

CHAPTER 1

Introduction

U.S. SENATORS HAVE NOT always been elected by the public. The popular stage on which U.S. senators walk, and their place in modern plebiscitary politics, makes it easy to forget that for the first half of the Senate's history, senators did not derive their electoral mandates from the people—at least not directly—but instead from state governments, acting through their state legislatures. The founders chose to elect members of the upper chamber of the people's branch indirectly. This suggests that they considered indirect election to be noble, functional, and practical. A century and a quarter later, in 1913, the Seventeenth Amendment to the U.S. Constitution was ratified to provide for election by the public, which indicates that the public, acting through its legislators in Washington, D.C., and back home, eventually concluded that the indirect mode of election was unsavory, unworkable, and ineffective.

The journey of the Senate from exemplary protector of states' rights to corrupt seat of special interests during a period when senators were not directly elected by the public raises a number of interesting questions about U.S. political development—questions that have rarely been raised by political scientists or historians since the Seventeenth Amendment was adopted. In this book, we are interested fundamentally in the dynamics of indirect elections, but at the same time we seek to assess the consequences of the switch to direct elections with the adoption of the Seventeenth Amendment. Measuring those consequences is not easy; given how much the federal government has expanded, and with it the responsibilities of a U.S. senator, it is nearly impossible to construct an absolute comparison between the indirect and direct elections eras. In the broadest terms, however, we aim to assess the extent to which the goals of the Seventeenth Amendment—empowering voters in the choice of U.S. senators, and reducing the corrosive effects of money and party machine power—have been met. In doing so, we provide a new opportunity to understand electoral design, legislatures, parties, and political ambition.

In particular, we examine the election of U.S. senators from 1871 to 1913 based on where those elections occurred: the state legislatures. We have created a data set of these elections by searching the journals of the forty-eight state legislatures that were part of the Union as of 1913 in order to reconstruct the roll call history at the microlevel of nearly every Senate election

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during this period. This account, which surprisingly has never been told before, helps to ground empirical and normative judgments about the quality of representation in the Senate under indirect election.

The account we give is significant for four reasons. First, we are empirical political scientists who recognize a huge hole in our understanding of U.S. electoral history when we see it. There has never been a systematic account of how the upper chamber of Congress was *actually* elected in the forty-plus years before the passage of the Seventeenth Amendment.¹ Evidence of the hole in our knowledge about these elections includes the fact that we do not know things such as the candidates who ran for the Senate before popular election, how candidates were identified and nominated, and what role factors like party played in these elections. Absent such basic facts as building blocks, it is simply impossible to grapple with the larger set of normative questions about the functioning of representative institutions in the United States across its long history.

Second, studying indirect elections reveals a tremendous amount about the role and power of political parties in shaping competition and policy choices through the indirect election process. Focusing on an era when both scholarly and public discourse was dominated by polarization and party government, we use our unique data set on the voting patterns in indirect Senate elections to show what happens to democratic processes when parties succeed in coordinating the rank and file behind a particular choice, and what happens when they fail. On a broader level, by providing a heretofore-unavailable basis for comparing the indirect to the direct elections process, we can demonstrate how the macro forces inherent in U.S. politics, such as regionalism, single-member district-based elections, elite ambition, and economic power, dominate electoral outcomes regardless of whether there are intermediaries or voters choose the electoral winner for themselves.

In locating the choice for U.S. senator in state legislatures, the founders expected, or at best hoped, that state legislatures would be filled with educated, diligent men who would choose senators and hold them accountable for serving the state as well as national interest. The founders did not want political parties to coordinate this choice, nor did they anticipate a decline in the education and experience of state legislators. Yet the end result of their choice to put Senate elections in the hands of state legislatures was

¹For the classic treatment of pre-Seventeenth Amendment Senate elections, see George H. Haynes, *The Election of Senators* (New York: Henry Holt, 1906). Haynes's book is not systematic, though, and embodies all the flaws of the Progressive scholarship of the time in being more a learned work of reformist advocacy than a modern, dispassionate work of social science. We still owe a great debt to Haynes, and cite his work extensively below, but always after remembering Ronald Reagan's favorite Russian adage in dealing with the former Soviet Union: "trust, but verify."

to increase the power of state party organizations in that process and make Senate seats the focal point of partisan power struggles. Party factionalism along with the personal corruption exhibited in the buying and selling of votes for Senate spots by candidates and state legislators both exemplify the type of pernicious influence that the founders hoped to avoid in the U.S. democracy.

Third, in a related vein, our study provides us with a clear-eyed view of how elections are conducted in the United States when they are held away from the popular eye and dominated by elite institutions. Whether or not motivated by the general legal movement called *originalism*, some political commentators, politicians, judges, and members of the public have adopted a view of nineteenth-century politics that characterizes it as purer and less corrupt than the politics of today—precisely because they were more closely governed by the words that the framers agreed to in Philadelphia during summer 1787.²

This perspective too readily equates “election by the state legislatures” with “election by the state,” as if the will of a state is as unified as the will of an individual. Although some legal scholars argue that indirect elections were put in place to guarantee a voice for the states as units in the federal system, our work shows the ways in which partisanship overwhelmed the notion of *state interest* as the chief consideration in the choice of U.S. senators under this system. In other words, state legislators battled over who would control the choice and ultimate occupant of the seat, and the fights were centered within and across political parties. By providing a richer empirical account of how Senate elections worked under the “Framer’s Constitution,” uncorrupted by the progressive championed Seventeenth Amendment, we intend to throw cold water on these benighted ideas. At the very least, we offer new evidence that we hope will prompt modern readers to reconsider the normative issues that faced reformers at the turn of the twentieth century when they took stock of the health of the system that elected U.S. senators.

²For perhaps the clearest expression of originalism in general, see Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (Eagan, MN: Thomson West, 2012). For commentary criticizing the demise of the older indirect election regime, see Roger G. Brooks, “Garcia, the Seventeenth Amendment, and the Role of the Supreme Court in Defending Federalism,” *Harvard Journal of Law and Public Policy* 10 (1987): 189; Jay S. Bybee, “Ulysses at the Mast: Democracy, Federalism, and the Sirens’ Song of the Seventeenth Amendment,” *Northwest University Law Review* 91 (1997): 500; Laura E. Little, “An Excursion into the Uncharted Waters of the Seventeenth Amendment,” *Temple Law Review* 64 (1991): 629; Ralph A. Rossum, *Federalism, the Supreme Court, and the Seventeenth Amendment: The Irony of Constitutional Democracy* (Lanham, MD: Lexington Books, 2001); Todd Zywicki, “Senators and Special Interests: A Public Choice Analysis of the Seventeenth Amendment,” *Oregon Law Review* 73 (1994): 1007; Todd Zywicki, “Beyond the Shell and Husk of History: The History of the Seventeenth Amendment and Its Implications for Current Reform Proposals,” *Cleveland State Law Review* 45 (1997): 165–234.

Fourth, changing the Constitution to improve democracy is no small matter. Promises made by advocates of direct elections about their capacity to produce a more participatory Senate, led by the Progressives, remain unfulfilled. Constitutional amendments should not be taken lightly; if in fact such actions do not substantively improve Senate responsiveness, such a finding may discourage other changes in the Constitution for the intended purpose of enhancing democratic representation. Although the other studies we cite in this chapter concentrate on broad indicators of Senate behavior after the Seventeenth Amendment, none of them go into sufficient detail about the dynamics underlying the indirect elections process.

The major contribution of this book lies in unveiling the indirect elections process, but we also pay close attention to the extent to which the Senate is markedly different in its responsiveness to constituents in the direct election era. We take the opportunity to reflect on how much of the actual electoral mechanism for legislative office can overcome the powerful macro forces that exert influence over policymaking in U.S. politics.

WHY THE SENATE, AND WHY 1871–1913?

Despite the fact that the federal government cast a shorter shadow on national life in the nineteenth century and into the early years of the twentieth century, it could still act in ways that affected all Americans, with the Senate as a highly visible participant in those actions. The relatively small size of the U.S. Senate, allotment of two senators from every state regardless of population size, and power of individual senators to advance or block legislation all contributed to make the U.S. Senate central to federal policymaking. Although we tend to center our attention more on the impact of the Senate nationally, the legislative body also provided representation for various economic and political interests at the state level. The Senate was—and continues to be—the only institution in the national government that gives voice to constituents as defined by the geographic unit of the state they live in, even if arriving at consensus about what defines state interests has proven consistently difficult over time. As such, the election of senators was of paramount importance to the nature and scope of our federal system of government.

We focus on the years spanning 1871 to 1913 because the balance of power between the federal and state governments began to shift dramatically during that time. The power to elect U.S. senators elevated the significance of state legislatures because they were pivotal in determining the composition of the U.S. Senate. Because there were periods when a narrow partisan majority controlled the U.S. Senate and both parties were riddled with sectional tensions, observers of national politics had to follow state

elections in states that had upcoming Senate elections. This was particularly true in the sixty years following the Civil War, as Congress wrestled with issues such as civil rights, economic regulation, western expansion, and foreign policy. This was also the period when the role of the federal government started to expand in the aftermath of the military defeat of the strongest states' rights claims, which had emanated from the South. Moreover, it marks the first year after the beginning of a regulated process governing Senate elections in state legislatures mandated by an 1866 Act of Congress, and after post–Civil War disputes about the legitimacy of state legislatures elected under Reconstruction had been mostly, but not entirely, resolved.³ Given that all states had to follow the same procedure to elect senators after 1866, we believe that the variation we uncover can be explained by variables that span states and time rather than being a function of idiosyncratic state electoral procedures.

To understand this process, we must take a brief journey back to the founding era.

FROM CONSTITUTION TO AMENDMENT: THE EVOLVING MODE OF SENATE ELECTION

As stated above, the indirect election of senators was the original design under the Constitution of 1787. But the Constitution had almost nothing to say about how these elections would actually be carried out, so from 1789 to 1866, states were inconsistent in their timing and methods of electing senators. This resulted in numerous election controversies, which periodically spilled on to the floor of the U.S. Senate itself. Over time, state legislatures were viewed as so inept at choosing their U.S. senators in a timely fashion that Congress eventually enacted a law to streamline the process of indirect elections across all states.

The Movement to Regulate Indirect Elections

The movement to crack down on the state legislatures was building in Congress in the years immediately preceding the Civil War. Momentum to enact a uniform standard for U.S. Senate elections reached a critical level in 1857, when there were two especially egregious cases of controversy over Senate elections in Indiana and Pennsylvania. These elections provided the catalyst for a bill to enact a uniform procedure for electing U.S. senators in

³There were still a few controversies along these lines in Alabama and Louisiana in the early 1870s, but most states had resolved them by then.

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state legislatures.⁴ The secession crisis and subsequent war caused reform efforts to be put aside. Once the Civil War emergency gave way to a new era of normal politics, the election of senators reemerged as a concern in Washington, D.C.

The postbellum tipping point occurred in 1865 with the election of John P. Stockton (D-NJ), which came about after the New Jersey state legislature changed its rules regarding the definition of a quorum. Prior practice in New Jersey had required a majority vote in each chamber to elect a U.S. senator, but in this case the legislature had adopted new rules that allowed Stockton to be elected by a plurality in both houses. Republicans in the U.S. Senate wanted to block Stockton in order to increase their capacity to override presidential vetoes, especially in relation to post–Civil War civil rights issues.

In January 1866, the U.S. Senate Judiciary Committee upheld Stockton's election, but the debate on Senate election practices was only just beginning. In March of the same year, the Senate considered the arguments made by Senator Daniel Clark (R-NH) that because the Constitution did not dictate specific election practices in state legislatures, precedent should be the guide; Clark argued that since the Stockton election contradicted prior practices in New Jersey, he should not be seated.

Despite Clark's contention, the Senate voted twenty-two to twenty-one in favor of seating Stockton. This would have probably led to the immediate, if controversial, seating of Stockton but for one important detail: Stockton had voted to seat himself.⁵ Seizing on this act of parliamentary indiscretion, Senator Charles Sumner (R-MA) demanded another vote on the grounds that it was improper for Stockton to vote on his own case. This time, the Senate voted twenty-three to twenty against seating Stockton.⁶

⁴Anne M. Butler and Wendy Wolff, *United States Senate Election, Expulsion, and Censure Cases, 1793–1990*, S. doc. 103–33 (Washington, D.C.: Government Printing Office, 1995).

⁵*U.S. Senate Journal*, 39–1, March 23, 1866, 269.

⁶*U.S. Senate Journal*, 39–1, March 23, 1866, 278–79. Had the difference simply been the abstention of Stockton on the second vote, the vote would have been tied, and Stockton would have been seated, because the resolution to deny him a seat would have failed under a tie vote. (There was no vice president to break a tie, because Andrew Johnson had been elevated to president on the assassination of Abraham Lincoln.) Thus, the outcome shift was due to the coming and going of senators between the two votes—a membership churning abetted by the fact that there were five intervening roll call votes. In addition to Stockton, two Republican senators, Lafayette Foster (CT) and William Morris Stewart (NV), at first voted to seat Stockton and then refused to answer to the roll in the second vote. Yet Stockton picked up the support of two Republicans who had previously abstained—Peter Van Winkle (WV) and James Doolittle (WI). On the other hand, only one senator who had first opposed seating Stockton abstained on the second vote, Lott Morrill (ME), who was paired with Foster. In addition to picking up Stewart's switched vote, anti-Stockton forces gained two former abstainers to their cause on the second vote—Jacob Howard (MI) and George

The New Jersey Senate seat was subsequently left empty until September 1866, when a replacement was elected to complete the term. Stockton himself was elected to the Senate in 1869 and served one term.⁷

In defending his own election, Stockton prepared a long description of the varied practices governing the election of U.S. senators among state legislatures. This report, coupled with frustration over the time and resources devoted to resolving contested election cases, led to broader action to enact a bill that would regularize these elections.

Ultimately, seventy-seven years after the ratification of the Constitution, in July 1866, Congress passed “An Act to Regulate the Times and Manner of Holding Elections for Senators in Congress” (14 Stat. 243), instituting a set of proceedings in state legislatures to elect U.S. senators.⁸ First, each chamber was to meet separately at noon on the second Tuesday after the state legislature had organized to vote separately for senator. On the following day at noon, the two chambers would meet in joint assembly to count the votes.⁹ If a majority of the members of each chamber favored the same candidate, that person would be declared elected. If no candidate secured a majority of the joint assembly, House and Senate members were required to meet together, and ballot at least once a day until a senator was chosen or their legislative session adjourned sine die. If the legislature failed to elect a senator before adjourning sine die, the governor could appoint someone to fill the vacancy until the next time the legislature met. Until 1893 the U.S. Senate would typically agree to seat these appointed senators, but in that year the Senate changed its rules, establishing a precedent that if the state legislature was unable to name a senator by its final adjournment, anyone appointed by the governor to fill the vacancy would be denied the seat. The impetus for the change was political: there were appointed senators from states that were opposed to the Senate majority’s preferred policies, so the Senate voted not to seat them.

An important feature of the Act of 1866 was the requirement that legislators vote *viva voce*—that is, out loud in a public roll call vote—and that the votes be recorded in the journals of the state legislatures.¹⁰ Given this,

Henry Williams (OR). While Stockton went from keeping his seat by one vote to losing it by four, the result was accomplished by changing the behavior of eight of the chamber’s senators.

⁷“The Election Case of John P. Stockton of New Jersey (1866),” U.S. Senate: Art and History, [http://www.senate.gov/artandhistory/history/common/testimony能](http://www.senate.gov/artandhistory/history/common/testimony�能) /contested_elections/047John_Stockton.htm.

⁸For background on why the law was adopted, see Haynes, *The Election of Senators*, chapter 2.

⁹During the period of our study, Nebraska was a bicameral legislature; it changed to a unicameral one in 1937.

¹⁰During debate over the bill, members of Congress expressed concern that this requirement might not allow legislators to freely cast their votes in the face of party and outside

it established a formal framework that makes the comprehensive study of Senate elections within the state legislatures possible. Without such requirements, there would be a thin and inconsistent empirical basis on which to study these elections.¹¹ The 1866 act also required a majority to approve the choice for U.S. senator in each chamber separately, or a majority of all legislators to approve the choice in joint session together. The majority rule requirement becomes a critical factor in the resolution of indirect elections.

The Movement for Direct Election

The standardization of U.S. Senate election practices in state legislatures failed to solve the problems associated with indirect Senate elections. One prominent complaint about the indirect election system was that it resulted in vacant Senate seats when state legislatures deadlocked. Deadlocks happened at least fourteen times in the decade and a half starting in 1891.¹² As we will explain in later chapters, these stalemates were the product of fierce competition over Senate seats both between the parties and within same-party factions.

The media at the time wrote scornful and disapproving pieces about the failure of state legislatures to fulfill this basic constitutional task. For example, on March 15, 1899, the *New York Times* detailed the prospect of Senate seats going empty as a result of unresolved conflicts in state legislatures:

Pennsylvania, it is believed, will not elect a Senator. Its legislature is to adjourn April 20, and the expectation is that Senator [Matthew] Quay will not have a chance to secure re-election before another meeting of the Legislatures. Califor-

interest pressures. The debate in the Senate occurred on July 11, 1866; debate in the House took place on July 23, 1866. Both sets of debates are accessible in the *Congressional Globe*. The amendment removing the requirement of a roll call vote was defeated overwhelmingly in the Senate, by six to twenty-eight, allowing the public vote to serve, at least theoretically, as an enforcement mechanism for any campaign pledges that legislators made to support a particular candidate for the Senate (*U.S. Senate Journal*, 39–1, 638). An analysis of the roll call vote in the Senate reveals that it was more strongly supported by Republicans than by Democrats. Republicans voted twenty-three to seven in favor, with eight abstentions; Democrats voted four to two against it, with three abstentions. The debate on the issue of private ballot versus *viva voce* voting echoed the earlier debate in the House over whether speakers should be elected similarly. See Jeffery A. Jenkins and Charles Stewart III, *Fighting for the Speakership: The House and the Rise of Party Government* (Princeton, NJ: Princeton University Press, 2012).

¹¹This factor is similar to that discussed in Jenkins and Stewart, *Fighting for the Speakership*, in which the institution of *viva voce* voting for the U.S. House speaker in 1839 allowed for an in-depth analysis of these elections that would have been impossible without knowledge of individual roll call votes.

¹²Haynes, *The Election of Senators*, 38–39.

nia is hopelessly broken up and promises to adjourn with a dead-lock preventing an election, so tenacious are the partisans of different candidates and so reluctant are they to unite upon a man not yet named as a candidate. The Republicans have 51 Senators and might have had 54 but for the fights in Pennsylvania, California, and Delaware. . . . The Senate has declared against the seating of Senators appointed where State Legislatures have neglected or refused to elect, so that neither Delaware nor Utah will be represented next December, and California and Pennsylvania are likely to be in the same fix.¹³

Harper's Weekly wrote that the framers had intended to make sure that each state was fully represented by two senators at all times by giving governors the power to fill vacancies when they occurred while the legislature was in recess. The article goes on to bemoan the fact that even when legislatures were in session, they would leave Senate seats empty: "During the past six years five States in the Union have each had one of their two Senatorial seats unoccupied for nearly one-third of the six year term. The reason in every instance was that the Legislature which should have elected a Senator failed to discharge its duty."¹⁴

An equal, if not stronger, complaint about indirect Senate elections was that they were plagued by significant corruption to a point that undermined the very legitimacy of the election process and the U.S. senators who were elected by it. As we note above, the years 1871 to 1913 saw important changes in the federal government's role in regulating the burgeoning industrial sector. The rising centrality of the federal government in a wide range of economic matters—banking, transportation, trade, and imperialism, among others—made influence over the federal government a top priority for the leaders of the nation's largest businesses, and of course, the political parties aligned with those businesses.

In this Gilded Age, it was common for business interests and wealthy individuals to pursue their private ends through bribery, or the use of money in ways that looked like bribery. One might question why bribery and corruption were so prevalent in electing senators but not in electing members of the House of Representatives. We would answer that because members of the U.S. House were elected popularly, it was impractical for those wishing to use bribery to influence the selection of representatives to do so on any large scale. The same holds true for the presidency: the de facto popular election of presidents similarly made widespread bribery in those cases an inefficient proposition.

Engaging in bribery to win a Senate seat was in comparison a relatively efficient use of money. While the number of state legislators was large—over sixty-five hundred in the year 1912, for instance—it was a knowable

¹³ Staff, "Standing of the Senate," *New York Times*, March 15, 1899, 3.

¹⁴ Staff, "Public Life," *Harper's Weekly*, May 6, 1899, 444.

quantity in each state. Furthermore, political or economic actors intent on using bribery to influence Senate elections could easily identify the set of state legislators who would be casting ballots. Once moneyed interests had a significant stake in who was elected to the Senate, the process became easily corruptible, as we will show in later chapters. Ironically, the founders often viewed the Senate as a potential bulwark against corruption. The extent of corruption under this system cannot be overstated—something that is woefully underacknowledged by those in the current era who argue for a return to indirect elections.¹⁵

Numerous newspaper and magazine articles of the day observed that the Senate electoral process was so corrupt that it produced an unresponsive and unrepresentative Senate. In 1896, for example, Goldwin Smith, a political columnist and historian, wrote in the *Saturday Review* that

wealth has its weight in senatorial elections, as it has in elections generally, and in all countries. That senatorships are directly bought those who ought to know do not believe. That they are indirectly bought by contributions to party funds and other outlays morally corrupt seems to be generally admitted. . . . In most cases, no doubt, there is a great deal of intrigue. In one State the other day, a rich man openly alleged that he had purchased the election by his contributions to the party fund, and insisted that the goods should be delivered, though, happily, in vain.¹⁶

Not all commentary, however, was in support of adopting direct elections as a solution to the issues of deadlock and corruption. William Everett, a former U.S. House member and scholar, wrote in the *Atlantic Monthly* in 1906 that corruption was a major problem in the election of U.S. senators generally.

One hears a great deal of amending the Constitution so as to have senators chosen directly by the people. I have no belief in any such scheme. It is in the power of the people of any state to let their legislatures know in half a dozen ways whom they want for senators and to enforce their will, if they so choose. A stream can rise no higher than its fountain. It is said the senators are chosen by corrupt legislatures; but by whom were the corrupt legislatures chosen? The fault is the people of the states and in them only.¹⁷

Everett's lament can be tied right back to James Madison's claim that it would not be possible to corrupt a sufficient number of state legislatures simultaneously to produce a majority of corrupt U.S. senators.

¹⁵ Rossum, *Federalism, the Supreme Court, and the Seventeenth Amendment*, 190–91.

¹⁶ Smith Goldwin, "Has the American Senate Decayed?" *Saturday Review*, May 9, 1896, 467–68.

¹⁷ William Everett, "The United States Senate," *Atlantic Monthly* 97, no. 2 (1906): 166.

Thus, corruption and electoral instability resulting in conflict and deadlock were strong forces leading to the replacement of the indirect election of senators by direct election. The Oregon plan for direct primaries is the best known of these efforts. Briefly, the plan was adopted in 1904 by Oregon to institute direct primaries as a means of nominating candidates for state and local elected office, including for U.S. Senate. Consequently, the plan allowed for Senate candidates to be included on the ballot in statewide elections, and the voters' choice was intended to serve as a popular referendum as to who should be chosen as a senator by the state legislature. The sticking point in implementing the direct primary plan was what it meant for party nominating conventions. Proponents argued that it should wholly replace nominating conventions, but opponents asserted that such conventions could effectively guide voters in primary elections.

In the years immediately following 1904 in Oregon, a hybrid system existed with informal gatherings known as assemblies, which would endorse candidates in the upcoming primary.¹⁸ These party gatherings were the initial way in which party organizations adapted to the movement for direct elections. Later in the book, in chapter 4, we discuss the role of parties in Senate nominations during this period, and suggest that the major parties ultimately realized that direct elections would enable them to knockout minor parties more easily in the contest for Senate seats, thus giving them an incentive to support the change to direct elections. With the rise of direct elections, Senate elections became a different beast.

The Impact of Electoral Reform on the U.S. Senate.

The ratification process for the Seventeenth Amendment was a relatively short one by U.S. history standards. The House of Representatives had been passing a version of the Seventeenth Amendment repeatedly since 1894, but the Senate did not seriously consider the measure until June 12, 1911, when it passed the amendment by a vote of 64 to 24. The House wrangled a bit, though finally passed the Senate's version on May 13, 1912, by a vote of 238 to 39. The states took one year to ratify the amendment; on May 31, 1913, William Jennings Bryan, Woodrow Wilson's secretary of state, presided over a ceremony in Washington, D.C., in which he recognized the ratification.¹⁹

¹⁸ James D. Barnett, "Forestalling the Direct Primary in Oregon," *Political Science Quarterly* 27 (1912): 648–68.

¹⁹ Robert C. Byrd, *Addresses on the History of the United States Senate, 1789–1989* (Washington, D.C.: United States Senate, 1989), 1:401–3; Staff, "Popular Election of Senate in Force," *New York Times*, June 1, 1913, 3.

One might have expected major changes in the behavior of U.S. senators elected after the Seventeenth Amendment and even transformations in the nature of the Senate itself. But political scientists have come to the conclusion that in fact, while there were some changes, they were relatively minor. After the direct election system was instituted, the partisan composition of the Senate gradually shifted toward the Democratic Party after a long period of Republican dominance. Some institutional patterns changed as well. Senators had slightly longer average tenures in office, and incumbent senators were more likely to moderate their roll call voting behavior to appeal to the median state voter rather than to the majority party in the state legislature.²⁰

Nevertheless, traditional career-building activities such as bill sponsorship and committee work did not change much; U.S. senators used these tools to build constituent support in the indirect and direct election periods. With respect to shifts in internal Senate rules and the use of filibuster, scholars Greg Wawro and Eric Schickler find no direct correlation between the switch to direct elections and adoption of the cloture rule in the Senate in 1917, but they do see an increase in filibuster activity in the post–Seventeenth Amendment period.²¹ The cry to repeal the Seventeenth Amendment began less than two decades after its ratification and continues to this day, though typically out of the mainstream of U.S. politics. On December 11, 1933, for instance, a letter writer to the *New York Times* urged Congress to keep up the momentum leading to the repeal of Prohibition by repealing the Sixteenth Amendment (income tax), after which “the next

²⁰ Haynes, *The Election of Senators*; Charles Stewart III, “Responsiveness in the Upper Chamber: The Constitution and the Institutional Development of the Senate,” in *The Constitution and American Political Development*, ed. Peter F. Nardulli (Urbana: University of Illinois Press, 1992), 63–96; Charles Stewart III and Barry R. Weingast, “Stacking the Senate, Changing the Nation: Republican Rotten Boroughs, Statehood Politics, and American Political Development,” *Studies in American Political Development* 6 (1992): 223–71; Ronald F. King and Susan Ellis, “Partisan Advantage and Constitutional Change: The Case of the Seventeenth Amendment,” *Studies in American Political Development* 10 (1996): 69–102; Sara Brandes Crook and John R. Hibbing, “A Not-so-Distant Mirror: The 17th Amendment and Congressional Change,” *American Political Science Review* 91 (1997): 845–53; Daniel Wirls, “Regionalism, Rotten Boroughs, Race, and Realignment: The Seventeenth Amendment and the Politics of Representation,” *Studies in American Political Development* 13 (1999): 1–30; Wendy J. Schiller, “Building Careers and Courting Constituents: U.S. Senate Representation, 1889–1924,” *Studies in American Political Development* 20 (2006): 185–97; William Bernhard and Brian R. Sala, “The Remaking of an American Senate: The 17th Amendment and Ideological Responsiveness,” *Journal of Politics* 68 (2006): 345–57; Sean Gailmard and Jeffery A. Jenkins, “Agency Problems, the 17th Amendment, and Representation in the U.S. Senate,” *American Journal of Political Science* 53, no. 2 (2009): 324–42.

²¹ Gregory J. Wawro and Eric Schickler, *Filibuster: Obstruction and Lawmaking in the U.S. Senate* (Princeton, NJ: Princeton University Press, 2006), 195–209.

step is to repeal the Seventeenth Amendment, . . . that we may get rid of the sons of wild jackasses and their like; that we may have dignity, intelligence and decorum in that erstwhile august body.”²² Repeal was lurking around the fringes of political respectability in 1976 when the American Independent Party, on the occasion of nominating the Georgia segregationist Lester Maddox for president, turned back an effort to add the repeal of the Seventeenth Amendment to its party’s platform.²³

Present-day opponents of the Seventeenth Amendment, who include incumbents (senators Mike Lee [R-UT], Ted Cruz [R-TX], and Rand Paul [R-KY]), legal scholars, and historians, argue that this change in the election of U.S. senators has expanded federal power at the expense of the states.²⁴ They reason that by giving the power to select U.S. senators back to state legislatures, senators would be more accountable to states as entities, and thereby more sensitive to federal encroachment on state sovereignty as well as mandates (funded and unfunded) to carry out federal policy.²⁵ In particular, the legal scholarship on this issue indicts the amendment for its negative impact on federalism and advocates—implicitly or explicitly—for the amendment’s repeal as restorative.²⁶

One does not have to believe that we will actually repeal or even modify the Seventeenth Amendment to acknowledge that having a deeper understanding of the effects of constitutional change on U.S. democracy is a worthwhile endeavor. Indeed, the stakes are high for rethinking the representative relationship between states and the federal government. A quick snapshot of the share of the federal budget that flows to states helps to illustrate just how intertwined these sets of governments are in the modern United States. In fiscal year 2010, 35 percent of the \$3.3 trillion federal budget (\$1.15 trillion) went to states: \$332.3 billion went to state and local governments directly for programs such as education, housing, child nutrition,

²²S. J. Treat, “Urging Further Repeal,” *New York Times*, December 11, 1933, 18.

²³It did add a plank urging the repeal of the Sixteenth Amendment, while also rejecting a proposal to endorse the repeal of the Voting Rights Act. See Stephen Wermiel, “Conservatives Choose Maddox,” *Boston Globe*, August 28, 1976, 1.

²⁴In 2013, the American Legislative Exchange Council, a conservative-leaning association of state legislators, considered a proposal to give state legislatures the opportunity to nominate a candidate for U.S. Senate to include on the statewide ballot alongside those candidates chosen in direct primaries. At its 2013 conference, Senator Cruz endorsed the idea of a greater role for state legislatures in nominating Senate candidates. See Amanda Terkel, “Ted Cruz to ALEC: ‘Stand Your Ground’ against Dick Durbin,” *Huffington Post*, May 12, 2013, http://www.huffingtonpost.com/2013/12/05/ted-cruz-alec_n_4392721.html?utm_hp_ref=tw.

²⁵For an expanded analysis of the Tea Party Movement in particular, see Theda Skocpol and Vanessa Williamson, *The Tea Party and the Remaking of Republican Conservatism* (New York: Oxford University Press, 2011).

²⁶See the arguments contained in the citations in footnote 2 above.

and infrastructure; \$297.9 billion was distributed for entitlement programs administered by the states such as Medicaid and Temporary Assistance to Needy Families; and \$516.7 billion flowed to states in the form of federal procurement (64 percent, or \$331.2 billion, of those funds were defense related).²⁷ Clearly, states incur serious budgetary impacts every time a funding formula or the eligibility requirement for a federal program is altered, and the Senate remains the vehicle for states to register their dissatisfaction with these changes.

But the link between federal and state governments is far more complex than mere money; with federal aid comes federal mandates, requirements, and regulations. Opponents to the Seventeenth Amendment contend that over the past century, the federal government has usurped state powers and overrun state laws, most notably under the auspices of the Commerce Clause and power of taxation.²⁸ The rhetoric used to describe President Barack Obama's Affordable Care Act, passed in March 2010, reflects this deep concern about the overreach of federal sovereignty at the states' expense. The act made sweeping changes in the provision of health care, and forced states to either implement parts of the law themselves or have the federal government come into the state and implement it directly. Given that twenty-seven states refused to implement the key component of the law—health insurance exchanges—opponents of direct Senate elections might argue that if U.S. senators were elected by state legislatures, the senators from those twenty-seven states would have opposed the bill, and it would not have passed the Senate.²⁹ We cannot test this counterfactual, but it highlights how a different electoral configuration for U.S. Senate elections could directly affect federal policymaking, at least if we believed that the alternative is for U.S. senators to be directly beholden to the legislature of their home states.

On a different dimension, the Seventeenth Amendment was also supposed to reduce the influence of wealthy elites, decrease the role of money in determining Senate election outcomes, and give incumbent senators the incentive to represent their constituents responsibly. Yet some scholars have maintained that the Congress is as much bought and sold today as it was more than a century ago. Larry Bartels asserts that the modern Senate is corrupt in one important way: precisely because senators are first and

²⁷U.S. Census Bureau, "Federal Aid to States for Fiscal Year 2010," September 2011, figure 3, viii, <http://www.census.gov/prod/2011pubs/fas-10.pdf>; "Consolidated Federal Funds Report for Fiscal Year 2010," September 2011, table 1, 1, and table 5, 10, <http://www.census.gov/prod/2011pubs/cffr-10.pdf>. Note that the Census Bureau lost funding for this report and fiscal year 2010 is the latest data available in this format.

²⁸Rossum, *Federalism, the Supreme Court, and the Seventeenth Amendment*.

²⁹Kaiser Family Foundation, "State Decisions for Creating Health Insurance Marketplaces," 2014, <http://kff.org/health-reform/state-indicator/health-insurance-exchanges/>.

foremost responsive to upper-income constituents, with less responsiveness to those in the middle-income strata, and virtually unresponsive to folks at the lowest-income levels. Lawrence Lessig echoes this sentiment in arguing that the amount of money in campaigns is so overwhelmingly large, it creates an insurmountably unequal playing field in Congress between the have and have-nots. If these scholars are right, then the Seventeenth Amendment represents a type of reform in democratic governance that promised more than it delivered.³⁰

As we hope to make clear, there are dangers in judging the effects of the Seventeenth Amendment without a clear understanding of how elections actually were conducted before popular election took hold. Acquiring such knowledge is a major goal of this book. At the broadest level, the Seventeenth Amendment represents a change to the Constitution that was supposed to produce a more responsive and more accountable Senate than under the previous electoral system. The impetus and momentum to change the Constitution was accompanied by that very promise, and it absolutely bears on scholars of U.S. politics to dig deeper into whether that promise has been kept or broken.

DESCRIPTION OF DATA AND RESEARCH METHODS

Basic facts about the unfolding of indirect Senate elections have been slow to infiltrate congressional and historical scholarship, perhaps because they occurred in the confines of state legislative chambers. Until now, scholars have primarily relied on annual editions of *Appleton's Annual Cyclopaedia* and the *Tribune Almanac* for general summary information about Senate elections in state legislatures after the Civil War. We started with these sources, but found their usefulness limited. *Appleton's* only published general information about Senate elections (e.g., who won) and ceased covering Senate elections after the 1870s. The *Tribune Almanac* did not begin its coverage of Senate elections until 1877 (thereby omitting 15 percent of Senate elections held during this time period) and did not list individual roll call balloting in state legislatures. It occasionally provided information about the nomination of Senate candidates, but only sporadically.

The primary deficiency of sources like *Appleton's* and the *Tribune Almanac* is that they supplied only a cursory look at the individual-level behavior of the state legislators who served as electors in these episodes. Although

³⁰Larry M. Bartels, *Unequal Democracy: The Political Economy of the New Gilded Age* (Princeton, NJ: Princeton University Press, 2008); Lawrence Lessig, *Republic, Lost: How Money Corrupts Congress—and a Plan to Stop It* (New York: Hachette Book Group, 2011).

we later show that party was the primary organizing principle of these elections, it was not the only one, nor was party a perfect predictor of how legislators voted. Therefore, we were compelled to compile a unique historical data set designed to address the significant questions surrounding indirect elections as a democratic mechanism as well as fill in major lapses in our knowledge of U.S. politics during this period. We start our time series with 1871 for the reasons discussed above. We have amassed these data primarily from individual state legislative journals so that we have as complete a record of voting for senators during this period as possible.³¹ There are several excellent collections of state legislative journals throughout the United States—some more comprehensive than the official state repositories of the “home” states. Among these collections are the Library of Congress, New York Public Library, New York State Library, Wisconsin Historical Society, and Yale University Law Library. Our data set consists of 577,770 roll call records of the vote for U.S. senators in each state legislature for the Senate term beginning in 1871 to the last set of indirect elections held in 1913. In the process of compiling these data, we were also able to collect the number of candidates who were considered in these elections, nominating mechanisms for U.S. senators in and out of the legislatures, roll call records related to the organization of these state legislatures, and membership rosters of these legislatures. These data were also frequently gathered from the journals of the state legislatures, but state newspapers and blue books were also indispensable to our efforts.

We have identified 752 Senate elections held during this time frame, of which 85 percent (637) were general elections and 15 percent (115) were special elections held to fill vacancies.³² Overall, 31 percent (231) of these elections were resolved in joint assembly, with the number of joint session ballots ranging from 1 to 209; 68 percent (510) were accomplished through separate balloting, with most involving some fractioning of the party blocs; and 1 percent (11) cannot be categorized, mostly because state records are missing or confusing. In 19 of these elections, state legislatures were deadlocked to the point of not electing a senator before adjourning sine die between 1871 and 1913, leaving Senate seats vacant.³³

³¹In a few cases, state legislative journals do not exist. In those instances, we relied on state newspapers or unpublished legislative records to reconstruct the roll call record.

³²Some of the data used for this book also appear in an article we published; see Wendy J. Schiller, Charles Stewart III, and Benjamin Xiong, “U.S. Senate Elections before the 17th Amendment: Political Party Cohesion and Conflict, 1871–1913,” *Journal of Politics* 75, no. 3 (2013): 835–47.

³³As far as we know, we have identified the universe of U.S. Senate elections during this period and gathered the requisite roll call votes. The exceptions are a couple of cases where the legislative journals were not printed or were lost. In the process, we have uncovered evidence of a small number of elections that appear to have eluded prior notice by the scholarly literature, such as the Alabama election of December 1872, when two bodies separately

Our data include full rosters of each state legislature that were constructed using official information from the states, including blue books and legislative manuals, information in legislative journals, and newspaper accounts. We have identified approximately 106,000 legislators who served during this time. In terms of party affiliations, our data include complete or partial partisan identification for legislators in forty of the forty-eight states in our study. More specifically, we have complete partisan identification for all state legislators who cast a ballot in 28 percent (208 cases) of the elections, and partial partisan identification for 54 percent (409). Unfortunately, we were not able to obtain partisan identification for the remaining 18 percent (135) of the elections.

To supplement the accounts from *Appleton's Annual Cyclopaedia*, the *Tribune Almanac*, and our original ballot data, we also collected newspaper accounts of Senate elections. For this, the online Proquest historical newspaper archive was invaluable, but we also gathered accounts from other newspapers microfilmed in the states where the Senate elections were held.³⁴

How OUR STORY UNFOLDS

The remainder of the book proceeds as follows. In chapter 2, “A Theory of Indirect Elections,” we analyze the indirect elections of U.S. senators in state legislatures within a broader theoretical framework of how parties interact with institutional and electoral settings to affect electoral and policy outcomes. In this chapter we identify key participants in Senate campaigns during this period—candidates for U.S. Senate, business interests, political party organizations, and state legislators—and construct a model for

claiming to be the legitimate state legislature each elected a different senator, and the New Hampshire election of 1881, in which a deadlock ensued when the legislature attempted to elect the senator whose term began in 1883, two years early.

We also are able to correct the historical record in some cases. A notable example is accounting for situations that resulted in a deadlock. Haynes (*The Election of Senators*) reports a total of forty-five deadlocks in Senate elections in this period of time, whereas we only count nineteen elections as deadlocks. The basis of Haynes’s knowledge of deadlocks is the *Tribune Almanac*, which was also our starting point for identifying deadlocks. Our work in gathering data directly from state legislative journals, though, has alerted us to discrepancies between the *Tribune Almanac* accounts, official records of the legislatures, and Haynes’s tally. As a consequence, we found fewer deadlocks than Haynes reported.

³⁴We had also hoped to collect election return information for all our states, but that information has proven fugitive, ranging from New York and Pennsylvania (where it is practically complete), to Massachusetts (where it is mostly complete for the time period), to Maine (where it is complete for the Senate yet not the House), to Kentucky (where no collection of legislative election returns survives for this period).

how these stakeholders interacted with each other within the structure of legislative choice for U.S. senator along four dimensions—candidate identification, candidate nomination, election criteria, and system responsiveness. We also include a brief discussion of how an anticipated indirect Senate election might have affected voter turnout in the preceding state legislative election.

In chapter 3, “Candidate Emergence, Political Ambition, and Seat Value,” we provide a comprehensive overview of the value of a Senate seat and a general assessment of the value that a Senate seat added to a state during this era of federalism. We argue that from a purely distributive standpoint, the value of a Senate seat was not high, but for political parties and business interests, the stakes were enormous for the maintenance of political organizations and control over local politics as well as the direction of national policies, such as the tariff, that affected state and local business interests. This chapter includes case studies from Pennsylvania and Rhode Island to illustrate the desire to use a Senate seat to consolidate state political control and reap the associated economic benefits. It also includes cases from Nevada and Wisconsin to demonstrate the role of national party policies in the dynamics of state-based Senate campaigns. All the case studies in this chapter offer a window into the role of money in Senate elections in the indirect elections period by documenting campaign financing and bribery along with addressing the roots of partisan, economic, and geographic factionalism in state politics during this era.

In chapter 4, “Party as Gatekeeper: Canvass, Convention, and Caucus as Nomination Mechanisms,” we analyze the role of the party as a gatekeeper to running for U.S. Senate and delve more deeply into the role of the political party as an organization in the state legislature. We measure the function of partisanship in structuring the organization of state legislatures as well as examine how partisanship influenced the dynamics of Senate elections. In this chapter we also explain the role of party caucuses in the nomination and election stages of indirect elections, show how party leaders identified and rallied around Senate candidates, and identify the set of incentives that party leaders used to pressure state legislators to back their preferred Senate candidate. Furthermore, we discuss how candidates for U.S. Senate tried to consolidate support among key party leaders, and how regional party factionalism made that task more difficult. To illustrate these behaviors, we include case studies from a range of years and states, including New York, Kentucky, Washington State, Florida, and Illinois. This chapter also provides an opportunity to compare the party’s organizational role in the preprimary era with today’s system, in which parties serve as the main vehicle for party activists to hold their Senate candidates accountable for adherence to or divergence from party policy. Indeed, there are striking similarities in the extent to which party leaders try to diminish intraparty conflict over

the choice for U.S. senator in the indirect elections age and political party efforts in the modern era to do the same.

In chapter 5, “Political Dynamics and Senate Representation,” we present our quantitative analysis identifying and examining why a legislature resolved a Senate election on the first ballot or required joint balloting to do so, and in the latter case, explain the number of joint ballots it takes to resolve an election. The overall analysis offered in this chapter helps to unpack the variation in the level of conflict over Senate elections that we found across states and time. Contrary to expectations, we did not find that conflict was concentrated in a few states, regions, or years but instead discovered that factors such as majority-party size, incumbency, the role of the nominating mechanisms, and the number of candidates running for Senate help to explain the levels of conflict in these elections. In this chapter, we also assess the impact of the conditions of U.S. senators’ elections on their subsequent legislative behavior in the Senate. We look at the distributive benefits, including earmarks and patronage, and explore if and how the type of election—for example, smooth or conflictual—produces variation in U.S. senators’ committee assignments, bill sponsorships, ideological positions, and roll call voting records. Lastly, we analyze directly elected U.S. senators’ legislative behavior in comparison to their predecessors to see how the systematic effects of institutional opportunities and constituent interests exerted similar or different effects under each system of elections.

In chapter 6, “Senate Electoral Responsiveness under Indirect and Direct Election,” we integrate our findings on indirect elections with current scholarship on the impact of the adoption of the Seventeenth Amendment and onset of direct elections. We construct a comprehensive counterfactual analysis that helps to demonstrate what the political outcomes would have been with direct elections in place since the founding, and in contrast, what Senate elections would look like after 1913 if indirect elections were still in place. In this chapter, we also address the question of whether U.S. senators represented states as units and responded to state governmental concerns more under the indirect system than they do under direct elections.

In chapter 7, “Myth and Reality of the Seventeenth Amendment,” we conclude the book by summarizing our findings along with reflecting more broadly on the quality and context of Senate representation under two different electoral systems. In doing so, we address several key questions about institutional representation in the U.S. democracy. Are U.S. senators more responsive today to the needs and opinions of their constituents than under indirect elections? Did state legislators actually serve as good trustees in choosing their U.S. senators on behalf of their states’ voters? Finally, if the Tea Party and other advocates for the repeal of the Seventeenth Amendment get their wish, will the U.S. Senate be a fundamentally different institution?