The Seventeenth:

The Worst of All Amendments?

The 17th Amendment, putting the election of U.S. senators in the citizens' hands, instead of the state legislatures, was meant to empower citizens. It had the opposite effect.

by Jack Kenny

William Jennings Bryan, thrice a losing candidate for president of the United States, enjoyed a day of triumph as secretary of state early in the presidency of Woodrow Wilson. On May 31, 1913, Bryan signed the proclamation declaring the 17th Amendment, requiring direct election of U.S. senators, duly ratified and incorporated into the Constitution of the United States. Bryan had long been in the forefront of the battle for the amendment, as congressman, U.S. senator, and presidential candidate. Foreshadowing Franklin D. Roosevelt's campaign against the "horse-and-buggy" provisions of an 18th-century Constitution, Bryan insisted the progress of communications by the end of the 19th century had endowed the common people with sufficient information to make their own judgments as to who should represent them in the U.S. Senate.

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

Not a Representative Body

Yet the role of the Senate in the basic structure of the Constitution was clearly not to be a body representing the people. The House of Representatives had that duty. The United States Senate was to represent the states in the federal government, jealously guarding the prerogatives of the states against encroachments from Washington. Todd Zywicki, a George Mason University law professor, has been advocating repeal of the amendment for more than 20 years, arguing that it has broken down the constitutional structure designed to protect the rights and interests of the states and supplanted it with what he describes as a "master-servant relationship" between the federal and state governments. Stating his case for repeal in the November 15, 2010 issue of *National Review*, Zywicki wrote:

> Before the Seventeenth Amendment, the now-widespread Washington practice of commandeering the states for federal ends — through such actions as "unfunded mandates," laws requiring states to implement voter-registration policies that enable fraud (such as the "Motor Voter" law signed by Bill Clinton), and the provisions of Obamacare that override state policy decisions — would have been unthinkable. Instead, senators today act all but identically to House members, treating federalism as a matter of political expediency rather than constitutional principle.

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Power to the Judges

Ironically, an amendment advanced as a boon to the power of the people has had the effect of concentrating more power in the hands of the unelected branch of the federal government known as the judiciary. Since senators no longer see it as their duty to guard the boundaries between federal and state authority, those jurisdictional disputes have repeatedly landed in the laps of the judges. From the New Deal of the 1930s to the ObamaCare decision last June, the Supreme Court has time and again decided whether the federal government may tell a farmer how much wheat he may grow, legislate gun-free zones around schools, address domestic spousal abuse through the Violence Against Women Act, or burden a citizen with an additional tax for failure to purchase health insurance.

The appointment of senators by state legislators, Zywicki has written, "was one of the least controversial elements of the new Constitution. Popular election of senators was proposed at the Constitutional Convention, but received almost no support."

The tide in favor of direct election, overwhelming by 1912, began as a modest ripple in the 1820s. Rep. Henry R. Storrs, a Federalist from New York, proposed an amendment for popular election for Senators in 1826, but the bill went nowhere. Similar amendments were offered and tabled in 1829 and 1855. But soon after the Civil War, the cause was taken up by an American president, albeit an unpopular one. Andrew Johnson, who was impeached for other reasons, called for direct elections for reasons he thought "so palpable" that no explanation was necessary.

Scandals and Deadlocks

By the last decade of the 19th century, the populist crusade and the nascent Progressive movement had coalesced around the promotion of greater "democracy" and the elimination of political corruption. In an essay in *The Atlantic*, University of Baltimore School of Law Professor Garrett Epps described the state legislatures of that era as open markets for moneyed interests to buy votes for favored Senate candidates.

"Whenever a senatorial election occurred," wrote Epps, "railroad barons, oilmen and monopolists descended on the state capitol and spread their cash like butter across the lawmakers' outstretched palms." The famous "muckraking" journalists of the Progressive era contributed to the enthusiasm for political reform with stories of bribery and corruption in the nation's State Houses. The cure for the "ills of democracy," reformers argued, was more democracy. Convinced the problem was less with the people in office than the way they were elected, they sought to reform the Constitution.

Critics of the amendment have argued that much-publicized incidents of corruption were less a cause than an excuse for the campaign for direct elections. Writing in the journal *Humanitas* in 1996, historian C.H. Hoebeke noted:

> The intrigues, improprieties and illegalities would be difficult to measure precisely, particularly because an election that was unpopular was often portrayed as the result of underhandedness. In states where senatorial primaries succeeded only in producing a number of local mandates, the legislators were forced to compromise, and their choice was usually unpopular with any constituency that did not have its way. But it is a matter of record that the first case of bribery reported in the election of senators did not occur until 1872. From then until the ratification of the Seventeenth Amendment — a period when the independence of state legislators was losing ground to the popular primary — the number of allegations of corrupt elections rose to fifteen. Considering the extent to which the process of Senate elections had already been popularized, the reformers' assertions that they had become more corrupt did not exactly support the case for popularizing the process even further.

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Learning from history: Todd Zywicki, now a professor of law at George Mason University in Fairfax, Va., deplores the "master-servant" relationship between the federal and state governments.

"On the whole, most of the muckraking exposés of Senate elections turned out to be nothing more than good copy," wrote Hoebeke, who also pointed out the internal contradiction in the reformers' argument. If the people had been electing easily corruptible state legislators, what reason was there to believe they would do a better job of electing honest U.S. senators? The proposed remedy, he wrote, consisted of transferring Senate elections "from the 'corrupt' few to the incompetent many."

Another argument against election of senators by the legislatures was the number of legislative deadlocks that occurred, leaving Senate seats vacant for long periods of time. The deadlocks, in fact, became more frequent after Congress passed a law in 1866 requiring the election of each senator by a majority, not merely a plurality, of his state's legislature. In his 2001 book, *Federalism, the Supreme Court and the Seventeenth Amendment*, political science professor Ralph A. Rossum noted there were 71 such deadlocks from 1885 to 1912, resulting in 17 Senate seats going unfilled for an entire legislative session or more. "Deadlock was most evident and embarrassing in Delaware; it was represented by only one Senator in three Congresses and was without any Senator from 1901 to 1903."

Populists and Progressives, Unite!

The National People's, or Populist, Party included a plank calling for the popular election of U.S. Senators in its platform starting in 1892. The Democratic Party followed suit in 1896. Progressive Republicans, including the ever-popular Theodore Roosevelt, also backed the idea.

State party platforms joined the chorus, even as a growing number of states had effectively achieved their goal with, as Hoebeke noted, primary elections. A common method was to hold primary elections for U.S. Senate and then ask each candidate for the state legislature to pledge that he would vote for the winner of his party's primary.

In the fateful year of 1912, Arizona and New Mexico were admitted to the Union, and both were expected to join the rapidly growing number of states calling for a constitutional convention for the purpose of passing an amendment to provide for the direct election of senators. By that time 27 states had already issued the call, just five fewer than would be needed to bring such a convention about. Since the Article V provision concerning a constitutional convention in no way limits the nature or number of amendments that may be proposed, progressives in Congress, pushing for an amendment, were joined by conservatives fearful of a "runaway convention" that might alter the Constitution in ways unforeseen. Sending an amendment to the states seemed the safer route. Yet the amendment, when placed before the Congress, did face opposition from a vociferous minority. The irony of senators voting to discard the means by which they had been elected to their high office was not lost on Idaho Republican Weldon Heyburn, who issued the following challenge to his Senate colleagues:

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

Library of Congress

Vote on everything: Sen. Jonathan Bourne of Oregon wanted "Rousseauism, in the application of popular sovereignty, on a national scale."

Rousseauism Triumphant

Yet the amendment passed overwhelmingly, by a vote of 64 to 24 in the Senate and 238 to 39 (with 110 not voting) in the House. The temper of the time was not amenable to conservative persuasion, reflecting as it did the idealization of the all-conquering "general will" espoused by Jean-Jacques Rousseau, intellectual father of the French Revolution. Rousseau had argued that all questions facing the body politic should be decided according to the "general will" or consensus among all the people in the nation. Senator Jonathan Bourne of Oregon freely acknowledged that the Founders had not planned what he and his Progressive colleagues were after, namely "Rousseauism, in the application of popular sovereignty, on a national scale."

In 1908, 110 members of the U.S. House had pledged support of an amendment to establish a national referendum. While the states were holding ratification debates on the 17th Amendment, members of the Judiciary Committee of the U.S. Senate proposed the popular recall of federal judges. "Add to these," wrote Hoebeke, "the various third-party platforms that have made a range of demands,

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from the Socialists' call for abolishing the President and Senate to the Progressive Party's plank for finding 'a more easy and expeditious method of amending the Federal Constitution,' and the predilection for treating everyday political issues as systemic constitutional weaknesses becomes more readily visible."

The amendment was passed by Congress on May 13, 1912 and then sent to the states. By April 8, 1913, it was ratified by the required three-fourths of the states to become part of the Constitution.

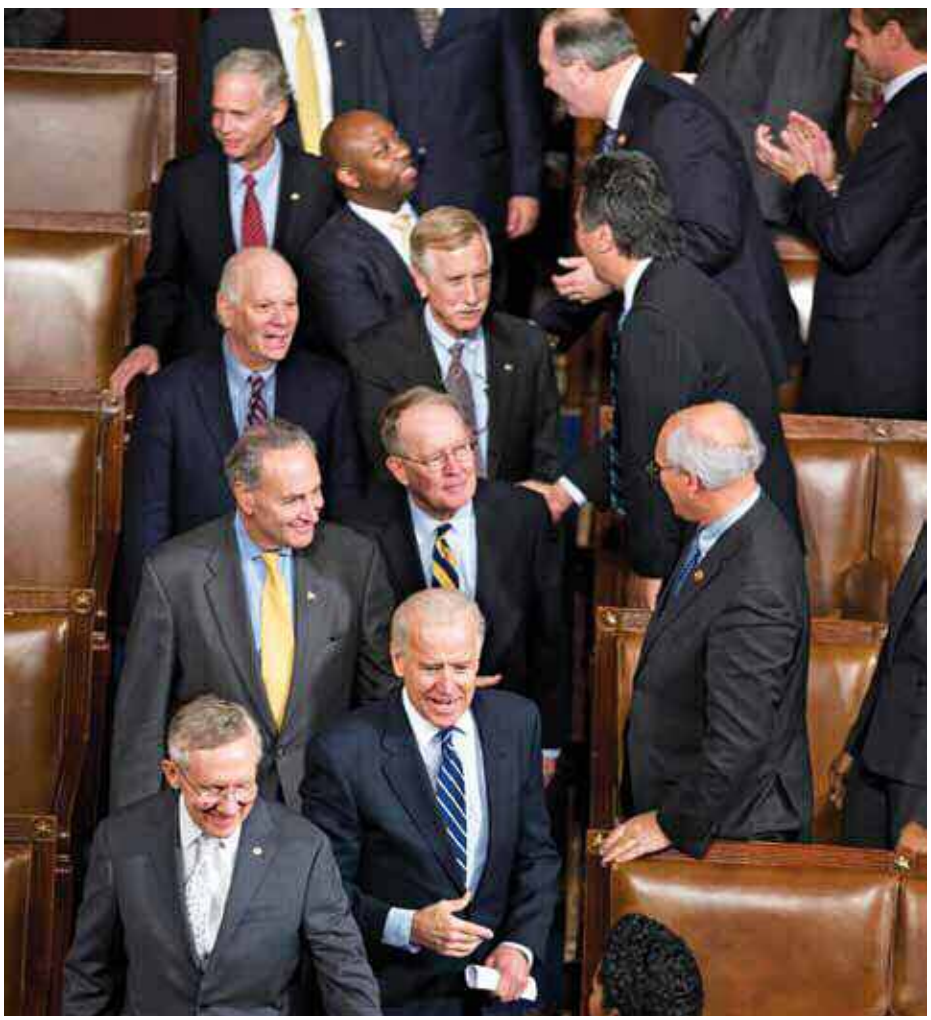
What Changed?

The amendment changed the nature of politics in America, though not entirely in the manner hoped for by the reformers. The first direct election of senators, in 1914, resulted in the reelection of every incumbent re-nominated by his party. The Senate remained largely a millionaires' club, and those who had hoped to cleanse elections of the corrupting influence of money had to be disappointed when the cost of running a statewide election campaign for a seat on "the world's greatest deliberative body" became clear. They would no doubt be shocked at current campaign spending sprees, including the more than $70 million in combined expenditures by Scott Brown and Elizabeth Warren in last year's Senate race in Massachusetts. Alliances with free-spending lobbying organizations and charges of election fraud have continued long after the power brokers in the "smoke-filled rooms" have been succeeded by armies of campaign consultants, media advisors, pollsters, and marketing experts to train the candidate in the art of telling the people what the people want to hear.

With senators no longer accountable to their state legislatures, lobbyists have benefited from an economy of scale, focusing on one national capital, rather than 50 state capitals, in their efforts to place increased helpings of federal largess at the service of their respective clients. Waves of new federal programs would be enacted in succeeding decades that undermined the authority of state governments. As late as 1930, the governor of New York could still say that a great many "vital problems of government" remained, by the nature of the federal Constitution, outside the purview of the national government. They included "the conduct of the banks, of insurance, of business, of agriculture, of education, of social welfare, and a dozen other important features," he observed. "Washington must not be encouraged to interfere" in those areas, the governor cautioned.

The governor was Franklin D. Roosevelt, who was elected president two years later and launched a "New Deal" program that would, over the next several years, bring the federal government into nearly all those areas. Among the most controversial were the federal agriculture programs aimed at raising farm prices by reducing food supplies, an effort critics described as an attempt to solve the problem of "poverty in the midst of plenty" by getting rid of the plenty.

Alexander Hamilton, in *The Federalist*, No. 17, cited "the supervision of agriculture and other concerns of a similar nature" as matters that "are proper to be provided for by local legislation [and] can never be desirable cares of a general jurisdiction." Though President Lincoln created the nation's first Department of Agriculture in



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Today's titans? Are Senate "titans" like Charles Schumer of New York and Vice President Joe Biden better than the likes of Webster, Clay, and Calhoun, who were chosen by their respective state legislatures?

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Mouthpiece for change: Glenn Beck, radio and TV talk-show host, is among the 21st-century advocates of repeal of the now 100-year-old 17th Amendment.

1862, the extent of federal involvement in the production and sale of agricultural products was nothing like what it would become in the New Deal and successive administrations. Today the federal government is involved in everything from our farms to our health and education, along with our sex lives (Viagra is covered by the prescription drug benefit for seniors, and contraception coverage is mandated under ObamaCare) and preschool programs for toddlers.

The Founders established one house of the federal legislature to be resistant to pressures for hastily considered changes in response to every crisis of the day, whether real or imagined. Members of the upper chamber would be chosen by popularly elected legislators, chosen in theory at least as persons of sound judgment and integrity. The senators would themselves be men inclined to consider coolly and dispassionately whether legislation advanced by the House of Representatives would be in harmony with the interests of a frugal and stable republic or would open a Pandora's box of raids upon the nation's treasury and assaults upon the governing prerogatives of the states. A statement attributed to our nation's first president compares the "cooling" role of the practice of pouring tea into a saucer. "Even so," said Washington, "we pour legislation into the senatorial saucer to cool it."

Election of U.S. senators by their respective state legislatures, Madison wrote in *The Federalist*, No. 14, would serve to remind the senators that the national government "is not to be charged with the whole power of making and administering laws. Its jurisdiction is limited to certain enumerated objects, which concern all the members of the republic, but which are not to be attained by the separate provisions of any." The state governments would otherwise "retain their due authority and activity."

Whatever merit was claimed for the amendment a century ago, few would argue today that it has produced a Senate of superior quality.

"Whether the modern titans of the Senate such as Trent Lott, Bill Frist, Harry Reid, and the late Ted Kennedy are superior to Webster, Clay, and Calhoun is to some extent a matter of taste," Zywicki conceded. "But it is likely that reinstating the original mode of selection would change the type of individuals selected — and it is not implausible to think that the change would be positive."

A Zeal to Repeal

While Zywicki's is no doubt a minority view, the Tea Party uprising of the past few years has inspired some office holders today to at least consider the potential benefits of repealing the 17th Amendment. Republican Mike Lee, elected to the Senate from Utah in 2010, said he would favor repeal of the amendment.

"We need one chamber of Congress in which states will be represented as states," Lee said on Fox News shortly after his election. In Atlanta, the Georgia legislature in early February had "inched ahead," *Slate* magazine reported, on a resolution calling for the repeal of the amendment. The resolution declares the "original purpose of the United States Senate was to protect the sovereignty of the states from the federal government."

Conservative commentator Glenn Beck has zeroed in on the amendment as a contributing factor in the rise of an overbearing federal government in the 20th century. Its adoption remains "One of the dumbest things we ever did," said former Arkansas governor and Republican presidential candidate Mike Huckabee. Speaking at Texas Tech University in November 2010, Supreme Court Justice Antonin Scalia said one change he would like to see to the Constitution would be to "change it back" to the original method of electing senators.

"The 17th Amendment has changed things enormously," Scalia said, adding, "We changed that in a burst of progressivism in 1913, and you can trace the decline of so-called states' rights throughout the rest of the 20th century." Retired New Jersey judge and Fox News legal commentator Andrew Napolitano has called the amendment "the only part of the Constitution that is itself unconstitutional."

"That was an assault, an invasion on the infrastructure of constitutional government," said Napolitano, viewing the amendment through history's lens. "Even kings in Europe had to satisfy the princes and barons around them. And that's how they lost their power, or that's how their power was tempered." Today, he said, "Congress believes it doesn't have to satisfy anybody. Its only recognized restraint is whatever it can get away with."

Empowering the federal government to take an unlimited amount of anyone's income (the 16th Amendment) and to make the U.S,. Senate a tribune for the "genral will" of the moment or day (the 17th) seems a strange way to subject the government to the people's control. The two amendments combined have driven a stake through the heart of a republic founded on the principle of limited, constitutional government. ■