
Ochlocracy in the Senate

The Failure of the
Seventeenth
Amendment to make
the United States
Senate More
Responsive to the
Will of the People

Jeremy Hurren
POLS 4790
June 2008

Throughout the nineteenth century and into the early twentieth century, discontent had been growing among the United States over the behavior of the Senate. The states had difficulties electing Senators due to partisan politics, with some states not sending a Senator to Washington for up to four years. Accusations of bribery and corruption abounded, and the media contributed to fanning the flames of public outrage. In an attempt to solve these problems, in April of 1913, the United States ratified the Seventeenth Amendment to the Constitution, allowing for the direct election of Senators by the people, rather than the previous system of election by state legislatures. Unfortunately, the Seventeenth Amendment has failed to make the United States Senate more responsive to the will of the people. To the contrary, it has resulted in increased representation of special interest views, political posturing and partisanship. The Seventeenth Amendment has contributed to the creation of an ochlocracy, rule by the easily moveable mob.

The idea of direct election of senators began sometime in the mid 1800s, but in the early twentieth century it began to be proposed in earnest. In 1908 Senator Robert L. Owen of Oklahoma introduced a direct elections resolution, which would “prevent the corruption of legislatures...prevent men using money improperly to obtain a seat in the Senate...compel the selection of the best-fitted men...and make the Senate more responsive to the will of the people of the States.” (Congressional Record. 1908) While this was neither the first nor the last attempt to pass such a resolution, the statements of Senator Owen are representative of the major arguments in support of the Seventeenth Amendment. A careful examination of these arguments will help illuminate the ineffectiveness of the amendment in accomplishing its purposes.

As we examine these issues and arguments, it is important to realize in the beginning that we cannot know how our representation would have changed had the Seventeenth Amendment not been ratified. We cannot change history and examine the effects. We are left to examining

the situation before and after the amendment's ratification, and to the examination of the Founder's intentions. And ultimately, logical deduction will play a great role in our evaluation of these arguments.

The most prominent argument in favor of the Seventeenth Amendment was that the Senate had become corrupted by the special interests of trusts and corporations. The Senate had become a "rich-man's" club, in which money was traded for power and votes. This corruption was not limited to the U.S. Senate, but also occurred in the state legislatures, where trusts and corporate interests paid state lawmakers for their votes in Senate contests. (Amar 2005, 412) State legislatures became involved in providing exclusive franchises, profitable contracts, and direct funding in exchange for votes delivered by corporate interests. (Ure 2003, 28)

One result of this special interest competition within the state legislatures was a trend of deadlocks in electing senators. In the period between 1891 and 1905 there had been nearly fifty cases of such deadlocks in state legislatures. During this period, states often had only one senator representing them, and in one particularly problematic case, Delaware had no Senate representation at all for two years. (Amar 2005, 412)

On the surface, a direct popular election seems to solve the problem of deadlocks. Indeed, it is extremely unlikely to have an exact match in vote counts among candidates when there are potentially millions of voters involved. But it does not follow that this will result in the election of good candidates, only that it will result in the election of some candidate.

The corruption of the U.S. Senate was a natural consequence of corruption of the state legislatures, on whom the senators relied for votes. In the forty years leading up the amendment debate, U.S. senators were accused of corruption charges on fifteen separate occasions vs. only a single time in the eighty-four years prior to that. (Hoebeke 1955, 170) Senators in Kansas had allegedly bought their seats from the state legislature. A Montana senator distributed 140

thousand dollars to his state legislature. And in 1906, two senators were paid by clients to intervene with federal agencies. (Chang 2002, 21-23)

If we adjust the price of these “election costs” using the consumer price index to their equivalent in 1998 dollars, the price of the 140 thousand dollar Montana election would be around 2 million dollars. By contrast, the average winning senate campaign in 1998 spent 5.4 million dollars. While these numbers are not precisely correlatable – one is a number that does not include total campaign costs, while the other does – they are useful as an illustration of rising campaign costs. A study by the University of Washington shows that in many states in 2006, a candidate will not be competitive with less than 10 million dollars. (Assessment of US Senate Campaign Expenditures 2005) Empirical evidence shows that the effect of the amendment may well have been to increase the influence of money on senate elections.

Logically, this makes a great deal of sense. Prior to the passage of the amendment, a senate candidate would have to lobby and convince a relatively small group of people of his worthiness. This small number of state legislators could be dealt with individually, reducing the cost of campaigning. After the amendment, a candidate must now try to convince many millions of people of his worthiness. As author Christopher Hoebeker said, “It is widely acknowledged that one of the most significant results of America’s democratization was the creation of permanent party machinery. With frequent elections decided by large numbers, democracy forced politicians to build large organizations to influence voters.” (Hoebeker 1955, 86) It should come as no surprise that with these large organizations the costs of a campaign are higher.

When campaign costs are higher, then the candidates must raise this money somewhere. A look at the top ten federal campaign contributors from 2002 shows that less than 1% of the 65 million dollars of total campaign contributions from these organizations come from individuals. Political Action Committees donated 282 million dollars in total for the same election year.

(Public Agenda n.d.) After the passage of the Seventeenth Amendment, “those with the ambition to become Senators were forced to turn to corporations and to special interests, even political machines, to secure the finances necessary to campaign on a state level.” (Bybee 1997, 541) A description by Senator Robert C. Byrd of the Senate prior to the Iraq invasion illustrates the situation today: “The chamber was empty because the senators were somewhere else. Many of them were at fund-raising events they now feel compelled to attend almost constantly in order to collect money—much of it from special interests—to buy 30-second TV commercials for their next re-election campaign.” (Gore 2007)

Another very compelling piece of evidence against the amendment’s effectiveness can be found by examining the results of the election directly following the passage of the amendment. In the 1914 election there were twenty-five senate seats available. Despite the passage of the amendment, and the direct election, all twenty-five of the state legislature selected incumbents won re-election. (Chang 2002, 27) It seems possible that, in spite of the arguments of the amendment proponents, the Senate was not actually as corrupt as we would be led to believe. (Or it is also possible that the people just didn’t care, or were not sophisticated enough to see through campaigning by the candidates – we will examine this idea more closely a little later.)

Even if we assume that the Senate was as corrupt as amendment supporters indicated, we need to examine the idea that popular election would serve as a check against this corruption. Publius wrote in *The Federalist No. 51* that one of the safeguards against corruption would be the check of the state government against that of the national government. These two forces would contend one with another with ambition counteracting ambition. (*The Debate on the Constitution* 1993) If it is ambition that is to counteract ambition, then moving the election of Senators to the people is a step in the wrong direction. The people have no ambition to become Senators, while the same cannot be said for the men and women in state legislatures. These state legislatures

have a vested interest in exposing corruption in the Senate, as it will further their ambition towards either increased states rights or personal ambition to become a U.S. Senator.

The argument for direct election based on the idea that the state legislatures and U.S. Senate had become corrupt does not seem to hold water. The candidates selected did not significantly change as a result of the amendment. In fact, it would seem that the amendment removed some checks against Senate corruption, and increased the influence of special interests on Senate elections. (This idea is based on key checks and balances that the Founders intended to place on the Senate, and we will discuss these further below.) It is probable – though not empirically provable – that the passage of the amendment actually increased the amount of corruption in the Senate.

A second argument for the amendment was that the body of the people as a whole would be more capable of selecting senators who would obey the will of the people than were the state legislatures. The logical fallacy in this argument is that “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. Senators?” (Bybee 1997, 540)

To see what kind of representation the citizenry chooses directly, it is useful to look at the makeup of the House of Representatives, who have always been chosen by direct election. In describing the makeup of Congress in the mid 1800s, Alexis de Tocqueville first looks at the House, writing “there is not a distinguished man in the whole number...They are mostly village lawyers, men in trade, or even persons belonging to the lower classes of society...the representatives of the people do not always know how to write correctly.” In contrast, he describes the Senate thus, “scarcely an individual is to be seen in it who has not had an active and illustrious career: the Senate is composed of eloquent advocates, distinguished generals, wise

magistrates, and statesmen of note, whose arguments would do honor to the most remarkable parliamentary debates of Europe.” (De Tocqueville 1945, 204)

Note that these descriptions do not imply that the people of the nation are incapable of selecting representatives. However, the type of representative required for the Senate, which was intended to be a much deliberative body, is not the kind of person that the people choose to represent them.

De Tocqueville concludes that the only factor that could account for this difference between the two houses is their manner of election. He writes that “men who are chosen in this manner [through indirect election] accurately represent the majority of the nation which governs them; but they represent only the elevated thoughts that are current in the community...rather than the petty passions that disturb, or the vices that disgrace it.” (De Tocqueville 1945, 205) He concludes that the practice of election by an elected body is the only way in which to bring political power to all classes of the people.

Due to its direct election by the people, the makeup of the House of Representatives is an indicator of the inability of the people to choose individuals of this different quality to represent them. Based on the observations of De Tocqueville, it would appear that the state legislatures were significantly more effective at selecting senators than the people could be.

One problem with turning the election of senators over to the people is that the people are much more susceptible to manipulation than were the state legislatures. “Once the election of senators was taken from the legislatures, the election was abandoned to party machines...Machines could more easily manipulate candidates and the populace than they could the egos of the legislators.” (Bybee 1997, 559)

This problem has grown in scope since the days when the amendment was passed. The debate around election of a senator used to take place in public meeting areas and in newspapers.

The methods of communications in these debates were bi-directional, and allowed the public to deliberate among themselves about the candidates. Former Vice President Al Gore hypothesizes in his book, *The Assault on Reason*, that one of the reasons our democracy is not working well today is that our communication has become unidirectional. We educate ourselves on politics using the television which allows for no deliberation, no communication, and according to Gore, has physiological effects on our brains that make us more susceptible to manipulation. (Gore 2007)

This second argument, that citizens are more capable than state legislators at electing senators, appears to be as lacking as the first argument we examined. The people have shown their ineptitude at electing representatives both in the state legislatures, and the U.S. House of representatives. We have also seen that the people face certain roadblocks against their decision-making that the state legislatures do not have.

A third argument for the amendment was that the direct connection between the electing body and the representative would make the Senate more responsive to the will of the individual voter. The theory is that because the voter has a direct impact of the success of a senator's election bid, the senator will in turn listen to the concerns and interests of each individual voter.

Contrary to the conventional wisdom of the time, the passage of the amendment has actually negatively impacted the influence that an individual voter can have on the election of a senator. Prior to the amendment, an individual voter would have to meet with his state legislator, who generally lives in the same local area as the voter. He would have to convince that legislator of his viewpoint, who would in turn attempt to convince the other members of the state legislature. Given that the average constituency size of a state legislator in modern times is around 50,000 people, a single voter's voice is much more likely to be heard by a state legislator than by a senator whose constituency is closer 7 million. (Ure 2003, 51-52)

There is also an issue of access. If an individual voter wants to meet with his local state representation, he may have to drive a few minutes. In many cases he can reach the representative directly on the phone. I have personally met my Utah State House and Senate representatives on numerous occasions. By contrast, it would often be necessary for me to travel to Washington D.C. to meet with my U.S. House and Senate representatives. And in my personal experience, even taking that step is not sufficient to obtain a meeting.

One of the unintended side-effects of the Seventeenth Amendment may be a decreased interest in politics and a general feeling of voter apathy. Some contributing factors to this are “the increased costs citizens face to have a legitimate say in government,” (Ure 2003, 52) or the kind of senators that are selected due to the direct election. The 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.” (Bybee 1997, 541)

Gore’s *The Assault on Reason* comments on further decreases in voter interest. The increase in unidirectional communication methods, such as television, and resulting lack of participation by voters has led to a situation where people are more interested in what happens in Hollywood than Washington D.C. This voter apathy has led to representative apathy as well. “The Senate was silent because Senators don’t feel that what they say on the floor of the Senate really matters that much anymore—not to the other Senators, who are almost never present when their colleagues speak, and certainly not to the voters, because the news media seldom report on Senate speeches anymore.” (Gore 2007) When voters cease to be interested in political happenings, it is not surprising that the political leaders have no incentive to respond to the will of the people.

This new breed of senator, in attempting to appeal to everyone, may have lost the respect of many people, discouraging them from participation in the political process. The fact that senators have such a large constituency means that they must rely on polls and special interests to learn of the will of the citizens they represent. This results in individual concerns not being addressed unless they are of universal concern. The fact that many issues are not addressed at all is followed by an increase in voter apathy. “Before the passage of the Seventeenth Amendment, a Senator was more likely to be cognizant of the multiplicity of the issues in their states.” (Ure 2003, 53)

The large constituency of senators combined with the direct election had another unforeseen side-effect: an increased priority given to concerns of urban areas. Prior to the amendment, senators were elected by the legislatures, which were chosen by geographical districts usually representing rural, middle-class interests. State legislatures generally chose senators who were representative of these interests. (Ure 2003, 54) After the amendment, voters in the urban areas became much more important. When senators are elected by state legislatures, they must appeal to a majority of districts spread across the entire state. When they are elected directly by a majority of voters, they only need appeal to the mass of citizens in the cities, and can safely ignore the interests of the rural areas.

The Founders intended the two houses of Congress to balance each other, with the House representing the people’s interests directly and the Senate representing each State equally. One of the beneficial side-effects of this scheme is that while the House, which is constituted based on population, would represent interests preferential to urban areas, the Senate would be able to represent the interests of those people who did not live in concentrated numbers in urban centers. The passage of the Seventeenth Amendment dramatically shifted this balance towards urban representation.

In the end, this third argument for the amendment appears to be just as problematic as the first two. There is no positive reason for a senator to become more responsive to the general will just because the whole population is directly involved in their election. Indeed, there is ample reason for them to become less responsive.

With the ratification of the Seventeenth Amendment, a truly crucial balance of power was removed, enabling the federal government to grow unchecked, fulfilling every passing whim of special interests. “The Seventeenth Amendment enabled an astronomical increase in the size of the federal government and signaled the beginning of a long series of minute usurpations of rights.” (Ure 2003, 44) The Senate was intended by the founders to be an obstructionist body. It was created to check the power of the legislative branch, the executive branch, and the judicial branch. It was for these purposes that the Senate was endowed with the power of blocking legislation passed by the House, and the power of removing Presidents and Judges through impeachment. These powers of obstruction were designed to create a government that would respond to the will of the whole people. Only those interests that were truly universal and common to the whole people would be followed, while issues of local interest would be left to state and local governments.

The Seventeenth Amendment was proposed, passed, and ratified with good intentions. Unfortunately, its creators appear to have weakened the framework created by the Constitution. They have upset the delicate checks and balances of the founding fathers, and replaced it with ochlocracy. The Senate no longer represents the will of the whole people as much as it did prior to the passage of the amendment. Instead, it represents the easily moveable and quickly shifting desires of special interests, and represents the people of the nation disproportionately.

Reference List

Amar, Akhil Reed. *America's Constitution: A Biography*. New York, NY: Random House, 2005.

"Assessment of US Senate Campaign Expenditures in 2000, 2002 and 2004, with Predictions for 2006." Department of Communication, University of Washington, Seattle, 2005.

Bybee, Jay S. "Ulysses at the Mast: Democracy, Federalism, and the Sirens' Song of the Seventeenth Amendment." *Northwestern University Law Review* 91, 1997.

Chang, Richard K. C. "The Seventeenth Amendment: The Illusion of Popular Control." Brigham Young University, Provo, 2002.

"Congressional Record." *60th Congress, 1st Session*. 1908.

De Tocqueville, Alexis. *Democracy in America*. Translated by Henry Reeve. New York, NY: Random House, 1945.

Hoebeker, C. H. *The Road to Mass Democracy: Original Intent and the Seventeenth Amendment*. New Brunswick, NJ: Transaction Publishers, 1955.

Public Agenda. <http://www.publicagenda.org> (accessed June 6, 2008).

The Debate on the Constitution: Federalist and Antifederalist Speeches, Articles, and Letters During the Struggle over Ratification Part Two: January to August 1788. New York, NY: Liberty Classics of the United States, 1993.

Ure, Daniel S. "Federalism, Jurisprudence, and the Seventeenth Amendment: An Evaluation of the Direct Election of Senators." J. Reuben Clark School of Law, Brigham Young University, Provo, 2003.

Thesis: The Seventeenth Amendment has failed to make the United States Senate more responsive to the will of the people.

1. Opposition: Corruption in state legislatures and senate
 - a. State legislatures provide a check against the senate power, because they have ambition to potentially become senators
 - b. Cost of a campaign makes senators more subject to special interests who can provide money for said campaign
 - c. Constitution of senate did not change in subsequent election
 - d. Deadlocks do not happen in a simple majority popular vote
2. Opposition: The people more capable of electing than state legislatures
 - a. When the people are in control (e.g., House of Representatives) they do not choose great men
 - b. The people are responsible for electing the state legislatures, who are supposedly part of the problem
 - c. Media influence is more effective against the body of people as a whole than against a smaller group of well-selected men
3. Opposition: Direct connection between people and elected would foster responsiveness
 - a. Larger constituency makes senators less responsive because each voice is less important