The Seventeenth Amendment:

The Folly of the Direct Election of Senators

On April 28, 2004 Senator Zell Miller of Georgia submitted to the Senate a resolution to repeal the Seventeenth Amendment to the Constitution of the United States; Senator Miller's proposed amendment was promptly referred to the Judiciary Committee where it quietly died, receiving little attention from either the media or other politicians. Not even Senator Miller himself expected that his amendment would gain any momentum, proclaiming on the Senate floor that it "doesn't stand a chance of getting even a single cosponsor, much less a single vote beyond my own."[1] The reason that Senator Miller could so accurately predict the utter lack of support for his proposed amendment is that the Seventeenth Amendment has long since ceased to be an issue in American politics; indeed, the acceptance of its wisdom has been almost universal. Its apparent logic seems so self-evident to most individuals that few are able to identify what part of the Constitution the Seventeenth Amendment changed.

The Seventeenth Amendment states in part that "The Senate of the United States shall be composed of two Senators from each State, *elected by the people thereof* (emphasis added)," as opposed to Article I, Section 3 which established that a state's senators would be "chosen by the Legislature thereof." In spite of the numerous, clearly states reasons for the selection of senators by the State Legislatures, it did not take long for some to begin to demand that the people be given the authority to elect the members of the senate directly. Advocates of this change argued that the method for selecting senators that was provided in the Constitution was hopelessly inefficient, causing gridlock in the State Legislatures, and that it led to the corruption of senators

[1] *Congressional Record*. 24 Apr. 2004: S4503.

by special interests and urban political-machines. Most of all though reformers lamented the fundamentally undemocratic nature of the selection of senators by state governments, believing that the problems of governing could be easily solved if only the people were allowed to govern themselves without interference. The first resolution that attempted to provide for the direct election of United States senators was introduced in the House of Representatives in 1826. Even though it took eighty-six years and 187 subsequent resolutions, the direct election of senators was finally obtained through the Seventeenth Amendment which was ratified on April 8, 1913.[2]

By the end of the twentieth century the direct election of senators had become so widely accepted by people of all political persuasions that the Seventeenth Amendment was reduced to nothing more than a footnote in a history textbook. Some individuals vaguely recall that senators were not always elected by the people, but they consider it to have been a quirk that has long since been eliminated from our system of government, and not worthy of further thought or discussion. Few bother to explore the reasons given by the architects of the Constitution for placing the selection of senators in the hands of the Legislatures, preferring to ignore their warnings.

This paper explores the rationale behind the original structure of the United States Senate, and how, by altering this structure, the Seventeenth Amendment inadvertently removed many of the safeguards the Constitution provided against an over-powerful national government. It will begin by examining the arguments given by the delegates of the Constitutional Convention, and the State Ratifying Conventions, for the necessity of legislative selection of senators. Following that, it will then discuss the forces which led to the adoption of the Seventeenth Amendment, and the unforeseen consequences of direct election. Finally, this paper will show that the assumptions made by the advocates of direct election were wrong, while the insights of the founding fathers into this regard are as true now as they were in 1787; and that the sooner we restore the original

[2] Rossum, Ralph A. *Federalism, The Supreme Court, and the Seventeenth Amendment: The Irony of Constitutional Democracy.* Lanham, MD: Lexington Books, 2001. Pg. 183.

structure of the Senate, the sooner we can undo the damage that has been caused by this ill-advised amendment.

The Original Rationale of the Senate

Just as the direct election of U.S. senators by the public is now nearly universally regarded as the only logical method of selection, so was the wisdom of senatorial appointment by the State Legislatures seen as axiomatic at the time the U.S. Constitution was adopted. While there were numerous proposals during the Constitutional Convention concerning senatorial selection, ranging from selection by the state governors to appointment by the House of Representatives or the president, most of the delegates favored selection by the legislatures, and only James Wilson of Pennsylvania supported direct election by the people.[3] In writing *Federalist No. 62* James Madison declared that the obvious logic of legislative appointment made it "unnecessary to dilate on the appointment of senators by the State legislatures," and that it was the method "most congenial with the public opinion."[4]

To understand why the authors of the Constitution believed that legislative selection of senators was conclusively better than their direct election we must first understand the reasons that the Senate was established. Typically, the origins of the two houses of Congress are explained solely in the context of the debate between larger and smaller states, with the larger states favoring representation based on population, while the smaller states wanted equal representation in the legislature. The result was the Connecticut Compromise, where representation would be based on population in the House of Representatives, while all states were equally represented in the Senate, thereby placating both the large and small states. While the need to resolve this debate certainly played a role in the final form of the Congress, it was by no means the sole consideration of the conventions delegates. In addition to protecting less

[3] "Debate on Method of Electing Senators." Ed. Ketcham, Ralph. *The Anti-Federalist Papers and the Constitutional Convention Debates: The Clashes and the Compromises that Gave Birth to our Form of Government.* New York, NY: Signet Classic, 1989. Pg. 54-58

[4] Hamilton, Alexander, Jay, John, & Madison, James. "Number 62." Ed. Rossiter, Clinton. *The Federalist Papers.* New York, NY: Signet Classic. Pg. 375.

populous states from the domination of the larger states, the Senate, with its members chosen by the state legislatures, was intended to perform three additional tasks which were seen as vital to ensuring liberty: first, to give the states, as semi-sovereign entities, a voice in the workings of the national government; second, to yield the protections of a bicameral legislature with each house beholden to a different constituency; and finally, to serve as a check against the tyranny of the majority.

CHAMPION OF THE STATES

The United States Constitution did not create a purely national government to rule over the entire country, nor was it simply a treaty between fully sovereign states. Rather it created a *federal* government. While the word federal has become synonymous with the word national, this is not necessarily how the word was used by the members of the Constitutional Convention. To the delegates in Philadelphia a federal government often referred to a government comprised of a national government and numerous state governments, each supreme in its own sphere of influence, with a mutual ability to check the other's power. Madison discussed the interdependency of the state and national governments in *Federalist No. 45*:

> The State governments may be regarded as constituent and essential parts of the federal government; whilst the latter is nowise essential to the operation or organization of the former.[5]

He later advocated the appointment of senators on the grounds that it would give "to the State governments as must secure the authority of the former, and may form a convenient link between the two systems."[6] The primary instrument given to the state governments to check the power of the national government was their ability to decide the composition of the Senate.

[5] "Federalist Number 45." Pg. 287.
[6] "Federalist Number 62." Pg. 375.

While one of the objectives of the authors of the Constitution was to give the national government a greater amount of power than it had previously had under the Articles of Confederation, one of their great concerns was to ensure that the states would not be overwhelmed by the newly empowered national government. George Mason argued that "allowing [the states] to appoint the second branch of the National Legislature" would offer them "some means of defending themselves against encroachments of the National Government."[7] The fact that senators were accountable to their respective State Legislatures meant that they would be naturally hesitant to support any action of the national government which proved to be too invasive of the rights and prerogatives of the various state governments. To quote Madison again, "the Senate will be elected absolutely and exclusively by the State Legislatures," and will therefore "owe its existence more or less to the favor of the State Governments, and must consequently feel a dependence" on them for reelection.[8]

At the New York Ratifying Convention Alexander Hamilton explained that "the senators will constantly look up to the state governments with an eye of dependence and affection. If they are ambitious to continue in office, they will make every prudent arrangement for this purpose, and, whatever may be their private sentiments or politics, they will be convinced that the surest means of obtaining reelection will be a uniform attachment to the interests of their several states." He then pointed out that "their future is absolutely in the power of the states," and asked, "Will not this form a powerful check?"[9] Thus, the natural desire of senators to retain their seats, rather than their personal political beliefs, would be used to ensure that no national legislation which would infringe upon the rights of the states would emerge from the Congress.

The ability of the Senate to protect the interests of the states goes far beyond its influence in the formation of legislation; in fact, it is difficult to imagine any action that can be taken by the

[7] Ferrand, Max, Ed. *Records of the Federal Convention of 1787*, vol. 1. New Haven, CT: Yale University Press, 1937. Pg. 155, 407.
[8] "Federalist Number 45." Pg. 287-288
[9] Rossum, Ralph A. "California and the Seventeenth Amendment." Ed. Janiskee, Brian P. and Masugi, Ken. *The California Republic*. Lanham, MD: Rowman & Littlefield, 2004. Pg. 70-71.

national government which does not at some point have to face a vote before the Senate. While it is the House of Representatives that has the power to impeach officials of the national government, it is the Senate which ultimately tries them, giving the states a role in removing corrupt office holders. The Constitution grants the states two mechanisms for promoting or halting the amendment process: indirectly through the Senate, and directly through the requirement for State Legislatures to ratify amendments. The requirement of the President to obtain the "advice and consent" of the Senate when appointing members of the judiciary and the executive agencies gives the states a powerful tool to influence those branches of the national government where they are not directly represented.[10] Furthermore, the need of a two-thirds majority in the Senate in order to ratify any treaty, as well as the ability of Congress to raise and support a military, regulate piracy and "offences against the law of nations," regulate international commerce, and declare war, means that even in matters of foreign policy the states have not fully surrendered their sovereignty.[11] Due to the vast scope of the Senate's authority, the states, through their representatives, have the ability to shape, and effectively veto, any action of the national government.

In addition to choosing as senators men who were believed to trustworthy representatives of the state, the Legislatures also had the ability to issue instructions to their respective senators. Through this means the states as entities could clearly express their approval or disapproval of a certain act of the national government, and have a direct voice in the formation of national policy. Even though the Legislatures had no immediate means to punish a senator that disobeyed instructions, any senator would be hesitant to openly defy his constituents; some senators even felt it to be their duty to resign, rather than vote contrary to their instructions.[12] While the

[10] Amar, Vik D. "The Senate and the Constitution." *The Yale Law Journal*, Vol. 97, No. 6. May, 1988. Pg. 1113.
[11] Bybee, Jay S. "Ulysses at the Mast: Democracy, Federalism, and the Sirens' Song of the Seventeenth Amendment." *Northwestern University Law Review*. Vol. 91, No. 2. 1997. Pg. 562-563.
[12] Haynes, George H. *The Senate of the United States: Its History and Practice*. Vol. 2. Boston, MA: Houghton Mifflin, 1938. Pg. 1027-1029.

practice of instructing senators declined with time, it was always an option available to the State Legislatures if they wanted to exert more control over the decisions of their representatives.[13]

It was the intent of the members of the Constitutional Convention to create in the Senate a champion for the state governments in the national government; an advocate of their concerns, and a guardian of their rights. As such it makes sense that the power of selecting senators was given to the State Legislatures, giving them considerable control over the body which was to fight on their behalf.[14] While there were other safeguards built into the Constitution to protect the federal structure of the government, such as the Electoral College, state militias, the "full faith and credit" clause, and the eventual addition of the Tenth Amendment, these all pale in comparison to the awesome power found in the United States Senate.

THE BENEFITS OF A BICAMERAL LEGISLATURE

It has long been understood that a bicameral legislature is less prone to produce foolish or unjust legislation by requiring that two separate bodies deliberate over and agree upon any law before it is passed. What is generally less well understood is that bicameralism can also yield other benefits if the two legislative houses are beholden to different constituencies. *Federalist No. 51* advocates the use of bicameralism to help prevent unwise or oppressive laws:

> The remedy for this inconveniency is, to divide the legislature into different branches; and to render them by different modes of election, and different principles of action, as little connected with each other, as the nature of their common functions and their common dependencies on the society, will admit.[15]

By making the House of Representatives accountable to the people and the Senate accountable to the State Legislatures, the Constitution ensured that for any legislation to pass it would have to

[13] Swanstrom, Roy. "The United States Senate, 1787-1801: A Dissertation on the First Fourteen Years of the Upper Legislative Body." Washington, DC: U.S. Government Printing Office, 1988. Pg. 171-172.
[14] Wechsler, Herbert. "The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government." *Columbia Law Review*. Vol. 54, No. 4. April, 1954. Pg. 543-546.
[15] "Federalist Number 51." Pg. 319.

have a wider base of support, thus reducing the ability of special interests to utilize government power for their own private gains.[16]

The different constituencies given to the two Houses of Congress were haled for the "additional impediment it must prove against improper acts of legislation. No law or resolution can now be passed without the concurrence, first, of a majority of the people, and then of a majority of the States."[17] To the crafters of the Constitution it seemed remarkably less likely that a special interest or individual would be able to obtain legislation which proved useful to themselves, but damaging to the public good, if they had to secure the support of the representatives of both the states and the people; for it may be possible to convince one group, through manipulation, deception, or bribery, to support a resolution, but it is considerably more difficult to convince two distinct bodies.[18] Madison expressed his faith in this mechanism further, stating that:

> [T]he improbability of sinister combinations will be in proportion to the dissimilarity in the genius of the two bodies, it must be politic to distinguish them from each other by every circumstance which will consist with a due harmony in all proper measures and with the genuine principle of republican government.[19]

The benefits of a bicameral legislature are widely known, and exist even if the two houses of the legislature share the exact same constituency. Yet these benefits can be further amplified by subjugating the two houses to the will of two distinct bodies, and providing for different methods of selecting their members. The Senate and the House of Representatives were designed to provide the republic with just this sort of legislature.

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[16] Zywicki, Todd J. "Beyond the Shell and Husk of History: The History of the Seventeenth Amendment and its Implications for Current Reform Proposals." *Cleveland State Law Review*. Vol. 45. 1997. Pg. 176-179.
[17] "Federalist Number 62." Pg. 376.
[18] Zywicki, Todd J. "Senators and Special Interests: A Public Choice Analysis of the Seventeenth Amendment." *Oregon Law Review*. Vol. 73. 1994. Pg. 1031-1033.
[19] "Federalist Number 62." Pg. 377.

PREVENTING THE TYRANNY OF THE MASSES

Federalist Number 47 proclaimed that the concentration of all power into "the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."[20] While this particular statement was used in a discussion on the importance of checks and balances within the three branches of the national government, it is emblematic of the great fear the framers of the Constitution had of concentrating political power in any one group, including the people themselves. As Vice President, John Adams wrote of government, saying that "every project has been found to be no better than committing the lamb to the custody of the wolf, except that one which is called a balance of power. A simple sovereignty in one, a few, or many has no balance," and therefore even the people themselves were capable of oppression if given enough power.[21] The delegates who gathered in Philadelphia in 1787 hoped to avoid this tyranny partly by fragmenting political power between the various branches of government, but also by ensuring that no one group, not even the people, could select the members of every branch of government.

Having studied previous attempts to establish a government along democratic or republican lines, the founders of the American republic could not help but notice that even those governments which were accountable to the people could easily become corrupt, and were just as likely as a monarch or aristocracy to trample upon the rights of individuals. Madison criticized governments which placed complete power in the hands of the people, saying:

> A common passion or interest will, in almost every case, be felt by a majority of the whole; a communication and concert results from the form of government itself; and there is nothing to check the inducements to sacrifice the weaker part or an obnoxious individual. Hence it is that such democracies have ever been

[20] "Federalist Number 47." Pg. 298.
[21] Hoebeke, C.H. *The Road to Mass Democracy: Original Intent and the Seventeenth Amendment.* New Brunswick, NJ: 1995. Pg. 33.

> spectacles of turbulence and contention; have ever found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths.[22]

Indeed, many of the problems that plagued the country as the Constitution was being crafted, such as the prolific printing of paper money, the failure to enforce contracts, the confiscation of Tory property without due process, excessive state spending, and the lack of protection for the rights of economic, political, and religious minorities, can be traced to the inability of state governments to restrain the actions of the majority.[23]

In spite of the weaknesses that were evident in republican governments, the members of the Constitutional Convention were convinced that it presented the best hope for preserving liberty and justice. Thus they set out to find ways to mitigate problems caused by a self-interested majority by insulating to various degrees, the different bodies of the national government. For instance, the President was to be selected by a college of electors, and the judges of the judiciary were to be appointed by the President and serve for life terms, granting to each some level of autonomy. However, it was feared that the legislature, if it were to be entirely accountable to the people, would naturally promote the "licentiousness" of the majority at the expense of individuals and minority groups, while the constant and rapid changes in public opinion would eat away at the stability of the government.[24]

It was hoped that by giving the power to select the members of the upper house of Congress to the state legislatures, that Senators would feel less pressure to give in to the demands of the majority. In addition, Senators would serves for six years, with only one third of them facing reelection at any given time, ensuring that

[22] "Federalist Number 10." Pg. 76.
[23] Hoebeke, 39-42.
[24] Zywicki. "Shell and Husk of History." Pg. 180-183.

the fleeting passions of the masses could not bring about a change in the entire Senate at once. Indeed the Senate is the only part of the national government which cannot be wholly transformed by a temporary majority, with every House member up for election every two years and the executive branch changing with each new President. Even the judiciary can be captured by a short-lived majority if it were to "pack" the courts with new judges as President Roosevelt attempted during the 1930's.[25]

While the authors of the Constitution were certainly nervous about the idea of trusting the people with political power, this did not stem from a sense of elitism or a desire to guard aristocratic power. Rather, it came from their conviction that nobody, not a king, not a ruling council, not the people, was capable of wielding absolute power. Therefore they took steps to ensure that while the will of the national government would ultimately derive its legitimacy from the will of the people, that it could never be used by the masses to oppress a minority group or individual. Among the various means of countering the excesses of the majority was the structure of the Senate, and the method through which its members were selected.

THE INADAQUACIES OF PARCHMENT BARRIERS

The primary goal of the delegates at the Constitutional Convention was to create a government which was strong enough to provide order and justice, without threatening the liberty of its citizens. Yet opponents of the new Constitution felt that it did too little to protect the rights of individuals, and demanded that a bill of rights be added to limit the power of the government. The Constitution did not lack a bill of rights because its authors thought that those rights were unimportant, they simply did not believe that it would be effective in protecting those rights.

[25] Amar, 1126-1127.

The explicit enumeration of the powers of the government, and the rights of the people, was thought to be a mere "parchment barrier," since the only thing preventing the abuse of government power was a piece of paper. It was believed that "a mere demarcation on parchment of the constitutional limits of the several departments is not sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands."[26] To rely upon "parchment barriers" was to trust that those in power would willingly restrain themselves and respect the limits placed on their power, which was not something that the framers were willing to do.

Instead they chose to rely upon the structure of the government to ensure that the government could not abuse its power, or threaten the rights and liberties of individuals. This could be done by "so contriving the interior structure of the government, as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places." The idea was to structure the government in such a way that the various branches of the government would be naturally inclined to resist each others' attempts to expand their power, thereby ensuring that no governmental power could ever expand to the point of infringing on the rights of individuals. They were not counting on the honesty or trustworthiness of those in authority, but rather their lust for power; "Ambition" would be made to "counteract ambition.[27]

The selection of United States Senators by the state legislatures was one of the structures that the framers built into the Constitution to prevent the abuse of government power. It would prevent the central government from encroaching upon the domain of the states, by giving them a means of influencing policy and

[26] "Federalist Number 48." Pg. 305, 310.
[27] "Federalist Number 51." Pg. 317-322

preventing inappropriate actions by the national government. It would also diminish the ability of private citizens, factions, and special interests to secure favorable legislation at the cost of the public good, by rendering the two houses of Congress accountable to different constituencies. Finally, the ability of state legislatures to select their representatives in the Senate protected the rights of minorities and individuals, who would have otherwise been at the mercy of the majority, by ensuring that, no group, not even the people, could possess an excessive amount of power.

With the adoption of the Seventeenth Amendment in 1913 this structure was fundamentally altered, and the safeguards that it provided against the abuse of power were removed. Not surprisingly, the result of this has been a dramatic increase in the size and intrusiveness of the national government. The main benefactors of the direct election of U.S. Senators have been special interests and political factions which can now more easily mobilize support in Congress, while the states and individuals have been forced to pay the financial costs and bear the regulatory burden of this structural change.

The Adoption of the Direct Election

In 1838 Abraham Lincoln gave a speech in which he lamented the fact that the principles that the republic had been founded on were fading with time, and the institutions and structures the country had been built upon were increasingly misunderstood. He believed that these structures "were a fortress of strength; but what invading foemen could never do, the silent artillery of time has done; the leveling of its walls."[28] This accurately describes what happened to the selection of senators by state legislatures. Over time people forgot the principles that the Senate

[28] Rossum. *Federalism.* Pg 281.

was built upon, and the dangers it was meant to guard against. With its reasons forgotten many began to call for the end of the traditional method of selecting senators, which was seen as causing problems of its own, in favor of direct elections by the people.

DEADLOCK IN THE SELECTION OF SENATORS

One of the perceived problems with the original method of selecting senators was that it encouraged deadlock in the States Legislatures, sometimes resulting in a states being underrepresented in the Senate. The Constitution simply states that a senator must be chosen by the State Legislature, it was unclear though about the method through which this must be done. Some states with a bicameral legislature held the vote during a joint meeting, voting as one body, while others required a concurring vote in both houses. This caused a problem when the two houses were controlled by different parties and could not come to a compromise, halving the size of the states delegation in the Senate until the two houses could agree on a candidate.[29]

The problem was greatly exacerbated by a federal law passed in 1866 which regulated the selection of senators. It stated that in a bicameral legislature, its two houses were to first meet separately and take a voice vote on who should be made senator. If the two were not in agreement they were to meet jointly the next day, and every day after that, to hold a combined vote. Unfortunately the law required that an individual receive an absolute majority to win the Senate seat, which was often very difficult when more than two candidates were seeking the office. In addition, by requiring the first vote to be an open vote, the 1866 law allowed legislators to know who supported which candidate, thus making it easier to organize an effort to block

[29] Bybee, 541-544.

an undesirable candidate. Often the legislators proved to be utterly unwilling to compromise and, in spite of meeting every day for a new vote, securing a majority proved impossible.[30] As a result of this legislation, between 1885 and 1912 there were seventy-one instances in which the legislature deadlocked; and seventeen Senate seats went unfilled for a legislative session or more.[31]

These deadlocks convinced many people that senators should be elected directly by the people, thus allowing the legislature to deal with more important matters. Legislative deadlocks though could have just as easily been avoided by altering the 1866 law regulating the selection of senators to allow a plurality of the votes to win the seat. Yet this solution appears to have occurred to very few people, and many in state government felt that the only way to ensure that their state was represented at all in the Senate was to yield their right to select senators to the people, and thereby forfeit their only means of defending themselves against the expansion of the national government.

CORRUPTION AND BRIBERY IN THE SENATE

It was also widely believed during the late nineteenth, and early twentieth century that senators had become exceedingly corrupt, prone to bribery, and beholden to the urban political machines, and special interests. It was thought by many that because so many of the state legislators were under the control of the great party bosses, or were taking bribes from private interests, that it would be impossible for the legislature to objectively pick the best candidate for the job. Proponents of direct election argued that the only way to end this rampant corruption was to allow the

[30] Haynes, George H. *The Election of Senators*. New York, NY: Henry Holt & Co., 1906. Pg. 36-50.
[31] Rossum. *Federalism.* Pg. 187-191.

people themselves to elect senators; for surely the people were far too wise, and far to numerous to ever be completely corrupted or controlled.[32]

There was little evidence though to support this widely held accusation against senators. Of the 1,180 senators between 1787 and 1909, a mere fifteen of these seats were contested due to allegations of corruption or bribery, and only seven of these cases resulted in a senator being denied his seat, a rather impressive record.[33] The House of Representatives on the other hand, even though it had always been chosen by the people, had a total of three hundred eighty-two seats contested in this manner, clearly raising doubt about the assertion that direct election would reduce corruption in the Senate.[34]

While the belief that the Senate was corrupt due to the means by which its members were selected was widespread, there was little actual evidence to support that belief. Indeed, one would speculate that similar numbers of people are still convinced that the Senate is fraught with corruption, and in desperate need of reform. Ultimately, the argument in favor of direct election of the Senate on the pretense that it would prevent corruption and make the body more honest is unfounded and baseless.[35]

THE PROGRESSIVE MOVEMENT'S SUPPORT FOR DIRECT DEMOCRCY

Throughout the late nineteenth and early twentieth century the progressive movement swept across America. Progressives attacked the government at all levels, believing it to be corrupt and controlled by the rich, hopelessly out of touch with the

[32] Amar, Vikram David. "Indirect Effects of Direct Election: A Structural Examination of the Seventeenth Amendment." *Vanderbilt Law Review*. Vol. 49, No. 6. November, 1996. Pg. 1352-1355.
[33] Hoebeke, 179-180.
[34] Hoebeke, 96.
[35] Zywicki. "Beyond the Shell and Husk of History." Pg. 196-198.

average American, and therefore unable to respond to their needs.[36] The progressives were firmly committed to the belief that all of the problems of governing could be solved by creating institutions that were more democratic. If only more power could be placed in the hands of the people, surely they would know best how to govern themselves and better their lives.[37] This is of course quite a departure from the beliefs of the framers, who believed that concentrating too much power in the hands of any group would inherently lead to abuse and tyranny, and they therefore took steps to dilute the power of the majority, and insulate the Senate from the passions of the people.

Thus, progressives lobbied states to grant their citizens the right to directly involve themselves in the legislative process through referenda and ballot initiatives, as well as the ability to recall public officials who fail to properly obey the will of the people. Furthermore, progressives wanted to secure the direct election of U.S. senators, arguing, in the words of Senator William Jennings Bryan, that "if the people of the United States have enough intelligence to choose their representatives in the State legislatures … they have enough intelligence to choose the men who shall represent them in the United States Senate."[38] Progressives were a very strong force in American politics around the turn of the century, and their campaign for direct election persuaded much of the public and many in both the state and federal governments that an amendment was needed in order to fix the perceived problems in the senate.

THE SEVENTEENTH AMENDMNET

[36] Hoebeke, 101-102.
[37] Rossum. "California and the Seventeenth Amendment." Pg. 82.
[38] *Congressional Record.* 53, 1894. 7775

As was mentioned earlier, the first attempt to amend the method of choosing senators came in 1826, and was proposed by Representative Henry Randolph Storrs of New York. Over the next half century there were around twenty attempts to push an amendment establishing the direct election of senators through Congress, yet the proposed amendment received little enthusiasm. Between 1880 and the ratification of the Seventeenth Amendment though, 167 different resolutions calling for the direct election of senators were brought before the Congress.[39] This happens to coincide with the height of the Progressive movement, as well as a jump in the number of legislative deadlocks over open Senate seats.[40] By 1893 the House of Representatives had approved by the required two-thirds majority a resolution to amend the method of selecting senators, but it found much less support in the Senate.

Pressure continued to mount from all across the nation, and politicians found it increasingly more difficult to defend the structure of the Senate, in spite of the vital role it played in protecting citizens from the abuse of power. In fact, few still understood the principles upon which the structure of the Senate was built, preferring instead to believe that the framers of the Constitution were merely aristocrats, jealously guarding their wealth and power. The House approved a further five resolutions until finally, on May 12, 1912, the Congress approved the Seventeenth Amendment by a vote of 238-39 in the House and 64-24 in the Senate.[41]

In one of the great ironies of history, the state legislatures proved to be not just willing, but enthusiastic accomplices to their own disenfranchisement. The progressives had had much greater success winning seats at the state and local levels, and the legislatures had experienced first hand the frustration of deadlocking over senate appointments. In spite of the fact that their ability to select senators was the

[39] Rossum. *Federalism.* Pg. 183, 194.
[40] *Ibid.* Pg. 197-199.
[41] *Ibid.* Pg. 184.

primary means by which the states could check the power of the national government, the states gladly ratified the Seventeenth Amendment, aiding "in their own collective suicide," as they "slashed their own throats and destroyed federalism forever."[42] Debate within the legislatures was short, and many voted unanimously, and on April 8, 1913, less than a year after being approved by the Senate, Connecticut became the 36th state to ratify the amendment, making it a part of the supreme law of the land.[43]

The wisdom of the framers and their insight into the need for government structures, rather than mere "parchment barriers," to prevent the uncontrollable growth of government power had been forgotten, slowly battered down by "the silent artillery of time."

Results of Direct Election

As one would expect, by fundamentally altering the structure of the Senate, it was no longer able to fulfill its intended functions as it once was. The states, now lacking a champion in the national government, could do little to protect themselves; they were at the mercy of Washington, whose policies became more and more intrusive. Rather than decreasing the power of special interests as the amendments supporters had promised, by making the House of Representatives and the Senate accountable to the same constituency, special interests found it easier to raid the Treasury. In addition, by concentrating large amounts of power in the hands of the people, opportunistic majorities have used the power of the state to promote their own interests at the expense of minorities and individuals.

[42] *Congressional Record*. 24 Apr. 2004: S4503.
[43] *Ibid.* Pg. 214-218.

The power of the national government can now be seen in nearly every corner of life: commerce, education, health care, transportation, communication, police protection; all were once primarily the domain of state governments, and now all are heavily influenced by the national government. Washington's constant use of unfunded mandates places an enormous burden upon state governments by forcing them to pay for programs they may not even want, a practice that a pre-Seventeenth Amendment Senate surely would not have permitted.

In those cases where there is a "parchment barrier" forbidding a certain action of the national government the Congress may use its control over the national budget to blackmail the state governments into carrying out the forbidden action for them. An example of this is found in the national drinking age of 21. In order to get around the inconvenience of the Twenty-First Amendment, which explicitly forbid federal regulation of alcohol, the Congress ordered the Department of Transportation to withhold five percent of any state's federal highway funds if it had not enacted a minimum drinking age of 21. South Dakota sued, but the Supreme Court affirmed the right of the Congress to use its spending power to indirectly exert power even in fields that it is forbidden from directly interfering with.[44] Justice Antonin Scalia later explained that while he did not see anything unconstitutional about what the Congress had done, he could not imagine that the Senate would have permitted such an act if the senators were still accountable to their state legislatures.[45]

Traditionally, the era of big government is said to have begun with Franklin Roosevelt's New Deal during the Great Depression, and continued throughout World War Two and the Cold War; in reality though the steady growth of the national government began shortly after the passage of the Seventeenth Amendment. Randall

[44] *South Dakota v. Dole.* 483 U.S. 203 (1987).
[45] Rossum. *Federalism.* Pg. ix.

G. Holcombe examined growth rates for the national government and found that while the size of the government had always spiked at times of war, from 1787 until 1913 government growth was virtually non-existent in times of peace. However, Holcombe found that the decade of the1920s was the first time that the government had ever consistently grown when there was no national crisis.[46] While the growth rate of the 1920s was certainly lower than what was seen during the New Deal, it was still an unparalleled change in American politics, which coincided remarkably with the first sustained period of peace following the ratification of the Seventeenth Amendment.

This unprecedented growth of the national government was made possible by the direct election of senators. Bicameralism became less effective at restraining special interests once the House and the Senate began sharing the same constituency, and temporary majorities found that they could use its weight to force favorable legislation out of the Congress, even if it endangered the economic or political rights of individuals, businesses, or smaller factions. Furthermore, senators now had to conduct expensive state-wide campaigns to reach out directly to the public, which increased the willingness of senate candidates to make deals with special interests which could fund their campaigns, and made them rely upon political machines more to organize their campaigns.

Returning the Senate to its Original Form

When Senator Miller submitted his proposed amendment to the Senate and called for the end of the direct election of senators few analysts noticed, much less commented on it. Most of those who did comment on the resolution though did so in

[46] Holcombe, Randall G. "The Growth of the Federal Government in the 1920s." *Cato Journal*. Vol. 16, No. 2. Fall 1996. Pg. 175-177.

an effort to prove that Senator Miller had indeed lost all grip on reality. The idea of amending the Constitution for the sole purpose of *taking away* the voting rights of American citizens seems so backwards that most would never even consider it. That is exactly what must be done though.

When our current system of government was designed, the structure of the Senate was meant to play a critical role in maintaining the delicate balance of power within the nation. It was critical to protecting the rights of states, companies, and individuals from the uncontrollable growth of centralized power, and made it difficult for special interests or majority factions to plunder and oppress those with less influence. Alas, the insight of the framers of the Constitution faded into obscurity, and the structural safeguards that they built into the republic were removed. Almost a century later the central government has ballooned to a size that was unimaginable in 1913, yoking its citizens with an enormous tax and regulatory burden. While traditional attempts to reduce the size of government and lessen its burden through legislation may succeed in the short run, over the long term the predisposition of the national government to expand will continue, until the structural safeguards provided by the legislative selection of senators are restored.