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### Ulysses at the Mast: Democracy, Federalism, and the Sirens' Song of the Seventeenth Amendment

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# ULYSSES AT THE MAST: DEMOCRACY, FEDERALISM, AND THE SIRENS' SONG OF THE SEVENTEENTH AMENDMENT

*Jay S. Bybee\**

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Whoever, unaware, comes close and hears the Sirens' [lucid song] will nevermore draw near . . . his home . . . . But if you wish to listen to their song, just stand erect before the mast and . . . tie fast your hands and feet . . . . . But . . . if you plead with [your crew] to loose those bonds, they must add still more ropes and knots.<sup>1</sup>

## I. INTRODUCTION

One of the most remarkable aspects of the Constitution is the manner in which it marbles together people and states. The Constitution begins with the words "We the People of the United States"<sup>2</sup> and ends with requirements for state ratification and the signatures of its authors.<sup>3</sup> In between, the Constitution alternately protects or subjects to national control people and states.<sup>4</sup> While "American federalism allowed the federal government to do almost all its business directly

<sup>1</sup> THE ODYSSEY OF HOMER 244 (Allen Mandelbaum trans., 1990).

<sup>2</sup> U.S. CONST. pmb1. "The Constitution of the United States was ordained and established, not by the states in their sovereign capacities, but emphatically . . . by 'the People of the United States.'" *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 324 (1816).

In his 1865 commentary, O.A. Brownson asked,

Who are this people? . . . Are they the people of the States severally? No; for they call themselves the people of the *United States*. Are they a national people, really existing outside and independently of their organization into distinct and mutually independent States? No; for they define themselves to the people of the *United States*. If they had considered themselves existing as States only, they would have said "We, the States," and if independently of State organization, they would have said "We, the people," do ordain, &c.

THE AMERICAN REPUBLIC: ITS CONSTITUTION, TENDENCIES, AND DESTINY 220-21 (1865).

<sup>3</sup> U.S. CONST. art. VII. *Compare McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 403 (1819) (rejecting the argument that the Constitution emanated from the states: "when [the people] act, they act in their states. But the measures they adopt do not, on that account, cease to be the measures of the people themselves or become the measures of state governments.") *with U.S. Term Limits v. Thornton*, 115 S. Ct. 1842, 1875 (1995) (Thomas, J., dissenting) (quoting U.S. CONST. art. VII) (While "[t]he Constitution took effect once it had been ratified by the people gathered in convention in nine different states," it "went into effect only 'between the States so ratifying the same.'").

<sup>4</sup> I have discussed this structure in Jay S. Bybee, *Taking Liberties with the First Amendment: Congress, Section 5 and the Religious Freedom Restoration Act*, 48 VAND. L. REV. 1539, 1546-52 (1995).

with persons,"<sup>5</sup> the states remained "constituent and essential parts of the federal Government."<sup>6</sup>

By ratifying the Constitution, the states agreed to cede a portion of their sovereignty to a new entity, the "United States." The states granted to Congress their collective powers to impose taxes,<sup>7</sup> incur debt,<sup>8</sup> issue coin and securities,<sup>9</sup> regulate commerce among the states and with other sovereigns,<sup>10</sup> and control the engines of war.<sup>11</sup> The states further relinquished their rights to act as independent sovereigns and enter into treaties with foreign countries, coin money, grant titles of nobility, and wage war.<sup>12</sup> The states gave up their powers to lay duties on the goods of other states,<sup>13</sup> to treat citizens of other states as aliens who lack the privileges and immunities of their own citizens,<sup>14</sup> and to regard the public acts of other states as those of foreign powers.<sup>15</sup> As to those powers vested in Congress and deprived the states, Congress's authority was complete over people and states.

Nevertheless, Congress did not acquire the plenary powers of a national government. Madison noted that if "the Government [is] national with regard to the *operation* of its powers, it changes its aspect again when we contemplate it in relation to the *extent* of its powers."<sup>16</sup> The states reserved authority over their criminal laws,<sup>17</sup> particularly the power to issue or not the Writ of Habeas Corpus.<sup>18</sup> The Constitution also made clear that states might maintain a separate militia<sup>19</sup> and provide their own rules regarding religious freedom, speech, and

<sup>5</sup> William H. Riker, *The Senate and American Federalism*, 49 AM. POL. SCI. REV. 452, 453 (1955).

<sup>6</sup> THE FEDERALIST NO. 45, at 311 (James Madison) (Jacob E. Cooke ed., 1961).

<sup>7</sup> U.S. CONST. art. I, § 8, cl. 1.

<sup>8</sup> *Id.* § 8, cl. 2.

<sup>9</sup> *Id.* § 8, cls. 5, 6.

<sup>10</sup> *Id.* § 8, cl. 3.

<sup>11</sup> The Constitution accomplished this by affirmatively granting such powers to Congress and expressly disabling the states from exercising such powers. *Id.* § 8, cls. 11-16; § 10; see *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243, 249 (1833).

<sup>12</sup> U.S. CONST. art. I, § 10, cls. 1, 3.

<sup>13</sup> *Id.* § 8, cl. 2.

<sup>14</sup> *Id.* art. IV, § 2; see *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1869).

<sup>15</sup> U.S. CONST. art. IV, § 1.

<sup>16</sup> THE FEDERALIST NO. 39, at 256 (James Madison) (Jacob E. Cooke ed., 1961) (emphasis in original).

<sup>17</sup> U.S. CONST. art. IV, § 4; see Jay S. Bybee, *Insuring Domestic Tranquility: Lopez, Federalization of Crime, and the Forgotten Role of the Domestic Violence Clause* (unpublished manuscript, on file with *Northwestern University Law Review*).

<sup>18</sup> U.S. CONST. art. I, § 9, cl. 2; see Jordan Steiker, *Incorporating the Suspension Clause: Is There a Constitutional Right to Federal Habeas Corpus for State Prisoners?*, 92 MICH. L. REV. 862, 871-72 & n.42 (1994).

<sup>19</sup> U.S. CONST. art. I, § 8, cl. 16; amend. II.

press.<sup>20</sup> States retained a right to territorial integrity against efforts to divide or combine states<sup>21</sup> and the right not to be deprived of equal representation in the Senate without the state's consent.<sup>22</sup> To these enumerated reservations, the Constitution added that powers not delegated to the United States, nor prohibited to the states, were reserved to the states and the people.<sup>23</sup>

Nowhere is the interrelationship between the people who ordained and established the United States and the states who ratified it more evident than in the election of the President and the composition of Congress. The President and Vice President are selected by the electors who meet following popular election. By tradition, a state's electors—equal to the total of its senators and representatives in Congress—vote for the candidate who received the largest number of votes in the state.<sup>24</sup> The voting for President is accomplished by states. This arrangement combined both democracy and federalism, without subordinating one to the other.<sup>25</sup>

This same pattern replicated in the structure of Congress. As James Madison described it:

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<sup>20</sup> U.S. CONST. amend. I; Bybee, *supra* note 4, at 1557-60; see U.S. CONST. art. I, § 8, cl. 8; art. III, § 3, cl. 1; William T. Mayton, *Seditious Libel and the Lost Guarantee of a Freedom of Expression*, 84 COLUM. L. REV. 91, 115-16, 118 (1984) (arguing that the omission in Treason Clause to constructive treason barred seditious libel and that the Copyright Clause limits Congress's power to suppress freedom of press).

<sup>21</sup> U.S. CONST. art. IV, § 3.

<sup>22</sup> *Id.* art. V.

<sup>23</sup> *Id.* amend. X. The people, without regard to their political incorporation as states, reserved their own rights against the national government and the states. For example, people may not be deprived by the national government of the right to Habeas Corpus, *id.* art. I, § 9, cl. 2, nor may they suffer bill of attainder or ex post facto laws, *id.* art. I, § 9, cl. 3. The Bill of Rights specifies other rights that inure to "Owner," *id.* amend. III; "people," *id.* amend. IV; "person," *id.* amend. V; or "accused," *id.* amend. VI. Similarly, states are forbidden from enacting bills of attainder, ex post facto laws, or laws impairing the obligation of contracts. *Id.* art. I, § 10, cl. 1. My discussion here has been limited to those guarantees in the Constitution of 1789 and the Bill of Rights.

<sup>24</sup> *Id.* amend. XII; see also ALEXANDER M. BICKEL, *REFORM AND CONTINUITY: THE ELECTORAL COLLEGE, THE CONVENTION, AND THE PARTY SYSTEM* 5 (1971).

<sup>25</sup> As Professor Diamond explained,

Elections are as freely and democratically contested as elections can be—but *in the states*. Victory always goes democratically to the winner of the raw popular vote—but *in the states*. . . . Democracy thus is not the question regarding the Electoral College, federalism is: should our presidential elections remain in part *federally* democratic, or should we make them completely *nationally* democratic?

MARTIN DIAMOND, *THE ELECTORAL COLLEGE AND THE AMERICAN IDEA OF DEMOCRACY* 7 (1977) (emphasis in original); see Martin Diamond, *The Federalist on Federalism: "Neither a National Nor a Federal Constitution, But a Composition of Both,"* 86 YALE L.J. 1273, 1283-85 (1977) [hereinafter Diamond, *The Federalist on Federalism*]; see also U.S. Term Limits v. Thornton, 115 S. Ct. 1842, 1875 (1995) (Thomas, J., dissenting) ("The ultimate source of the Constitution's authority is the consent of the people of each individual State, not the consent of the undifferentiated people of the Nation as a whole.").

The house of representatives will derive its powers from the people of America, and the people will be represented in the same proportion, and on the same principle, as they are in the Legislature of a particular State. So far the Government is *national* not *federal*. The Senate on the other hand will derive its powers from the States, as political and co-equal societies; and these will be represented on the principle of equality in the Senate, as they now are in the existing Congress. So far the government is *federal*, not *national*.<sup>26</sup>

Federalism and democracy are not in opposition in Congress any more than they are in the Electoral College; they work in concert to hold the relationships among the national government, the states, and the people in constitutional equipoise. Neither is federalism a competitor to democracy, but its willing servant. Federalism suggests to the democratic impulse that it should confine itself to local rather than to national resolution; that uniformity of government is not required and may, therefore, not be demanded. Thus, federalism is a different manifestation of democratic will: Democracy demands that individual voices be heard; federalism asks, "How great the din?"

The mechanism by which the states could most readily defend against federal encroachment was their representation in the Senate. "[T]he equal vote allowed to each state, is at once a constitutional recognition of the portion of sovereignty remaining in the individual states, and the instrument for preserving that residuary sovereignty."<sup>27</sup> State legislatures stood to mediate between the national government and the people, both for the state's account and the account of the people. As Alexander Hamilton said,

[T]he state Legislature, who will always be not only vigilant but suspicious and jealous guardians of the rights of the citizens, against encroachments from the Federal government, will constantly have their attention awake to the conduct of the national rulers and will be ready enough, if any thing improper appears, to sound the alarm to the people and not only to be the VOICE but if necessary the ARM of their discontent.<sup>28</sup>

Accordingly, the Constitution entrusted to state legislatures the duty to elect the state's senators.<sup>29</sup>

Ironically, in 1913 the states dealt away their most potent tool—most willingly and in near record time—by ratifying the Seventeenth

<sup>26</sup> THE FEDERALIST NO. 39, at 254-55 (James Madison) (Jacob E. Cooke ed., 1961); see also THE FEDERALIST NO. 58, at 392 (James Madison) (Jacob E. Cooke ed., 1961) ("[P]eculiarity [in the Constitution] lies in this, that one branch of the legislature is a representation of citizens; the other of the states.").

<sup>27</sup> THE FEDERALIST NO. 62, at 417 (James Madison) (Jacob E. Cooke ed., 1961).

<sup>28</sup> THE FEDERALIST NO. 26, at 169 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

<sup>29</sup> U.S. CONST. art. I, § 3, cl. 1 ("The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislatures thereof."), repealed by U.S. CONST. amend. XVII.

Amendment.<sup>30</sup> During the debates over the proposed amendment, Elihu Root, New York Senator, former Secretary of State and War, and future Nobel Peace Prize winner, recognized the folly of this act. He said that in the original mode of selecting senators the people were as Ulysses, heroically bound to the mast that "he might not yield to the song of the siren . . . . [S]o 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."<sup>31</sup> Just as the Goddess Circe had warned Ulysses, "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>32</sup>

Yet, unbind themselves the states did. How could the states have been so foolhardy as to disenfranchise themselves? Why would the state legislatures surrender their most important constitutional function? Senator Root correctly surmised that when the states unbound themselves from the mast, they had little idea of the consequences of the amendment. In the eighty-three years since the states ratified the Seventeenth Amendment, they have willingly, though ignorantly, accepted the consequences of direct election. This article is an attempt to assess those consequences.

Part II discusses the original structure of the U.S. Senate and the constitutional architecture the Founders erected. There is a natural tension between the Senate's role as an independent, detached body in Congress and its duty to represent the states, and that tension runs through the debates over its formation. Part II also discusses the Founders' assumptions about the nature of senatorial election, representation and tenure, and importantly, those mechanisms for ensuring accountability in the Senate that were familiar to the Founders but that they chose not to make formal in the Constitution. These mechanisms, including instruction, recall, and rotation in office, might have insured greater state control over the Senate; their absence contributed to making state legislatures irrelevant to the process of selecting senators.

Part III reviews the debates over the Seventeenth Amendment, the stated reasons for its passage, and more modern views of the interests satisfied in its passage. The framers of the Amendment focused superficially on corruption in state legislatures and delay in electing senators, and ignored the effects direct election promised to bring to

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<sup>30</sup> "The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof . . . ." U.S. CONST. amend. XVII.

<sup>31</sup> 46 CONG. REC. 2241 (1911).

<sup>32</sup> 46 CONG. REC. 2242 (1911).

state representation in the Senate. While proponents of the Amendment expressed great confidence in the judgment of the people as electors, they manifested no concern for the future of the states and the severing of important ties between the Senate and state legislatures. They also failed to see that popular election alone relieved senators of any real accountability to their new constituency.

Despite the structural nature of the Seventeenth Amendment, it has occasioned surprisingly little scholarly commentary. There was almost no contemporaneous legal commentary,<sup>33</sup> and only recently has the legal community begun to explore the effect the Seventeenth Amendment has had on the American political and legal system.<sup>34</sup> In Part IV, I examine the effects of the direct election of senators. It had an immediate, measurable effect on the political composition in the Senate and likely had long-term effects on the political composition of

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<sup>33</sup> The principal contemporaneous work was GEORGE HAYNES, *THE ELECTION OF SENATORS* (1906) [hereinafter G. HAYNES, *ELECTION OF SENATORS*]. See Max Farrand, *Popular Election of Senators*, 2 *YALE REV.* 234 (1913) (asserting that Seventeenth Amendment is matter of policy; not contrary to original purposes); Joseph R. Long, *Tinkering with the Constitution*, 24 *YALE L.J.* 573, 587-88 (1915) (discussing ease of passage of Sixteenth and Seventeenth Amendments; opposing making it easier to amend the Constitution); Gordon E. Sherman, *The Recent Constitutional Amendments*, 23 *YALE L.J.* 129 (1913) (discussing the process by which the Seventeenth Amendment was adopted); Note, *Devices for Securing in Substance Direct Election of United States Senators*, 24 *HARV. L. REV.* 50 (1910) (discussing advisory primary elections as a substitute for direct election); see also Edward P. Buford, *Federal Encroachments upon State Sovereignty*, 8 *CONST. REV.* 23, 37 (1924) (arguing that Seventeenth Amendment threatens state sovereignty).

<sup>34</sup> C.H. HOEBEKE, *THE ROAD TO MASS DEMOCRACY: ORIGINAL INTENT AND THE SEVENTEENTH AMENDMENT* (1995) (suggesting that the Seventeenth Amendment has not fulfilled its promise); Vikram David Amar, *Indirect Effects of Direct Election: A Structural Examination of the Seventeenth Amendment*, 49 *VAND. L. REV.* 1347 (1996) (arguing that the Seventeenth Amendment affected separation of powers); Laura E. Little, *An Excursion into the Uncharted Waters of the Seventeenth Amendment*, 64 *TEMP. L. REV.* 629 (1991) (discussing the process for filling senatorial vacancies in light of Seventeenth Amendment); Todd J. Zywicki, *Senators and Special Interest: A Public Choice Analysis of the Seventeenth Amendment*, 73 *OR. L. REV.* 1007 (1994) (discussing state and constituent self-interests in seeking or opposing the Seventeenth Amendment); Roger G. Brooks, Comment, Garcia, *The Seventeenth Amendment, and the Role of the Supreme Court in Defending Federalism*, 10 *HARV. J.L. & PUB. POL'Y* 189 (1987) (discussing the Seventeenth Amendment's "crippling" effect on federalism); Kris W. Kobach, Note, *Rethinking Article V: Term Limits and the Seventeenth and Nineteenth Amendments*, 103 *YALE L.J.* 1971 (1994) (discussing the process of enacting the Seventeenth Amendment and its informal effect on Article V); Byron Daynes, *The Impact of the Direct Election of Senators on the Political System* (1971) (unpublished Ph.D. dissertation, University of Chicago) [hereinafter Daynes, *Direct Election*] (discussing the unintended consequences of the Seventeenth Amendment and suggesting that it has not achieved its purposes); see also Riker, *supra* note 5 (discussing the effects of the Seventeenth Amendment on federalism; noting the amendment's inevitability); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 *COLUM. L. REV.* 543 (1954) (noting, but failing to give any significance to, the Seventeenth Amendment).

I only became aware of Professor Amar's article as this article was going to press. I regret that I could not give it greater consideration.



state legislatures as well. It has made the Senate less responsive to the states and the people, contributed to longer Senate terms, and changed the calculus of the Senate's constitutional functions. I conclude that the actual effect of the Amendment has been greatly understated and that its role in reducing the constitutional position of the states has been enormous. Almost inadvertently, the Seventeenth Amendment altered constitutional politics, further insulating states from sharing in the control of the government they united to create.

## II. "MORE COOLNESS":<sup>35</sup> THE STRUCTURING OF THE U.S. SENATE

### A. Pre-Constitutional Senates

In the colonial period of American history, eleven of the thirteen original states had bicameral legislatures. The lower houses, known as the assembly, burgess, commons, representatives, or delegates, were patterned after the House of Commons and were popularly elected. The upper house, known as the council, resembled the House of Lords and was selected by the king in the royal colonies and the proprietor in the proprietary colonies. In the three popular colonies, the councillors were selected by the general legislature (Massachusetts) or the voters (Connecticut and Rhode Island).<sup>36</sup> Pre-revolutionary councils comprised "provincial aristocracy" and served in defense of royal authority.<sup>37</sup> Although many councillors were large landholders, most did not derive their principal income from land, and even fewer actually farmed; they represented "predominantly urban rather than rural" interests.<sup>38</sup>

Following the colonies' declaration of independence in 1776, colonial councils were renamed "senates" in early state constitutions. These early senates remained the stronghold of the aristocratic class—"to avoid 'the tumult and riot incident to a simple Democracy'"<sup>39</sup>—but democratic elements crept in. Although state senators served longer terms than their counterparts in the lower houses, they failed to secure permanent seats. "[D]espite . . . attempts to dilute or . . . to refine the democratic influence, the great majority of senators were chosen for short terms by small property holders."<sup>40</sup>

<sup>35</sup> 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 151 (Max Farrand ed., 1911) [hereinafter 1 FARRAND] (statement of James Madison).

<sup>36</sup> CLARA H. KERR, THE ORIGIN AND DEVELOPMENT OF THE UNITED STATES SENATE 2 (1895); JACKSON T. MAIN, THE UPPER HOUSE IN REVOLUTIONARY AMERICA, 1763-1788, at 3 (1967).

<sup>37</sup> MAIN, *supra* note 36, at 232.

<sup>38</sup> *Id.* at 94-95.

<sup>39</sup> Frances Harrold, *The Upper House in Jeffersonian Political Theory*, VA. MAG. HIST. & BIOGRAPHY 281, 281 (July 1970) (quoting Carter Braxton; citation omitted), reprinted in 1 THE CONGRESS OF THE UNITED STATES, 1789-1989, at 235 (Joel Sibley ed., 1991).

<sup>40</sup> MAIN, *supra* note 36, at 189, 235-36.

The Articles of Confederation departed from the bicameral system embraced by the states. Delegates to the unicameral Congress were to be "appointed in such manner as the legislature of each state shall direct, . . . with a power reserved to each state to recal[l] its delegates."<sup>41</sup> Additionally, states paid their own delegations and no delegate served for "more than three years in any term of six years."<sup>42</sup> The real debate was whether Congress represented states or people; large states naturally favored state representation in proportion to population, while smaller states argued that sovereign states must be represented equally. Ultimately, each state was granted one vote, although important questions, such as waging war and borrowing money, required the assent of nine states.<sup>43</sup> The state legislatures, given the power to decide the manner of appointing representatives to Congress, generally exercised that power in favor of themselves. Only two states—Connecticut and Rhode Island, both with histories of popular selection of senators—permitted the voters to elect their delegates.<sup>44</sup> Except in these two states, delegates looked to state legislatures for their appointments, and in all states they were beholden to state legislatures for their salaries and, because legislatures held the power to recall them, their continued appointment. Indeed, the only inroad on state control of members of Congress was the tenure limitation, which was the familiar colonial practice of rotation in office.<sup>45</sup> The structure of the Articles of Confederation emphasized that the delegations represented states (and their people) and not the people at large (and their united states).

### B. *The Creation of the Senate*

The Constitutional Convention of 1787 faced the same questions of representation as the Congress that agreed to the Articles of Confederation. Under the New Jersey Plan, Congress would have remained a single branch in which states would be represented equally; under the Virginia Plan, Congress would become a bicameral legislature, selected by the people.<sup>46</sup> Once the convention determined to have a bicameral legislature, it provided for a House of Representatives, chosen "by the people immediately, as a clear principle of free [government]."<sup>47</sup> The convention then turned to the "second branch"

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<sup>41</sup> ART. CONFED. art. V, § 1.

<sup>42</sup> *Id.* § 2.

<sup>43</sup> *Id.* § 4; art. IX, § 6; see MERRILL JENSEN, *THE ARTICLES OF CONFEDERATION* 141-45 (1940).

<sup>44</sup> I WILLIAM W. CROSSKEY, *POLITICS AND THE CONSTITUTION* 525-26 (1953).

<sup>45</sup> See *infra* text accompanying notes 193-230.

<sup>46</sup> CATHERINE D. BOWEN, *MIRACLE AT PHILADELPHIA* 104-06 (1966).

<sup>47</sup> 1 FARRAND, *supra* note 35, at 134 (statement of James Madison).

and to the difficult questions of mode of election, tenure, and state representation.<sup>48</sup>

Throughout the debates over the Senate, two themes recurred. First, the Senate should counter the democratic excesses of the people, newly represented in the House of Representatives. In Madison's words, the Senate must be structured to reflect "more coolness"<sup>49</sup> of decision and to "render [the houses of the legislature] 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 dependence on the society will admit."<sup>50</sup> Second, the Senate should serve as a check on the inexorable impulse of the new government to accretion of power. Federalism was to the states what separation of powers was for the three great departments: an assurance of non-encroachment.

1. *The Mode of Election of Senators.*—In late May 1787, Edmund Randolph of Virginia proposed that the members of the "second branch" (which would become the Senate) should be chosen by those of the first.<sup>51</sup> According to Randolph, the Senate he envisioned would be smaller than the first so as "to be exempt from the passionate proceedings to which numerous assemblies are liable"; a good senate, he argued, would check "the turbulence and follies of democracy."<sup>52</sup> Madison added that the Senate must be of limited membership in order to proceed with "more coolness, with more system, & with more wisdom. . . . The more the representatives of the people therefore were multiplied, the more they partook of the infirmities of their constituents."<sup>53</sup> According to Madison, the question was whether the Senate should be good or powerful; it might be both, but the latter was more important: "When the weight of a set of men depends merely on their personal characters; the greater the number the greater the weight. When it depends on the degree of political authority lodged in them the smaller the number the greater the weight."<sup>54</sup>

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<sup>48</sup> The terms—"terms" and "tenure"—are typically used interchangeably. More precisely, "term" refers to the period of time established by the Constitution—six years for senators. "Tenure" is a senator's length of service and may be multiple terms or may be less than a term if the senator resigned, died, or otherwise failed to complete a term. Sula P. Richardson, *Congressional Tenure: A Review of Efforts to Limit House and Senate Service 1* (CRS Report Sept. 13, 1989).

<sup>49</sup> 1 FARRAND, *supra* note 35, at 152.

<sup>50</sup> THE FEDERALIST NO. 51, at 350 (James Madison) (Jacob E. Cooke ed., 1961).

<sup>51</sup> 1 FARRAND, *supra* note 35, at 20.

<sup>52</sup> *Id.* at 51.

<sup>53</sup> *Id.* at 152.

<sup>54</sup> *Id.*

Randolph's proposal was met with criticism and alternative proposals.<sup>55</sup> Roger Sherman objected that a senate chosen by the representatives would tend to be appointed out of that body, and that a senate so selected would be too dependent, destroying its checking function.<sup>56</sup> George Read of Delaware suggested that senators should be appointed by the Executive from persons nominated by state legislatures.<sup>57</sup> The proposal found no support. James Wilson of Pennsylvania opposed both nomination by state legislatures and election by the first branch; the second branch should be independent of both bodies and both branches of the national legislature should be chosen by the people.<sup>58</sup> Madison agreed with Wilson to the extent the people promised "as uncorrupt & impartial a preference of merit," but Wilson's proposal likewise found little support.<sup>59</sup>

Richard Spaight of North Carolina proposed that the second branch be chosen by state legislatures, and his proposal was moved again by John Dickinson.<sup>60</sup> While the convention ultimately approved this proposal, the delegates offered very different reasons for supporting it. Several delegates argued that a senate elected by state legislatures, instead of selected by the people, would be more likely to produce "fit men."<sup>61</sup> Elbridge Gerry, taking a page from the experience of the colonial councils, argued that "commercial & monied interest [would] be more secure in the hands of the State Legislatures, than of the people at large."<sup>62</sup> The former, he argued, "have more sense of character, and will be restrained by that from injustice."<sup>63</sup> Since most states had two branches, "one of which is somewhat aristocratic," there would be a "better chance of refinement in the choice" of senators.<sup>64</sup> He repeated that "the great mercantile interest and of stockholders" would be better represented "if the state legislatures choose the second branch."<sup>65</sup> Madison added that the "Senate ought to come from, & represent, the Wealth of the nation."<sup>66</sup>

George Mason of Virginia took a very different, less instrumentalist approach. Drawing an analogy from the idea of separation of

<sup>55</sup> See *id.* at 152 (statement of Elbridge Gerry).

<sup>56</sup> *Id.* at 59.

<sup>57</sup> *Id.* at 151.

<sup>58</sup> *Id.* at 52, 58-59, 153-54, 159.

<sup>59</sup> *Id.* at 154.

<sup>60</sup> *Id.* at 51 (statement of Richard Spaight); *id.* at 150, 156, 158 (statement of John Dickinson).

<sup>61</sup> *Id.* at 154 (statement of Rep. Sherman).

<sup>62</sup> *Id.*

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

<sup>64</sup> *Id.* at 155.

<sup>65</sup> *Id.* at 157.

<sup>66</sup> *Id.* at 158. Dickinson suggested that the Senate should "draw forth the first characters either as to family or talent." *Id.* at 156.

powers, which the delegates had “studiously” endeavored to provide for [the departments’] self-defence,” Mason argued that the Constitution could not “leave the State alone unprovided with the means for [self-defence].”<sup>67</sup> Mason believed that having the senate selected by state legislatures would “prevent the encroachments on each other.”<sup>68</sup> Dickinson offered a variation on this theme. The differing composition of the two houses, “like the British house of lords and commons, whose powers flow from different sources, are mutual checks on each other.”<sup>69</sup> Mason summed up:

[W]e have agreed that the national Legislature shall have a negative on the State Legislatures—the Danger is that the national, will swallow up the State Legislatures—what will be a reasonable guard agt. this Danger, and operate in favor of the State authorities—The answer seems to me to be this, let the State Legislatures appoint the Senate—<sup>70</sup>

In the wake of Mason’s comments, the question of appointment by state legislatures carried unanimously.<sup>71</sup>

Gerry and Mason offer a stark contrast in motivation for having state legislatures choose senators. Their motivations are not inconsistent but are pieces in a puzzle to help us understand why the Senate was structured as it was. Gerry’s rationale was instrumentalist. State legislatures, themselves an elite group, would likely select a senate that looked very much like themselves. Such a propertied body would serve to protect the interests of the commercial and mercantile classes. The mode of election was merely a means of securing protection to the upper classes. However, Gerry’s premise—that state legislatures would elect persons drawn from the upper classes and that the voters generally would not select such persons—was somewhat flawed. Gerry’s “aristocratic” element more likely controlled only the upper houses in the state legislatures, while the voters whom Gerry feared continued to control the lower houses. To the extent that Gerry was correct that new Senate and House of Representatives would represent different economic interests, the bodies that would select the senators would mirror precisely those differences.

By contrast, Mason’s view sought state selection of senators as a good in itself. Mason wished to provide some mechanism for states to defend themselves against “encroachment” by a national government

<sup>67</sup> *Id.* at 155-56.

<sup>68</sup> *Id.* at 157.

<sup>69</sup> *Id.* at 156-57; see C. ELLIS STEVENS, SOURCES OF THE CONSTITUTION OF THE UNITED STATES 77-79 (reprint 1987) (2d ed. 1894) (discussing relationship of Senate to the House of Lords and the Privy Council).

<sup>70</sup> 1 FARRAND, *supra* note 35, at 160.

<sup>71</sup> *Id.*; see THE FEDERALIST NO. 62, at 415-16 (James Madison) (Jacob E. Cooke ed., 1961). Mason’s reference to a “negative” against state laws was a proposal that Congress should have a veto over all state laws. It was defeated shortly after the vote in favor of state legislatures selecting senators. 1 FARRAND, *supra* note 35, at 169-71.

that everyone recognized would have significantly more power than any American sovereign since July 3, 1776. A senate appointed by state legislatures would be a near-complete defense to national encroachment because the senate controlled one-half of Congress. Indeed, several early commentators noted that if the states refused to send or to pay their senators, it would frustrate Congress entirely.<sup>72</sup> Thus, in Mason's view, the states, rather than Gerry's upper classes, were the plan's primary beneficiaries.

2. *Length of Senatorial Tenure.*—The delegates agreed generally that senators should serve longer than representatives. Delegates proposed terms of three, four, five, six, seven, and nine years; others proposed tenure during "good behavior" and even life tenure.<sup>73</sup> William Pierce of Georgia feared that any term longer than three years would "raise an alarm" with the people and would remind them of the "[g]reat mischiefs" in England.<sup>74</sup> Charles Coatesworth Pinckney of South Carolina thought that longer terms worked against the southern states, whose senators had farther to travel. "If the Senators should be appointed for a long term, they [would] settle in the State where they exercised their functions; and would in a little time be rather the representatives of that than of the State appoint[ing] them."<sup>75</sup> Sherman thought seven years was too long. If senators did their duty, then they should be re-elected; but "if they acted amiss, an earlier opportunity should be allowed for getting rid of them."<sup>76</sup>

In the end, the delegates opted for stability in the Senate. For Randolph, the longer term guarded against "Democratic licentiousness."<sup>77</sup> Madison thought seven years would not give "too much stability" to the government and feared more that "the popular branch

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<sup>72</sup> See THE FEDERALIST No. 59, at 400 (Alexander Hamilton) (Jacob E. Cooke ed., 1961); 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 58 (photo. reprint 1941) (J. Elliot ed., 1836) [hereinafter ELLIOT'S DEBATES] (statement of William Davie). The Constitution granted Congress power to prescribe the "times, Places and Manner of holding Elections for Senators and Representatives," U.S. CONST. art. I, § 4, cl. 1, apparently to forestall the possibility of the states refusing to elect senators. See 3 ELLIOT'S DEBATES, *supra*, at 366 (statement of James Madison); 46 CONG. REC. 2649 (1911) (statement of Sen. Borah); *id.* at 2766-67 (statement of Sen. Rayner). The Convention also voted to pay Senators from the national treasury, U.S. CONST. art. I, § 6, cl. 1, to prevent states from effectively shutting down Congress by refusing to pay their senators. 2 FARRAND, *supra* note 35, at 291-92.

<sup>73</sup> 1 FARRAND, *supra* note 35, at 218, 408-09, 415, 421 (various proposals). Alexander Hamilton suggested life tenure, *id.* at 300, a proposal which John Jay supported. MAIN, *supra* note 36, at 217.

<sup>74</sup> 1 FARRAND, *supra* note 35, at 218.

<sup>75</sup> *Id.* at 421. See also Brutus, No. 16 (April 10, 1788) ("Six years is a long period for man to be absent from his home, it would have a tendency to wean him from his constituents."), in 2 THE FOUNDERS' CONSTITUTION 220 (Philip B. Kurland & Ralph Lerner eds., 1987).

<sup>76</sup> 1 FARRAND, *supra* note 35, at 218.

<sup>77</sup> *Id.*

would still be too great an overmatch for it.”<sup>78</sup> At the same time, however, Madison warned against re-election to lengthy terms. He thought even nine years was not too long, provided that the “long term allowed to the 2d. branch should not commence till such a period of life as would render a perpetual disqualification to be re-elected little inconvenient either in a public or private view.”<sup>79</sup>

The lengthy term for senators ensured a long view of problems. Though the question of tenure did not directly concern senators’ duties to their states, the longer term shielded states from precipitous actions by the House. Democratic excesses against the people might be cured as easily as they were created, but offenses to states might require greater time to rectify. The nature of the constituencies of the two houses suggests that the states had more to lose than the masses, and that the longer terms for senators secured the states’ position.

3. *Per Capita Voting and State Representation in the Senate.*— From the questions of mode of election and term of office, the convention then turned to the important question of state representation in the Senate. Without recounting all of the debate, much of which should be familiar to us, I will mention several important points which bear on the present discussion.

The great debate, of course, was over whether the states should have equal suffrage, suffrage based on population like the House, or something in between.<sup>80</sup> Often overlooked in the Great Compromise, which gave each state equal representation in the Senate and proportional representation in the House, was the decision that each state should send two senators. Gouverneur Morris suggested that each state elect three senators. This brought objections from several delegates who argued that the senate would be too numerous, particularly as new states were added to the union.<sup>81</sup> The convention had no sooner approved two senators when Luther Martin of Maryland objected to the senators voting per capita. It “depart[ed] from the idea of the *States* being represented in the 2d. branch.”<sup>82</sup> Without much further recorded discussion, the states voted nine to one (Maryland casting the sole negative vote) to permit representation per capita.<sup>83</sup>

The implications of the per capita vote far exceed the space allotted to the issue in Madison’s notes on the Constitutional Convention. The Great Compromise, after all, had been over the question of

<sup>78</sup> *Id.*; see also GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 436 (1969).

<sup>79</sup> 1 FARRAND, *supra* note 35, at 423.

<sup>80</sup> For example, Pinkney proposed that no state would have fewer than one vote, nor more than three. *Id.* at 155.

<sup>81</sup> 2 FARRAND, *supra* note 35, at 94.

<sup>82</sup> *Id.*

<sup>83</sup> U.S. CONST. art. I, § 3, cl. 1 (“each Senator shall have one Vote”).

whether states should be represented equally in the Senate. Having agreed to that momentous proposition, the convention provided without discussion that the delegates could vote independently and split their votes, and the convention, voting by states, approved the proposition. That action seems contrary to the idea of state representation.<sup>84</sup> The delegates may have assumed that there were other means, aside from voting by delegation, for state legislatures to assure a unified vote. The reasons for approving per capita voting may have had more to do with the delegates' practical experience than with a desire to undermine state representation. The Founders had a great deal of experience with divided caucuses, and even with caucuses that went unrepresented because of evenly divided votes. Per capita voting ensured that states would be represented, even if they were not represented consistently.<sup>85</sup> It also helped assure that divided delegations would not abstain and frustrate action by the Senate at all.

The Founders also may have assumed that per capita voting would better represent the states, even if a state's senators split their votes. Madison thought that corruption in the Senate would be unlikely without corrupting state legislatures themselves because "the periodical change of members would otherwise regenerate the whole body."<sup>86</sup> Even as a pair of senators represented a state, they would represent different moods or political sentiments. Senators elected by shifting majorities in the state legislatures would accurately reflect the shifting political sentiments of the people.

4. *The Senate's Constitutional Functions.*—The Senate and the House of Representatives mirrored different aspects of American political life. But their duties of representation were potentially in tension only in those matters in which the Senate and House had to agree—principally in the making of laws and amending the Constitution. Other functions of national self government were entrusted to a single house of the legislature. To the Senate, the Constitution conferred the power to advise the President on appointments and consent to their approval, to confirm treaties, and to try impeachments.<sup>87</sup>

There was no formal connection between the states and the Senate's advice and consent power or its impeachment powers. It was, however, implicit in the relationship between states and their senators. Hamilton wrote that the Senate's consent to appointment served as

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<sup>84</sup> Lewis Henry Boutell, *Roger Sherman in the Federal Convention*, S. Doc. No. 406, 56th Cong., 1st Sess. 46 (1902) ("The proposition . . . that the Senators vote per capita . . . removed from the proceedings of the Senate all appearances of State action."); see Diamond, *The Federalist on Federalism*, *supra* note 25, at 1282.

<sup>85</sup> See ROY SANDSTROM, *THE UNITED STATES SENATE, 1787-1801*, S. Doc. No. 64, 87th Cong., 1st Sess. 172-74 (1961) (discussing split voting in the first Congresses).

<sup>86</sup> *THE FEDERALIST* NO. 63, at 429 (James Madison) (Jacob E. Cooke ed., 1961).

<sup>87</sup> U.S. CONST. art. I, § 3, cl. 7; *id.* art. II, cl. 2.



“an excellent check upon the spirit of favoritism in the President, and would tend greatly to preventing the appointment of unfit characters from State prejudice.”<sup>88</sup>

Although the framers denied the states a formal role in the appointments process, they contemplated that the states would nevertheless serve some role. During the debates over the Appointments Clause,<sup>89</sup> Edmund Randolph observed that the appointment power vested in Congress and the President was “formidable” and asked whether some appointments should be left to the states.<sup>90</sup> Dickinson then moved to except from the President’s power those appointments “where by law the appointment shall be vested in the Legislatures or Executives of the several States.”<sup>91</sup> James Wilson replied that if this provision were enacted, state legislatures would issue “a standing instruction . . . to pass no law creating officers, unless the [appointments] be referred to them.”<sup>92</sup> The motion was defeated.

The Constitution also conferred on the President and the Senate the power to commit the United States to treaties,<sup>93</sup> and it expressly denied to the states the power to enter into “any Treaty, alliance, or Confederation.”<sup>94</sup> Conferring the ratifying power upon the Senate, where states were equally represented, made it less likely that the United States would “make treaties without an equal eye to the interests of all the states,” which had surrendered their sovereignty in this area.<sup>95</sup> Indeed, the power the Senate possessed in foreign affairs paled in comparison with the power the Constitution required the states to cede to the national government.

### C. *The Limits of Accountability*

The debates in the Federal Convention show two important purposes in the design of the Senate. First, the delegates were reluctant to turn the government over entirely to democratic whims. The Senate was the delegates’ response to this concern. It was a tempering institution, a body of elite senators whose terms and manner of election ensured greater stability in the Congress. With their terms three times longer than those of their House counterparts, senators could take a more detached view of issues coming before Congress. They

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<sup>88</sup> THE FEDERALIST NO. 76, at 513 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

<sup>89</sup> U.S. CONST. art. II, § 2, cl. 2.

<sup>90</sup> 2 FARRAND, *supra* note 35, at 405.

<sup>91</sup> *Id.* at 406.

<sup>92</sup> *Id.*

<sup>93</sup> U.S. CONST. art. II, § 2, cl. 2.

<sup>94</sup> U.S. CONST. art. I, § 10, cl. 1; *see* THE FEDERALIST NO. 22, at 144 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

<sup>95</sup> THE FEDERALIST NO. 64, at 437 (John Jay) (Jacob E. Cooke ed., 1961); *see* 2 FARRAND, *supra* note 35, at 392 (statement of James Madison); THE FEDERALIST NO. 66, at 450 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

were not subject to the same kind of repetitive review in the two-year election cycle, which constituted the Eighteenth Century equivalent of government by poll.

Second, the Senate protected the states as states; it stood as a defense to the federal government in the same way that each of the three branches of the national government had checks and balances against abuse of power by the other branches. The Senate stood to ensure that the system remained federal. Although the Senate comprised only half of the legislative branch, the principle of bicameralism guaranteed that Congress could not pass legislation without the concurrence of the Senate; the House of Representatives had no override to a Senate veto. While the Senate could not affirmatively approve legislation without the assent of the House, in a government of enumerated powers, it was sufficient for the states to possess the negative veto.

There was a natural tension between the idea of senators as counters to popular democracy (and, therefore, required to exercise independent judgment) and senators as the states' representatives (and, therefore, accountable to the states).<sup>96</sup> Manner of election, the length of senators' terms, and per capita voting gave senators a measure of independence. On the other hand, the manner of election and the fact that the states were represented proportionally suggested that senators had an obligation to the states; if the states were not to be represented as such, the Great Compromise was no compromise at all.

The states needed one or more mechanisms for ensuring the senators' accountability. The convention and the state ratifying conventions considered three familiar devices for the task: instruction of senators, recall, and rotation in office.<sup>97</sup>

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<sup>96</sup> Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1508 (1994). Frank Easterbrook has explained how representation helps to cure self-interest: "[A] representative's self-interest is not at stake in the vast majority of votes, and in any event, is not identical to the interests of constituents. Mediating among many factions, the representative answers to none." Frank H. Easterbrook, *The State of Madison's Vision of the State: A Public Choice Perspective*, 107 HARV. L. REV. 1328, 1331-32 (1994). Of course, that a representative can be said to represent no individual is not to say that the representative represents no one. A senator representing a state in fact represents numerous factions within that state, which are themselves represented variously in the state legislature.

<sup>97</sup> Professor Willi Adams locates these controls as part and parcel of more familiar mechanisms such as a bill of rights and the system of checks and balances: "The limiting of [colonial] governmental powers took several forms. The two most fundamental of these were the Bills of Rights and the fixed procedures for ratifying and amending constitutions. The third consisted of a number of technical measures: limited terms of office, instructions for representatives, restrictions on reelection, and the system of checks and balances, including the controls the two legislative chambers exert over each other." WILLI P. ADAMS, *THE FIRST AMERICAN CONSTITUTIONS* 243-44 (Rita Kimber & Robert Kimber trans., 1980) (footnote omitted); see also Diamond, *The Federalist on Federalism*, *supra* note 25, at 1281-82.

1. *Instruction of Senators.*—The most significant and controversial constraint on senators considered by the drafters was the right of state legislatures to instruct their senators.<sup>98</sup> The right had honorable origins in both the British and the colonial experience, particularly in the states of the South and Northeast.<sup>99</sup> As the colonists came to think of themselves as those who governed rather than those who were governed, the people began to think of their representatives as their agents rather than their guardians; legislators represented the people in the same way that an agent, ambassador, or attorney was bound to accede to the wishes of his principal.<sup>100</sup> In America, there was greater sentiment than in England that representatives were bound by instructions from their constituents.<sup>101</sup>

The right of instruction improved upon the more familiar right of petition, but the two are not the same. Petitions request that the legislature take a specified action, while instructions insist that the legislature take the action.<sup>102</sup> The legislature had the right, after consideration, to reject a petition; but in theory, it could not fail to

<sup>98</sup> Instructions are distinct from credentials, which are the initial authorization to a representative or agent. Kenneth Colgrove, *The Early History of State Instructions to Members of Congress, 1774-1812*, at I-2 (1915) (unpublished Ph.D. dissertation, Harvard University).

<sup>99</sup> ADAMS, *supra* note 97, at 246-47; THOMAS E. CRONIN, *DIRECT DEMOCRACY* 24-25 (1989); EDMUND S. MORGAN, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA* 209-23 (1988); JOHN P. REID, *THE CONCEPT OF REPRESENTATION IN THE AGE OF THE AMERICAN REVOLUTION* 96-118 (1989); Margaret E. Monsell, "Stars in the Constellation of the Commonwealth": *Massachusetts Towns and the Constitutional Right of Instruction*, 29 *NEW ENG. L. REV.* 285, 288-99 (1995). Instruction found its broadest support in Jeffersonian Republicans and Jacksonian Democrats and was not favored by more elitist Federalists and Whigs. CRONIN, *supra*, at 25. The doctrine was understood in England and practiced to varying degrees in Europe. ROBERT LUCE, *LEGISLATIVE PRINCIPLES: THE HISTORY AND THEORY OF LAWMAKING BY REPRESENTATIVE GOVERNMENT* 439-48 (1930).

Early discussions of the right of instruction are found in *An Argument on the Right of the Constituent to Instruct his Representative in Congress*, 4 *AM. REV.* 137 (1812) [hereinafter *The Right of the Constituent to Instruct*]; *Instructions to Representatives*, 4 *AM. JURIST* 314 (1830); 4 *AM. L.J.* 571 (1813).

<sup>100</sup> REID, *supra* note 99, at 105; see also Kenneth Bresler, *Rediscovering the Right to Instruct Legislators*, 26 *NEW ENG. L. REV.* 355, 360 (1991). John Adams once wrote that representation was "in reality nothing more than this, the people choose attorneys to vote for them in the great council of the nation, reserving always the fundamentals of the government, reserving also a right to give their attorneys instructions how to vote, and a right at certain, stated intervals, of choosing a-new. . . . It is this reservation of fundamentals, of the right of giving instructions, and of new elections, which creates a popular check upon the whole government." ADAMS, *supra* note 97, at 233 (citation omitted); see *ANNALS OF CONG.*, 11th Cong., 3d Sess. 154 (1811) (statement of Sen. Leib); WOOD, *supra* note 78, at 188-89. See also *id.* at 173-88. For a modern theory of legislators as representatives in the attorney-client model, see Marci A. Hamilton, *Discussion and Decisions: A Proposal to Replace The Myth of Self-Rule with An Attorneyship Model of Representation*, 69 *N.Y.U. L. REV.* 477 (1994).

<sup>101</sup> REID, *supra* note 99, at 102-03.

<sup>102</sup> See LUTHER S. CUSHING, *ELEMENTS OF THE LAW AND PRACTICE OF LEGISLATIVE ASSEMBLIES IN THE UNITED STATES OF AMERICA* 287 (9th ed. 1907) (stating that state legislatures could instruct senators only "by means of a legislative act, passed in the ordinary form").

follow instructions.<sup>103</sup> As Gordon Wood explains, "Petitioning implied that the representative was a superior" while instructing "implied that the delegate . . . was simply a mistrusted agent."<sup>104</sup> While the people occasionally abused their right of instruction, in general, the people only instructed their representatives on the most important of issues, and even then they were often careful to commit the matter to their delegate's good judgment.<sup>105</sup>

By instructing, a state legislature assumed responsibility for the votes of its senator. The political liabilities fell to the legislature rather than the individual senator. This shift of responsibility acted as a constraint on the state legislatures' willingness to instruct on controversial or difficult matters, and it undoubtedly prompted some senators to seek instruction as a way of insulating themselves.<sup>106</sup> State legislatures exercising their right of instruction did not encroach their senators' independence except as to that particular matter. State legislatures could not hope to instruct in all matters. But they could instruct on matters of great importance to the state or the people.<sup>107</sup> Significantly, by instructing its senators, a state legislature overcame the consequences (at least to the state) of per capita voting and united its delegation in the Senate.

The Senate provided a perfect opportunity for the exercise of the right, and through the first century of the nation, the controversial practice survived because of two facts. First, state legislatures, knowledgeable in matters before Congress and familiar with their constituents, were well situated to instruct their senators. The legislative body was a discrete group, easily convened to adopt instructions. The idea of legislative instruction fit well with the idea that senators represented the states. By contrast, members of the House of Representatives could not be so conveniently instructed. Their natural constituency was the voters themselves, who could not so efficiently convene to instruct their representatives. Since representatives had to stand for election every two years, the frequency of election guaranteed that representatives would inform themselves of their constituents' views. The legislature could not instruct perfectly in the affairs of individual congressional districts because, as a collegial body, it was only capable of instructing for the jurisdiction it represented—the state at large. State legislators, recognizing these limitations, sought

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<sup>103</sup> RAYMOND C. BAILEY, *POPULAR INFLUENCE UPON PUBLIC POLICY: PETITIONING IN EIGHTEENTH-CENTURY VIRGINIA* 31-32 (1979).

<sup>104</sup> WOOD, *supra* note 78, at 189.

<sup>105</sup> ADAMS, *supra* note 97, at 246-47.

<sup>106</sup> See, e.g., 32 CONG. REC. 838-39 (1899) (request of Sen. Perkins seeking instructions on ratification of a treaty with Spain).

<sup>107</sup> See *infra* notes 146-59 and accompanying text.

only to instruct their senators; they would only advise the state's delegation in the House of Representatives of their views.<sup>108</sup>

Second, the state legislatures elected senators and could re-elect them.<sup>109</sup> Accordingly, there was an efficient mechanism—the legislature—for advising senators, and a means—refusal to re-elect—for disciplining those who disobeyed instructions. The mechanism was imperfect because there was no contemporaneous means for compelling senators to obey instructions, and the practice of instruction was never fully accepted as a political doctrine. The system of instruction depended on senators regarding the legislature that sent them as their constituents, or as the proper representatives of the people.<sup>110</sup> Senators—quite naturally—resented having their judgment on national issues dictated or second-guessed by local politicians,<sup>111</sup> and they resented the idea that the President and other states might meddle in their own state's politics to bring about a particular instruction.<sup>112</sup>

*a. The constitutional debates over instruction.*—By 1789, several states had expressly guaranteed the right of instruction in their

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<sup>108</sup> Clement Eaton, *Southern Senators and the Right of Instruction, 1789-1860*, 18 J.S. Hist. 303, 303 (1952). See, for example, the form of a Virginia Resolution condemning Andrew Jackson's decision to remove federal funds from the Bank of the United States: "Resolved, That our Senators be *instructed*, and our Representatives be *requested* . . ." CONG. DEB., 23d Cong., 1st Sess. 2840 (1834) (emphasis added); see Colgrove, *supra* note 98, at I-18 ("[T]here does not appear to have been a single instance in which a State legislature claimed to be the constituency of the Representatives."). Representatives, however, sometimes accepted these resolutions as instructions. See, e.g., ANNALS OF CONG., 14th Cong., 2d Sess. 494-95 (1817) (statements of Reps. Robertson and Clay).

<sup>109</sup> A senator "held his place there, subject to the control of the Legislature . . . and whenever their instructions reached him, he should be governed by them." CONG. DEB., 23d Cong., 2d Sess. 255 (1835) (statement of Sen. King).

<sup>110</sup> See CONG. GLOBE, 39th Cong., 1st Sess. 3728 (1866) (statement of Sen. Williams) (discussing recorded voting for senators in state legislatures: "Members of the Legislative Assembly are frequently instructed by their constituents as to how they shall vote in the choice of a Senator, and I think those constituents have a right to know as to whether or not that representative obeys those instructions."). See also the interesting colloquies between Ohio Senators Thomas Morris and Thomas Ewing over their duty to follow contradictory instructions, CONG. DEB., 24th Cong., 1st Sess. 1021-28 (1836); between Tennessee Senators John Bell and Andrew Johnson over Senator Bell's declination to follow a resolution to admit Kansas to the union, CONG. GLOBE, 35th Cong., 1st Sess. 804-13 (1858); and between California Senators Stephen White and George Perkins over White's refusal to follow instructions to approve treaty with Spain, 32 CONG. REC. 838-42 (1899).

<sup>111</sup> "There is no public man that requires instructions more than I do, . . . but I do not like to have it come in too imperative a shape." CONG. GLOBE, 31st Cong., 1st Sess. 275 (1850) (statement of Sen. Webster); see SANDSTROM, *supra* note 85, at 170 (stating that in contrast to the Articles of Confederation, the Constitution freed state legislatures from legislating for the union, allowing them to focus on state issues).

<sup>112</sup> EATON, *supra* note 108, at 316 ("The practice of instructions in the 1830's constituted a standing invitation to the President to intervene in state politics and purge his opponents . . .").

constitutions,<sup>113</sup> and the right figured prominently in the ratifying debates and in the debates during the drafting of the Bill of Rights. Although no formal proposal for a right of instruction was debated in the first state ratifying conventions, the right of instruction was mentioned frequently and was assumed always to exist. In Massachusetts, Rufus King thought that “state legislatures, if they find their [senators] erring, can and will instruct them.”<sup>114</sup> These “public instructions” would constitute a “check” that only the most “hardy” would ignore.<sup>115</sup> In New York, Hamilton agreed that the people had a right to instruct their representatives, and the state legislatures had a right to instruct their senators.<sup>116</sup> John Jay assumed that instructions would constitute “a constant correspondence,”<sup>117</sup> while in Virginia, James Monroe asserted that senators had a “duty to obey their directions.”<sup>118</sup> Both Virginia and North Carolina proposed amendments guaranteeing the right of the people “to instruct their representatives.”<sup>119</sup>

On August 15, 1789, during debates over what would become the First Amendment, Thomas Tucker of South Carolina pointed out that the proposed amendment omitted the right “to instruct their representatives,”<sup>120</sup> as requested by North Carolina and Virginia. The proposed amendment initially caused a great deal of confusion. Madison pointed out that Congress was prepared to secure the freedom of speech and the press, and the right of the people to petition their representatives. If the amendment meant the people could advise their representatives, it was redundant. He asked if it meant that delegates

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<sup>113</sup> *E.g.*, MASS. DECL. OF RIGHTS art. XIX (1780), reprinted in 1 BENJAMIN PERLEY POORE, FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS AND OTHER ORGANIC LAWS OF THE UNITED STATES 959 (2d ed. 1878) [hereinafter FEDERAL AND STATE CONSTITUTIONS]; N.H. CONST. OF 1784 art. XXXII, reprinted in 2 FEDERAL AND STATE CONSTITUTIONS, *supra*, at 1283; N.C. DECL. OF RIGHTS art. XVIII (1776), reprinted in 2 FEDERAL AND STATE CONSTITUTIONS, *supra*, at 1410; VT. DECL. OF RIGHTS art. XXII (1786), reprinted in 2 FEDERAL AND STATE CONSTITUTIONS, *supra*, at 1869. The right of instruction was frequently found in a state’s bill of rights, usually together with the right of petition or consultation.

<sup>114</sup> 2 ELLIOT’S DEBATES, *supra* note 72, at 47.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 252.

<sup>117</sup> *Id.* at 283.

<sup>118</sup> 3 ELLIOT’S DEBATES, *supra* note 72, at 334. *But see id.* at 355 (statement of Patrick Henry) (“[Y]ou may instruct them and offer your opinions; but if they think them improper they may disregard them”; arguing for a right of recall to enforce instructions.).

<sup>119</sup> *Id.* at 658-59 (Virginia); 4 ELLIOT’S DEBATES, *supra* note 72, at 244 (North Carolina). Virginia “enjoin[ed]” its representatives “to exert all their influence and use all reasonable and legal methods, to obtain” these amendments. 3 ELLIOT’S DEBATES, *supra* note 72, at 661.

<sup>120</sup> 1 ANNALS OF CONGRESS 732 (Gales & Seaton eds., 1834) (Aug. 15, 1789). The debates of 1789 are found in two different reports, each with its own pagination. For clarity, I have followed citations of volume one with the exact date.

were obliged to follow the instructions.<sup>121</sup> The amendment's supporters assured him it did. The right to instruct, argued John Page of Virginia, followed directly from the right of petition: "[T]o what end will [the right of the people to consult] be done, if they have not the power of instructing their representatives? Instruction and representation in a Republic appear . . . to be inseparably connected."<sup>122</sup> Maryland's Michael Stone opposed the proposition because it bespoke "a democracy of singular properties," and that once representatives were instructed to the contrary, "any law passed by the Legislature would be of no force."<sup>123</sup>

The latter idea brought the proposal into focus. What were the consequences of failure to follow instructions, and were there circumstances—if the instructions violated the Constitution or the member's conscience—under which a member could rightfully ignore the instructions?<sup>124</sup> As Senator William Maclay later noted, if laws passed contrary to instructions were void altogether or void in that state, then the states had been given a veto over federal legislation.<sup>125</sup> Moreover, the members had posed a question unique to the House of Representatives: the Senate represented the states and could look to their respective state legislatures, but to whom should the members of the House look for instructions?<sup>126</sup> Tucker's proposal failed by a sizeable majority in the House,<sup>127</sup> and a similar proposal fared no better in the Senate.<sup>128</sup>

Although Tucker's amendment provided a useful opportunity for the Founders to discuss the doctrine of instruction, the inferences to be drawn from the amendment's failure are few. We cannot conclude that the Founders thought that a right of instruction was contrary to constitutional design because they only considered the right in the context of the House of Representatives, a place for which it was ill-suited. That body was distinct from the Senate in size, term, and mode of election. House districts were smaller than states, and the

<sup>121</sup> *Id.* at 738; *see also id.* at 735-37 (statements of Reps. Clymer, Sherman, Jackson and Gerry).

<sup>122</sup> *Id.* at 734.

<sup>123</sup> *Id.* at 739.

<sup>124</sup> *Id.* at 738-39 (statement of Rep. Madison); *id.* at 740 (statement of Rep. Gerry); *see also* 3 ELLIOT'S DEBATES, *supra* note 72, at 334 (statement of James Monroe explaining why he ignored his instructions).

<sup>125</sup> WILLIAM MACLAY, THE JOURNAL OF WILLIAM MACLAY, UNITED STATES SENATOR FOR PENNSYLVANIA, 1789-1791, at 215 (1927); *see* ANNALS OF CONG., 11th Cong., 3d Sess. 194-95 (1811) (statement of Sen. Giles) (A senator had a "constitutional and legal right to disobey his instructions" because "a law passed by a vote in disobedience of instructions is as valid as a law passed by a vote in obedience to instructions.").

<sup>126</sup> 1 ANNALS OF CONG., *supra* note 120, at 742 (statement of Rep. Livermore); *id.* at 743 (statement of Rep. Sedgwick); *id.* (statement of Rep. Ames) (Aug. 15, 1789).

<sup>127</sup> The vote was 41 to 10 against Tucker's amendment. *Id.* at 747.

<sup>128</sup> SENATE JOURNAL, 1st Cong., 1st Sess. 117 (1789).

people at large were poorly situated to control House members through instruction. Realistically, only a discrete body such as a state legislature could issue instructions.

Opponents of instruction had two general objections. First, they protested that it infringed the representatives' independent judgment.<sup>129</sup> Undoubtedly, instruction transferred power from representatives back to the people. But the objection was overstated because the people issued instructions only for the most important, or at least the most visible, issues. The reasons for this are obvious: the body politic had neither the time nor the will to govern itself in a pure democracy and for that reason had chosen a legislative agent. For some issues about which the electorate felt strongly, it was willing to assemble and define by consensus a set of instructions. Second, instruction's opponents objected that representatives should not be obligated to obey instructions because representatives represented the *whole*.<sup>130</sup> On this theory, each representative was responsible to the entire community, and not just to his own province. This was a far more difficult proposition to defend. Carried to its extreme, it destroyed any need for local elections. If representatives represented the whole, they might be selected by the whole, and few were willing to go so far. Asking legislative agents to represent the whole of the people, and not just their district or state, not only asked too much, but homogenized all notion of competing faction.<sup>131</sup>

The instruction debates again highlight the tension between the Founders' desire for an independent legislative body—secured through a six-year term—and a body to represent the states—secured through selection by legislatures. The Founders' desire that the Senate be independent is not inconsistent with the doctrine of instruction. States did not, in practice, and could not, even in theory, issue instructions on all matters, any more than the electorate could monitor all decisions of its elected representatives. That is the economy of representative government. A state's control over its senators through instructions was never absolute, and senators retained a great deal of discretion and independence. But there is no denying that instruction was important to the states and was resented and resisted by some senators. This resistance may reflect simple policy disagreements, or

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<sup>129</sup> REID, *supra* note 99, at 105.

<sup>130</sup> E.g., *The Right of the Constituent to Instruct*, *supra* note 99, at 143 (“[T]he power delegated . . . is to be exercised for the benefit of the community.”); ANNALS OF CONG., 11th Cong., 3d Sess. 194 (1811) (statement of Sen. Giles); see REID, *supra* note 99, at 105-06.

<sup>131</sup> See THE FEDERALIST NO. 10 (James Madison) (Jacob E. Cooke ed., 1961); BICKEL, *supra* note 24, at 14-19 (“What we have evolved, therefore, is not majority rule, but a pluralist system . . . of minorities rule.”); Easterbrook, *supra* note 96, at 1332 (“Elections from different states with different factions dilute the power of faction.”).



it may reflect a natural reluctance by these senators to admit their dependence on someone else's judgment.

In one sense, making the right of instruction formal in the Constitution would have been superfluous. The people did not lose any right to instruct their representatives. By not including the right in the First Amendment, the First Congress avoided the difficult question of enforcement. Although Representative Stone thought that laws were a nullity if passed with votes cast in violation of the members' instructions, it is not clear that anyone else, including Thomas Tucker, agreed with him. So what were the consequences? Did violation of instruction invite judicial review of the law (although in today's parlance, it probably would be a "political question"); or was the delegate defrocked automatically; or did the violations merely alert the state legislature, which might exercise a power of recall?<sup>132</sup> The right's omission from the Constitution left to the legislatures the right to instruct their senators and then determine for themselves whether the penalty for disobedience was recall, refusal to re-elect, or something else.

On the other hand, the lack of an express constitutional right of instruction diminished the legislatures' claim to exercise of the right and lent credence to the argument that senators were accountable only to the people. In an address during the debates over the Second Bank of the United States, Senator Giles of Virginia argued that instruction was contrary to the spirit of the new Constitution that "operate[d] upon the people of the United States in their individual characters," in contrast to the Articles of Confederation which "operated upon the States in their corporate characters."<sup>133</sup> Giles acknowledged the duty of representatives to obey instructions of "the people, as the legitimate source of all power."<sup>134</sup> But acknowledging the right of the *people* to instruct was an empty theory because there was no mechanism for the people to give such instructions; Giles' argument simply freed senators from accountability to state legislatures.<sup>135</sup> It also laid bare the important differences between the unicameral Congress of the Articles of Confederation and the bicameral Constitution. Under the former, the people were represented imperfectly through their state citizenship. By providing for a House and Senate, the Constitution satisfied the democratic impulse and the need for sectional-

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<sup>132</sup> See Bresler, *supra* note 100, at 384-86 (discussing the enforcing of instructions).

<sup>133</sup> ANNALS OF CONG., 11th Cong., 3d Sess. 196 (1811).

<sup>134</sup> *Id.* at 199.

<sup>135</sup> Even Giles admitted the right of the people to instruct "if practicable." *Id.* Contrast Giles's views with John C. Calhoun's claim that in instructions "the people of this country [have] matched the power of deliberation from this body[,] . . . [t]hey [have] resolved the Government into its original elements, and reserved to themselves their primitive power of legislation." ANNALS OF CONG., 14th Cong., 2d Sess. 576 (1817).

ism. While both the House and the Senate respected state geographical boundaries, the Constitution apportioned House seats roughly by population; it respected the democracy of what would become "one person/one vote" proportionality. The Senate defied any such connection. Instruction helped ensure fidelity to the states as a political entity and, indirectly, to the people who comprised it.

*b. The early practice of instruction.*—The Founders' failure to include an express right of instruction did not deter the states, many of which had—and many of which continue to have—a right under their own constitutions to instruct their legislators.<sup>136</sup> The question of the role of instruction arose in the First Congress.<sup>137</sup> The Senate, unlike the House, had refused to deliberate in public. These closed sessions enjoyed broad support among the Federalists, whose economic policies had the support of Secretary of the Treasury Alexander Hamilton. In December 1789, Virginia instructed its senators to secure "one of the important privileges of the people" by obtaining their "free admission" to the Senate.<sup>138</sup> Virginia's resolution was ignored,<sup>139</sup> and Maryland, New York, North Carolina, South Carolina, and Virginia instructed their senators to press again for open meetings.<sup>140</sup> When Senator James Monroe of Virginia again urged such action, the debate turned from the merits of open sessions to the states' right to instruct. "[N]o legislature has any right to instruct at all," claimed Federalist Senator Izard of South Carolina, while Connecticut's Oliver Ellsworth stated that instructions "amounted to no more than a wish and ought to be no further regarded."<sup>141</sup> Monroe's motion was defeated seventeen to nine, with one Senator each from Maryland, North Carolina, and South Carolina voting contrary to his instructions.<sup>142</sup>

Maryland, North Carolina, South Carolina, and Virginia reissued their instructions, making it clear that senators were "bound by the instructions of the legislature . . . where such instructions are not re-

<sup>136</sup> LUCE, *supra* note 99, at 454-55; Bresler, *supra* note 100, at 364 n.57 (listing states currently having such a right).

<sup>137</sup> See SANDSTROM, *supra* note 85, at 161-62; David P. Currie, *The Constitution in Congress: The First Congress and the Structure of Government, 1789-1791*, 2 U. CHI. L. SCH. ROUNDTABLE 161, 172-73 (1995).

<sup>138</sup> Elizabeth G. McPherson, *The Southern States and the Reporting of Senate Debates, 1789-1802*, 12 J.S. HIST. 223, 228 (1946) (citation omitted). The movement followed criticism of the Senate's closed deliberations over the Jay Treaty. See STANLEY ELKINS & ERIC MCKITRICK, *THE AGE OF FEDERALISM* 417-18 (1993).

<sup>139</sup> ANNALS OF CONG., 1st Cong., 2d Sess. 967-68 (Apr. 29-30, 1790); SENATE JOURNAL, 1st Cong., 2d Sess. 64, 65-66 (1790).

<sup>140</sup> McPherson, *supra* note 138, at 229-31.

<sup>141</sup> MACLAY, *supra* note 125, at 387-89.

<sup>142</sup> 1 ANNALS OF CONG., 1st Cong., 3d Sess. 1768 (Feb. 24, 1791); SENATE JOURNAL, 1st Cong., 3d Sess. 123-24 (1791).

pugnant to the constitution of the United States” and condemning the senators’ refusal as not justified “by any refinement of theory.”<sup>143</sup> Senators from Maryland and South Carolina again ignored their instructions, and this time Maryland issued a vote of censure.<sup>144</sup> Ultimately, in 1794, the Senate agreed to open its doors, and in its resolution of approval the Senate identified itself as “the Representatives of the sovereignties of the individual states.”<sup>145</sup>

States instructed their senators and representatives during this early period in other significant matters as well. Kentucky, for example, instructed them through the Kentucky Resolution to procure repeal of the “unconstitutional and obnoxious” Sedition Act.<sup>146</sup> States issued instructions on the recharter of the Bank of the United States;<sup>147</sup> the question of recognition of English common law;<sup>148</sup> the compensation of Congress;<sup>149</sup> construction of bridges;<sup>150</sup> cod and whale fishing;<sup>151</sup> pensions;<sup>152</sup> construction of a Marine hospital;<sup>153</sup> futures;<sup>154</sup> free coinage of silver;<sup>155</sup> the admission of Kansas, California, West Virginia, and New Mexico as states;<sup>156</sup> slavery;<sup>157</sup> presidential

<sup>143</sup> McPherson, *supra* note 138, at 233 (citations omitted).

<sup>144</sup> ANNALS OF CONG., 2d Cong., 1st Sess. 113 (1792); SENATE JOURNAL, 2d Cong., 1st Sess. 165 (1792); McPherson, *supra* note 138, at 234; *see also* CARL N. EVERSTINE, THE GENERAL ASSEMBLY OF MARYLAND, 1776-1850, at 209-17 (1982).

<sup>145</sup> ANNALS OF CONG., 3d Cong., 1st Sess. 33-34 (1794).

<sup>146</sup> 4 ELLIOT’S DEBATES, *supra* note 72, at 542. There is some disagreement over whether the Kentucky Resolution was in the form of instruction. *See* Colgrove, *supra* note 98, at X-45, 46 & n.63 (noting that Kentucky Senator Marshall failed to move repeal of the Alien and Sedition Laws as requested, to public disapproval but no official censure). *Compare* Riker, *supra* note 5, at 457 (Kentucky Resolution constituted instructions) *with* Wayne D. Moore, *Reconceiving Interpretive Autonomy: Insights from the Virginia and Kentucky Resolutions*, 11 CONST. COMM. 315, 322 (1994) (Kentucky Resolution was a petition and not an instruction).

<sup>147</sup> ANNALS OF CONG., 11th Cong., 3d Sess. 153-54 (1811) (instructions of Pennsylvania); *id.* at 201 (instructions of Virginia).

<sup>148</sup> I BLACKSTONE’S COMMENTARIES 438 (St. George Tucker ed., 1803).

<sup>149</sup> *See* ANNALS OF CONG., 14th Cong., 2d Sess. 594 (1817) (referring to instructions of Massachusetts).

<sup>150</sup> *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518, 524, 526-27 (1851) (instructions of Ohio to obtain bridge funding; instructions of Pennsylvania to oppose bridge construction).

<sup>151</sup> LUCE, *supra* note 99, at 461 (instructions of Massachusetts).

<sup>152</sup> *Id.*

<sup>153</sup> Colgrove, *supra* note 98, at X-35.

<sup>154</sup> 24 CONG. REC. 992 (1893) (statement of Sen. Vest) (referring to instructions of Mississippi).

<sup>155</sup> 7 CONG. REC. 1061 (1878) (instructions of Mississippi).

<sup>156</sup> *Virginia v. West Virginia*, 78 U.S. (11 Wall.) 39, 58-59 (1870) (Virginia instructions to obtain consent of Congress to admit West Virginia to union; describing this as an “emphatic legislative proposition”); CONG. GLOBE, 35th Cong., 1st Sess. 804 (1858) (Tennessee resolution instructing senators to vote to admit Kansas as a state); CONG. GLOBE, 31st Cong., 1st Sess. 52 (1850) (Vermont instructions to admit New Mexico and California).

<sup>157</sup> CONG. GLOBE, 31st Cong., 1st Sess. 52 (1850) (instructions of Vermont); *id.* at 275 (statement of Sen. Webster, referring to instructions from Northern states).

censure;<sup>158</sup> and various constitutional amendments, including the Eleventh and Twelfth Amendments.<sup>159</sup>

The Senators who received instructions contrary to their own views faced a difficult dilemma. Some, believing their obligation fixed, announced they would follow instructions.<sup>160</sup> Others accepted the instructions as advisory, but denied their binding effect.<sup>161</sup> Still other senators rationalized that they were relieved of their duty if the instructions might violate the Constitution,<sup>162</sup> or more likely, if the Senator believed the legislature issued its instructions without full information.<sup>163</sup>

In fact, a number of senators resigned rather than follow instructions from their home legislatures, and several determined not to stand for re-election over their differences.<sup>164</sup> During the vituperative debates over Andrew Jackson and the rechartering of the second Bank of the United States,<sup>165</sup> the New Hampshire legislature, after issuing a lengthy preamble and instructions, resolved,

That the honorable Samuel Bell, since his re-election to the Senate of the United States, has pursued a course in defiance of the wishes of the people of New Hampshire; that he has long misrepresented, and now misrepresents, the opinions of a majority of his constituents, and that he be and hereby is requested to resign his seat, agreeably to the solemn pledge heretofore made by him.<sup>166</sup>

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<sup>158</sup> CONG. GLOBE, 23d Cong., 1st Sess. 315-16 (1834) (instructions of Maine, New Jersey, and Ohio); *see also* CONG. GLOBE, 24th Cong., 1st Sess. 159 (1836) (instructions of New Jersey).

<sup>159</sup> *See* ANNALS OF CONG., 8th Cong., 1st Sess. 95-96 (1803) (instructions of Vermont and request of Massachusetts); *New Hampshire v. Louisiana*, 108 U.S. 76, 88 (1883) (instructions from Massachusetts to procure constitutional amendment in light of *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793)); *Florida v. Georgia*, 58 U.S. (17 How.) 478, 519-20 (1854) (Campbell, J., dissenting) (same; instructions of Virginia); *infra* notes 394-95 and accompanying text.

<sup>160</sup> *E.g.*, CONG. DEB., 23d Cong., 2d Sess. 262 (1835) (statement of Sen. Benton); ANNALS OF CONG., 14th Cong., 2d Sess. 494 (1817) (statement of Rep. Robertson); LUCE, *supra* note 99, at 466, 473 (examples of senators voting consistent with their instructions and against their own announced views).

<sup>161</sup> *E.g.*, CONG. GLOBE, 35th Cong., 1st Sess. 805 (1858) (statement of Sen. Bell); ANNALS OF CONG., 8th Cong., 1st Sess. 199 (1803) (statement of Sen. Plumer); *see also* ANNALS OF CONG., 14th Cong., 2d Sess. 594 (1817) (statement of Rep. Pickering).

<sup>162</sup> *E.g.*, CONG. DEB., 23d Cong., 2d Sess. 256 (1835) (statement of Sen. Moore); *id.* at 722 (statement of Sen. Mangum) (instructions may require violation of U.S. CONST. art. I, § 5, cl. 3 requirement that the Senate keep a journal of its proceedings); ANNALS OF CONG., 8th Cong., 1st Sess. 153-54 (1803) (statement of Sen. Plumer) (instructions to amend the Constitution violated Article V); *id.* at 176-77 (statement of Sen. Tracy) (same); *see* ANNALS OF CONG., 14th Cong., 2d Sess. 495 (1817) (statement of Rep. Clay); *id.* at 620 (statement of Rep. Tyler).

<sup>163</sup> *E.g.*, CONG. GLOBE, 35th Cong., 1st Sess. 809-10 (1858) (statement of Sen. Bell).

<sup>164</sup> *E.g.*, LUCE, *supra* note 99, at 463-68 (examples of John Quincy Adams and others who resigned rather than follow instructions).

<sup>165</sup> *See* Eaton, *supra* note 108, at 305-15; *see also* William E. Dodd, *The Principle of Instructing United States Senators*, 1 S. ATLANTIC Q. 326 (1902).

<sup>166</sup> CONG. DEB., 23d Cong., 1st Sess. 2062 (1834). Senator Bell filled the remaining nine months of his term and was not re-elected.

The bank affair involved two separate incidents. In order to cripple the Bank, President Jackson had ordered the withdrawal of all U.S. funds from it, an action which various state legislatures applauded or condemned.<sup>167</sup> Then, after the Senate ordered Jackson censured for this act, several state legislatures ordered the censure expunged from the Senate records.<sup>168</sup> In this controversial period, between 1834 and 1840, at least seven Southern senators resigned their offices rather than accede to their instructions.<sup>169</sup> Others boldly announced that they would not follow the instructions and paid a heavy political price for their noncompliance.<sup>170</sup>

Not all senators who resisted their instructions paid such a price. Particularly as the practice of instruction died out after the Civil War, senators who refused their legislative patrons sometimes benefitted by appearing statesmanlike and independent.<sup>171</sup> After the war, the practice of instruction dwindled, though it did not die out completely. Indeed, the practice survived until the adoption of the Seventeenth Amendment.<sup>172</sup> As an ultimate irony, the last recorded refusal to follow legislative instructions was that of Senator Weldon Heyburn of

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<sup>167</sup> The incident helped propel Attorney General Roger Taney into the spotlight. Secretary of the Treasury William Duane refused Jackson's order to remove the funds. Jackson fired him and replaced him temporarily with Taney. When Jackson formally nominated Taney as Treasury Secretary, the Senate rejected him. Later Jackson nominated him to the Court and, on the second attempt, was successful. *THE SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES, 1789-1993*, at 118 (Clare Cushman ed., 1993).

<sup>168</sup> *E.g.*, CONG. DEB., 24th Cong., 1st Sess. 1021 (1836) (instructions of Ohio); CONG. DEB., 23d Cong., 2d Sess. 253 (1835) (instructions of Alabama).

<sup>169</sup> The roll call includes Senators Alexander Porter of Louisiana; Bedford Brown, Robert Strange, and Willie Mangum of North Carolina; Hugh White of Tennessee; and William Rives and John Tyler of Virginia. 2 GEORGE H. HAYNES, *THE SENATE OF THE UNITED STATES* 1025-31 (1938) [hereinafter G. HAYNES, *SENATE OF THE UNITED STATES*]; KERR, *supra* note 36, at 83-85; Dodd, *supra* note 165, at 327-29; Eaton, *supra* note 108, at 305-18; *see also* SANDSTROM, *supra* note 85, at 166-68; LUCE, *supra* note 99, at 468-70; Riker, *supra* note 5, at 459 n.18.

<sup>170</sup> Benjamin Leigh of Virginia, for example, announced that he would neither follow instructions nor resign. He in fact resigned within months, but cited health as his reason. 2 G. HAYNES, *SENATE OF THE UNITED STATES*, *supra* note 169, at 1028; Eaton, *supra* note 108, at 313-15.

<sup>171</sup> Two prominent senators who successfully refused their instructions were future Supreme Court Justice Lucius Q.C. Lamar of Mississippi, *see* 32 CONG. REC. 840 (1899); 7 CONG. REC. 1061 (1878); 2 G. HAYNES, *SENATE OF THE UNITED STATES*, *supra* note 169, at 1029-30, and Charles Sumner of Massachusetts, *see* KERR, *supra* note 36, at 85; *see also* 32 CONG. REC. 840 (1899).

<sup>172</sup> *See, e.g.*, ELECTION OF UNITED STATES SENATORS, H.R. REP. NO. 88, 56th Cong., 1st Sess. 2 (1900); S. REP. NO. 530, 54th Cong., 1st Sess. 9 (1896) (noting that nine states had "instructed in favor of this amendment"); 46 CONG. REC. 2770 (1911) (statement of Sen. Overman); 45 CONG. REC. 7111 (1910) (statement of Sen. Owen); *id.* at 7113 (instructions of California), 7115 (instructions of Kansas), 7117 (instructions of North Carolina); 23 CONG. REC. 1267 (1892) (statement of Sen. Palmer); 23 CONG. REC. 76 (1891) (statement of Sen. Turpie).

Idaho, who refused to support the Seventeenth Amendment and disenfranchise the body that elected him.<sup>173</sup>

2. *Recall.*—The second mechanism for demanding the accountability of senators was the right of recall. Recall was the means by which states changed their representation in the Senate and enforced their instructions.<sup>174</sup> The mere threat of recall would help ensure that delegates obtained and followed instructions, formally or informally issued.

Although none of the states provided for recall in their own constitutions,<sup>175</sup> the Articles of Confederation had guaranteed state legislatures the power “to recall its delegates, or any of them, at any time within the year, and to send others in their stead, for the remainder of the year.”<sup>176</sup> We have few records of anything said at the convention concerning recall. The Founders voted to strike language that would have made members of the House of Representatives “incapable of re-election . . . and subject to recall.”<sup>177</sup> Apparently the delegates did not even consider a right of recall of senators. Anti-Federalist Luther Martin objected vigorously to this oversight:

the senate *as constituted* could not be a *security* for the *protection* and *preservation* of the *State* governments, and that the *senators* could not be justly considered the *representatives* of the *States* as *States* . . . : for *six years* the *senators* are rendered totally and absolutely *independent* of their *States*, of *whom* they ought to be the *representatives*, without any *bond* or *tie* between them: During that time they may join in measures *ruinous* and *destructive* to their *States*, even such as should *totally annihilate* their *State governments*, and their *States cannot recall them*, nor *exercise any controul over them*.<sup>178</sup>

New York was one of several ratifying conventions that debated the omission of the recall power. The debates echo the themes of independence of senators versus accountability to their respective states. Robert Livingston argued against the proposal<sup>179</sup> as counter to the Senate’s stability. State legislatures “being frequently subject to

<sup>173</sup> 2 G. HAYNES, SENATE OF THE UNITED STATES, *supra* note 169, at 1030; see 46 CONG. REC. 2768-69 (1911) (statement of Sen. Heyburn); 45 CONG. REC. 7113-14 (1910) (Idaho called for a constitutional convention on the direct election of senators.).

<sup>174</sup> Riker, *supra* note 5, at 456.

<sup>175</sup> ADAMS, *supra* note 97, at 244.

<sup>176</sup> ART. OF CONFED. art. V.

<sup>177</sup> 1 FARRAND, *supra* note 35, at 217.

<sup>178</sup> Luther Martin, *Genuine Information* (1788), in 2 THE FOUNDERS’ CONSTITUTION, *supra* note 75, at 213-14.

<sup>179</sup> New York’s proposal read:

*Resolved*, That no person shall be eligible as a senator for more than six years in any term of twelve years, and that it shall be in the power of the legislatures of the several states to recall their senators, or either of them, and to elect others in their stead, to serve for the remainder of the time for which such senator or senators, so recalled, were appointed.

2 ELLIOT’S DEBATES, *supra* note 72, at 289.

factionous and irregular passions” might appoint a senator on one day and recall him the next, and all of this would be a “source of endless confusion.”<sup>180</sup> The power of recall would “bind the senators too strongly to the interests of their respective states,” requiring a sacrifice of the interests of the union to those of the state.<sup>181</sup> The threat of recall was itself a potent power calculated to foster dependence; according to Hamilton, senators “will be convinced that the surest means of obtaining a reelection will be a uniform attachment to the interests of their several states.”<sup>182</sup> For John Lansing, dependence was precisely the object of recall; such would “induce [the senators] to pay a constant regard to the good of their constituents.”<sup>183</sup> The recall proposal would have vested the power with the state legislature because popular recall was “impracticable”; there was “no regular way of collecting the people’s sentiments.”<sup>184</sup> By contrast, legislative recall was “simple and easy.”<sup>185</sup>

In the Virginia debates, Patrick Henry argued that recall, or some other method of discipline such as impeachment, was necessary to enforce the right of instruction: “You may instruct [senators], and offer your opinions; but if they think them improper, they may disregard them. . . . Where, then, is the security?”<sup>186</sup> George Nicholas, however, thought the legislature had “sufficient security” and that “[t]he dread of being recalled would impair their independence and firmness.”<sup>187</sup> In Massachusetts, others noted the lack of the right to recall.<sup>188</sup> And in debates in New York, Rhode Island, and Pennsylvania, it was formally urged that legislatures have the right to recall senators at any time.<sup>189</sup>

Neither the New York proposal nor subsequent recommendations survived. In 1808, following the failed impeachment of Justice Samuel Chase, Virginia instructed its senators to obtain an amendment “respecting the removal from office, by the vote of a majority of the whole number of the members of the respective state legislatures,

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<sup>180</sup> *Id.* at 291; *see also id.* at 303 (statement of Alexander Hamilton) (stating that senators will become “slave[s] to all the capricious humors among the people”).

<sup>181</sup> *Id.* at 296.

<sup>182</sup> *Id.* at 306 (statement of Alexander Hamilton). Hamilton noted that no state had ever exercised the recall power under the Articles of Confederation. *Id.*

<sup>183</sup> *Id.* at 293.

<sup>184</sup> *Id.* at 294.

<sup>185</sup> *Id.*

<sup>186</sup> 3 ELLIOT’S DEBATES, *supra* note 72, at 355.

<sup>187</sup> *Id.* at 360.

<sup>188</sup> 2 ELLIOT’S DEBATES, *supra* note 72, at 5 (statement of Dr. Taylor); *id.* at 47 (statement of Col. Jones).

<sup>189</sup> 1 ELLIOT’S DEBATES, *supra* note 72, at 330 (New York); *id.* at 337 (Rhode Island); 2 *id.* at 545 (Pennsylvania).

their Senators who have been, or may be appointed to Congress.”<sup>190</sup> Virginia’s proposal found no support.

Without a formal means of recalling senators, states resorted to other means of controlling their senators, largely through instruction.<sup>191</sup> But without a power of recall, the states lacked a means of enforcing their instructions. The Founders’ refusal to authorize recall did not leave the states without any means of controlling their senators, but it left them without an effective means. Refusal to re-elect was the formal mechanism provided by the Constitution, but it was never as potent as the recall power. A senator who disregarded instructions or ignored the state’s wishes might bank on persuading his constituents of their error, hope for dimming memory, or wait out the legislative elections and a change in personnel.<sup>192</sup>

The Founders’ unwillingness to have a right of recall reaffirmed their commitment to the six-year term. Had the Constitution granted states the recall power, then each succeeding legislature might select its own delegate to the Senate, perhaps making the Senate as subject to the winds of political change as the House. This would have undermined the Senate as a repository of wisdom and stability. On the other hand, it surely lessened the role of the senators as representatives of the state legislature and forced the legislators to give more careful consideration to a senator assured of at least a six-year term.

3. *Rotation in Office.*—The third mechanism was rotation, or what we would call term limits. Simply put, “rotation in office . . . [is] an obligation on the holder of that office to go out at a certain period.”<sup>193</sup> Rotation had a venerable provenance. Its origins owed to Greek democratic thought, rotation was copied by the Romans, adopted by Northern Italian city-states, and made popular in the seventeenth and eighteenth centuries by Dutch and English theorists.<sup>194</sup> This thought did not take hold in America until after the revolution of

<sup>190</sup> SENATE JOURNAL, 10th Cong., 1st Sess. 267 (1807) (statement of Sen. Giles); see also LUCE, *supra* note 99, at 490. An effort contemporaneous with the impeachment trial was similarly dispatched. 14 ANNALS OF CONG., 8th Cong., 2d Sess. 1214-15 (1805); Colgrove, *supra* note 98, at X-47. Other examples are found in 2 G. HAYNES, SENATE OF THE UNITED STATES, *supra* note 169, at 1023-25.

<sup>191</sup> See Eaton, *supra* note 108, at 315 (Alabama wished to recall Senator Moore and passed resolutions requesting his resignation; Moore refused.); see also 3 ELLIOT’S DEBATES, *supra* note 72, at 360 (statement of Wilson Nicholas) (“We cannot recall our senators. We can give them instructions; and if they manifestly neglect our interest, we have sufficient security against them. The dread of being recalled would impair their independence and firmness.”).

<sup>192</sup> Riker, *supra* note 5, at 457, 460.

<sup>193</sup> Mark P. Petracca, *Rotation in Office: The History of an Idea*, in LIMITING LEGISLATIVE TERMS 19 (Gerald Benjamin & Michael J. Malbin eds., 1992) (quoting THE JEFFERSONIAN CYCLOPEDIA 786 (John P. Foley ed., 1967)).

<sup>194</sup> CARL RUSSELL FISH, THE CIVIL SERVICE AND THE PATRONAGE 80 (1905); Petracca, *supra* note 193, at 19-27.



1776. Although prior to that time, colonial laws specified limited terms of office, "short terms of office had not prevented the recurrent reelection of individuals, some of whom retained certain offices for decades at a time, nor had it prevented the growth of dynasties that laid claim to public offices."<sup>195</sup> The colonists had experience with unresponsive administrators and addressed the problem in part by requiring rotation in office.<sup>196</sup> Rotation was something of an eighteenth century equal protection clause. While general principles demanded that the laws apply to everyone, rotation insisted that, in addition, a larger number of people get an opportunity to make the laws. Rotation prevented aristocracy from maintaining its position, and it prevented those who would make themselves aristocrats from doing so through public office.<sup>197</sup> Although "[t]he theoretical defense of rotation was based upon attachment to democracy[,] practical men defended it by virtue of its value in winning elections."<sup>198</sup>

Nine of the new states' constitutions had some form of mandatory rotation. Concerned with the abuse of power by their executives, most of those states limited the tenure of their governors. Three states limited the tenure of state senators, one limited the tenure of state representatives, and two restricted the tenure of their delegates to the Continental Congress.<sup>199</sup> The new Americans thought mandatory rotation an "important constitutional device [ ] for compelling mobility in a deferential society where men too often feel obliged to re[-]elect their rulers for fear of dishonoring them."<sup>200</sup> Rotation was to the people and their representatives what separation of powers was to the legislative and executive branches.<sup>201</sup>

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<sup>195</sup> ADAMS, *supra* note 97, at 251.

<sup>196</sup> *Id.* at 243.

<sup>197</sup> See WOOD, *supra* note 78, at 87.

<sup>198</sup> LEONARD D. WHITE, *THE JACKSONIANS* 317 (1954).

<sup>199</sup> ADAMS, *supra* note 97, at 308-11. Only Maryland, New Hampshire, and North Carolina mandated rotation of their delegates to Congress. MD. CONST. OF 1776, art. XXVII, *reprinted in* 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 113, at 824; N.H. CONST. OF 1784, *reprinted in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 113, at 1291; N.C. CONST. OF 1776, art. XXXVII, *reprinted in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 113, at 1414.

<sup>200</sup> WOOD, *supra* note 78, at 140.

<sup>201</sup> The connection was explicit in Virginia:

That the legislative and executive powers of the State should be separate and distinct from the judiciary; and that the members of the two first may be restrained from oppression, by feeling and participating the burdens of the people, they should, at fixed periods, be reduced to a private station, return into that body from which they were originally taken, and the vacancies be supplied by frequent, certain, and regular elections, in which all, or any part of the former members, to be again eligible, or ineligible, as the laws shall direct.

VA. BILL OF RIGHTS § 5 (1776), *reprinted in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 113, at 1909; *see also* MASS CONST. OF 1780, part 1, art. VIII, *reprinted in* 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 113, at 958.

The principle of rotation found its way into the Articles of Confederation,<sup>202</sup> but the principle as a formal legal constraint did not survive the Constitutional Convention. The convention, without discussion, first struck a proposal making representatives “incapable of re-election into 1st. branch for [ ] years and subject to recall.”<sup>203</sup> In the subsequent debates over senators’ terms, James Wilson argued that “9 years [terms] with a rotation” would provide “stability or efficacy [in] our Government.”<sup>204</sup> Apparently, the delegates assumed that because senatorial terms were longer than representatives’ terms, mandatory rotation was unnecessary.<sup>205</sup> For example, although Madison did not expressly mention rotation, he hoped that states would send senators of sufficient age and experience that they would naturally not seek re-election.<sup>206</sup>

Rotation was, however, the subject of debates in ratifying conventions in New York, Massachusetts, South Carolina, and Virginia. In Massachusetts, Major Kingsley pointed out that under the Articles of Confederation the people had “three checks on their delegates in Congress—the *annual election* of them, their *rotation*, and the power to recall.”<sup>207</sup>

In June 1788, the New York ratifying convention saw the most extensive and spirited debate between Federalists and Anti-Federalists over the question of rotation.<sup>208</sup> Melancton Smith explained that formal rotation was needed because “[a]s the clause now stands, there is no doubt that senators will hold their office perpetually.”<sup>209</sup> Gilbert Livingston proposed that New York recommend as an amendment to the Constitution: “Resolved, That no person shall be eligible as a senator for more than six years in any term of twelve years . . . .”<sup>210</sup> Livingston reasoned that without this constraint senators would have a “security of their reelection, as long as they please.”<sup>211</sup> Not only would rotation be good for senators, who are “apt to forget their dependence,” but the presence of senators-turned-citizens would “diffus[e] a more general knowledge of the measures and spirit of the

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<sup>202</sup> ART. OF CONFED. art. V (“[N]o person shall be capable of being a delegate for more than three years in any term of six years.”).

<sup>203</sup> 1 FARRAND, *supra* note 35, at 217.

<sup>204</sup> 1 FARRAND, *supra* note 35, at 426.

<sup>205</sup> Petracca, *supra* note 193, at 31.

<sup>206</sup> 1 FARRAND, *supra* note 35, at 423.

<sup>207</sup> 2 ELLIOT’S DEBATES, *supra* note 72, at 61-62, 63.

<sup>208</sup> See Petracca, *supra* note 193, at 31; Erik H. Corwin, Note, *Limits on Legislative Terms: Legal and Policy Implications*, 28 HARV. J. ON LEGIS. 569, 582-86 (1991). See generally Michael J. Malbin, *Federalists v. Antifederalists: The Term-Limitation Debate at the Founding*, in LIMITING LEGISLATIVE TERMS 53 (Gerald Benjamin & Michael J. Malbin eds., 1992) (discussing the debates over rotation).

<sup>209</sup> 2 ELLIOT’S DEBATES, *supra* note 72, at 309.

<sup>210</sup> *Id.* at 289.

<sup>211</sup> *Id.* at 287.

administration"; citizens will "feel more forcibly that the government is of their own choice," and as new senators are elected, "they will consider their interest as the same with those of their constituents, and that they legislate for themselves as well as others."<sup>212</sup> Anti-Federalist John Lansing added that the best means of securing representation of the people was to "oblig[e] our rulers, at certain periods, to relinquish their offices and rank. The people cannot be represented by men who are perpetually separated from them."<sup>213</sup> Melancton Smith suggested that Congress "would undoubtedly have suffered all the evils of faction, had it not been secured by the rotation established by the Articles of Confederation. . . . [R]otation in the government is a very important and truly republican institution."<sup>214</sup>

The Federalists argued vigorously that rotation would not improve representation of the people. Most obviously, rotation limited the people's choices, their "natural rights": "The people are the best judges who ought to represent them."<sup>215</sup> Rotation, they claimed, actually limited senators' accountability. Senators who must depend on state legislatures for re-election will respond to their wishes; conversely, a senator who "knows that no meritorious exertions of his own can procure a reappointment . . . will become more unambitious, regardless of the public opinion."<sup>216</sup>

Alexander Hamilton argued equally vigorously against the resolution and defended the six-year senate term. Notably, he opposed rotation as a formal requirement, but suggested that rotation in the Senate would in fact occur. "[T]he main design of the Convention, in forming the Senate, was to prevent fluctuations and cabals. . . . The senators are to serve six years. . . . One third of the members are to go out every two years; and in six, the whole body will be changed."<sup>217</sup> Hamilton also reminded the Convention that because state legislatures elected senators, that rotation in state legislatures would bring about rapid changes in the composition of the Senate: "As the state legislatures are in continual fluctuation, the senator will have more attachments to form, and consequently a greater difficulty of maintaining his place . . . ." <sup>218</sup> He added that the Senate would see "a constant and frequent change of members," and thus "[a]ny scheme of usurpation will lose, every two years, a number of its oldest advocates,

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<sup>212</sup> *Id.* at 288.

<sup>213</sup> *Id.* at 294.

<sup>214</sup> *Id.* at 310.

<sup>215</sup> *Id.* at 292 (statement of Robert R. Livingston).

<sup>216</sup> *Id.* at 298 (statement of Richard Harrison).

<sup>217</sup> *Id.* at 305.

<sup>218</sup> *Id.* at 306.

and their places will be supplied by an equal number of new, unaccommodating, and virtuous men."<sup>219</sup>

The Federalists were probably correct that "lame duck" senators owed no fealty to their constituents, but the cure was either life tenure, as Hamilton had advocated unsuccessfully at the Constitutional Convention, or instruction of senators, as the northeastern and southern states practiced. Life tenure cures the lame duck syndrome but, as Hamilton would have known, would do nothing to make senators responsive to their constituents. As to the claim that mandatory rotation limited voters' choices, Melancton Smith properly pointed out that all government was a restraint on the "natural rights" of the people. The people's best choices might be excluded by such a restriction, but only rarely might they thereby "sustain any material loss."<sup>220</sup> New York nevertheless rejected Livingston's proposed amendment.

The idea of formal rotation has re-emerged on several occasions since the framing of the Constitution.<sup>221</sup> George Washington, Thomas Jefferson, and Andrew Jackson supported the notion as well.<sup>222</sup> The notion stumbled during the Civil War when the situation required stability in office.<sup>223</sup> By the turn of the century, the culture of professionalism made it acceptable for members of Congress to make a career out of service. By contrast, state legislatures continued to turn over.<sup>224</sup> Rotation was mentioned during debates on the Twenty-Second Amendment, and one proposal would have limited senators and representatives to a six year tenure.<sup>225</sup> Presidents Truman, Eisenhower, and Bush have since endorsed some form of mandatory rotation in office.<sup>226</sup>

Federalists and others assumed that senators would rotate out of office even without a constitutional provision. Rotation was ingrained in the philosophy of the day.<sup>227</sup> In fact, there was a great deal of turnover in the early Senate, but not necessarily because of rotation. Fully half of the senators elected between 1789 and 1793 failed to serve a

<sup>219</sup> *Id.* at 319; see also Corwin, *supra* note 208, at 601-02 (commenting on term limits and lame ducks).

<sup>220</sup> 2 ELLIOT'S DEBATES, *supra* note 72, at 311.

<sup>221</sup> *E.g.*, ANNALS OF CONG., *supra* note 120, at 761 (Aug. 18, 1789) (proposal of Thomas Tucker).

<sup>222</sup> Andrew Jackson, First Annual Message, in 3 MESSAGES AND PAPERS OF THE PRESIDENTS 1011-12 (James D. Richardson ed., New York, Bureau of National Literature, Inc. 1897); Petracca, *supra* note 193, at 35-36.

<sup>223</sup> Petracca, *supra* note 193, at 39-40; Richardson, *supra* note 48, at 5.

<sup>224</sup> Petracca, *supra* note 193, at 41-42.

<sup>225</sup> Senator O'Daniel sponsored the amendment as a substitute for the proposed Twenty-Second Amendment. The substitute failed 82 to 1. 93 CONG. REC. 1962-63 (1947).

<sup>226</sup> Presidential Debate, 1992-93 PUB. PAPERS 1830 (Oct. 15, 1992) (endorsement by George Bush); Richardson, *supra* note 48, at 8.

<sup>227</sup> Petracca, *supra* note 193, at 30-31.

full term, most through resignation.<sup>228</sup> The informal practice of rotation waned after the Civil War and finally disappeared.<sup>229</sup> Senators, like their House counterparts, viewed political office as a career possibility, and their ambition prevented them from accepting lower public office, as had been common earlier.<sup>230</sup>

#### D. *The Consequences of Structure*

The structure of the Senate in the original Constitution influenced the way in which it and other institutions behaved. Each of the institutions most concerned with the selection and control of senators—the people, the state legislatures, and the senators themselves—had a distinct interest. The people, naturally, cared most about laws that affected them, irrespective of whether the laws were state or federal. People were interested in securing laws that benefitted them and minimizing laws that harmed them. Because of the limitations of direct government, people were interested in electing state and federal representatives who could strike the proper balance.

By contrast, state legislatures maximized their own positions or spheres of influence by obtaining benefits for, and minimizing harms to, their constituents, and by getting themselves re-elected. The former was secured directly by the laws enacted by the state legislature and was secured indirectly through the laws enacted by Congress, one house of which was elected by the legislatures. The legislature had an interest in the laws it enacted and in the senators it elected, since it bore direct responsibility for both. State legislatures understood that when Congress preempted or otherwise made state laws ineffective, the state legislatures became less relevant in their lawmaking capacity and more relevant in their role as regulators of the state's senators. When state legislatures lost all control over their senators through the Seventeenth Amendment, they became virtually irrelevant to the process of monitoring federal legislation through the state's senators. In subsequent years, as Congress preempted more and more state legislation, state legislatures were powerless to prevent their slide into ignominy.

Senators similarly were concerned with enacting laws benefitting their constituents and getting re-elected. Politics, like nature, abhorred a vacuum, so senators felt the pressure to do something, namely enact laws.<sup>231</sup> Once senators were no longer accountable to

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<sup>228</sup> ALAN I. ABRAMOWITZ & JEFFREY A. SEGAL, *SENATE ELECTIONS* 14 (1992).

<sup>229</sup> In the House, rotation was honored prior to the Civil War in regions other than the South. The Southern states rotated state offices, but not federal offices, recognizing that seniority in Congress protected Southern interests. Samuel Kernell, *Toward Understanding 19th Century Congressional Careers: Ambition, Competition, and Rotation*, 21 *AM. J. POL. SCI.* 669, 676 (1977).

<sup>230</sup> *Id.* at 691.

<sup>231</sup> See BARBARA SINCLAIR, *THE TRANSFORMATION OF THE U.S. SENATE* 144-45 (1989).

and constrained by state legislatures, the maximizing function for senators was unrestrained; senators almost always found it in their own interest to procure federal legislation, even to the detriment of state control of traditional state functions.

The original structure of the Senate left state legislatures in a difficult position. The lack of formal rotation suggested the possibility of a more permanent institution in Congress. The states' inability to recall senators, together with the loss of the power of instruction, limited the influence state legislatures had over the Senate. If state legislatures could not make senators accountable in any unique way, there was little reason to have senators elected by state legislatures. And as senators became less accountable and state legislatures less demanding or vigilant, the states as political entities ceased to be represented in the Senate. In many respects, the Seventeenth Amendment was an acknowledgement of the legislatures' failed control over senators.

### III. "DIRECT REPUBLICANISM":<sup>232</sup> THE ADOPTION OF THE SEVENTEENTH AMENDMENT

#### A. *Early Proposals for Direct Election*

As early as 1826, Representative Storrs proposed amending the Constitution to provide for popular election of senators.<sup>233</sup> Similar amendments were proposed between 1829 and 1855.<sup>234</sup> The most prominent proposal came in 1868 in correspondence and speeches by President Andrew Johnson, who thought the merit of direct election "so palpable" that it did not require further explication.<sup>235</sup>

In 1866, Congress enacted, for the only time in its history, an act pursuant to its power to alter the "Times, Places and Manner of holding Elections for Senators."<sup>236</sup> In December 1865, the New Jersey legislature elected John Stockton to the Senate, but with only 40 of 81 votes, a plurality.<sup>237</sup> Although the Constitution did not specify that the legislature elect by majority vote, the Senate voted to exclude Stockton and then adopted an act requiring, among other things, that state legislatures, meeting if necessary in joint assembly, had to elect

<sup>232</sup> Bresler, *supra* note 100, at 358.

<sup>233</sup> 2 CONG. DEB. 1348-49 (1826); *see* 5 CONG. DEB. 362 (1829) (statement of Rep. Wright) (proposing that senators be elected "in such manner as the [L]egislatures thereof may prescribe").

<sup>234</sup> G. HAYNES, ELECTION OF SENATORS, *supra* note 33, at 101-03.

<sup>235</sup> Andrew Johnson, Correspondence (July 18, 1868), in 9 MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 222, at 3840-41; *see also* Andrew Johnson, Fourth Annual Message (Dec. 9, 1868), in MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 222 at 3889.

<sup>236</sup> U.S. CONST. art. I, § 4, cl. 1.

<sup>237</sup> Although 41 of 81 legislators voted for someone other than Stockton, they divided their votes among five candidates (although one received 37 votes). *See* COMPILATION OF SENATE ELECTION CASES FROM 1789 TO 1913, S. DOC. NO. 1036, 62d Cong., 3d Sess. 324 (1913).

senators by majority vote.<sup>238</sup> Congress obviously regarded the issue as an important one, because it commenced debate in March 1866 and passed the bill in July 1866, a time which coincides precisely with the drafting, debates, and passage of the Civil Rights Act of 1866 and the Fourteenth Amendment.<sup>239</sup> The bill would play an important, but overlooked role in the impetus to the Seventeenth Amendment.

By the 1890s, the movement for popular election had gained strength. Its proponents pushed popular election on two fronts. First, a number of states provided for "elections" for United States senators.<sup>240</sup> The results were merely advisory to the legislatures, but two states required that their state legislators indicate whether they would follow the straw votes.<sup>241</sup> These nonbinding primaries were, in essence, referenda instructing state legislators.<sup>242</sup> Second, the states sought passage of a constitutional amendment. The proposal was solidly supported in the House,<sup>243</sup> but, at least initially, poorly supported in the Senate. Surprisingly, the bodies that stood to lose power if the amendment passed—state legislatures—were quite supportive. Indeed, by 1910 a majority of the states had indicated to Congress that they favored a constitutional amendment.<sup>244</sup> The wake-up call to the Senate was apparently the defeat in 1910 of ten Republican senators

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<sup>238</sup> Act of July 25, 1866, 14 Stat. 243, *repealed sub silentio* by U.S. CONST. amend. XVII. See G. HAYNES, ELECTION OF SENATORS, *supra* note 33, at 22-30. Under the Act each house of the state legislature should meet and give a recorded vote. If both houses had elected the same person, he was declared senator. If not, the houses were to convene together and a senator elected by majority of the joint assembly. In the event the joint assembly could not elect a senator, the assembly "shall meet at twelve o'clock, meridian, of each succeeding day during the session of the legislature, and take at least one vote until a senator shall be elected." 14 Stat. at 243; see also 1 G. HAYNES, SENATE OF THE UNITED STATES, *supra* note 169, at 81-85; KERR, *supra* note 36, at 15.

<sup>239</sup> The Republican Senate's expulsion of Stockton, a Democrat, occurred just before it voted to overturn Andrew Johnson's veto of the Civil Rights Act. Stockton's expulsion "[u]nderscor[ed] the intensity of Republican feeling" and helped prevent the sustaining of the veto. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 250 (1988); see HORACE EDGAR FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 36, 38-39 (1908).

<sup>240</sup> See, e.g., ABSTRACT OF LAWS RELATING TO THE ELECTION OF UNITED STATES SENATORS, S. DOC. NO. 393, 59th Cong., 2d Sess. (1907); see also *Newberry v. United States*, 256 U.S. 232, 265-66 (1921) (White, C.J., concurring); Daynes, *Direct Election*, *supra* note 34, at 13.

<sup>241</sup> 1 G. HAYNES, SENATE OF THE UNITED STATES, *supra* note 169, at 100-04.

<sup>242</sup> 46 CONG. REC. 2774 (1911) (statement of Sen. Borah); see ROBERT RIENOW & LEONA TRAIN RIENOW, OF SNUFF, SIN AND THE SENATE 291-92 (1965) (recounting how Republican legislators in Oregon first pledged to follow the straw votes and, when the people chose an idiosyncratic Democrat, then appealed to President Roosevelt to absolve them of their pledge; Roosevelt refused).

<sup>243</sup> The House had good reason to support the amendment. Popularly elected senators represented the same constituency (albeit more numerous) as popularly elected representatives. States (through their legislators) could block populist proposals coming out of the House. Without the influence of state legislatures, the House stood to gain power in Congress.

<sup>244</sup> HOEBEKE, *supra* note 34, at 149; see 45 CONG. REC. 7113-20 (1910).

who had opposed the proposed amendment.<sup>245</sup> Western states were more receptive to the changes, finding that direct democracy served their ends.<sup>246</sup> The North Atlantic states, in particular, opposed direct election.<sup>247</sup>

### B. *Motivation for the Seventeenth Amendment*

The Populist movement of the 1890s and the Progressive movement of the early 1900s brought powerful support for what would become the Seventeenth Amendment.<sup>248</sup> National figures such as William Jennings Bryan argued forcefully for reform, while opponents of direct election counted among their members powerful and venerable figures, including Senators Elihu Root of New York, George Hoar of Massachusetts, and George Edmunds of Vermont. Root believed so passionately in the folly of amending the Constitution in this way that he refused to stand for popular election after passage of the amendment.<sup>249</sup>

The stated justifications for the Seventeenth Amendment were corruption in state legislatures, deadlock in elections of U.S. senators, and renewed faith in the competence of people to make their own choices for senators. For the most part, federalism, or accountability of senators to states, was not only not an issue, it was studiously avoided by the amendment's proponents. As one commentator has stated, "It is difficult to understand how even the progressive propagandists imagined that depriving legislatures of their only control over national affairs would strengthen houses that were already decadent for want of a significant agenda."<sup>250</sup> But as we will see, the embarrassing silence is the best evidence that the people either believed themselves as capable as their legislatures at protecting the interests of federalism or simply preferred democracy to representation and were willing to shoulder the loss to constitutional federalism.

1. *The Corruption of State Legislatures.*—By the early 1890s, as the reform movement gained momentum, there was a general perception that senatorial elections had been bought and sold, that "men

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<sup>245</sup> Daynes, *Direct Election*, *supra* note 34, at 9; Larry J. Easterling, *Sen. Joseph L. Bristow and the Seventeenth Amendment*, 41 KAN. HIST. Q. 488, 503 (1975).

<sup>246</sup> Zywicki, *supra* note 34, at 1043-44 (Western states sought seniority in Senate.).

<sup>247</sup> G. HAYNES, *ELECTION OF SENATORS*, *supra* note 33, at 107-10. It would be overgeneralizing, however, to characterize the debate over the Seventeenth Amendment as one between Democrats and Republicans. The Democrats were quick to embrace it, but Western Republicans were strong supporters of the reform. Southern Democrats feared an erosion of their dominion through the seniority system. ALAN P. GRIMES, *DEMOCRACY AND THE AMENDMENTS TO THE CONSTITUTION* 82, 161 (1978); Zywicki, *supra* note 34, at 1043-44.

<sup>248</sup> ABRAMOWITZ & SEGAL, *supra* note 228, at 16.

<sup>249</sup> 2 PHILLIP C. JESSUP, *ELIHU ROOT* 242 (1964).

<sup>250</sup> Riker, *supra* note 5, at 468.



have gained seats in the Senate of the United States whom the people of their State would never have chosen to go there, and who never would have gone there but [f]or the corrupt use of money to secure their election."<sup>251</sup> Whatever the general impressions, members of Congress cited very few specifics in support of their claims of bribery and corruption.<sup>252</sup> One representative adverted to the "facts as experienced by many States of this Union, and by some more than once," but referred only to an incident in Kansas in 1873 in which a member of the state legislature received \$7000 to secure his vote and later returned the money.<sup>253</sup> Complaints about political "tricks" in Illinois turned out to be nothing more than a Republican get-out-the-vote effort that caught Democrats in a Democratic district by surprise.<sup>254</sup>

Despite the dearth of hard information on the floor of the House and Senate chambers, some evidence indicated that state legislators had sold their votes.<sup>255</sup> Between 1857 and 1900, the Senate investigated ten cases of alleged bribery or corruption, although in only three cases was a Senate committee able to conclude that the charges had merit.<sup>256</sup> In 1900, for example, Senator William Clark resigned after a Senate committee reported that Clark had purchased eight of his fifteen votes in the Montana legislature; Montana returned Senator Clark the following year.<sup>257</sup> Apparently other investigated incidents contributed to the overall impression of corruption. For example, in 1907, Senator Guggenheim revealed that he had contributed so much to Republican legislators' campaign funds that he covered their expenses.<sup>258</sup>

Aside from their charges of direct corruption, progressive and populist members took aim at two other targets: machine politics and corporations. Senator Palmer claimed that elections in the Illinois legislature were contests between two party machines. Only if "the people had the right and power to choose a Senator . . . would [there] be

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<sup>251</sup> 23 CONG. REC. 6066 (1892) (statement of Rep. Bushnell); *see id.* at 6071 (statement of Rep. Lanham); *see also* 31 CONG. REC. 4810 (1898) (statement of Rep. Corliss) ("[I]t is as difficult for a poor man to enter the Senate of the United States as for a rich man to enter the kingdom of heaven.").

Some members also complained that state legislators' votes were purchased by federal patronage. 23 CONG. REC. 1270 (1892) (statement of Sen. Palmer); *id.* at 6068 (statement of Rep. Gantz); *see also* KERR, *supra* note 36, at 20.

<sup>252</sup> Members may have been reluctant to accuse sitting Senators publicly.

<sup>253</sup> 23 CONG. REC. 6075 (1892) (statement of Rep. Kem).

<sup>254</sup> 23 CONG. REC. 3201 (statement of Sen. Palmer); *id.* at 6079 (statement of Rep. Scott).

<sup>255</sup> KERR, *supra* note 36, at 19-20 (Rhode Island and New York).

<sup>256</sup> G. HAYNES, ELECTION OF SENATORS, *supra* note 33, at 53-56. George Haynes also provided examples from Alabama, Arkansas, California, Montana, Ohio, Pennsylvania, and Utah. But as Haynes noted, the committees' conclusion of lack of evidence did not exonerate the members accused, and the Senate failed to investigate other, more serious, allegations.

<sup>257</sup> *Id.* at 56.

<sup>258</sup> GEORGE E. MOWRY, THE ERA OF THEODORE ROOSEVELT, 1900-1912, at 264 (1958).

some possibility of resisting and even overthrowing both those machines."<sup>259</sup> In a similar vein, William Jennings Bryan argued that "great corporations . . . are able to compass the election for their tools and their agents through the instrumentality of Legislatures, as they could not if Senators were elected directly by the people."<sup>260</sup>

Opponents of direct election of senators questioned the bribery and corruption rationale on several levels. They questioned whether the problem was sufficiently serious to merit a constitutional amendment.<sup>261</sup> Others asked whether the proponents had any assurances that corrupting influences would not corrupt popular elections as well.<sup>262</sup> Noting that most states would nominate senators through a convention, opponents argued that machine politics would "corrupt[ ] a convention as easily as a Legislature."<sup>263</sup>

Perhaps the most thoughtful opponent of direct election reform was New York Senator Elihu Root. Admitting that there were "rumors, suspicions, and occasionally proofs of corrupt conduct on the part of State legislatures," he questioned whether there was any "claim . . . that the wise men who framed our Constitution were mistaken in their belief that wise and intelligent and faithful State legislatures would make the best possible choice for Senators of the United States."<sup>264</sup> Given these "exceptional and occasional cases," he asked, why "abandon . . . rather than reform the system," when the "whole proposition rests upon the postulate of the incapacity of the people of the United States to elect honest and faithful legislatures[?]"<sup>265</sup> Root's point was well taken. The proponents of the Amendment had brought forth evidence of corruption, but they had failed to show that it resulted from the structure of the present mode of election and that structural change in the mode of election would cure the problem. If the people had proven so notoriously inept in electing state legislators, what made us think they would prove more capable of electing U.S.

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<sup>259</sup> 28 CONG. REC. 6735 (1896). In fact, in 1912, the Senate expelled Illinois Senator William Lorimer for having been elected corruptly. It was poor timing for a Senate opposed to direct election, although the vote to expel Lorimer crossed the lines of supporters and opponents of direct election. HOEBEKE, *supra* note 34, at 92-93.

<sup>260</sup> 26 CONG. REC. 7775 (1894); *see* 28 CONG. REC. 1520 (1896) (statement of Sen. Turpie); 23 CONG. REC. 3194 (1892) (statement of Sen. Chandler); *id.* at 6063 (statement of Rep. Tucker); *id.* at 6068 (statement of Rep. Gantz).

<sup>261</sup> 46 CONG. REC. 2771 (1911) (statement of Sen. Heyburn).

<sup>262</sup> 35 CONG. REC. 2618 (1902) (statement of Sen. Stewart); 25 CONG. REC. 105 (1893) (statement of Sen. Hoar).

<sup>263</sup> 23 CONG. REC. 6076 (1892) (statement of Rep. Dungan); *see also* S. REP. NO. 794 (Part 1), 52d Cong., 1st Sess. 3 (1892); 28 CONG. REC. 6735 (1896) (statement of Sen. Palmer); 25 CONG. REC. 102-03 (1893) (statement of Sen. Hoar).

<sup>264</sup> 46 CONG. REC. 2242 (1911).

<sup>265</sup> *Id.*; *see also* 23 CONG. REC. 6076 (1892) (statement of Rep. Dungan) ("[T]o amend our Federal Constitution this wise, is to distrust the capacity of the people for wise and honest selection of members of the Legislature.").

senators? What populism was there to the cynicism with which popularly-elected state legislatures were viewed?

Moreover, the proponents of the Amendment had perhaps overlooked that state-wide races conducted to the electorate rather than to the legislature would prove far more expensive than congressional races or the then current senate races, and the need for money could only encourage the influence of corporations and political machines. If the proponents' real concern was eliminating corporate influence, the Amendment may have only facilitated the influence.<sup>266</sup> The proponents thought that corporations would have less influence with the electorate than with the legislature, but direct election turned the corporations' attention from the legislature to the candidates themselves, lowering the costs of securing influence.<sup>267</sup> As senators refocused on a mass electorate rather than a relatively small group of legislators, they became amenable to the influence of powerful lobbies. The Seventeenth Amendment reduced the cost of lobbying by eliminating the state legislatures as a countervailing source of control over U.S. senators. Direct election enabled lobbyists to focus directly on the senators rather than on the entire state legislature.<sup>268</sup>

Whatever the level of discourse at which state legislators and senators had conducted their mutual business, the Seventeenth Amendment ensured that future discourse would be conducted at a more general level. The Seventeenth Amendment guaranteed the ascendancy of a different kind of senator: one whose primary skills are dealing with the masses through public appearances, mailings, and sound bites.<sup>269</sup>

2. *Deadlock and Delay in the Election of Senators.*—A second ground for demanding direct election was the delay and deadlock in the actual election of senators.<sup>270</sup> Often senators-elect failed to obtain their seats due to technicalities.<sup>271</sup> From time to time, state legislatures could not agree on a candidate and delayed sending a represen-

<sup>266</sup> Zywicki, *supra* note 34, at 1012 (stating that the Seventeenth Amendment "eliminated institutional arrangements which restrained special-interest groups' use of the federal government as a tool for wealth distribution"); see HOEBEKE, *supra* note 34, at 5 ("[M]ass democracy cannot even claim to promote the will of the majority so much as the agenda of those who can organize and raise money for various private and local interests.").

<sup>267</sup> Daynes, *Direct Election*, *supra* note 34, at 58.

<sup>268</sup> Zywicki, *supra* note 34, at 1040; see also Vik D. Amar, Note, *The Senate and the Constitution*, 97 *YALE L.J.* 1111, 1129 (1988) ("By requiring Senatorial candidates to raise large amounts of money to campaign for many votes, the Seventeenth Amendment may facilitate private interest group access to the federal government.").

<sup>269</sup> Daynes, *Direct Election*, *supra* note 34, at 74-81.

<sup>270</sup> *E.g.*, S. REP. NO. 530, *supra* note 172, at 6-7; S. REP. NO. 794 (Part 2), 52d Cong., 1st Sess. 7 (1892).

<sup>271</sup> These cases are collected in *COMPILATION OF SENATE ELECTION CASES*, *supra* note 237. See also 33 *CONG. REC.* 4121 (1900) (statement of Rep. Ryan).

tative to Washington. In some extreme cases, states proved so intransigent they failed to send anyone at all.<sup>272</sup> As support for direct election swelled, state legislatures proved particularly inept. Between 1891 and 1905, eight state legislatures failed to elect senators and were without full representation from periods of ten months to four years.<sup>273</sup> Delaware presented the most extreme case, failing to send senators in 1895, 1899, 1901, and 1905. One of Delaware's seats went unfilled from March 1899 to March 1903, and between 1901 and 1903, Delaware failed to send any senators to Washington. In 1895 the Delaware legislature deadlocked for 114 days, recording some 217 ballots, and still failed to elect a senator. In 1897, apparently in anticipation of a dispute over an open senate seat, one-third of the Oregon legislature refused to take the oath of office. The legislature met for some 53 days without convening; it disbanded having failed to elect a senator, or to take legislative action of any kind.<sup>274</sup>

For the proponents of direct election, this intransigence was unthinkable. It emphasized "a very clear incongruity between legislative duties and the office of choosing Senators of the United States."<sup>275</sup> The mode of election "divert[ed] the attention of legislators from matters of legislation"<sup>276</sup> and threatened "total neglect" by state legislators. The failure of states to elect was "not a physical disability; it [was] rather a political or functional inability induced by the too close equilibrium of dissenting forces which are unable to unite upon a

Problems apparently began with the First Congress, when the New York legislature adjourned without electing senators. SANDSTROM, *supra* note 85, at 29.

<sup>272</sup> See 1 G. HAYNES, SENATE OF THE UNITED STATES, *supra* note 169, at 86-88.

<sup>273</sup> The states were California, Delaware, Montana, Oregon, Pennsylvania, Utah, Washington, and Wyoming. Data on the elections are taken from CONGRESSIONAL QUARTERLY, GUIDE TO U.S. ELECTIONS (2d ed. 1985) [hereinafter GUIDE TO U.S. ELECTIONS]. See also 31 CONG. REC. 4819 (1898) (statement of Sen. Tongue); 30 CONG. REC. 171 (1897) (statement of Sen. Turpie); 28 CONG. REC. 1521 (1896) (statement of Sen. Turpie); *id.* at 6729-30 (statement of Sen. Perkins); G. HAYNES, ELECTION OF SENATORS, *supra* note 33, at 38-39.

<sup>274</sup> 31 CONG. REC. 4820-21 (1898) (statement of Sen. Tongue); 30 CONG. REC. 171 (1897) (statement of Sen. Turpie); see also G. HAYNES, ELECTION OF SENATORS, *supra* note 33, at 193-95.

<sup>275</sup> 30 CONG. REC. 171 (1897) (statement of Sen. Turpie).

<sup>276</sup> 28 CONG. REC. 6728 (1896) (statement of Sen. Mitchell). Senator John H. Mitchell of Oregon was a vigorous advocate of direct election of Senators. See 23 CONG. REC. 1270 (1892) (statement of Sen. Mitchell) (Mitchell introduced proposed amendment in 1888 and 1890). He was himself the source of a great deal of controversy, and one wonders whether he would have survived a popular vote. Mitchell (which was not his real name) was a bigamist and an adulterer. He was notable for another reason. In 1866 he sued his former client, Marcus Neff, for \$253.14 plus costs, serving him by publication. When Neff failed to show, Mitchell had Neff's property in Oregon seized and sold at auction, which Mitchell himself purchased. Mitchell turned around and sold the property to his friend and future Oregon Governor, Sylvester Pennoyer. The resulting suit was, of course, *Pennoyer v. Neff*, 95 U.S. 714 (1877). In 1905, Senator Mitchell was convicted of land fraud and died, in office, while his appeal was pending. The story has been wonderfully preserved in Wendy Collins Perdue, *Sin, Scandal and Substantive Due Process: Personal Jurisdiction and Pennoyer Reconsidered*, 62 WASH. L. REV. 479 (1987).

choice.”<sup>277</sup> As one representative put it: “The framers of our Constitution did not intend to permit vacancies to exist in the Senate.”<sup>278</sup>

Moreover, there was a general sense that the election of U.S. senators had overwhelmed local issues, that state legislators were often selected for the purpose of choosing a U.S. senator.<sup>279</sup> Some Senate elections became so important, they dominated the local elections. One late-nineteenth century treatise observed that people chose their state legislators “with especial reference to electing United States senators.”<sup>280</sup>

Legislative deadlocks presented a persuasive argument for those favoring direct election, and if state legislatures had any reservations about giving up their power to elect U.S. senators, their failure to exercise the power could not have come at a worse time.<sup>281</sup> Here was a serious threat to democratic and republican ideals. Misrepresentation, through corruption or malfeasance, might be cured at the polls, but nonrepresentation was denial of a state’s franchise and worse than misrepresentation.

The opponents of direct election, however, argued convincingly that legislative deadlocks were not the inevitable result of legislative election. The real problem, they said, was the Act of July 25, 1866. Senator William Stewart of Nevada, who had been a member of the Senate Judiciary Committee that considered the 1866 Act, argued that the purpose for the Act was to forestall one house from refusing to meet with the other house, thereby preventing election. “The method now in vogue to prevent an election is the failure of any candidate to secure a majority.”<sup>282</sup> For Senator Root, “deadlock [and] . . . inexplicable delay . . . constitute the chief reason for the assent of the people to propositions to change the manner of election.”<sup>283</sup> As Root pointed out, amending the 1866 law to permit election by plurality would eliminate the deadlocks. If securing election through majority vote was the end of the proposed constitutional amendment, it was destined to failure. “In every close State the outlying parties, the irreconcilable, not occasionally or accidentally, but as a rule, poll more votes than the difference between the two great parties, and that

<sup>277</sup> 30 CONG. REC. 171 (1897) (statement of Sen. Turpie).

<sup>278</sup> 33 CONG. REC. 4110 (1900) (statement of Rep. Corliss).

<sup>279</sup> See 30 CONG. REC. 4810 (1898) (statement of Rep. Corliss).

<sup>280</sup> ANNA LAURENS DAWES, *HOW WE ARE GOVERNED* 85 (1885); see also John Haynes, *Popular Election of United States Senators*, in 11 *JOHNS HOPKINS U. STUD. IN HIST. & POL. SCI.* 99-100 (Hebert B. Adams ed., 1893) [hereinafter Haynes, *Popular Election*].

<sup>281</sup> The Oregon legislature so afflicted itself with deadlocks that it finally capitulated. In the next session, the legislature, after it failed to convene to elect a senator, adopted a resolution calling for the direct election of senators. G. HAYNES, *ELECTION OF SENATORS*, *supra* note 33, at 194-95.

<sup>282</sup> 35 CONG. REC. 2617 (1902).

<sup>283</sup> 46 CONG. REC. 2242 (1911).

means that, as a rule, in the close States of the Union no one is elected by a majority vote."<sup>284</sup> If a majority rule of election was a good in and of itself, direct election of senators virtually assured that senators in close elections would not be elected by a majority.<sup>285</sup>

3. *Populist Sentiment.*—As Root and others demonstrated, while corruption and legislative deadlock might have demanded reform, neither justified amending the Constitution. These problems required attention, but far less drastic reform measures were available. Thus, neither served as an adequate explanation for the Seventeenth Amendment.

In the end analysis, the superficial appeal of election reform aside, the real justification for the Seventeenth Amendment was its populist appeal, a need to "awaken[ ] in the Senators . . . a more acute sense of responsibility to the people."<sup>286</sup> The people simply wished to elect senators themselves, without the mediation of their state representatives. William Jennings Bryan argued that "[i]f the people of a State have enough intelligence to choose their representatives in the State legislature . . . they have enough intelligence to choose the men who shall represent them in the United States Senate."<sup>287</sup> Whatever the reasons for the original mode of selection, the voters were "a new people living and acting under an old system."<sup>288</sup> In the proponents' view, the Senate had been "a sort of aristocratic body—too far removed from the people, beyond their reach, and with no especial interest in their welfare."<sup>289</sup> For populists and progressives, election by the legislature was an anachronism:

To whom, we ask, is a Senator now answerable for his conduct? To the legislature? This body changes three times during his service. A Senator elected to-day for six years by a legislature comes back in six years seeking reelection before another legislature composed of almost entirely new men. His pledges to the body that elected him are *nudum pactum* to the legislature, which was not a party to the contract of his service or to his pledges.<sup>290</sup>

<sup>284</sup> *Id.*; see also 25 CONG. REC. 106 (1893) (statement of Sen. Hoar) ("plurality must take the place of the majority").

<sup>285</sup> Some proponents recognized that a plurality of voters would elect senators. 28 CONG. REC. 1521 (1896) (statement of Sen. Turpie).

<sup>286</sup> *Election of Senators*, H.R. REP. NO. 1456, 50th Cong., 1st Sess. 2 (1898); see also S. REP. NO. 530, *supra* note 172, at 4-5; *Election of Senators by the People*, H.R. REP. NO. 944, 53d Cong., 2d Sess. 2 (1894).

<sup>287</sup> 26 CONG. REC. 7775 (1893).

<sup>288</sup> 28 CONG. REC. 1519 (1896) (statement of Sen. Turpie); see *id.* at 6728 (statement of Sen. Mitchell).

<sup>289</sup> S. REP. NO. 530, *supra* note 172 at 10.

<sup>290</sup> H.R. REP. NO. 368, 52d Cong., 1st Sess. 3 (1892); cf. S. REP. NO. 530, *supra* note 172, at 7 ("Senators do not owe their positions to the people, who are *permanent*, but the legislatures,

The populist movement was hard to ignore. By 1910, some thirty-one state legislatures had submitted requests that Congress convene a constitutional convention pursuant to Article V for the purpose of proposing an amendment on the direct election of senators.<sup>291</sup> One state legislature, California, had instructed its senators to vote for submission of such an amendment, and two other state legislatures had formally urged Congress to adopt such an amendment.<sup>292</sup> Many states, including states which had not called for a constitutional amendment, had provided some means for the voters to instruct their legislatures in the selection of senators. At the least, passage of the amendment avoided Congress's duty to call a constitutional convention.<sup>293</sup>

These arguments were difficult to counter. The record of deadlocks and corruption made it difficult to claim that the people possessed less sense, were less qualified, than their representatives. Venerable George Hoar of Massachusetts argued that direct election took from "public officers to whom the great public duty of State legislation is intrusted" and substituted "conventions composed of persons without other responsibility."<sup>294</sup> Hoar contended that the people were a far less permanent body than the legislature. "For a choice by a permanent body, there must be a choice by a body lasting but a day."<sup>295</sup> Some members argued that the great senators of history could not have secured popular election,<sup>296</sup> while others argued that

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which are *transient*."). *But see* S. DOC. NO. 406, *supra* note 84, at 53 (statement of Sen. Hoar) (Senate is the only "perpetual body" among the political branches).

<sup>291</sup> Some seventy-five total applications were made. Three states, Montana, Nevada, and Oregon, applied six times each. CONSTITUTIONAL CONVENTION IMPLEMENTATION ACT OF 1984, S. REP. NO. 594, 98th Cong., 2d Sess. 48-57 (Comm. Print 1984).

<sup>292</sup> 45 CONG. REC. 7113-20 (1910) (compiling resolutions). The various requests for a constitutional convention are also compiled in Michael S. Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment*, 103 YALE L.J. 677, 765-89 (1993).

By 1909 more than half the states had a mechanism for a popular vote—only advisory—for senators. MOWRY, *supra* note 258, at 81.

<sup>293</sup> *See* 35 CONG. REC. 2617 (1902) (statement of Sen. Dubois) ("[U]nless the Senate is allowed to debate this question, enough States will act to take it out of our hands."); *see also* ELECTION OF U.S. SENATORS, H.R. REP. NO. 125, 57th Cong., 1st Sess. 2-4 (1902); MEMORIAL RELATIVE TO AMENDING THE CONSTITUTION OF THE UNITED STATES, S. DOC. NO. 454, 60th Cong., 1st Sess. (1908).

<sup>294</sup> 25 CONG. REC. 103-04 (1893).

<sup>295</sup> *Id.*; *see id.* at 108 ("I think that it is best to commit this great function of choosing the members of this body to the deliberate and careful judgment of men who are trusted with every other legislative function of sovereignty, and not to adopt a method which in practice will commit it to men whom the people trust with nothing else.").

<sup>296</sup> 23 CONG. REC. 106 (1893) (statement of Sen. Hoar) (suggesting that Daniel Webster, Charles Sumner, and Salmon P. Chase would not have been elected); *see also* HOEBEKE, *supra* note 34, at 175 (discussing circumstances under which Elihu Root was drafted for the Senate; suggesting popular election has made it difficult to obtain election of such "elder statesmen").

most of the senators had experience in the popularly-elected House and thus the amendment would have little practical effect.<sup>297</sup>

Several members of Congress argued that direct election of senators threatened the equal suffrage of the states. "[I]t would be a fatal movement to the equality of the States. When Senators are elected by popular votes of States and not by the legislatures thereof it will be forcibly argued that the constituents of Senators should be equal."<sup>298</sup> The objection proved too much. No one had advocated that states be deprived of their representation in the Senate; indeed, the Seventeenth Amendment had nothing to do with equal suffrage in the Senate. Whatever the merits of direct election of senators, the states bore the benefits or burdens of reform equally. If this objection had merit, we would expect that less populous states would have opposed the Amendment, but no such pattern appeared.<sup>299</sup>

More persuasively, members argued that the Amendment took from the states, not their equal representation, but their representation as *states*.<sup>300</sup> The states were "sovereign, entitled . . . to have a separate branch of Congress to which they could . . . send their ambas-

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<sup>297</sup> 26 CONG. REC. 7765 (1893) (statement of Rep. Northway); see also ABRAMOWITZ & SEGAL, *supra* note 228, at 15 ("Of the sixty-three Senates elected by state legislatures, fifty-one matched the party chosen to run the House by the people. . . . [J]udging by party control, the Senate was largely representing majoritarian concerns even prior to the passage of the Seventeenth Amendment.").

Furthermore, if populist sentiment demanded greater voter participation, there were other, more familiar practices available. The first would have been instruction through legislation. A second would have been popular instruction through referenda. See Easterling, *supra* note 245, at 503 (Oregon's reforms convinced Senator Bristow of the need for initiatives and referenda).

<sup>298</sup> 35 CONG. REC. 2617 (1902) (statement of Sen. Stewart); see also 46 CONG. REC. 2244 (1911) (statement of Sen. Root); 35 CONG. REC. 2616 (1902) (statement of Sen. Hoar); *id.* at 6595 (statement of Sen. Vest).

<sup>299</sup> In fact, the less populous Western states were among the most vocal advocates of direct election. ABRAMOWITZ & SEGAL, *supra* note 228, at 19-20, 23-24. Of the 24 senators who voted against the proposed amendment, three were Western Republicans, nine represented Southern states (one Republican and eight Democrats), and twelve were from the East. GRIMES, *supra* note 247, at 161. Zywicki suggests that Western states had long been more volatile in their selection of their state legislatures and, consequently, their senators were envious of the seniority of the Southern states. Direct election brought greater stability—and, therefore, greater seniority—to Western states. Zywicki, *supra* note 34, at 1021, 1044; see also DANIEL J. ELAZAR, *AMERICAN FEDERALISM: A VIEW FROM THE STATES* 139-40 (2d ed. 1972) (Southern seniority allowed those states more than their share of benefits); Kernell, *supra* note 229, at 676 (South rotated state legislative seats, but not congressional seats).

<sup>300</sup> H.R. REP. NO. 1456, *supra* note 286, at 3 (views of the Minority); see Deborah J. Merritt, *Three Faces of Federalism: Finding a Formula for the Future*, 47 VAND. L. REV. 1563, 1568 (1994) ("Today, individual senators may care about the autonomy of state government, but they are just as likely to care about the environment, welfare reform, health care, mass transit, or farm subsidies. Many senators have no experience in state government and their reliance on state political machines for reelection is declining. Under these circumstances, there is no formal or informal structural guarantee that senators (or anybody else) will represent the interests of state governments in Washington." (footnote omitted)).



sadors.”<sup>301</sup> In response, the amendment’s supporters pointed out that “a change in the *mode* or *manner* of selecting Senators would not in the slightest manner interfere” with “whether the Senate should be the representatives of the States rather [than] their people.”<sup>302</sup> Representation of states referred to “the fixed *ratio* of representation” and “not . . . the *mode* or *manner* in which Senators should be chosen.”<sup>303</sup> But here the Amendment’s opponents had a point. It was true enough that the Amendment did not trifle with the states as geographic districts; following passage of the Amendment, senators would represent precisely the same territory as before. But the mode or manner for choosing senators was hardly irrelevant to the question of whom senators represented, and the states as political entities (rather than mere territorial entities) would no longer be represented. At some theoretical level senators had always represented the people, so that the change to direct election was no change in constituency. But at a more functional level, senators knew they represented state legislatures and that they were immediately accountable to that body. In this sense, the mode of election interfered directly with the manner in which senators saw themselves as representatives of states.<sup>304</sup>

In the end the Senate went reluctantly, but surely. The states ratified the Amendment in less than two years. Efforts to return to indirect election met with no response.<sup>305</sup>

#### IV. “ULYSSES AT THE MAST”: THE EFFECTS OF DIRECT ELECTION OF SENATORS

The passage of the Seventeenth Amendment worked a structural change in the composition of Congress. While I have discussed some of the theory behind the Senate’s original organization and subsequent reformation, in this Part, I consider the structural and practical consequences of the Amendment, matters about which very little has been written. If “[t]he failure of the Senate to represent state governments [was] a crucial constitutional development,”<sup>306</sup> it is nevertheless a maddeningly difficult proposition to prove. Prior efforts to measure the effects of the Seventeenth Amendment have covered the popular re-election of Senators previously chosen by their state legislatures,<sup>307</sup>

<sup>301</sup> H.R. REP. NO. 1456, *supra* note 286, at 4 (views of the Minority).

<sup>302</sup> S. REP. NO. 794 (Part 2), *supra* note 270, at 4.

<sup>303</sup> *Id.* at 4, 5; *see also* S. REP. NO. 530, *supra* note 172, at 2-4.

<sup>304</sup> Indeed, one of the arguments against instruction was that senators represented the people at large, and no body capable of instructing the people could claim to be the people, only another representative body. *The Right of the Constituent to Instruct*, *supra* note 99, at 156-60.

<sup>305</sup> *See* 72 CONG. REC. 771 (1929) (Rep. Underhill, introducing JOINT RESOLUTION PROPOSING AN AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES PROVIDING FOR THE ELECTION OF SENATORS, H.R.J. RES. 166, 71st Cong., 2d Sess.).

<sup>306</sup> Riker, *supra* note 5, at 455.

<sup>307</sup> ABRAMOWITZ & SEGAL, *supra* note 228, at 25.

changes in the length of terms,<sup>308</sup> voting patterns in pairs of senators from the same state,<sup>309</sup> and U.S. senators' experience in state legislatures.<sup>310</sup> Other studies rely on political theory.<sup>311</sup> Curiously, no one has asked, "What would the Senate look like if we did not have the Seventeenth Amendment?" Sections A and B address that question and the related question of how state legislatures might be different.

Section A begins with an analysis of the political congruence between state legislatures and their U.S. senators. Alexander Hamilton anticipated that the states would send senators who were a "faithful copy" of a majority of the legislature.<sup>312</sup> Section A tests Hamilton's hypothesis, comparing the political composition of state legislatures against the senators selected from that state prior to 1913. This gives some basis for comparing the choices the people have made since 1913 with the party affiliation of the candidate that likely would have been chosen by the legislatures. In addition, this gives one immediate measure of the Amendment's effect—the congruence between the political choices of the people and the political composition of their legislatures.

Section B, building on the data in Section A, discusses the impact of the Seventeenth Amendment on the political composition of state legislatures. Section C lays out the Amendment's impact on instruction, recall, and tenure, and Section D concludes with a discussion of how the Amendment has affected the Senate in its constitutionally-assigned roles.

### A. *The Political Composition of the U.S. Senate*

So far as I can determine, there has been no comprehensive study of the effects of the Seventeenth Amendment on the political composition of the U.S. Senate, or its effects on state legislatures. According to one recent article, "membership in the Senate did not change very much after passage of the amendment."<sup>313</sup> Another pointed out that in the election of 1914, apparently not one legislatively-chosen incumbent was defeated.<sup>314</sup> Other commentators have gone so far as to conclude that "direct election of senators has not brought about any sweeping changes."<sup>315</sup> These observations are probably correct so far as they describe that the privilege of incumbency held even after the

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<sup>308</sup> Zywicki, *supra* note 34, at 1047-54; Daynes, *Direct Election*, *supra* note 34, at 142-46.

<sup>309</sup> Daynes, *Direct Election*, *supra* note 34, at 44-51.

<sup>310</sup> *Id.* at 81-86, 98-101.

<sup>311</sup> *E.g.*, HOEBEKE, *supra* note 34; Riker, *supra* note 5; Brooks, *supra* note 34.

<sup>312</sup> THE FEDERALIST NO. 60, at 407 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

<sup>313</sup> Amar, *supra* note 268, at 1129 & n.86.

<sup>314</sup> ABRAMOWITZ & SEGAL, *supra* note 228, at 25.

<sup>315</sup> BROADUS M. & LOUISE P. MITCHELL, A BIOGRAPHY OF THE CONSTITUTION OF THE UNITED STATES: ITS ORIGIN, FORMATION, ADOPTION, INTERPRETATION 214 (1964).

people acquired the right to elect their own senators and that few election reforms have followed.<sup>316</sup> But the Seventeenth Amendment, in fact, had an immediate impact on the political composition of the Senate.

I collected information on the political composition of state legislatures from 1865 to present<sup>317</sup> and compared the state legislative data

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<sup>316</sup> See, e.g., Carleton W. Sterling, *Control of Campaign Spending: The Reformers' Paradox*, 59 A.B.A. J. 1148, 1149 (1973) (stating that Seventeenth Amendment failed to stem campaign spending and may have encouraged it).

<sup>317</sup> Information from 1937 through 1993 was taken from the biennial BOOK OF THE STATES, published by the Council of State Governments, and from a data base of James Garand of the LSU Political Science Department. Information from 1994-95 was taken from "Preliminary Partisan Composition of the State Legislatures—1994 Election," obtained from the National Conference of State Legislatures.

Information prior to 1937 was collected from the following sources (listed alphabetically by state): Arizona: "Legislature's Political Makeup Since Statehood," ARIZ. CAPITOL TIMES, June 10, 1987, at 2-3; California: JAMES D. DRISCOLL & DARRYL R. WHITE, LIST OF CONSTITUTIONAL OFFICERS, CONGRESSIONAL REPRESENTATIVES, MEMBERS OF THE CALIFORNIA STATE LEGISLATURE AND MEMBERS OF THE SUPREME COURT, 1849-1985, at 138-45 (1985); Colorado: Control by Two Major Political Parties of Governorship and General Assembly in Colorado from 1891 to the Present (n.d.); Connecticut: CONNECTICUT STATE REGISTER AND MANUAL 184-87 (1995); Delaware: Delaware General Assembly Majority Compositions (n.d.); Idaho: IDAHO BLUE BOOK, 1993-1994, at 180-81 (1993); Illinois: SAMUEL K. GOVE & RICHARD W. CARLSON, AN INTRODUCTION TO THE ILLINOIS GENERAL ASSEMBLY 181 (1972); SAMUEL K. GOVE & GILBERT Y. STEINER, THE ILLINOIS LEGISLATIVE PROCESS 40-41 (1954); BLUE BOOK OF THE STATE OF ILLINOIS, 1931-1932 (1931); Letter from Dave Johnson, Office of the Illinois Secretary of State to Jay Bybee, author (n.d.; copy on file with author); Indiana: A BIOGRAPHICAL DIRECTORY OF THE INDIANA GENERAL ASSEMBLY (2 vols.) (Rebecca A. Shepherd et al. eds., 1980); Iowa: FRANK J. STORK & CYNTHIA A. CLINGAN, THE IOWA GENERAL ASSEMBLY: OUR LEGISLATIVE HERITAGE, 1846-1980, at 5-8 (1980); Kansas: *Membership in House of Representatives and Senate* (compiled by Legislative Reference Division of the Kansas State Library; n.d.); Kentucky: "Kentucky General Assembly Party Affiliation" (n.d.); Maine: "Legislature of Maine: Political Composition" (n.d.); Massachusetts: CORNELIUS DALTON ET AL., LEADING THE WAY: A HISTORY OF THE MASSACHUSETTS GENERAL COURT, 1629-1980, at 441-44 (1984); Michigan: MICHIGAN MANUAL, 1993-1994, at 332-35 (1993); A SESQUICENTENNIAL LOOK AT THE MICHIGAN LEGISLATURE 53-56 (1987); Minnesota: POLITICS IN MINNESOTA: THE DIRECTORY (1995); see also MINNESOTA CONGRESSMEN, LEGISLATORS, AND OTHER ELECTED STATE OFFICIALS: AN ALPHABETICAL CHECK LIST, 1849-1971 (W.F. Toensing, comp. 1971); Missouri: "Missouri Legislature, Party Representation, 1878-1937" (n.d.); Montana: ELLIS WALDRON & PAUL B. WILSON, ATLAS OF MONTANA ELECTIONS, 1889-1976 (1978); Nevada: POLITICAL HISTORY OF NEVADA 193-222 (9th ed. 1990); New Jersey: JOSEPHINE A. FITZGERALD, MANUAL OF THE LEGISLATURE OF NEW JERSEY 192-94 (1940); New Mexico: JACK E. HOLMES, POLITICS IN NEW MEXICO 316-19 (1967); NEW MEXICO BLUE BOOK, 1935-1936, at 13-14; THE NEW MEXICO BLUE BOOK, 1929-30, at 43-44; THE NEW MEXICO BLUE BOOK, 1926-27, at 41-51; LAWS OF NEW MEXICO, 1931, at v; LAWS OF NEW MEXICO, 1933 (n.p.); New York: "Number of Democrats and Republicans in the Senate and Assembly, 1900-1953" (n.d.); hand-compiled statistics for 1893-1906 from The New York State Library (copy on file with author); North Dakota: NORTH DAKOTA CENTENNIAL BLUE BOOK, 1889-1989, at 229-376 (1989); Ohio: "Ohio General Assembly, Historical Political Party Affiliations" (n.d.), compiled from ANNUAL REPORTS OF THE SECRETARY OF STATE, OHIO STATISTICS, AND ROSTERS OF THE GENERAL ASSEMBLY; Oklahoma: DIRECTORY OF OKLAHOMA, 1983; Oregon: "Party Composition of the Oregon Legislature, 1859-" (n.d.), compiled from CHRONOLOGICAL LIST OF OREGON'S LEGISLATURES (Cecil L. Edwards, comp. 1993);

with data on the actual election of senators. I then simulated the functioning of the Act of 1866. Prior to 1866, state legislatures elected senators in one of the two following ways: (1) they elected senators in the same way they passed laws, by a vote of each house separately; or (2) they elected senators in a convention format, by vote of the legislators of both houses.<sup>318</sup> The Act of 1866 employed both methods. It required that state legislatures first vote as separate houses. If no candidate received a majority in both houses, then the legislature voted in joint assembly.<sup>319</sup>

For each class of senators,<sup>320</sup> I compared the party affiliations of the members of each state's upper house with that of its lower house; if the majority party in each house was the same, I then compared the majority's party affiliation with that of the state's U.S. senator elected in that year. Any state which showed perfect political congruence between the two houses and the state's U.S. senators (or any state for which we did not have complete statistics),<sup>321</sup> was reported as consistent. For those states in which there was a split in the political control of the two houses, I combined state senates and assemblies into a single body and then compared the political composition of the body as a

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Pennsylvania: 88 THE PENNSYLVANIA MANUAL 495 (1947); South Dakota: 2 BIOGRAPHICAL DIRECTORY OF THE SOUTH DAKOTA LEGISLATURE, 1889-1989, at 1235 (1989); handwritten notes from the Government Documents Department, South Dakota State Library (copy on file with author); Tennessee: "Tennessee General Assembly Political Party Designations" (compiled by Tennessee State Library & Archives, n.d.); Texas: *Political Composition of the Legislature for Selected Years Other Than Democrat* (n.d.); Utah: RICHARD D. POLL ET AL., UTAH'S HISTORY 711 (1978); Vermont: VERMONT LEGISLATIVE DIRECTORY (published biennially) (1876-1939); Washington: STATE OF WASHINGTON: MEMBERS OF THE LEGISLATURE, 1889-1991, at 1-4 (1991); West Virginia: WEST VIRGINIA BLUE BOOK 429-30 (Darrell E. Holmes ed., 1993); Wisconsin: WISCONSIN BLUE BOOK, 1995-1996, at 276 (1995); Wyoming: 1973 WYOMING OFFICIAL DIRECTORY 161 (1973).

Nebraska's legislature is non-partisan. Minnesota's was non-partisan until 1986.

<sup>318</sup> G. HAYNES, ELECTION OF SENATORS, *supra* note 33, at 19-35.

<sup>319</sup> See *supra* note 238.

<sup>320</sup> The Constitution divides senators into three classes, so that in any two year period approximately one-third of Senate seats are up for election. U.S. CONST. art. I, § 3, cl. 2.

<sup>321</sup> Although there are some gaps in the historical data, I had sufficient data for 1865-1913 to test the hypothesis that state legislatures selected U.S. senators along partisan lines. Data was complete for 1937 to present and nearly complete for 1913-1937. As explained in note 317, *supra*, information for 1937 to the present had been previously compiled. Information for 1865-1937, however, had to be collected state by state. In many cases, state archivists advised that the information simply did not exist, or that, if it existed, it was in a form that could not be readily compiled. Among the states for which I did not have complete data are the eleven states of the Confederacy which, after Reconstruction, voted heavily Democratic. By oral tradition, Southern Democratic senators are an accurate reflection of the political composition of their state legislatures.

For 1869, I had information on 24 percent of the states. By including the Southern states, I had 54 percent. For 1889, I had data for one half of the states; including the Southern states, I had data for 79 percent of the states. For 1913, I had data for 71 percent of the states; 87 percent, by including the Southern states.

whole with the political affiliation of the U.S. senator elected by the legislature (1865-1913) or the people (1914-present). In sum, the study first predicted party affiliation of senators on the basis of separate votes in each house. If that method failed to produce a single candidate (identified by party), the study looked at the combined legislature to predict a candidate. I only marked as inconsistent those cases in which the state legislature was controlled by one party in a given year and either the legislature (prior to 1913) or the people (post-1913) sent a U.S. senator from a different political party.

Figure 1 is a summary of the data.<sup>322</sup> In Figure 1, the solid lines show the actual composition of the U.S. Senate, by party affiliation. The dotted lines show the composition of the U.S. Senate (again by party affiliation),<sup>323</sup> assuming that state legislatures voted along party lines. The difference between the solid and dotted lines represents changes in party affiliation of the total number of Democrats and Republicans in the U.S. Senate. For example, prior to 1893, there is no difference between the solid and dotted lines; I had no evidence that state legislatures selected a senator that represented a party other than the party controlling the legislature. Hamilton was, as we had expected, correct. In 1893, however, the North Dakota legislature sent William Roach, a Democrat, to the U.S. Senate. Both houses of the North Dakota legislature had a Republican majority.<sup>324</sup> This is shown in Figure 1 as a net change in the composition of the Senate for the six years that Senator Roach served (he was not re-elected). If, during that same term, another state, having a Democratic legislature, had sent a Republican senator, Figure 1 would have shown no net change in the political composition of the Senate.

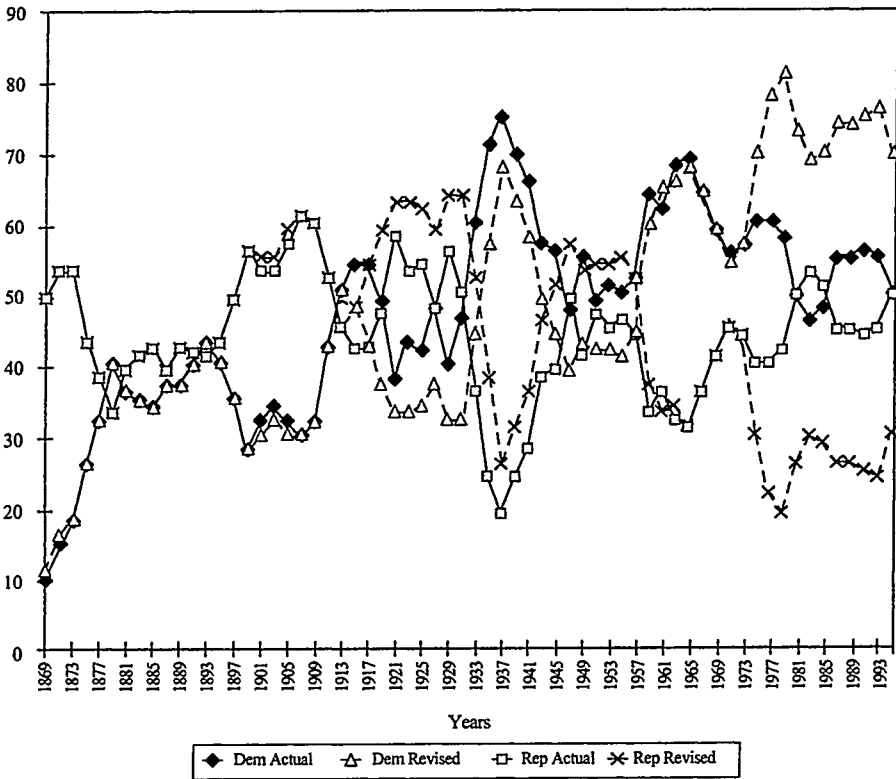
Figure 1 demonstrates that the Seventeenth Amendment, in fact, had an immediate and dramatic impact on the political composition of the U.S. Senate. Between 1865 and the 1914 election (the first election under the newly-ratified Amendment), there was near-perfect identity between the political affiliations of state legislatures and the senators they elected. The first clear aberration was not until 1893, and there are only scattered changes between 1893 and 1915.<sup>325</sup> Even if no incumbent was defeated in the election of 1914, popular election shifted the balance in the Senate. Between January 1913 and January

<sup>322</sup> Summary data on which Figure 1 is based are attached as an Appendix.

<sup>323</sup> For simplicity, I have only charted Democrats and Republicans. Although other parties, Free Silver, Labor, Socialist, and others are accounted for, they are less significant, especially post-1913.

<sup>324</sup> G. HAYNES, ELECTION OF SENATORS, *supra* note 33, at 64-65. Apparently, there was also cross-party voting in the first elections. KERR, *supra* note 38, at 19.

<sup>325</sup> *E.g.*, Kansas (1897), Kentucky (1909), Nevada (1911), and Oregon (1909, 1913). Oregon does not represent a true aberration, because it had adopted a ballot requiring candidates to the state legislature to pledge to support the U.S. Senate candidate who won the straw popular vote. See G. HAYNES, ELECTION OF SENATORS, *supra* note 33, at 145-47.



1915, control of the Senate had changed from Republican to Democrat. The data suggest that the election of 1914 saw seven senate seats go to candidates representing the opposite party than controlled their respective state legislatures; six of the seven seats went to Democrats in states with Republican-dominated legislatures.<sup>326</sup> The election of 1914 thus gave the Democrats a majority in the Senate (54-42); whereas, the Senate, in the absence of the Seventeenth Amendment, probably would have been deadlocked (48-48). The results for the succeeding elections are even more dramatic. In 1917, the Democrats retained control of the Senate (54-42). Had senators been elected by state legislatures, the data suggest that the political control of the Senate would have returned to the Republicans (43-53).

Although it is beyond my present purposes to detail all of the changes the Seventeenth Amendment might have wrought in the political composition of the U.S. Senate, I have several observations. First, under the assumptions made in Figure 1, control of the Senate

<sup>326</sup> The states were California, Colorado, Nevada, Oregon, South Dakota, and Wisconsin. Indiana, with a heavily Democratic legislature, sent a Republican. GUIDE TO U.S. ELECTIONS, *supra* note 273.

would have shifted from Democrat to Republican in 1917-20, 1933-34,<sup>327</sup> 1945-46, and 1949-58. Significantly, the data also suggest that for the 1994 elections in which the Republicans regained control of the Senate, Democrats would have retained the Senate by a substantial margin (70-30).<sup>328</sup> Senate control would likewise have shifted from Republicans to Democrats in 1981-86.

Second, the political composition of state legislatures and the political composition of the Senate are nearly identical prior to 1913. In the period just following ratification of the Seventeenth Amendment, they are not identical, although generally congruent. Between 1921 and 1932, for example, the Republicans controlled the Senate, although they did not enjoy the majority they might have had if state legislatures were electing senators. The explanations for this are undoubtedly complex. One obvious explanation is the malapportionment of state legislatures. Malapportionment generally favored rural interests, which in the modern era were largely Republican.<sup>329</sup> In part, the Seventeenth Amendment was a land-grab by urban interests in industrial states who saw a chance to eliminate rural domination of state legislatures.<sup>330</sup>

The debates over the Seventeenth Amendment had recognized the malapportionment problem. One House report noted that malapportionment of state legislatures distorted popular choices that a properly apportioned legislature might otherwise make.<sup>331</sup> Senator

<sup>327</sup> This is perhaps the most dramatic change because it is the first two years of the New Deal. Had the Republicans held control of the Senate, it surely would have affected Roosevelt's "Hundred Days."

<sup>328</sup> I have made no attempt to account for death or resignation in my data. I focused exclusively on party identification. According to my data, the Senate in the 104th Congress would, absent death or resignation, have been evenly divided between Democrats and Republicans. Republican control of the Senate resulted from the resignations of David Boren (D-Okla.) and Albert Gore (D-Tenn.), who were replaced in special elections by James Inhofe (R-Okla.) and Fred Thompson (R-Tenn.). Following the 1994 elections, Senators Ben Nighthorse Campbell (Colo.) and Richard Shelby (Ala.) switched from the Democratic to the Republican party. In a special election in January 1996, Ron Wyden, an Oregon Democrat, assumed the seat of Bob Packwood, who had resigned. Prior to the November 1996 election, Republicans claimed a 53-47 advantage in the Senate.

<sup>329</sup> ABRAMOWITZ & SEGAL, *supra* note 228, at 15, 23. The predominance of rural interests in state senates is a more recent phenomena. See MAIN, *supra* note 36, at 95 ("Despite the majority of farmers in the [colonial] population, there were relatively few farmers in the upper houses.")

<sup>330</sup> Zywicki, *supra* note 34, at 1020. See HOEBEKE, *supra* note 34, at 4-5 (stating that popular election encouraged political machines); John D. Buenker, *The Urban Political Machine and the Seventeenth Amendment*, 56 J. AM. HIST. 305, 320 (1969) ("The fate of the Seventeenth Amendment in the major industrial states amply demonstrates that the urban political machine was one of the most consistent and influential supporters of this reform."). As Professor Zywicki has shown, the urban-rural split is an incomplete explanation, because much of the Amendment's support came from western and other rural-dominated states. Zywicki, *supra* note 34, at 1021.

<sup>331</sup> H.R. REP. NO. 368, 52d Cong., 1st Sess. 3 (1892); see also H.R. REP. NO. 368 (Part 2), 52d Cong., 1st Sess. 2 (1892) (views of the Minority).

Edmunds of Vermont argued that people of various areas should have a right of representation and not be overwhelmed by "mere weight of numbers that might occupy only a corner of the State and possess interests and cherish ambitions quite unlike those of all the other sections of the commonwealth."<sup>332</sup> Members of Congress noted that malapportionment favored Republicans, and that direct election of senators favored urban wealthy and poor, while it worked against middle class farmers.<sup>333</sup> On the other hand, the House had great incentive to see the Seventeenth Amendment adopted. Once senators represented the people—a body already represented in the House of Representatives—there was greater congruence between the electors and their representatives in Congress, and less opportunity for interference from the states. For Representatives in the House, the Seventeenth Amendment reduced the opposition to their constituencies, thereby increasing their power and making their votes more important to special interests.<sup>334</sup>

In theory, the reapportionment of state legislatures in the 1960s following the one person, one vote decisions<sup>335</sup> should have suggested greater congruence between the political composition of state legislatures and that of the Senate. In fact, there is greater congruence beginning about 1959 (prior to the reapportionment decisions) and continuing until 1973. Reapportionment may be a satisfactory explanation for the consistency in the 1960s, but it cannot explain large variations beginning in the 1970s. This post-Watergate era shows heavy domination by Democrats in state legislatures, but far more modest Democratic Senate majorities in 1973-80 and 1987-94, and Republican Senates in 1981-86 and 1995-96.<sup>336</sup>

### B. *The Political Composition of State Legislatures*

In the preceding section, I noted the changes that might have occurred in the political composition of the Senate—some quite dra-

<sup>332</sup> S. DOC. NO. 406, *supra* note 84, at 62-63. Senator Edmunds also observed that "an election by a majority of all the people of a State is radically a different thing from the choice of the same officers by the people (through their representatives) of the separate political divisions of it." *Id.* at 60.

<sup>333</sup> See 31 CONG. REC. 4815 (1898) (statement of Rep. Cummings) (examples of Connecticut and New York); 25 CONG. REC. 104 (1893) (statement of Sen. Hoar).

<sup>334</sup> Zywicki, *supra* note 34, at 1040-41. Zywicki also points out that the great congruence between election of senators and representatives would reduce the lobbyists' costs in the Senate.

<sup>335</sup> *E.g.*, Reynolds v. Sims, 377 U.S. 533 (1964); see also Baker v. Carr, 369 U.S. 186 (1962).

<sup>336</sup> One explanation for the domination of the Democrats in state legislatures at a time when their numbers in the Senate and their control of the White House was far more modest is a trend in the states toward professional legislatures, which may favor Democrats. Morris P. Fiorina, *Divided Government in the American States: A Byproduct of Legislative Professionalism?*, 88 AM. POL. SCI. REV. 304, 306-08 (1994); see also Corwin, *supra* note 208, at 575 (showing that in states with professional legislatures, incumbency rates are about the same as for members of Congress).



matic—assuming that state legislatures voted along political lines. That assumption has a solid historical foundation. For the post-1913 elections, I discussed possible changes in the Senate, holding the political composition of state legislatures constant. But there was nothing constant about the political composition of state legislatures so long as they held the power to elect U.S. senators. The political composition of state legislatures was not independent of their duty to elect senators.

If Hamilton was correct that senates would be a “faithful copy” of legislatures,<sup>337</sup> he might have also anticipated the influence that senate elections would have on state legislatures. Indeed, the converse of Hamilton’s statement was also often true: legislatures were faithful copies of their senators. The real questions are which is the copy, which is the original, and does it even matter? The election reform movement of the 1890s made apparent to all, if it was not clear before, the connection between state legislative elections and U.S. Senate elections. But the reforms—requiring candidates for state office (irrespective of their party affiliation) to pledge support for the senatorial candidate who won the straw poll<sup>338</sup>—had the effect of divorcing state legislative elections from Senate elections. The Seventeenth Amendment made this divorce lawful and final.

Direct election of senators had a leveling influence on the political composition of state legislatures. Until the 1830s, candidates for the Senate did not come forward until after the state legislative elections. This limited the candidate’s campaigning to the legislators and encouraged fidelity to them.<sup>339</sup> Beginning in the 1830s, candidates began campaigning to the people (“canvassing the public”), who responded by electing a slate of legislators pledged to elect a particular candidate.<sup>340</sup> The question of whom state legislators would support for senator became an important campaign issue. As President, Andrew Jackson recognized the potential and maneuvered to get the right people in place in state legislatures in order to secure his support in the Senate.<sup>341</sup> The most famous example of the influence of Senate elections on local elections was the legendary Lincoln-Douglas debates, which were not a plea for popular vote, but for a slate of state legislative candidates pledged to support either Lincoln or Douglas.<sup>342</sup>

<sup>337</sup> THE FEDERALIST NO. 60, at 406-07 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

<sup>338</sup> See *supra* text accompanying notes 240-42.

<sup>339</sup> Riker, *supra* note 5, at 463.

<sup>340</sup> HOEBEKE, *supra* note 34, at 87; Riker, *supra* note 5, at 463.

<sup>341</sup> Eaton, *supra* note 108, at 313, 316-17.

<sup>342</sup> THE LINCOLN-DOUGLAS DEBATES 371-73 (Harold Holzer ed., 1993). Douglas got the seat, although Lincoln got the popular vote. Haynes, *Popular Election*, *supra* note 280, at 102; see also Eaton, *supra* note 108, at 311, 315.

The U.S. Senate race was *the* issue in the 1858 campaign for the Illinois legislature.

Figure 1 is also a measure of the gap between state legislatures and their senators. The data suggests that in the 1970s and 1980s, the political composition of state legislatures was nearly independent of the composition of the Senate. It is evidence of the completeness of the divorce. For example, if it is hard to think of the Democratic party during the Carter Administration controlling 81 seats in the Senate, the data may suggest that re-linking senators and legislatures would have tempered the political composition of state legislatures in the late 1970s. If the country did not want a Senate so tilted toward the Democrats, perhaps it would have altered the political composition of its state legislatures.

The Seventeenth Amendment contributed to, but of course did not cause, the gap between legislatures and the Senate. That process had already begun, and reform efforts culminating in the Seventeenth Amendment demonstrated the growing mistrust of state legislatures. The Seventeenth Amendment, however, hastened that process. As Elihu Root argued, robbing legislatures "of power, of dignity, of consequence" would lead to "state legislatures growing less and less competent, less and less worthy of trust, and less and less efficient in the performance of their duties. You can never develop competent and trusted bodies of public servants by expressing distrust of them, by taking power away from them."<sup>343</sup>

Direct election may also have given the people less representation in Washington. If the Amendment diminished the stature of state legislatures, it has failed to spur American voters to the polls to secure their representation in senatorial elections. Voter participation has remained low.<sup>344</sup> This non-voting segment of the population is unrepresented in the choice of senators. To put it another way, senators may not accurately reflect their constituents because their constituents do not vote. The same could be said, of course, for state legislators, who are also elected by a relatively small proportion of the electorate. However, even if state legislators do not fully reflect their constituents either, they are at least physically and metaphorically closer to their constituents; the smaller the group represented the more likely representatives will reflect—or at least understand—the interests of their

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<sup>343</sup> 46 CONG. REC. 2243 (1911); see also HOEBEKE, *supra* note 34, at 24 ("[D]emocratic reformers . . . never managed to improve the popularity of representative bodies by diminishing their authority. . . . [The respect accorded state legislatures and the quality of such bodies] subsided proportionately with the amount of control that was taken from them.").

<sup>344</sup> E.g., RUY A. TEIXEIRA, *THE DISAPPEARING AMERICAN VOTER* 9 (1992) (showing decline in turnout in Presidential elections since 1820s); Norman Luttberg, *Comparative Insights Into Voter Participation: Are There Barriers That We Can Remove*, in AMERICAN BAR ASSOCIATION, *THE DISAPPEARANCE OF THE AMERICAN VOTER RE-VISITED*, app. A, fig. 3 (1990) (comparing decline in voting in presidential, gubernatorial, and congressional elections).

constituents. Prior to the Seventeenth Amendment, senatorial elections were extremely important occasions in which all legislators were likely to participate. Thus, in pre-Seventeenth Amendment elections, all persons were likely to have been (at least nominally) represented in the voting for U.S. senators. Given the level of participation in modern elections, we cannot say the same today. As John Jay understood, election of senators by state legislators had “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>345</sup>

### C. Instruction, Recall, and Rotation

The Seventeenth Amendment brought a formal end to instruction.<sup>346</sup> It could not end the practice of *advising* senators, but it took from the legislatures any remaining mechanism for enforcing their views.<sup>347</sup> In the post-Seventeenth Amendment era, state legislatures continued to issue requests, but it was understood that the senators would suffer any political consequences on the merits of their votes, rather than for having disobeyed an order from the legislature. Thus, an important consequence of the Seventeenth Amendment has been that senators from any given state have been less inclined to vote together; senators have become more independent since 1913.<sup>348</sup> The Seventeenth Amendment has exacerbated the effects of per capita voting.

No modern analogue to instruction has replaced it. The closest mechanism is probably the public opinion poll. The public's lack of familiarity with specific issues, and the way in which the polls are conducted limits the usefulness of the poll. At least, polls convey general impressions or moods on very broad issues. They are, however, inadequate substitutes for legislative directives, which were issued in written form and on the record. One other substitute for instruction is the public initiative or referendum. The referendum has found some success at the state and local level, but has not yet shown its usefulness at

<sup>345</sup> THE FEDERALIST NO. 64, at 432-33 (John Jay) (Jacob E. Cooke ed., 1961).

<sup>346</sup> 2 G. HAYNES, SENATE OF THE UNITED STATES, *supra* note 169, at 1027; Bresler, *supra* note 100, at 365; Eaton, *supra* note 108, at 319; Colgrove, *supra* note 98, at I-21.

<sup>347</sup> I have previously discussed the circumstances under which Congress may advise, but not instruct, the President. Jay S. Bybee, *Advising the President: Separation of Powers and the Federal Advisory Committee Act*, 104 YALE L.J. 51 (1994).

<sup>348</sup> Daynes, *Direct Election*, *supra* note 34, at 44. Daniel Elazar has discussed intrastate political unity and a state's ability to translate that into power in the Senate, as shown by voting agreement between a state's senators. ELAZAR, *supra* note 299, at 21-23 & tbl. 4.

a national level.<sup>349</sup> Indeed, short of Article V, there is presently no means of calling for a national referendum.<sup>350</sup>

Recall, as a mechanism of control over senators, has fared no better. During the debates over the Seventeenth Amendment, Senator Owen proposed that the people should possess both the power to elect senators and the right to recall them.<sup>351</sup> Just as the referendum is a cumbersome device for instructing senators, popular recall is expensive and difficult.<sup>352</sup> Although state legislatures never enjoyed the right of recall of U.S. senators, they were far better positioned to obtain it and exercise it than the populace.

Rotation has followed a more convoluted path. During the ratification debates, Senator DePew warned that senators popularly elected would have the "tenure of their place here" questioned by the people in each election.<sup>353</sup> And Senate historian George Haynes predicted in 1906 that popular election would tend to shorten terms in the Senate:

[T]he choice of senators by state legislatures has tended to produce a continuity of service, and hence an efficiency based upon long experience in legislature work, highly exceptional in popular governments. . . . [I]f the effects of popular elections be judged by results produced in the election of governors and representatives in Congress, it is clear that the trading of localities, the restless craving for rotation in office, the insistence that the prizes be widely distributed, would make it highly improbable that a senator would be given more than one or, at most, two terms. When the loss to the country is estimated if the service of a Webster or a Clay, a Sherman or a Hoar, were limited to six even to twelve years, the innovator may well hesitate to urge popular election; for the evidence is incontrovertible that the American people still cherish the notion of rotation of office, and that they are particularly loath to reelect men for long terms of legislative service.<sup>354</sup>

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<sup>349</sup> CRONIN, *supra* note 99, at ch. 7.

<sup>350</sup> See *Hawke v. Smith*, 253 U.S. 221 (1920); see also Jonathan L. Walcoff, Note, *The Unconstitutionality of Voter Initiative Applications for Federal Constitutional Conventions*, 85 COLUM. L. REV. 1525 (1985). But see Akhil R. Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457 (1994) (asserting that popular referendum may be constitutional); Kobach, *supra* note 34 (suggesting that the means by which the Seventeenth and Nineteenth Amendments came about justifies an alternative amending process).

<sup>351</sup> 45 CONG. REC. 7125 (1910). In that era, one state, Arizona, provided for the recall of its U.S. senators. 2 G. HAYNES, SENATE OF THE UNITED STATES, *supra* note 169, at 1025; see CRONIN, *supra* note 99, at 125-27.

<sup>352</sup> CRONIN, *supra* note 99, at 125-56.

<sup>353</sup> 35 CONG. REC. 3980 (1902).

<sup>354</sup> G. HAYNES, ELECTION OF SENATORS, *supra* note 33, at 226. According to Haynes, the Seventeenth Amendment "was a later phase of the movement to democratize American government, a movement which had begun to manifest itself many years earlier in the broadening of the suffrage, the multiplication of elective offices and the shortening of their terms." 2 G. HAYNES, SENATE OF THE UNITED STATES, *supra* note 169, at 1041.

History has shown these predictions incorrect. Senators had already begun to regard their positions as careers in the 1890s, and the number of senators serving consecutive terms remained about the same from the 1890s to the 1950s, but has increased since then.<sup>355</sup> Rather than serving to limit senators' terms, the Seventeenth Amendment has contributed to longer terms.<sup>356</sup> There are at least two reasons for this phenomenon. First, once the election of senators was taken from the legislatures, the election was abandoned to party machines. Party bosses, not legislative compromise, determined who would be elected.<sup>357</sup> Machines could more easily manipulate candidates and the populace than they could the egos of legislators.

Second, the ambitions of the legislators themselves had helped to curb the terms served in the Senate. The Seventeenth Amendment worked against rotation or tenure limits because the elective body (the people) had less ambition to the office it controlled. Legislators had more natural ambition to the office and thus more incentive to watch senators.<sup>358</sup> As a result senators had to be responsive to legislators' concerns. The ambitions of state legislators helped curb lengthy stays in the Senate.<sup>359</sup>

Whatever natural rotation we assumed the people would impose on their senators has not materialized. The alternative—rotation imposed by state law—was struck down by the Supreme Court in *U.S.*

<sup>355</sup> GEORGE F. WILL, RESTORATION 80-83 & tbl. 4 (1992); Kernell, *supra* note 229, at 677.

<sup>356</sup> Daynes, Direct Election, *supra* note 34, at 142-45, 152.

<sup>357</sup> HOEBEKE, *supra* note 34, at 190.

<sup>358</sup> Colgrove, *supra* note 98, at IX-21; see also DAVID J. ROTHMAN, POLITICS AND POWER: THE UNITED STATES SENATE, 1869-1901, at 124-31 (1966) (showing that senators had substantial experience in local government); Heinz Eulaw, *Expectations, in THE LEGISLATIVE SYSTEM* 129-30 (John C. Wahlke et al., eds., 1962) (surveying state legislators' ambitions to other offices); Deborah J. Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 16 (1988) (senators increasingly lack experience in local politics); Daynes, Direct Election, *supra* note 34, at 124-29 (demonstrating that senators with local or state political experience decreased dramatically after 1913). State legislators have shown greater stability of membership. Richard G. Niemi & Laura R. Winsky, *Membership Turnover in U.S. State Legislatures: Trends and Effects of Districting*, 12 LEGIS. STUD. Q. 115 (1987); Kwang S. Shin & John S. Jackson III, *Membership Turnover in U.S. State Legislatures: 1931-1976*, 4 LEGIS. STUD. Q. 95 (1979). State legislatures enjoy substantial benefits of incumbency, even though their elections are frequently less visible and not as well financed as their congressional counterparts. Malcolm E. Jewell & David Breaux, *The Effect of Incumbency on State Legislative Elections*, 13 LEGIS. STUD. Q. 495, 496, 511-12 (1988).

<sup>359</sup> WILL, *supra* note 355, at 84. While incumbency remains a substantial factor in re-election, after 1960, "the electoral position of senators becomes more tenuous as the number of terms served increases." Peter Tuckel, *Length of Incumbency and the Re-election Chances of U.S. Senators*, 8 LEGIS. STUD. Q. 283, 285 (1983). Re-election rates increase between first and second terms, but fall off after the second and third senate terms. Professor Tuckel attributes this to redistribution of power in the Senate in the 1950s (which enhanced the visibility of junior senators) and television (which "may decrease the reelection changes of veteran senators"). *Id.* at 286-87.

*Term Limits v. Thornton*,<sup>360</sup> which means that the only methods remaining are self-imposed rotation and constitutional amendment.

#### D. *The Senate's Constitutional Functions*

As I discussed in Section B, as state legislatures involved themselves in the election of senators and concerned themselves with national affairs, there was a reciprocal effect: the importance of national affairs affected state elections. There was a leveling or harmonizing effect in political affiliation when the elections of U.S. senators and members of state assemblies were linked. We would anticipate that there was a harmonizing as well between state interests in national issues and congressional handling of such issues.

After the Seventeenth Amendment, state legislatures no longer held a leveling influence, and the Senate was freed from the discipline of the body best situated to recognize the impact of federal legislation on state laws.<sup>361</sup> The Senate continued to represent people within state geographical boundaries, but it no longer represented the people within the states as a political unit. The Senate had become a smaller, more detached version of the House of Representatives. As the Senate lost any incentive to police itself for the states' account, the task fell instead to the Supreme Court, which shortly found the Tenth Amendment tautologous<sup>362</sup> and left the questions of state-federal relations to a political process<sup>363</sup> that no longer represented the states' political interests.<sup>364</sup> In contest after contest between Congress and the states, the states lost control over commerce,<sup>365</sup> succumbed to the allure of conditional federal spending,<sup>366</sup> and, through the Court's intervention, barely avoided direct control by Congress.<sup>367</sup> Congress has since discovered that it may employ the states to its own ends,

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<sup>360</sup> 115 S. Ct. 1842 (1995).

<sup>361</sup> See 46 CONG. REC. 2244 (1911) (statement of Sen. Root) ("[W]hen members of this body have to explain to the State legislature the reasons for their action, they meet minds that are competent and trained for the appreciation of their explanation. The people at large have far less understanding upon the subject.").

<sup>362</sup> *United States v. Darby*, 312 U.S. 100 (1941).

<sup>363</sup> *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 554 (1985); see also Brooks, *supra* note 34.

<sup>364</sup> See, e.g., *Katzenbach v. Morgan*, 384 U.S. 641, 645 n.3 (1966) (New York's senators sponsored legislation with the "explicit purpose" of preempting New York's voting requirements.).

<sup>365</sup> E.g., *Wickard v. Filburn*, 317 U.S. 111 (1942); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). But see *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114 (1996); *United States v. Lopez*, 115 S. Ct. 1624 (1995).

<sup>366</sup> E.g., *South Dakota v. Dole*, 483 U.S. 203 (1987); *Steward Mach. Co. v. Davis*, 301 U.S. 548 (1937); *United States v. Butler*, 297 U.S. 1 (1936); see Thomas R. McCoy & Barry Friedman, *Conditional Spending: Federalism's Trojan Horse*, 1988 SUP. CT. REV. 85.

<sup>367</sup> See *New York v. United States*, 112 S. Ct. 2408 (1992); see also *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

without being politically accountable for the cost of the programs.<sup>368</sup> The Court is simply not an adequate braking mechanism for Congress's own ambitions.<sup>369</sup> Congress, determined to lead, has wrested the whip handle from the states and found itself unrestrained.

So far I have discussed the role the states were intended to play in restraining Congress and the changes the Seventeenth Amendment facilitated, changes the Court itself has acknowledged. In *Garcia*, the Court observed that "changes in the structure of the Federal Government . . . not the least of which has been the substitution of popular election of Senators by the adoption of the Seventeenth Amendment in 1913 may work to alter the influence of the States in the federal political process."<sup>370</sup> The Seventeenth Amendment, however, did not affect matters of federalism alone. In this final Section, I review the impact of the Seventeenth Amendment on other constitutional functions of the Senate.

1. *The Advice and Consent Power.*—As I have previously noted,<sup>371</sup> there was no formal connection between the states and the Senate's advice and consent power outside of the relationship between state legislatures and their senators. The informal link was, of course, instruction.

States apparently did not instruct frequently on appointments, but there are several significant instances. In 1834, for example, President Jackson nominated Roger Taney as Secretary of the Treasury. The Senate rejected him the following day—the Senate's first rejection of a cabinet nominee. At least four senators opposed to Taney voted against instructions from their legislatures.<sup>372</sup> In a celebrated case, New York Senators Roscoe Conkling and Thomas Platt so objected to President Garfield's nomination of a fellow New York Republican that they resigned, assuming that the New York Legislature would reaffirm its support and immediately return them to the U.S. Senate. The New York Legislature refused.<sup>373</sup>

Even if the states were not routinely involved in the appointments process, the impact of direct election of the political composition of the senate and its concomitant effect on the Senate's advice

<sup>368</sup> Merritt, *supra* note 300, at 17.

<sup>369</sup> See *Tyler Pipe Indus. v. Washington State Dep't of Revenue*, 483 U.S. 232, 259-65 (1987) (Scalia, J., dissenting).

<sup>370</sup> *Garcia*, 469 U.S. at 554; see *United States v. Lopez*, 115 S. Ct. 1624, 1639 (1995) (Kennedy, J., concurring) (noting the "absence of structural mechanisms" to force the political branches to preserve "the federal balance").

<sup>371</sup> See *supra* text accompanying notes 87-88.

<sup>372</sup> CARL B. SWISHER, ROGER B. TANEY 287-88 (1936); see also *id.* at 312-13 (noting that Maryland House refused to issue resolution or instructions in favor of Taney's nomination to the Supreme Court).

<sup>373</sup> 2 G. HAYNES, SENATE OF THE UNITED STATES, *supra* note 169, at 745-47.

and consent power cannot be overlooked. States certainly would have had a particular interest in federal district and court of appeals judges with jurisdiction over the state's geographical area and other political appointments, and these have been affected. Even the appointment of Justices to the Supreme Court was not a matter in which the states were disinterested.<sup>374</sup> Under the assumptions explained in Part IV.A, the Seventeenth Amendment affected the composition of the Senate and would have resulted in a change in political control of the Senate during the administrations of Presidents Wilson (1917-22), Franklin Roosevelt (1933-34), Truman (1945-46, 1949-52), Eisenhower (1953-58), Reagan (1981-86), and Clinton (1995-). These periods cover, for example, the appointments of Sherman Minton, Tom Clark, Earl Warren, John Harlan, William Brennan, Charles Whittaker, Potter Stewart, Sandra Day O'Connor, William Rehnquist (as Chief Justice), and Antonin Scalia. In the cases of Presidents Wilson, Roosevelt, Truman, and Reagan, each found support in a sympathetic Senate and might have faced a hostile one. Only Eisenhower had a hostile Senate and might have faced a sympathetic one. Of the nominees during these periods, only Sherman Minton and William Rehnquist faced serious opposition, and we can only speculate as to whether they would have been confirmed by a Senate controlled by the other party. On the other hand, President Eisenhower's appointment of Democrat William Brennan was a recess appointment and was to show his bipartisan spirit just before the election.<sup>375</sup> Had Eisenhower faced a Republican Senate, he might not have been as conciliatory in his choice.

2. *The Treaty Power.*—The states' power to speak in foreign affairs found its voice in the states' senators. Prior to the Seventeenth Amendment, the states instructed on treaties<sup>376</sup> and on related matters such as embargoes.<sup>377</sup> The state-led movement to open the Senate's proceedings resulted in part from closed deliberations over the Jay Treaty. So long as the Senate was cloaked in secrecy, no one, in-

<sup>374</sup> In 1893, New York senators successfully opposed two U.S. Supreme Court nominees from New York. President Grover Cleveland ultimately nominated Edward Douglass White of Louisiana. *THE SUPREME COURT JUSTICES*, *supra* note 167, at 273; HOEBEKE, *supra* note 34, at 111.

<sup>375</sup> *THE SUPREME COURT JUSTICES*, *supra* note 167, at 448; Stephen J. Wermiel, *The Nomination of Justice Brennan: Eisenhower's Mistake? A Look at the Historical Record*, 11 *CONST. COMM.* 515, 521-24, 533 (1994-95).

<sup>376</sup> 32 *CONG. REC.* 838 (1899) (instructions of California to support treaty with Spain); *id.* at 2125 (same; instructions of South Dakota); Katherine F. Nelson, *Resolving Native American Land Claims and the Eleventh Amendment: Changing the Balance of Power*, 39 *VILL. L. REV.* 525, 580 & n.339 (1994) (instructions of New York to secure treaty with Seneca nation; citations omitted); see also 3 *ELLIOT'S DEBATES*, *supra* note 72, at 346 (statement of James Madison) (noting instructions of New Jersey on treaty with Great Britain and Spain).

<sup>377</sup> John Quincy Adams' refusal to abide his instructions on an embargo bill led to an early vote on his replacement and to his own resignation. Colgrove, *supra* note 98, X-59-64.



cluding state legislatures, had an opportunity to weigh in on the Senate's deliberations.<sup>378</sup>

More recent experience with the General Agreement on Tariffs and Trade (GATT) and the North American Free Trade Agreement (NAFTA) confirms that, post-Seventeenth Amendment, the states retain a strong interest in treaties, and it reminds us of the states' lack of official representation in Washington. For example, the National Conference of State Legislatures supported ratification of GATT "as long as the pact includes guarantees for state legislative authority and principles of federalism."<sup>379</sup> Ironically, one proposal suggested a point-of-contact person between states and the U.S. Trade Representative on NAFTA and GATT: "To best protect states measures, state legislatures should be part of the state-federal communications loop."<sup>380</sup>

3. *The Impeachment Power.*—The Senate's role in impeachments<sup>381</sup> is unique among its powers (because it is more a judicial than a legislative function) and seems ill-suited to interference by the states. Its power to try impeachments would seem to offer little occasion for state influence. During the impeachment of Samuel Chase, none of the states instructed their senators, apparently on the theory that instructions to the Senate as a court of impeachment were improper.<sup>382</sup> The states did react, however, to the acquittal of Chase and moved to obtain the power of recall out of a sense of betrayal by the Senate.<sup>383</sup>

Such noninterference, in fact, has not always been the case. In the impeachment of President Andrew Johnson, some states instructed their senators to vote to convict. A number of Republicans ignored their instructions, and one, John Henderson of Missouri, offered to resign rather than vote to convict. He then refused to resign and voted not guilty.<sup>384</sup> While the Seventeenth Amendment has relieved state legislatures of the temptation to influence impeachments, this is surely not a power essential to protecting state interests.

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<sup>378</sup> ELKINS & MCKITRICK, *supra* note 138, at 417; see also *supra* notes 137-45 and accompanying text.

<sup>379</sup> NCSL Resolution Backs GATT Pact if States' Authority Is Protected, 11 Int'l Trade Rep. (BNA) No. 31, at 1200 (Aug. 3, 1994).

<sup>380</sup> Aides to Governors' Group Offer Plan to Balance State-Federal Relations, Daily Report for Executives (BNA), at A245 (Dec. 23, 1994).

<sup>381</sup> U.S. CONST. art. I, § 3, cl. 6.

<sup>382</sup> Colgrove, *supra* note 98, at X-47. But see Kramer, *supra* note 96, at 1568 n.53 (suggesting that states did issue instructions to impeach Chase).

<sup>383</sup> Riker, *supra* note 5, at 457-58; see *supra* note 190 and accompanying text.

<sup>384</sup> 2 G. HAYNES, SENATE OF THE UNITED STATES, *supra* note 169, at 1034 n.4; LUCE, *supra* note 99, at 473-75.

4. *The Article V Amendment Process.*—The unique relationship of the Senate to the amendment process provides more fruitful ground for exploring the consequences of the Seventeenth Amendment. Article V provides two means for amendment. Congress, upon the approval of two-thirds of both Houses, may propose amendments to the states. If ratified by three-quarters of state legislatures or by state conventions, the amendment becomes effective.<sup>385</sup> Alternatively, if two-thirds of the states call for a constitutional convention, then Congress shall call a convention for proposing amendments.<sup>385</sup> As with the congressionally-initiated method, amendments proposed by the convention become law upon ratification by three-fourths of the states.

The two methods provide alternate paths for amending the Constitution.<sup>387</sup> The Founders assumed, and the assumption has been borne out in practice, that it would be easier to initiate amendments through Congress than through a constitutional convention. Although the constitutional convention route is more cumbersome,<sup>388</sup> fraught with unanswered concerns over the scope of the convention's agenda,<sup>389</sup> it is an important alternative because it allows the states to amend the Constitution without the consent of Congress.<sup>390</sup> Congress need only perform its duty and call the convention when sufficient states have so applied.<sup>391</sup>

The Senate bears no express role in the amendment process. As a chamber of Congress, the Senate may initiate the amendment process within Congress by proposing amendments or suggesting that sufficient states have applied for a convention. It may also prevent Congress from proposing amendments—as it did for several years

<sup>385</sup> U.S. CONST. art. V.

<sup>386</sup> *Id.*; see also THE FEDERALIST NO. 85, at 593 (Alexander Hamilton) (Jacob E. Cooke ed., 1961); THE FEDERALIST NO. 39, at 257 (James Madison) (Jacob E. Cooke ed., 1961).

<sup>387</sup> See Paulsen, *supra* note 292, at 692 n.48.

<sup>388</sup> "Even with [the constitution convention method], many framers recognized amendment without Congressional agreement to be a difficult procedure." Amar, *supra* note 268, at 1120.

<sup>389</sup> As Gerald Gunther has said, "there are many questions, many uncertainties, and no authoritative answers . . . [;] neither I nor anyone else can make absolutely confident assertions about what the convention process was intended to look like." Gerald Gunther, *Constitutional Brinkmanship: Stumbling Toward a Convention*, 65 A.B.A. J. 1046, 1049 (1979); see, e.g., Charles Black, Jr., *Amending the Constitution: A Letter to a Congressman*, 82 YALE L.J. 189 (1972); Walter Dellinger, *The Recurring Question of the "Limited" Constitutional Convention*, 88 YALE L.J. 1623 (1979); John Noonan, *The Convention Method of Constitutional Amendment—Its Meaning, Usefulness, and Wisdom*, 10 PAC. L.J. 641 (1979); Paulsen, *supra* note 292; Grover Rees, *Constitutional Conventions and Constitutional Arguments: Some Thoughts About Limits*, 6 HARV. J.L. & PUB. POL'Y 79 (1982); William Van Alstyne, *The Limited Constitutional Convention—The Recurring Answer*, 1979 DUKE L.J. 985.

<sup>390</sup> THE FEDERALIST NO. 39, at 257 (James Madison) (Jacob E. Cooke ed., 1961); THE FEDERALIST NO. 43, at 296 (James Madison) (Jacob E. Cooke ed., 1961).

<sup>391</sup> Paulsen, *supra* note 292, at 756-57.

prior to the proposing of the Seventeenth Amendment—by refusing to agree with the House. In this respect, the Senate's formal responsibilities are no different from those of the House of Representatives. It is an integral part of alternative processes, one initiated by the national legislature, and the other by state legislatures.

The position of senators as the representatives of the states nevertheless marks a unique role for the Senate in the proposal and passage of amendments. Because of the practice of instruction, there is a middle road between congressionally-proposed amendments and constitutional conventions. Because of our hesitation to call a constitutional convention, we have left Congress responsible for initiating constitutional reforms of its own institutions; a task it, quite naturally, has accepted with reluctance.<sup>392</sup>

From the beginning, state legislatures instructed their senators to propose or support constitutional amendments. States instructed their senators to procure a Bill of Rights,<sup>393</sup> and amendments depriving federal courts of jurisdiction over suits by private individuals against states (now the Eleventh Amendment),<sup>394</sup> changing the mode of electing the President and Vice-President (now the Twelfth Amendment),<sup>395</sup> the removal of Article III judges,<sup>396</sup> the removal of senators

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<sup>392</sup> Professors Ackerman and Golove point to the "dysfunctional" rules laid down by Article V when reforms affect the Congress. Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 804, 909 (1995) (stating that in the 1940s "while a strong and sustained majority of Americans opposed the Senate monopoly on treaty-making, Article V was blithely instructing them to seek the consent of two thirds of the Senate to its own disestablishment").

<sup>393</sup> Colgrove, *supra* note 98, at X-1, 2.

<sup>394</sup> U.S. CONST. amend. XI; see *New Hampshire v. Louisiana*, 108 U.S. 76, 88 (1883) (instructions from Massachusetts to procure constitutional amendment in light of *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793)); *Florida v. Georgia*, 58 U.S. (17 How.) 478, 519-20 (1854) (same; instructions of Virginia); see also Clyde E. Jacobs, *Prelude to Amendment: The States Before the Court*, 12 AM. J. LEGAL HIST. 19, 31, 34 (1968) (discussing the instructions).

Various other states reacted sympathetically to the Massachusetts and Virginia resolutions. "[D]uring the fall and winter of 1793, virtually every state governor referred to *Chisholm* and the Massachusetts and Virginia resolutions in messages to their respective legislatures. The legislatures of North Carolina and Connecticut formally responded with resolutions critical of the Court's decision." New Hampshire, New York, Maryland, South Carolina, and Georgia also considered resolutions, although they did not formally adopt such. The resolution which became the Eleventh Amendment was introduced in the Senate on January 2, 1794. CLYDE E. JACOBS, *THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY* 65 (1972).

<sup>395</sup> ANNALS OF CONG., 8th Cong., 1st Sess. 95-96 (1803) (instructions of Vermont and Massachusetts); ANNALS OF CONG., 7th Cong., 1st Sess. 472 (1802) (instructions of Vermont); *id.* at 509 (instructions of New York); *id.* at 1285 (same); see also TADAHISA KURODA, *THE ORIGINS OF THE TWELFTH AMENDMENT: THE ELECTORAL COLLEGE IN THE EARLY REPUBLIC, 1787-1804*, at 109 (1994) (resolutions and amendments proposed by New Hampshire, Vermont, and South Carolina).

<sup>396</sup> SENATE JOURNAL, 10th Cong., 1st Sess. 271 (1808) (instructions of Massachusetts legislature); see also *id.* at 27, 131-32 (instructions of Vermont legislature).

by state legislatures,<sup>397</sup> and the direct election of senators (now the Seventeenth Amendment).<sup>398</sup>

The leverage states held over senators and the amendment process did not go unnoticed in the Senate. During debates over a proposal to amend the manner of electing the President and the Vice-President, Senator William Plumer of New Hampshire argued that whatever the merits of instructions on other matters of interest to the Senate, the states exceeded their powers under Article V when they instructed on proposed amendments:

The State Legislatures have nothing to do till after Congress has proposed the amendments, and then it is their exclusive province either to ratify or reject them. But they have no authority to direct or even request Congress to propose particular amendments for themselves to ratify. Instructions on this subject are therefore improper. It is an assumption of power, not the exercise of a right. It is an attempt to create an undue influence over Congress. It is prejudging the question before it is proposed by the only authority that has the Constitutional right to move it. If these instructions are obligatory, our votes must be governed not by the convictions of our own judgments, or the propriety and fitness of the measure, but by the mandates of other Legislatures. This would destroy one of the checks that the Constitution has provided against innovation. State Legislatures may, on some subjects, instruct their Senators; but on this, their instructions ought not to influence, much less bind us, to propose amendments, unless we ourselves deem them necessary.<sup>399</sup>

Senator Tracy opined that Article V contemplated the “uninfluenced movement” of senators and representatives.<sup>400</sup> “Can it be thought . . . either proper or Constitutional for the State Legislatures to assume the power of instructing to propose to them a measure when the power is not only not given to them but given exclusively to Congress? As well and with as much propriety might Congress make a law attempting to bind the State Legislatures to ratify, as the Legislatures, by instructions, bind Congress to propose.”<sup>401</sup>

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<sup>397</sup> *Id.* at 267 (1808) (instructions of Virginia).

<sup>398</sup> *See supra* note 172.

<sup>399</sup> ANNALS OF CONG., 8th Cong., 1st Sess. 153-54 (1803); *see* 46 CONG. REC. 2769 (1911) (statement of Sen. Heyburn) (“[T]he States have not asked us to submit the question [of direct election of senators], nor does the Constitution authorize them to request Congress to submit it. There is no mention in the Constitution with reference to the States requesting Congress to submit amendments to the Constitution.”); *see also id.* at 2773 (“There is not a line in the Constitution . . . that authorizes the legislatures of the States to demand . . . that [the Senate] act in a given way.”). The irony of Senator Heyburn’s remarks is that Heyburn disparaged the right of legislatures to instruct because he was defending their right to elect. Heyburn was acting contrary to his own instructions from Idaho. *See supra* note 173 and accompanying text.

<sup>400</sup> ANNALS OF CONG., 8th Cong., 1st Sess. 176 (1803).

<sup>401</sup> *Id.* at 177.

The senators' arguments turned on the absence of an express role for the states in the proposing of amendments in Congress. But the relationship between the states and the Senate was created by Article I, Section 4, not by Article V. No single state could dictate a course of action to the Senate, only a course of action to its own senators. Nothing in Article V forbid the states from influencing Congress—whether through instructions or through some other means.

In sum, the Seventeenth Amendment affected Article V directly, but not formally. It took from the states a means of defending themselves against unwise amendments, and it severely limited the power of the states to amend the Constitution without a state call for a convention. It has thus made constitutional conventions more likely since states cannot instruct senators to propose and support amendments. Just as instruction by the people “displace[d] representation in ordinary government with direct action of the People themselves,”<sup>402</sup> so instruction of senators displaced the senators with the direct action of state governments themselves, but in a manner that fell short of constitutional convention. A subtle, but important change.

## V. CONCLUSION

For its defenders, the Seventeenth Amendment was the “wildest and widest revolution . . . since the Constitution of the United States was adopted in 1787.”<sup>403</sup> To its detractors, it was “the total product of those who believed in the illusion of reform.”<sup>404</sup> In some respects, the Seventeenth Amendment represents both a significant change in the structure of the Constitution and a failed reform of a system gone awry. Far from “bringing the process of government close to the lay voter,” the Seventeenth Amendment “may well have insulated the voter even further from his government.”<sup>405</sup> In the end, the Amendment may have served neither the purposes of federalism nor the ideals of democracy.

In *New York v. United States*, Justice O'Connor observed:

The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals.<sup>406</sup>

If the Seventeenth Amendment represented the failure of state legislatures, did the people acquire anything in the exchange? At one

<sup>402</sup> Akhil R. Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1059 (1988).

<sup>403</sup> 35 CONG. REC. 3981 (1902) (statement of Sen. DePew).

<sup>404</sup> Daynes, Direct Election, *supra* note 34, at iv.

<sup>405</sup> *Id.* at 150.

<sup>406</sup> 505 U.S. 144, 181 (1992).

level, they gained unmediated control over their senators. At least they acquired "control" in the sense of electing a senator every six years. There is, unfortunately, no mechanism for the people to exercise any direct control over their senators in the interim. To put it another way, there is no means for senators to give an accounting of themselves—other than through the mechanism of an election. That would seem to suggest that we have less control of senators than previously. The Seventeenth Amendment answered the people's craving for the reins of democracy, but at the level at which senators operate, democracy is a poor master.

During the debates over the Seventeenth Amendment, one representative asked, "to whom [is] a Senator . . . responsible? Is he responsible to the Legislature that elected him? . . . [T]o whom is he responsible after it expires?"<sup>407</sup> Another argued that "the constant shifting of the membership of State Legislatures removes any possibility of accountability to the body which elects."<sup>408</sup> But what was the alternative? Were the people a more stable body and better positioned to demand accountability? The people only appeared to be more stable because they were more faceless than the legislature; it was precisely because the people could not be identified that senators felt beholden to the people as a body. It is easy to say that one is answerable to the people when the people have no effective means of calling their representatives to accountability.

It is unclear that the Supreme Court should be responsible for guaranteeing the role of the states and protecting the people from themselves. The Seventeenth Amendment took the power to elect senators from state legislatures (which, after all, represent people) and gave it to the people (who would now represent themselves). It seems to me that states as political entities in a federal system were more aggressively represented in Congress through their legislatures, but since the Constitution now provides otherwise, the people cannot complain about the Court when the people demanded control of the Senate and then failed to exercise it with the same vigilance as their legislatures.

If we are genuinely interested in federalism as a check on the excesses of the national government and therefore, as a means of protecting individuals, we should consider repealing the Seventeenth

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<sup>407</sup> 23 CONG. REC. 6064 (1892) (statement of Rep. Tucker).

<sup>408</sup> *Id.* at 6079 (statement of Rep. Scott); see 32 CONG. REC. 2125 (1899) (statement of Sen. Pettigrew) ("If I should undertake to follow the change of sentiment reflected by the successive legislatures of South Dakota, I would find myself voting on all sides of almost every question. I observe further that the members of the various legislatures of South Dakota have almost always been so unfortunate as not to secure reelection at the hands of their constituents."). See also 32 CONG. REC. 839-40 (1899) (statement of Sen. White, explaining why, as a Democrat, he would not follow instructions from a Republican legislature).

Amendment, limiting the terms senators serve (irrespective of whether we also impose term limits on our Representatives), and giving state legislatures the power to recall their senators. Reestablishing the position of state legislatures, together with recall authority, would effectively return the practice of instruction and engage state legislatures as a serious and proximate check on Congress. Limited terms would encourage the kind of natural ambition among state legislators that would command their attention to national affairs, while the flow of state legislators (or other state officials) to the Senate—with the foreknowledge that they would be returning to the state as citizens—would reinforce the interests of the state.

The Senate's slide to popular democracy unyoked states and the national government in a way that has left the states nearly powerless to defend their position as other legitimate representatives of the people. As the United States moved into the Twentieth Century, it was inevitable that Congress would aggressively exercise power over matters such as commerce and spending for the general welfare in ways that no constitutional prophet would have foreseen. The lack of foresight of the circumstances under which Congress would exercise its powers did not excuse our failure to maintain those constitutional structures that assure the tempered, essential use of such powers. When we loosed ourselves from the mast to answer the Sirens' call, we unleashed consequences only Circe could have foreseen.

## APPENDIX

*Data Supporting Figure 1*

Year	Party	Class 1	Class 2	Class 3	Change	Senate Summary	Senate w/ Change
1865	Dem	0	3	0	3		
	Rep	0	12	0	12		
1867	Dem	0	0	2	3		
	Rep	0	0	17	16		
1869	Dem	5	0	0	5	10	11
	Rep	20	0	0	20	49	48
1871	Dem	0	8	0	8	15	16
	Rep	0	16	0	16	53	52
1873	Dem	0	0	5	5	18	18
	Rep	0	0	17	17	53	53
1875	Dem	13	0	0	13	26	26
	Rep	10	0	0	10	43	43
1877	Dem	0	14	0	14	32	32
	Rep	0	11	0	11	38	38
1879	Dem	0	0	13	13	40	40
	Rep	0	0	12	12	33	33
1881	Dem	9	0	0	9	36	36
	Rep	16	0	0	16	39	39
1883	Dem	0	13	0	13	35	35
	Rep	0	13	0	13	41	41
1885	Dem	0	0	12	12	34	34
	Rep	0	0	13	13	42	42
1887	Dem	12	0	0	12	37	37
	Rep	13	0	0	13	39	39
1889	Dem	0	13	0	13	37	37
	Rep	0	16	0	16	42	42
1891	Dem	0	0	15	15	40	40
	Rep	0	0	12	12	41	41
1893	Dem	15	0	0	14	43	42
	Rep	13	0	0	14	41	42
1895	Dem	0	10	0	10	40	39
	Rep	0	18	0	18	43	44
1897	Dem	0	0	10	10	35	34
	Rep	0	0	18	18	49	50
1899	Dem	8	0	0	8	28	28
	Rep	20	0	0	20	56	56
1901	Dem	0	14	0	12	32	30
	Rep	0	15	0	17	53	55
1903	Dem	0	0	12	12	34	32
	Rep	0	0	18	18	53	55
1905	Dem	6	0	0	6	32	30
	Rep	24	0	0	24	57	59
1907	Dem	0	12	0	12	30	30
	Rep	0	19	0	19	61	61
1909	Dem	0	0	14	14	32	32
	Rep	0	0	17	17	60	60
1911	Dem	16	0	0	17	42	43
	Rep	16	0	0	15	52	51
1913	Dem	0	20	0	18	50	49
	Rep	0	12	0	14	45	46
1915	Dem	0	0	18	13	54	48
	Rep	0	0	14	19	42	48
1917	Dem	16	0	0	12	54	43
	Rep	16	0	0	20	42	53
1919	Dem	0	15	0	12	49	37
	Rep	0	17	0	20	47	59
1921	Dem	0	0	7	9	38	33
	Rep	0	0	25	23	58	63
1923	Dem	21	0	0	12	43	33
	Rep	11	0	0	20	53	63



Year	Party	Class 1	Class 2	Class 3	Change	Senate Summary	Senate w/ Change
1925	Dem	0	14	0	13	42	34
	Rep	0	18	0	19	54	62
1927	Dem	0	0	13	12	48	37
	Rep	0	0	19	20	48	59
1929	Dem	13	0	0	7	40	32
	Rep	19	0	0	25	56	64
1931	Dem	0	20	0	13	46	32
	Rep	0	12	0	19	50	64
1933	Dem	0	0	27	24	60	44
	Rep	0	0	5	8	36	52
1935	Dem	24	0	0	20	71	57
	Rep	7	0	0	11	24	38
1937	Dem	0	24	0	24	75	68
	Rep	0	7	0	7	19	26
1939	Dem	0	0	22	19	70	63
	Rep	0	0	10	13	24	31
1941	Dem	20	0	0	15	66	58
	Rep	11	0	0	16	28	36
1943	Dem	0	15	0	15	57	49
	Rep	0	17	0	17	38	46
1945	Dem	0	0	21	14	56	44
	Rep	0	0	11	18	39	51
1947	Dem	11	0	0	10	47	39
	Rep	21	0	0	22	49	57
1949	Dem	0	23	0	19	55	43
	Rep	0	9	0	13	41	53
1951	Dem	0	0	15	13	49	42
	Rep	0	0	17	19	47	54
1953	Dem	13	0	0	10	51	42
	Rep	19	0	0	22	45	54
1955	Dem	0	22	0	18	50	41
	Rep	0	10	0	14	46	55
1957	Dem	0	0	17	17	52	45
	Rep	0	0	15	15	44	51
1959	Dem	25	0	0	25	64	60
	Rep	8	0	0	8	33	37
1961	Dem	0	20	0	23	62	65
	Rep	0	13	0	10	36	33
1963	Dem	0	0	23	18	68	66
	Rep	0	0	11	16	32	34
1965	Dem	26	0	0	27	69	68
	Rep	7	0	0	6	31	32
1967	Dem	0	15	0	18	64	63
	Rep	0	18	0	15	36	37
1969	Dem	0	0	18	15	59	60
	Rep	0	0	16	19	41	40
1971	Dem	22	0	0	21	55	54
	Rep	11	0	0	12	45	46
1973	Dem	0	16	0	21	56	57
	Rep	0	17	0	12	44	43
1975	Dem	0	0	22	28	60	70
	Rep	0	0	12	6	40	30
1977	Dem	22	0	0	29	60	78
	Rep	11	0	0	4	40	22
1979	Dem	0	14	0	24	58	81
	Rep	0	19	0	9	42	19
1981	Dem	0	0	13	20	49	73
	Rep	0	0	20	13	50	26
1983	Dem	19	0	0	25	46	69
	Rep	14	0	0	8	53	30
1985	Dem	0	16	0	25	48	70
	Rep	0	17	0	8	51	29
1987	Dem	0	0	20	24	55	74
	Rep	0	0	14	10	45	26

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Year	Party	Class 1	Class 2	Class 3	Change	Senate Summary	Senate w/ Change
1989	Dem	19	0	0	25	55	74
	Rep	14	0	0	8	45	26
1991	Dem	0	17	0	26	56	75
	Rep	0	16	0	7	44	25
1993	Dem	0	0	19	25	55	76
	Rep	0	0	15	9	45	24
1995	Dem	14	0	0	19	50	70
	Rep	19	0	0	14	50	30