their biggest sources of influence over national level politics, and abandoned the decision-making process to the general electorate. The House of Representatives and Senate were essentially involuntarily forced into this position as three-quarters of state legislatures had agreed on the proposed amendment as Progressive lawmakers started rapidly gaining control at all levels of government.<sup>10</sup> The altering of the United States Constitution with the adoption of the Seventeenth Amendment and the direct election of senators was supposed to counter the apparent ethical issues that seemed to be quite common in the later half 19<sup>th</sup> century and in the first decade of the 20<sup>th</sup> century. The idea that it was also theoretically going to better “represent” the citizenry is anathema to the concept of state corporate representation and has directly contributed to the degradation of the once distinguished role of the United States senator. Once a member of the world’s greatest debating society, a senator can now be seen as a representative that merely serves for six instead of two years, no longer prideful and honorable, but instead forced to harp about gas prices, kissing babies, and other minutia.

As designed in the Constitutional Convention, different constituencies for the two houses of Congress help to protect the public by ensuring that legislation represents the views of at least a majority of the general public. By having two different methods of

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<sup>10</sup> Frances E. Lee and Bruce Oppenheimer. *Sizing Up the Senate: The Unequal Consequences of Equal Representation*. Chicago: The University of Chicago Press. 1999. p. 229.



selecting representatives and senators any law or resolution must first be approved by the majority of the people, then by the majority of the states.<sup>11</sup>

Though different political factors affect senators and representatives, since the passage of the Seventeenth Amendment they have become more similar in their composition and arguably the Senate has become more politically monolithic, contrary to the original intent of the Constitution. Instead of wide ranging debates and worry about opinions of home state legislators, senators are now obligated to concede to the general public's opinion. Senators are also forced to spend more attention and resources on constituent service.<sup>12</sup> The Seventeenth Amendment ensured that the Senate was no longer a representative of the individual states and their governments, but directly to the people of the state instead. The direct elections of senators established a relationship of electoral accountability between senators and the people of the states, going around the state level institutions it was initially designed to support, and concealed much of the Senate's explicitly federal character.<sup>13</sup>

Senators, and prospective members of the body, can now more easily use hyperbolic tirades, questionable electioneering tactics, exaggeration and embellishment, along with outright lies in order to gain a six year seat. The Senate thus has proceeded to follow the pathway of the more populist House of Representatives. In its place of being filtered by the presumably less reactionary professional politicians at state levels

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<sup>11</sup> Todd J. Zywicki. "Beyond the Shell and Husk of History: The History of the Seventeenth Amendment and Its Implications for Current Reform Proposals." *Cleveland State Law Review*. Volume 45:165, 1997. p. 176. <https://engagedscholarship.csuohio.edu/clevstlrev/vol45/iss2/3>.

<sup>12</sup> Daniel Wirls and Stephen Wirls. *The Invention of the United States Senate*. Baltimore, Maryland and London: The Johns Hopkins University Press, 2004. p. 212.

<sup>13</sup> Frances E. Lee and Bruce Oppenheimer. *Sizing Up the Senate: The Unequal Consequences of Equal Representation*. Chicago: The University of Chicago Press. 1999. p. 26.

of government, the ones who can more easily see through short and long term negatives and positives in the issues, senators can more easily ride a wave of popularity and familiarity into office, no matter how successful their legislative record actually is proven to be. Ironically, changing senatorial selection process to a direct election route has not led to a significant change in the overall public perception of the body. Since the Constitutional Convention the Senate has been both celebrated as bastion of renowned actions, good sense, and open debate, or contrarily, a black hole of progress.<sup>14</sup> It can be contended that if this is the case, perhaps the United States Senate would be better off being reestablished as true representatives of the individual state governments and not popular public opinion. Giving power back to the separate states could put a brake on how legislation is passed at the national level and potentially force a much longer termed view as to the pros and cons of any particular piece of legislation.

The passage of the Seventeenth Amendment led to significant changes in the functioning of the federal government and to the body of the Senate and has notionally led to the democratization of the entire legislative branch. The impression of the democratization of the Senate may very well seem to the modern reader as a rather noble ideal. While on its face this might be true, the amendment has taken away one of, if not the primary, purpose of the senatorial selection process, the corporate representation of the individual states on the national scene. The previously tight

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<sup>14</sup> Daniel Wirls and Stephen Wirls. *The Invention of the United States Senate*. Baltimore, Maryland and London: The Johns Hopkins University Press, 2004. p. 214.

relationship of the senator and their individual state legislature is now weakened, and in some cases, nonexistent.<sup>15</sup>

Since the amendment essentially stripped state legislatures of their appointment powers and sent this decision to the voting base, it is easy to decide that the Seventeenth Amendment was a highly democratizing action, bringing senatorial position choices to the masses. The second clause though, added a provision that proves to be potentially more undemocratic than the original selection process entailed. This particular clause allows for vacancies to be filled in an unchecked and undemocratic process, stating: “the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislatures may direct.”<sup>16</sup> Essentially, state governors may be allowed to pick any person they see as fit for the position in the event a seat is vacated.

At present, thirty-three states permit governors to select senators with no apparent checks on the process, and as for having special elections to actually elect a replacement senator many of the same issues that originally led to the amendment’s passage still remain a substantial issue, typically, bicameral legislatures divided between the major political parties, and strong minority parties kyboshing forward movement. As shown previously, this can have negative outcomes as some state leaders such as the Massachusetts legislature and Governor Blagojevich of Illinois play political brinkmanship or, grotesquely enough, unadorned criminal activity in the

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<sup>15</sup> Daniel Wirls and Stephen Wirls. *The Invention of the United States Senate*. Baltimore, Maryland and London: The Johns Hopkins University Press, 2004. p. 216.

<sup>16</sup> *The Constitution of the United States*, Amendment 17; Article 1, Section 2;

selection process of new senators.<sup>17</sup> These issues, though exceptionally rare, have allowed the Senate to still be looked at in a suspicious and skeptical way, lowering public confidence in the institution just as much as any perceived scandal in the pre-senatorial election period.

The Progressive Era has come to symbolize the potential of political activism to change society for the better, but the benefit of time has shown that the Seventeenth Amendment was a solution to a problem that was not as severe as many suspect, has besmirched the original intent of the United States Constitution, and has dramatically changed the character of United States senators. What may seem as a small detail, has had a tremendous effect on the structure and daily workings of the United States Senate. The simple fact that senators are now obliged to spend a disproportionate amount of time cultivating constituent relationships instead of legislating means they spend less time governing and more time preparing for the next election cycle.<sup>18</sup> The supremacy of the federal prerogative over the idea of states' rights in many segments of American life has been evident since the passage of the Seventeenth Amendment. Since the Progressive Era there has been a growing push to centralize as much power as possible into the realm of the federal government, taking away powers that had

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<sup>17</sup> Daniel T. Shedd. "Money for Senate Seats and Other Seventeenth Amendment Politicking: How to Amend the Constitution to Prevent Political Scandal during the Filling of Senate Vacancies," *George Washington Law Review* vol. 79, no. 3, April 2011. p. 963.  
[https://scholar.google.com/scholar?hl=en&as\\_sdt=0%2C33&q=Shedd%2C+Daniel+T.+%22Money+for+Senate+Seats+and+Other+Seventeenth+Amendment+Politicking%3A+How+to+Amend+the+Constitution+to+Prevent+Political+Scandal+during+the+Filling+of+Senate+Vacancies%2C%22+George+Washington+Law+Review+vol.+79%2C+no.+3+%28April+2011%29%3A+p.+960-994.&btnG=](https://scholar.google.com/scholar?hl=en&as_sdt=0%2C33&q=Shedd%2C+Daniel+T.+%22Money+for+Senate+Seats+and+Other+Seventeenth+Amendment+Politicking%3A+How+to+Amend+the+Constitution+to+Prevent+Political+Scandal+during+the+Filling+of+Senate+Vacancies%2C%22+George+Washington+Law+Review+vol.+79%2C+no.+3+%28April+2011%29%3A+p.+960-994.&btnG=) Accessed online 7 January 2018.

<sup>18</sup> Frances E. Lee and Bruce Oppenheimer. *Sizing Up the Senate: The Unequal Consequences of Equal Representation*. Chicago: The University of Chicago Press. 1999. p. 99.

originally been the purview of the individual states, per Article V and the Ninth and Tenth Amendments of the United States Constitution.<sup>19</sup>

Many of the apparent issues with the selection of United States senators were seen as the vaunted “Robber Barons” of the late 19<sup>th</sup> and early 20<sup>th</sup> century having much too large of an impact on all levels of government, up to and including the outright purchase of senatorial loyalty. Other plausible ideas as to how to fix these issues could have possibly lowered external influence on the legislative process without dramatically changing the Constitution. There has never been a strictly enforced ban on outside incomes except for specific reasons by representatives and senators, an issue that still stands to this day. Instead of the captains of industry of years past, there are now lobbyists, corporate interests, and special interests doing much the same, but now referring to the system as fundraising instead of bribery. The difference is that now senators basically have to partake in the malfeasance, whereas in the previous era some might very well have accepted money or favors, but a good number had no reason to just to keep their position. If ethics was really of such a great concern there are many ways that ethics laws could have been made stronger and wide ranging.

Contrary to most modern perceptions as to why the Seventeenth Amendment was passed, it was seen as important to have direct elections of United States senators not because of fraud, nepotism, or blatant disregard of the law or tradition, but primarily because some states, at times, had years of no proper representation. For most of the 19<sup>th</sup> and early 20<sup>th</sup> centuries state legislatures met for mere months a year, often times on a biennial basis, with state specific constitutional mandates that they end legislative

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<sup>19</sup> *The Constitution of the United States*. Article V; Amendment 9; Amendment 10.

sessions on a specific date. This ensured that a deadlocked legislature could not appoint a senator to represent their state, as mandated by the United States Constitution.<sup>20</sup> Shockingly, many state legislatures saw the amendment as was way to ensure proper representation for the state. Though a perfect answer does not exist the issues of nonrepresentation and malfeasance could have been mitigated by any number of means. The most obvious idea is with modern state legislatures and their more permanent status as full time legislatures. Though not intended to be life-long careers by the members of the Constitutional Convention generation, many positions in government have become that. As the profession matured it can be hoped that each state could have decided how best to decide on how to choose a senator. As state legislatures went from meeting for weeks and months to an almost year-round basis, there would not be the same artificial time constraints either. As a failsafe laws could have been enacted that pressured individual legislators by allowing the governor of the state to select a new senator if the position remained open after a particular amount of time. Though this paper has shown that these are not ideal, it does allow for the acceptance of the reality that such an important position as senator may cause a significant amount of arguing from varied interests inside of a state's political hierarchy. Since most modern state legislatures now meet on a basically fulltime or at least year round basis, with Texas being a notable exception, ensuring that open senatorial seats would no longer be as serious, or at minimum, long lived an issue, as a senator would most likely eventually be chosen. The passage of the Seventeenth Amendment further

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<sup>20</sup> Kris E. Palmer. *Constitutional Amendments, 1789 to the Present*. Detroit, MI: Gale Group, 2000. p. 406.

democratized the Constitution and tied the legislative branch closer to the people, but it undermined the links between the state and the federal systems.<sup>21</sup>

### **An Interesting Aside**

Under Article V of the Constitution, it is stated that Congress must call a Constitutional Convention for proposing amendments when two-thirds of the state legislatures apply for one. Since changing the Constitution in a way that would detrimentally affect the members of the Senate was not going to make it past the entire Congress without an enormous amount of external influence, the Seventeenth Amendment was the only amendment in United States history to be originally initiated at the state level. Due to this inordinate amount of pressure Congress pushed it through before the Convention would have become mandated. Had a full Constitutional Convention been called the entire United States Constitution could have been rewritten, affecting the entire document, and not just necessarily how United States senators were chosen.<sup>22</sup>

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<sup>21</sup> John R. Vile. *A Companion to the United States Constitution and Its Amendments*. Santa Barbara, CA: Praeger, 2010. p. 197.

<sup>22</sup> David E. Kyvig. *Unintended Consequences of Constitutional Amendments*. Athens, GA: University of Georgia Press, 2000.

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