Amendment XVII. [1913] The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

THE SEVENTEENTH AMENDMENT AND THE ELECTION OF U.S. SENATORS

Of all the institutions the U.S. Constitution established, the U.S. Senate probably best reflected the federal nature of government. The founders granted each state an equal number of two senators in that body, and Article I, Section 2 further provided that state legislatures would select senators whom states could expect to protect their interests. Over time, this arrangement for indirect election provoked charges that the Senate had become a "millionaires' club" composed of wealthy people with inordinate influence in the states. Moreover, the system of indirect election was obviously not as democratic as direct election. George Haynes has observed that over time the senatorial selection system resulted in deadlocks, bribery, stampeded elections, unfilled vacancies, interference with regular state legislative business, and corruption.

Advocates of direct election had to persuade sitting senators, who were already profiting from the existing arrangement, to support such a change. Some reformers persuaded state legislatures to agree to choose whoever won state popular elections. Others pursued the alternate route under Article V, which obligated Congress to call a convention to proposed amendments if two-thirds of the states petitioned it to do so. Such threats propelled Congress to act. Once it proposed the amendment, the states quickly ratified. Whereas Article I, Section 2 had allowed the state executive to make temporary appointments that legislatures would then fill in cases of senatorial vacancies, the Seventeenth Amendment provided that state legislatures could empower governors to make temporary appointments until the legislatures could provide for elections to fill such vacancies.

The Seventeenth Amendment further democratized the Constitution and tied the legislative branch closer to the people, but it may also have undermined the link between the Senate and the federal system. Both for better and for worse, Senators, who often have presidential aspirations, are now more likely to view themselves as representatives of the people of their states rather than of their states as political entities. Given this structural change, some commentators have argued that the judiciary has greater responsibility for preserving federalism than in the past.

Amendment XVIII. [1919] Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

Popular Election of Senators

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

(AMENDMENT XVII, CLAUSE 1)

On May 12, 1912, the Seventeenth Amendment, providing for direct popular election of the Senate, was approved by Congress; the requisite three-fourths of the state legislatures ratified it in less than eleven months. Not only was it ratified quickly, but it was also ratified by overwhelming numbers. In fifty-two of the seventy-two state legislative chambers that voted to ratify the Seventeenth Amendment, the vote was unanimous, and in all thirty-six of the ratifying states the total number of votes cast in opposition to ratification was only 191, with 152 of these votes coming from the lower chambers of Vermont and Connecticut.

Although state ratification of the Seventeenth Amendment came quickly and easily, congressional approval of the idea of popular election of the Senate did not. The first resolution calling for direct election of the Senate was introduced in the House of Representatives on February 14, 1826. From that date, until the adoption of the Seventeenth Amendment eighty-six years later, 187 subsequent resolutions of a similar nature were also introduced before Congress, 167 of them after 1880. The House approved six of these proposals before the Senate gave its consent. By 1912, senators were already picked by direct election in twenty-nine of the forty-eight states. As Senator William E. Borah said in 1911, "I should not have been here [in the U.S. Senate] if it [direct election] has not been practiced, and I have great affection [for this system]." Most states had gradually turned to non-binding primary elections to select their senators; state legislators promised to vote for the candidate that the people had selected in this "advisory" election. This "advisory" election had real teeth because many state laws provided that candidates for state legislator had to sign pledges (which were placed on the ballot) that they would promise (or refuse to promise) to vote for the U.S. Senate candidate that the people had selected in their nonbinding election. If the state legislative candidate refused to sign the pledge, the people would vote against him, and so the Senate gradually became populated with people who were, in effect, selected by popular, direct election.

The Seventeenth Amendment was approved and ratified to make the Constitution more democratic. Progressives argued forcefully, persistently, and ultimately successfully that the democratic principle required the Senate to be elected directly by the people rather than indirectly through their state legislatures. By altering the manner of election, however, they also altered the principal mechanism employed by the Framers to protect federalism. The Framers understood that the mode of electing (and especially reelecting) senators by state legislatures made it in the self-interest of senators to preserve the original federal design and to protect the interests of states as states (see Article I, Section 3, Clause 1). This understanding was perfectly encapsulated in a July 1789 letter to John Adams, in which Roger Sherman emphasized that "[t]he senators, being eligible by the legislatures of the several states, and dependent on them for re-election, will be vigilant in supporting their rights against infringement by the legislative or executive of the United States."

In practice, the state legislatures' election of senators became more complicated. The members of the state legislators were often divided over whom to elect as senator. Many state legislators simply voted for themselves, and their deadlock would result in no senator's being chosen, which then deprived the state of any representation in the Senate for a year or more.

In addition to its effect on federalism, the ratification of the Seventeenth Amendment has also had demographic, behavioral, and institutional consequences on the Senate itself. Demographically, popularly elected senators are more likely to be born in the states they represent, are more likely to have an Ivy League education, and are likely to have had a higher level of prior governmental service. Institutionally, the states are now more likely to have a split Senate delegation, and the Senate now more closely matches the partisan composition of the House. Additionally, the amendment makes problematic the assertion in *Garcia v. San Antonio Metropolitan Transit Authority* (1985) that the political process in

the Senate is sufficient to protect the states' sovereign interests against expansive federal legislation.

Ralph Rossum

See Also

Article I, Section 3, Clause 1 (Senate)
Article V (Prohibition on Amendment: Equal Suffrage in the Senate)

Suggestions for Further Research

Vikram David Amar, *Indirect Effects of Direct Election: A Structural Examination of the Seventeenth Amendment*, 49 VAND. L. REV. 1347 (1996)

Jay S. Bybee, *Ulysses at the Mast: Democracy, Federalism, and the Sirens' Song of the Seventeenth Amendment*, 91 NW. U. L. REV. 500 (1997)

Sara Brandes Crook & John R. Hibbing, *A Not-So-Distant Mirror: The 17th Amendment and Congressional Change*, 91 AM. POL. SCI. REV. 845 (1997)

C. H. HOEBEKE, THE ROAD TO MASS DEMOCRACY: ORIGINAL INTENT AND THE SEVENTEENTH AMENDMENT (1995)

RALPH A. ROSSUM, FEDERALISM, THE SUPREME COURT, AND THE SEVENTEENTH AMENDMENT: THE IRONY OF CONSTITUTIONAL DEMOCRACY (2001)

Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954)

Todd J. Zywicki, *Beyond the Shell and Husk of History: The History of the Seventeenth Amendment and Its Implications for Current Reform Proposals*, 45 CLEV. ST. L. REV. 165 (1997)

Significant Cases

Garcia v. San Antonio Metropolitan Transit Auth., 469 U.S. 528 (1985)

Vacancies in the Senate

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to effect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

(AMENDMENT XVII, CLAUSES 2 AND 3)

The Seventeenth Amendment, ratified in 1913, provided for the direct election of United States senators, replacing the original method that had left the choice to state legislatures. Previously, state legislatures could choose senators and fill vacancies at any time during a regular or special legislative session. After the ratification of the Seventeenth Amendment, it was recognized that the expense and inconvenience of election by popular vote made it necessary to schedule elections for senators at regular intervals. To avoid the hardship to a state's suffering a lack of representation pending a regular election, the Seventeenth Amendment also provided for methods of election or appointment to fill any unexpired term.

The language and history of the clause indicate that the states have the power to balance conflicting goals of a speedy popular election against the states' interests in conducting elections on a regularized basis so as to maximize voter participation and minimize administrative expense. Thus, when the death of Robert F. Kennedy created a vacancy in New York's Senate delegation in June 1968, New York was permitted to postpone the election of his replacement until 1970, rather than being required to hold both a primary and general election by the fall of 1968. *Valenti v. Rockefeller* (1969). Following the death of Senator John Heinz in 1991, Pennsylvania was permitted to fill the vacancy by a special election, with the candidates to be chosen by party conventions of the state's two major parties. The Court held that the Seventeenth Amendment did not mandate that party nominees be chosen by popular vote, so long as the actual election was

by popular vote. *Trinsey v. Pennsylvania* (1991). In 2008, Roland Burris was appointed by the governor of Illinois, Rod Blagojevich, to fill President-elect Barack Obama's Senate seat. (Blagojevich was later impeached and imprisoned for bribery and corruption charges related to his activities in connection with filling the vacancy.) Echoing *Valenti*, the Court found no violation of the Seventeenth Amendment when a special election was not called before a regularly scheduled general election, but it found that a writ of election must be issued. *Judge v. Quinn* (2010). *See also* S. J. Res. 7, 111th Cong., "A Joint Resolution Proposing an Amendment to the Constitution of the United States Relative to the Election of Senators" (2009) and H.R. 899, the Ethical and Legal Elections for Congressional Transitions Act (2009).

The clause does not define when a vacancy exists. During the 2000 election, the people of Missouri knowingly voted for the deceased Mel Carnahan. The governor declared this election to have created a vacancy, which he filled by appointing Carnahan's widow, Jean Carnahan, and he then issued a writ of election for 2002. It remains an open question, however, whether the voters can create a Senate "vacancy" by knowingly voting for an ineligible candidate and allowing the governor to fill the position with an individual of his choice, as opposed to simply declaring the votes to be improper or "spoiled" ballots.

Renewed interest in the Senate vacancy clause has arisen because of the controversy surrounding the appointment of Roland Burris and the Massachusetts legislature's political machinations to assure a Democratic appointee after the death of longtime Senator Edward Kennedy. Bills were considered that would have seated only senators who were elected by the people. One commentator has argued that the original understanding of the Seventeenth Amendment would not have led to the result in *Quinn* that required a writ of election to be issued when it was inconsistent with procedures set up by a state legislature. Others have debated whether Congress has the authority to require states to establish uniform procedures to fill vacancies or whether a constitutional amendment is necessary.

Todd Zywicki

See Also

Article I, Section 3
Article I, Section 4
Amendment XVII (Popular Election of Senators)

Suggestions for Further Research

Robert C. Byrd, The Senate, 1789–1989 (4 vols.1989-1994)

George H. Haynes, The Senate of the United States: Its History and Practice (2 vols. 1938)

Furqan Mohammed, *Extracting Lessons from Illinois' 2010 Special Election Fiasco: A Closer Look at the Seventh Circuit's Decision in* Judge v. Quinn *and the Special Election Requirement of the Seventeenth Amendment*, 32 N. Ill. U. L. Rev. 295 (2012)

Election of Senators by Popular Vote, S. Rep. No. 961, 61st Cong., 3d Sess. 4–5 (1911)

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Todd J. Zywicki, *Senators and Special Interests: A Public Choice Analysis of the Seventeenth Amendment*, 73 Or. L. Rev. 1007 (1994)

Significant Cases

Valenti v. Rockefeller, 292 F. Supp. 851 (S.D.N.Y. 1968), *aff'd* 393 U.S. 405 (1969)

Trinsey v. Pennsylvania, 941 F.2d 224 (1992)

Judge v. Quinn, 612 F.3d 537 (7th Cir. 2010), *amended on denial of reh'g*, 387 Fed. Appx. 629 (7th Cir. 2010), *cert. denied*, 131 S. Ct. 2958 (2011)

Prohibition

Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

Seventeenth Amendment (1913)

The Seventeenth Amendment provides for direct election of United States senators by the people of the states.

XVII

The Senate of the United States shall be composed of two Senators from each state, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislatures.

When vacancies happen in the representation of any state in the Senate, the executive authority of such state shall issue writs of election to fill such vacancies: Provided, that the legislature of any state may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

COMMENTARY

Selection of United States senators had been criticized for many years. For 124 years, under the first clause of Article I, Section 3, of the Constitution, senators had been chosen by the state legislatures. Direct election of senators was first proposed in 1826, and beginning in 1893, a constitutional amendment to establish direct election was proposed in Congress every year. By 1912, 29 of the 48 state legislatures provided for either nomination by party primaries, with the individual legislators bound to vote for their party's nominee, or a statewide general election, the result of which was binding on the legislature.

Many reasons were advanced for direct election, including reducing corruption, eliminating national party domination of state legislatures, and direct representation of the people in the Senate. Most observers see little difference in the types of persons elected to the Senate or in the proceedings of the Senate or state legislatures as a result of the Seventeenth Amendment.

The Seventeenth Amendment has not required much judicial review. In 1915, the Supreme Court held that the right to vote for United States senators was a privilege of United States citizenship, protected by the privileges and immunities clause of the Fourteenth Amendment, and in 1946 it held that that right could not be denied on account of race. The Court has also held that the Seventeenth Amendment does not require that a candidate receive a majority of the votes cast in order to be elected; a plurality will suffice.

AMENDMENT XVII

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

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THE SEVENTEENTH AMENDMENT: DIRECT ELECTION OF SENATORS

Another reform of the Progressive Era was allowing the people to select U.S. senators, rather than having state legislatures choose them, as originally provided in Article I. Advocates of the Seventeenth Amendment hoped to avoid the corrupt practice in which political machines, backed by corporate wealth, hand-picked senatorial candidates. Because of such practices, the Senate was often referred to as a "millionaire's club."

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

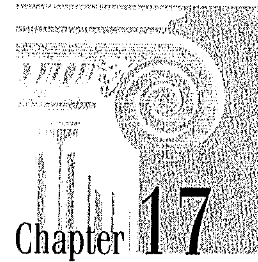
The Seventeenth Amendment changes Section 3 of Article I to allow direct election of senators by the people. It also allows states to determine what the qualifications of voters for senator shall be–subject of course to any further constitutional amendments. Therefore, women in some states, such as Wyoming, were allowed to vote for U.S. senator even before the Nineteenth Amendment gave women suffrage nationwide.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided,* That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

The governor of a state may make a temporary appointment for senator if the office becomes vacant. Article I does not contain similar provisions for the House of Representatives. As a result of the Cold War and the September 11, 2001 terrorist attacks, some scholars have proposed a constitutional amendment that would allow governors to make emergency appointments of House members if Congress was attacked and representatives were killed or disabled.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

One obstacle to enacting the Seventeenth Amendment was Article V's requirement that before an amendment can be submitted to the states for ratification, it must be approved by a two-thirds vote of both houses of Congress (or a special convention called by two-thirds of the states). Not surprisingly, the incumbent U.S. senators did not want to vote themselves out of a job. However, by 1911 a majority of states had already enacted some provisions requiring their state legislatures to consider the results of voter primaries when selecting senators. Consequently, the Seventeenth Amendment was proposed in 1912 and ratified in 1913, although the House of Representatives had first passed it in the 1890s.



Seventeenth Amendment

by R. B. Bernstein

Text of the Amendment

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the state legislature.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

Amendment Facts:

Submitted by Congress to the states: May 13, 1912. R by the required three-fourths of states (36 of 48): April 1913, and by nine more states by March 9, 1922. Decl be part of the Constitution: May 31, 1913.

Overview

The Seventeenth Amendment, which reassigned the power to elect senators from the state legislatures to the voters of each state, is the most drastic alteration in the system of constitutional federalism since the Civil War Amendments. It symbolized the abandonment of an understanding of the Senate more than a century old, that of the Senate as a council of representatives of the state governments. It also was a major achievement of the push to bring as many parts of the Constitution as possible in line with the principles of popular democratic government. In both ways, the Seventeenth Amendment was a major victory for the Populist and Progressive movements—two large, diverse reform movements that swept the American people in the late nineteenth and early twentieth centuries. Finally, the Seventeenth Amendment also is important in the history of the Constitution's amending

Racial Discrimination in Senatorial Elections

Though the Seventeenth Amendment provided for direct election of U.S. senators, many states prevented African Americans and other racial minorities from participating in senatorial elections. It was not until the passage of the Voting Rights Act of 1965 that all racially discriminatory mechanisms were outlawed, but the federal courts had, since the 1930s, struck down discriminatory schemes. One of the most popular was the *white primary.*

In the 1920s, Southern states began using the white primary as a way of limiting the ability of African Americans to play a part in the political process. The white primary was an effective device because of the virtual one-party political system in the South that existed until the late 1960s. In all but a few areas, nomination by the Democratic Party was tantamount to election, with Republicans often not bothering to run in the general elections.

In order to keep African Americans out of the political process, the Democratic Party in many states adopted a rule excluding them from party membership. The state legislatures worked in concert with the party, closing the primaries to everyone except party members. Southern states used this device because the Supreme Court had ruled in 1921, in *Newberry v. United States,* that political parties were private organizations and not part of the government election apparatus. Therefore, by means of the white primary device, African Americans were disenfranchised without official state action that would have triggered a violation of the Fourteenth Amendment's Equal Protection Clause.

Beginning in the late 1920s, the Supreme Court reviewed a series of cases involving the white primary. In *Nixon v. Herndon* (1927), the Court ruled that the state could not formally endorse the white primary, but in *Grovey v. Townsend* (1935), it upheld a Texas white primary that was based solely on a resolution adopted by the state Democratic Party.

In *United States v. Classic* (1941), the Court ruled that the federal government could regulate party primaries to prevent voter fraud. In recognizing that primaries were part of a state's electoral scheme, it overruled the *Newberry* precedent and weakened the *Grovey v. Townsend* holding. In *Smith v. Allwright* (1944), the Court finally overruled *Grovey* and struck down the white primary as a violation of the Fifteenth Amendment's prohibition against voting discrimination based on race.

The lower federal courts then began to apply the *Smith* precedent to the various white primary laws. In *Chapman v. King* (1946), the Fifth Circuit Court of Appeals ruled that the Georgia Democratic primary violated the rights of African Americans because it prevented them from voting for nominees for United States senator and representative. The court found that the state of Georgia collaborated with the Democratic Party by accepting the successful primary candidates for the official election ballot and by putting its power behind the rules of the party. Because African Americans were not allowed to vote in the primary, they were denied their constitutional rights under the Fourteenth, Fifteenth, and Seventeenth Amendments. However, it would take an additional 30 years before African Americans in the South could fully exercise the right given to them under the Seventeenth Amendment to elect U.S. senators.

process—because the popular demand for this constitutional change, frustrated for so long by the Senate itself, led to the most serious demand in American history for a second constitutional convention, under the convention procedures of Article V.

Origins

The Seventeenth Amendment made a major change in the so-called "upper house" of the Congress of the United States: it transferred the responsibility for choosing senators from the state legislatures to the people of the several states. To understand why the American people came to deem this change necessary, one must first examine the sources and precursors of the U.S. Senate in the theory and history of legislative and representative institutions—in particular, in Anglo-American political and constitutional history.

Pre-Colonial Roots

The idea of a two-house, or bicameral, legislature has deep roots in Western political thought. The most famous instance in ancient history of a people who divided their lawmaking powers between two representative bodies was the Roman Republic. The citizens of Rome—those possessing political power—were organized into 12 groups, or tribes, which (at least in theory) held and exercised ultimate lawmaking power. At the same time, Rome also had a smaller and far more famous body, the Senate. Its ranks included representatives of all the distinguished families of the city; though these men were elected by the citizenry, in practice they claimed election almost as a right by birth, and few if any citizens disputed them. Romans also became senators by holding executive offices; there was a ladder of such offices which a Roman citizen could climb by virtue of his ability at politics, government, and administration; his family's power and status; and his alliances with other distinguished families and political figures. Thus, Romans who had been aediles, quaestors, praetors, or consuls could sit in the Senate as of right; moreover, the Romans believed that former holders of such offices should place their experience and wisdom at the service of the Republic. All laws made for Rome began with the phrase "In the name of the Senate and the People of Rome"—which is also the meaning of the abbreviation SPQR that so often appears on Roman antiquities. In the last days of the Roman Republic, the Senate was the base of operations and the platform of the Republic's most ardent defenders; its members, known as senators, used the power of eloquence and argument to bolster the Senate's authority and to defend what they deemed the principles of the Republic. Even after Julius Caesar and his successors, notably Augustus Caesar, had supplanted the Republic with the Roman Empire, they preserved the Senate as a prop to their legitimacy and a resource to their governing of the Empire. For more than fifteen hundred years after it finally dissolved, the Roman Senate has exerted powerful symbolic influence over Western political thinkers. The Roman Senate's preeminence in the history of Western legislative institutions is due mainly to the Roman historians Livy and Tacitus, who made deliberations in the Senate the centerpieces of their works, and the distinguished Senator Marcus Tullius Cicero, famed for his eloquence, learning, and devotion to the Republic. All later legislative bodies known as senates have taken their name from Roman history, and with it the standards of rhetorical eloquence and mutual respect among members first established by the Roman Senate.

The other great "upper house" that influenced the creation of the United States Senate was the English House of Lords. Historians of Parliament have long disputed its origins and evolution. Was Parliament a representative body that stood for and defended the rights of Englishmen from time immemorial, as proclaimed by Sir Edward Coke and the other English adherents of "the ancient constitution"? Or was it a convenience for raising revenue founded under royal authority and under the thumb of kings? As is so often true of questions of constitutional history having modern, practical significance, there is no clear answer to such either/or questions.

What is clear is that, as English government and constitutional law evolved over the centuries, a three-part system for making laws gradually emerged as the core of the unwritten English constitution: King, Lords, and Commons. Only by the concurrence of all three of these major institutions—sometimes dubbed the "King-in-Parliament"—can statutes be enacted. The monarchy has always been a central institution in the English constitutional system. The House of Commons, the "lower house" of the English Parliament, began as a council of representatives of towns, counties, and special districts known as boroughs, each of which sent two members to sit in Parliament. The House of Lords was a council of the nobility of England and the high officials of the church.

For many years, historians treated English constitutional history as the epic struggle of the "democratic" institution of the English constitution, the House of Commons, to defend the rights and privileges of Englishmen against the encroachments of the King and the aristocracy; a key episode in this "useable past" is the winning by the House of Commons of the sole right to introduce taxation and revenue bills. Even though the growing assertiveness of the House of Commons made it the mainspring of the English constitutional system by the eighteenth century, the House of Lords remained an important bulwark of the system, often allying itself with the King to check the "lower house." Moreover, the House of Lords performed other valuable functions as well;

certain of its members, Law Lords, constituted the highest judicial tribunal in English law, and the entire body sat on rare occasions as a court to hear impeachments of high officials. (Not until 1911 did the House of Lords finally lose its contest for preeminence with the House of Commons. In that year, the new King George V and Prime Minister David Lloyd George joined forces to pressure the House of Lords to accept legislation democratizing the British constitution. Even so, the House of Lords can still exert some restraint on the rest of the government.)

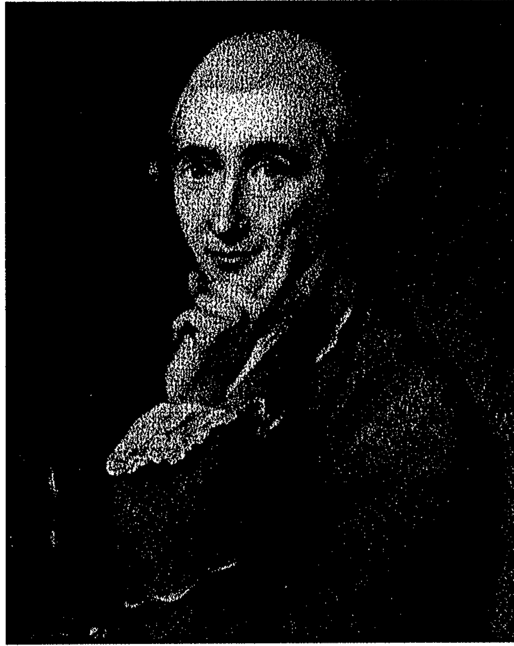
Political thinkers in the seventeenth and eighteenth centuries viewed the three-part structure of King, Lords, and Commons as having significance beyond its venerable history. They hailed it as the embodiment of a basic principle of good government. Drawing on the writings of the Greek philosopher Aristotle and the later Greco-Roman historian and political thinker Polybius, those who valued liberty and saw a republic as the best way to preserve liberty also believed that government had to take account of three basic political principles, corresponding to three "pure" forms of government: the rule of one person, or monarchy; the rule of a few, elite persons, or aristocracy; and the rule of the many, or democracy. Each pure form of government was an ideal only, corresponding to a different segment, or order, of society—monarchy, the one; aristocracy, the few; and democracy, the many. All societies were divided into these three orders. Because a government had to resemble the people and society it was to govern for it to succeed, political writers taught, no pure form of government could survive long in the real world without being corrupted into a selfish, unprincipled government that swiftly would destroy itself and the society as a whole. Pure monarchy would decay into tyranny; pure aristocracy would decline into oligarchy; and pure democracy would degenerate into ochlocracy (mob rule) or anarchy, which then would succumb to tyranny. The only way to avoid such a fate, conventional wisdom deduced, was to mix the three basic orders of society and the three forms of government—to combine the pure elements into a mixed government, which would have some hopes of enduring. The one model of government that could accommodate this mixing of forms was a republic. Thus, one could have a monarchic republic—a term that John Adams applied to the British constitution; an aristocratic republic, illustrated for eighteenth-century political thinkers by the Italian city-state of Venice; and a democratic republic, which Americans hoped to create.

As most Western political thinkers concluded in the eighteenth century, the best illustration of the promise of mixed government to endure and to preserve liberty was the English model. Thus, the unwritten English constitution was hailed throughout the Western world as the "palladium of liberty," the best form of government that had ever existed or was ever likely to exist. And critical to the English constitutional system was the division of government into King, Lords, and Commons. Indeed, in his controversial *Defence of the Constitutions of Government of the United States* (1787–88), John Adams insisted that the great secret of creating a stable and durable republic was to devise it as a mixed government, giving the aristocratic element of society a permanent stake in the government while at the same time hemming it in with monarchic and democratic elements.

The Colonial and Revolutionary Experience

The colonists of British North America thought of themselves as subjects of the British Empire, and proudly hailed the English constitution as the best on earth. Not only did they pay lip service to these ideals—they also sought to build their own governments on English (after the 1707 Act of Union, British) models.

Beginning in 1619 with the founding of the Virginia House of Burgesses, the British colonies in North America developed and fostered legislative and representative bodies as central components of their governments. By the eighteenth century, most colonies' governments followed a common model. A royal governor (though in Connecticut and Rhode Island he was popularly elected) headed the executive branch, advised and assisted by a council—which also served either as the upper house of the colony's legislature or was drawn from its ranks. The legislature had two houses—the "upper house" (sometimes the council, sometimes a Senate) and the "lower house" (often called the assembly or house of delegates). The lower house in most colonies fancied itself the colonial counterpart of the British House of Commons, and in every case borrowed their systems of parliamentary procedure from the House



Thomas Paine (1737–1809). ***(The Library of Congress)***

of Commons. In addition, lower houses in colonial legislatures sought to emulate the great battles won by the House of Commons in the seventeenth century against Stuart tyranny by contending vigorously against colonial governors and their councils (and the upper houses) over issues of taxation and spending. It was only natural that, as rifts developed between the colonies and Great Britain in the years following the French and Indian War (1756–63), colonial resistance to British policy found its focus and its institutional base in the lower houses of colonial legislatures.

In 1775 and 1776, as the Americans' quarrel with the mother country worsened and violent conflict with Britain loomed, the colonial governments began to topple. Royal governors left their posts for refuge in Canada or England, accompanied by their councils and political supporters, and colonial legislatures dissolved. The void of legitimate government was filled at first by informal, ad hoc bodies which called themselves revolutionary conventions and provincial congresses. These bodies had no source of legitimacy, however, and Americans agonized over how to restore legitimate government in the face of the worsening constitutional crisis. Conventions in some colonies, such as New Hampshire, drafted provisional constitutions. Other colonies beseeched the Second Continental Congress in Philadelphia, Pennsylvania, for guidance. John Adams, a Massachusetts delegate to the Second Continental Congress, waged a lonely struggle to persuade Congress to act on these requests; as part of his campaign, he wrote letters to politicians in other colonies who had asked him for advice about forming new governments.

In part to respond to this political problem, the expatriate British pamphleteer Thomas Paine wrote *Common Sense* (1776), a powerful argument for American independence. Paine not only demolished arguments for the authority of the British over the Americans—he also rejected the principles and assumptions of the unwritten English constitution, asserting instead that Americans should fashion their forms of government anew. To his way of thinking, all that was needed was a one-house legislature for each colony, and a similar one-house council of representatives for the American people. He spurned separation of powers, checks and balances, and in particular the idea of the bicameral legislature as needlessly complicated and out of date. *Common Sense* became one of the greatest bestsellers in the history of publishing, selling more than 120,000 copies in its first year (the equivalent of 10,000,000 to 12,000,000 copies today). Appalled by Paine's prescriptions for government and desirous of answering the appeals of American colleagues for advice about framing constitutions, John Adams published *Thoughts on Government.* His influential (though anonymous) pamphlet set forth Adams's fully developed model for a sound constitution—including the division of the legislature into a lower house and an upper house, which with an independent governor, would approximate the old, tested formula of King, Lords, and Commons in an American setting. One month later, in May of 1776, the Continental Congress adopted a resolution (drafted by Adams) that called upon the colonies to draft new state constitutions to fill the void of legitimacy—which it blamed on the British. Responding to this resolution, the colonies drafted new constitutions, at least some of them following Adams's lead.

In 1776 and 1777, virtually every colony adopted a new constitution and reorganized itself as a state. Only two states (Connecticut and Rhode Island) preserved their old colonial charters, revised to eliminate all references to the former mother country. But most of the new state constitutions did not parallel Adams's formula exactly. Having come to fear and distrust the power of

royal governors and royal judges, and having come to trust their own legislatures, the Americans wrote new state constitutions that concentrated power in the legislatures and left the executive and judicial branches at the legislatures' mercy. Two states, Pennsylvania and Georgia (followed in turn by the "independent republic of Vermont"), did away with a separate governor altogether, and also reorganized the legislature as a one-house body. The other states did not go so far, preserving bicameral legislatures; the upper houses of these bodies were allied with the governors as quasi-executive bodies yet still retained a role in the legislative process.

At the level of American politics, however, Americans were much less adventurous in exploring the possibilities of constitution-making than they had been at the state level. Ever since the New England Confederation of the 1640s, all intercolonial bodies or congresses had had only one house, in which each colony (after 1776, state) had one vote. These precedents set the model for the Albany Congress of 1754, the Stamp Act Congress of 1765, the First and Second Continental Congresses of 1774 and 1775, the Continental and Confederation Congresses of the 1770s and 1780s, the Annapolis Convention of 1786, and the Federal Convention of 1787.

As politicians who thought in national terms surveyed the sorry state of American public life in the 1780s, however, they determined that sweeping constitutional reform was in order. A core element of that reform was the devising of a fully worked-out constitutional government for the United States—one that would be organized around a two-house representative and legislative body, the Congress of the United States.

Early American History and Law

Thus, as the delegates to the Federal Convention assembled in Philadelphia, Pennsylvania, in the spring of 1787, they saw their greatest political challenge as the design of an American legislature. Americans who thought in national terms had concluded years before the convention gathered in Philadelphia in 1787 that the Confederation Congress—which had been little more than a council of representatives of the states—was inadequate to the demands of government on the national level, and that these inadequacies were rooted in the deficiencies of the articles' constitutional design. Remodeling the structure of a general government was as important to securing its success, they concluded, as providing the general government with sufficient powers.

In some ways, the design of a new American legislature seemed a simple matter. Although two states—Pennsylvania and Georgia (and the "independent republic of Vermont")—had adopted a one-house, or unicameral, legislative system in their new constitutions, most of the states had followed the precedent set by their colonial charters and adopted bicameral legislatures. Another spur to their decision to adopt two legislative chambers was their awareness that the most successful legislature in modern history, the Parliament of Great Britain, had two legislative chambers. Designing the Congress of the United States as a two-house legislature seemed a natural conclusion.

This "natural" answer to the challenge of national legislative design masked a dangerous problem, however: deciding what the proper method of representation would be for both houses of this new legislature. The issue of representation soon came to the fore as the most perplexing and ominous challenge to the ingenuity of the Framers of the Constitution.

Almost at the beginning of the convention's deliberations, delegates from large states such as Virginia and Pennsylvania insisted that both houses of the national legislature should be based on some form of proportionate representation. The scheme was just on grounds of principle and reality, such men as James Madison of Virginia and James Wilson of Pennsylvania insisted. Principle dictated that both houses represent the people of the United States; reality dictated that those who bear the greater burden of sustaining the new government ought to have a greater say in running it. But the small states were not convinced of the justice of these large-state arguments, either on the grounds of principle or practicality. Therefore, small-state delegates such as John Dickinson of Delaware fiercely resisted any step to deprive the small states of the doctrine that each state should have equal representation in Congress. Indeed, the Delaware delegates informed the convention early in its deliberations that their legislature had instructed them to oppose any deviation from the principle of state equality. The small-state delegates had both interest and precedent to draw on; no previous intercolonial or interstate gathering

had departed from the doctrine of state equality, and the small states regarded this doctrine as the only thing protecting them from the ambition of the large states. In response, delegates from large states continued to insist that representation had to reflect the diversity of population and wealth in the several states, and they therefore denounced the rule of state equality as unjust. The more fiercely they assailed this doctrine, however, the more they stiffened the resistance of the small-state delegations to any attempt to do away with it.

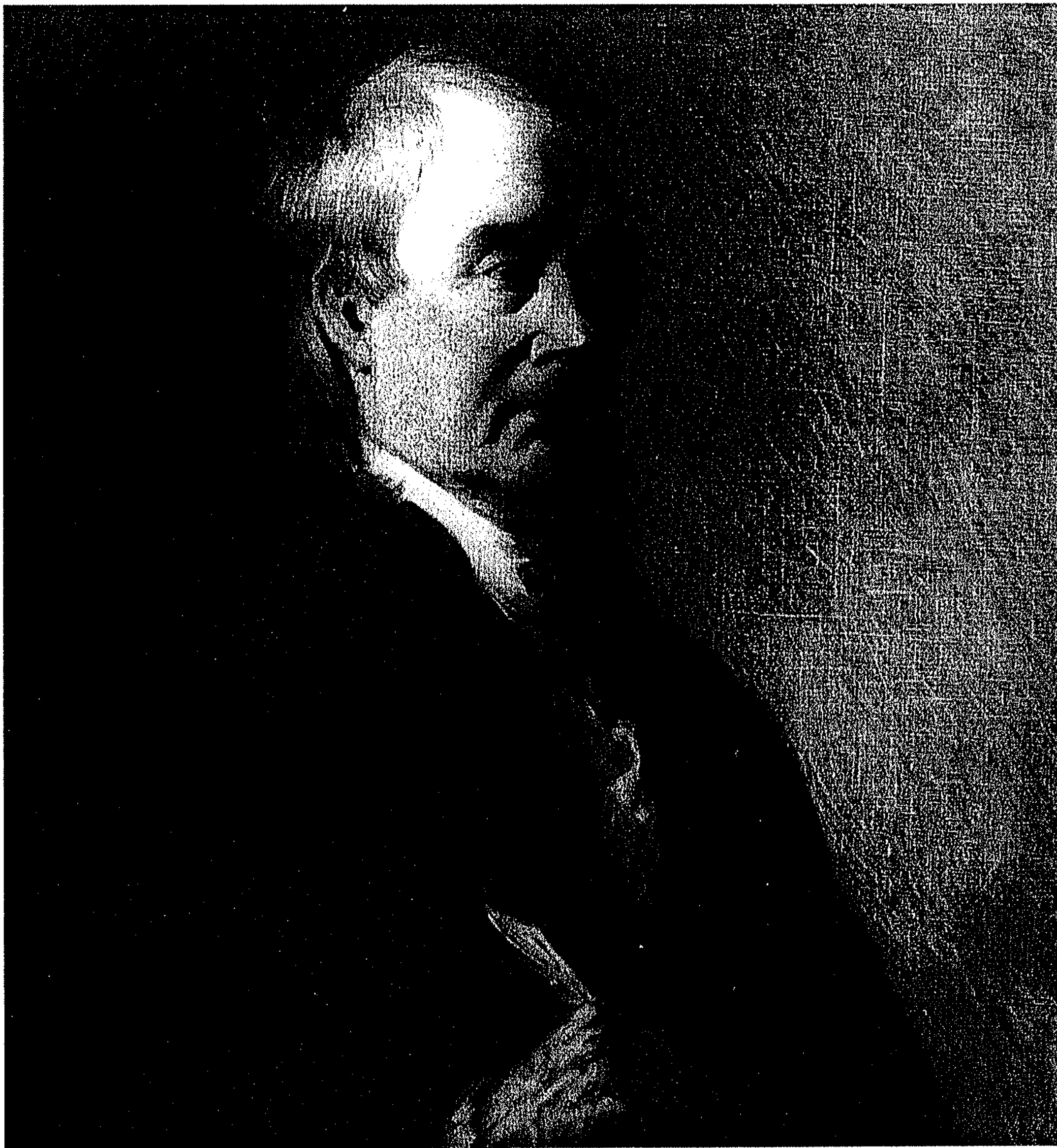
Throughout June and July of 1787, the delegates struggled to craft a method of representation that would meet the objections of large-state and small-state delegates alike, balancing the competing principles of proportional representation and state equality. Early in the argument, John Dickinson suggested what modern observers would call "splitting the difference"—apportioning one house on the basis of population and the other on the basis of state equality. But Dickinson was no longer the authoritative political leader he had been in the First and Second Continental Congresses, more than a decade before; frail in health and fussy and pedantic in manner, he could not muster his colleagues behind his solution. Rather, it was the oddly assorted delegation from Connecticut: Roger Sherman, Oliver Ellsworth, and William Samuel Johnson—who combined conciliation and tough-minded political maneuvering to ram through what later scholars have dubbed the "Connecticut Compromise." As Clinton Rossiter observed in his authoritative history of the convention, "The problem . . . was not for constitution-makers to find the solution but for politicians to learn to live with it, and that process of learning . . . was a hard one."

The bicameral Congress authorized in Article I of the Constitution was designed to satisfy both the large-state and small-state camps. The people of the states were to be represented in the House of Representatives, and the states themselves would be represented in the Senate. Although James Wilson, the delegate most committed to democratic elections, urged that the people of each state elect that state's senators (a precursor of the system ultimately put into effect by the Seventeenth Amendment), the convention spurned the proposal. Rather, the state legislatures would choose two senators apiece—though, in a departure from the "unit rule" of previous Congresses and the convention itself, each senator would have one vote.

The Great Compromise ensured that senators would take up an important function formerly performed by state delegates to the Continental and Confederation Congresses—representing the interests of their states to the general government. Although it drew fire during the ratification controversy of 1787–88, the Great Compromise was so successful that the rivalry between large states and small states never broke out again.

The general issue of representation having been resolved, the convention had also to consider the specific issue of how senators were to be chosen by the states. They considered five methods: (1) appointment by the national executive from a list of persons nominated by the state legislatures; (2) election by the people of each state; (3) indirect election by electors chosen by the people in special Senate districts; (4) election by the House of Representatives; and (5) election by state legislatures. The delegates spent little time on all but the last proposal. As George H. Haynes notes in his study of the Senate, "[t]he election of Senators by state legislatures seems to have been generally regarded as corollary of the Great Compromise . . . [H]ardly any other proposition before the Convention brought forward so many members to testify to their belief in its merits." Advocates of granting the power of electing senators to state legislatures noted that (1) it would foster the filtering of political talent, resulting in a better quality of Senators than any other method; (2) it would ensure a more complete representation of the states, because the state legislatures would be more able to achieve this goal than each state's voters; (3) it would enable the House and the Senate, embodying different principles of representation, to check and balance each other in the lawmaking process; and (4) it would give the state legislatures an added interest in supporting the general government. Moreover, election of senators by state legislatures had the added benefit of familiarity, for it was the method used by virtually every state to choose delegates to the Continental and Confederation Congresses; only Connecticut used popular elections for this end. Indeed, all the delegates to the Federal Convention itself had been appointed by state legislatures. Not only did this arrangement generally satisfy the delegates to the convention; it attracted little opposition during the ratification controversy.

Thus, Article I, Section 3, Paragraph 1, of the Constitution read as follows:



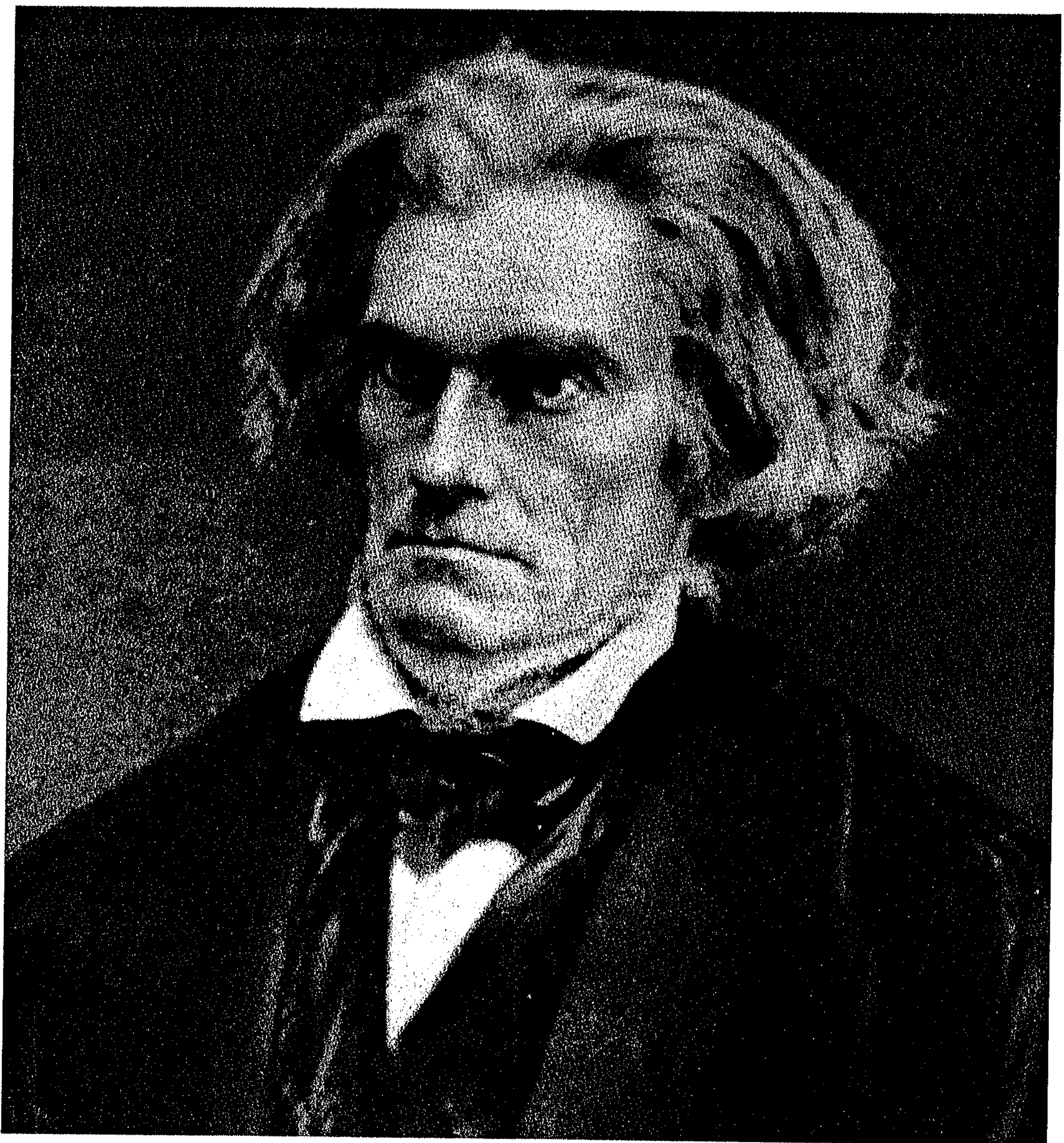
Roger Sherman (1721–1793)
(The Library of Congress)

> The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof. The Times, Places, and Manner of Holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by law make or alter such Regulations, except as to the Places of choosing Senators.

And yet, once the states began to choose senators, certain unexpected defects began to crop up in the process. For one thing, as each state's legislature (except for Pennsylvania and Georgia before the 1790s) was bicameral, and each legislative chamber voted separately on the choice of a senator, the two houses had to concur to elect a senator. Deadlocks between the two houses in senatorial elections not only frustrated legislative politics but led to delays in securing a state's representation in the Senate. Thus, for example, New York went unrepresented for most of the first session of the First Congress because of a deadlock between the Anti-Federalist lower house and the Federalist upper house. This first logjam in the Senate electoral process was an ominous preview of Senate elections by state legislatures throughout the nineteenth century and into the twentieth.

The Nineteenth Century

For generations, senators have been fond of extolling the U.S. Senate as the world's greatest deliberative body. The Senate won this reputation in the decades between 1820 and 1850, when three great senators dominated its proceedings. Henry



John Caldwell Calhoun (1781–1850). ***(The Library of Congress)***

Clay (Whig-Kentucky), Daniel Webster (Whig-Massachusetts), and John C. Calhoun (Democrat-South Carolina) were hailed as "the Great Triumvirate," analogous to the Roman triumvirates of Julius Caesar, Marcus Crassus, and Gnaeus Pompey, or Augustus Caesar, Marcus Lepidus, and Marcus Antonius. They were not the only senators with claims to intellectual power, oratorical excellence, and political shrewdness—for example, there was also their great ally and antagonist Thomas Hart Benton (Democrat-Missouri)—but Clay, Webster, and Calhoun were acknowledged as occupying the first rank by themselves. They symbolized what the Framers of the Constitution supposedly had designed the Senate to be: a deliberative body whose mission was to identify and adopt measures to secure the general good.

Even so, state interests continued to exert influence on national politics through the Senate in a variety of ways. For example, state legislatures used their power of election to control their senators' conduct. They also sought to bind senators through issuing instructions—a practice that was rooted in the custom, so common in England and at the level of colonial state politics, by which a representative's constituents passed resolutions of instruction to control his conduct. Indeed, two future presidents—John Quincy Adams of Massachusetts (in 1807) and John Tyler of Virginia (in 1836)—resigned from the Senate when the instructions of their state legislatures clashed with their personal views; Adams supported President Thomas Jefferson's embargo on trade with the warring powers of Europe despite the view pre-

vailing among his constituents in Massachusetts that the embargo would destroy the state's economy, and Tyler refused to back a Senate resolution that expunged (erased) from the Senate's records a vote of censure against President Andrew Jackson. The practice of instructing senators did not last, however, and died out by mid-century.

State interests cast a stronger influence on national politics than the Framers of the Constitution might have expected due to the perceived need to maintain a balance in the Senate between free and slave states. Southerners deemed this balance a valuable informal check on the federal government's power to injure their region's special interests; the quest to preserve this balance was at the core of every major territorial and sectional compromise between 1820 and the eve of the Civil War.

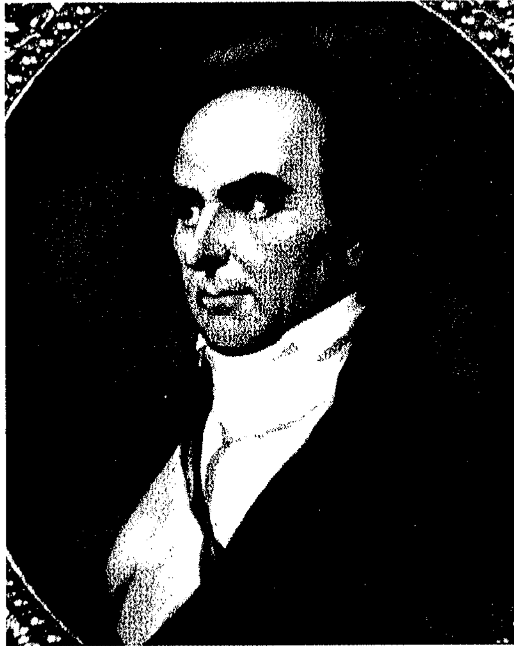
Despite the powerful pressures that maintained the Senate's role as a forum for state interests in this period, there were at least some efforts to remodel the Senate via the amending process to take account of the democratizing forces unleashed in the 1820s and 1830s by the Jacksonian revolution. The first such proposal was introduced in Congress in 1826, and found a stalwart champion in the 1850s and 1860s in Senator (later President) Andrew Johnson (Democrat-Tennessee).

After the Civil War, many Americans came to believe that the contest over slavery had transformed constitutional federalism and thus might in turn transform the Senate, the institutional embodiment of federalism. But the obstacles to such amendments seemed insuperable. The Senate itself had to approve any amendment originating in Congress by a two-thirds vote. Those who sought this change in the method of electing senators realized that the other way of setting Article V in motion—persuading two-thirds of the states to file applications with Congress for a constitutional convention to propose an amendment—was all but impossible. Even if they could obtain the needed supermajority of state legislatures, they realized that the Senate could still block action to call a convention or could interfere with its results. Thus, for most of the nineteenth century the proposal to change the method of electing senators remained an interesting idea with little likelihood of success.

Frustrated in their pursuit of direct election of senators by what they deemed the Senate's selfishness in exerting its powers, reformers sought other means to the same goal. The first such innovation was the introduction of political parties into the Senate's electoral process. Some historians have maintained that partisanship made its presence felt as early as the first elections of senators in 1789—and, to be sure, pro-Constitution forces easily secured dominance of the Senate in every state save Virginia. State legislatures, however, seeking to balance interests and factions within the state, often split their Senate delegations between advocates of commercial and agricultural interests or representatives of different regions of the state. As party systems coalesced in the nineteenth century, however, they pervaded politics within each state and on the national level, and thus permeated the process where state and national politics met: the choice of senators by state legislatures. State conventions of the party faithful designated their party's nominee for senator, and the party's candidates for the state legislature would be pledged to support that nominee should they win election. It was this process that gave rise, for example, to the first popular statewide campaign for Senate—the famous 1858 contest between the Democratic incumbent, Stephen A. Douglas, and his Republican challenger, Abraham Lincoln.

Partisan politics, however, often hampered state legislatures' choice of senators, sometimes leading to a state going unrepresented in the Senate, sometimes strangling a state's legislative business, sometimes resulting in chicanery, misrepresentation, or chaos. Annoyed by a particularly difficult Senate contest in New Jersey, in 1866 the Senate sought to invoke its constitutional power to regulate these elections. The measure finally enacted provided that state legislatures were to vote by open ballot; that each house would vote separately on a first ballot but that both houses would hold a joint vote if the concurrent vote failed to elect a senator; and that no state legislature was obliged (in cases of difficult elections) to hold more than one ballot for senator in each legislative day. Though the measure became law on July 25, 1866, and promised to bring order and regularity to states' choice of senators, the 1866 statute never achieved these goals. Instead, it provided greater opportunities for confusion and partisan squabbling until it was supplanted in 1913 by the Seventeenth Amendment.

For the first several decades of the century, despite all these problems and sources of confu-



Daniel Webster (1782-1852).
(The Library of Congress)

sion and frustration, the Senate remained what it had aspired to be—the greatest deliberative body in the Western world. The home to such legislative and oratorical titans as Henry Clay, John C. Calhoun, and Daniel Webster, the Senate attracted the praise of such distinguished foreign observers as Alexis de Tocqueville (the French author of *Democracy in America*), James Bryce (the Scottish Member of Parliament who penned *The American Commonwealth*), and British Prime Minister William E. Gladstone. And yet, with the end of the Civil War, changing conditions in American life remolded the Senate from a towering deliberative body to a controversial bastion of privilege tainted by corruption and influence.

The profound revolution wrought by the Civil War in virtually every aspect of American society reached into the Senate as well. The knitting together of a national economy and transportation system—developments in progress for most of the century but given powerful impetus by the war—brought with it the rise of peacetime industries and economic organizations operating on a national scale. In turn, these enterprises sought with notable success to exert powerful influences on the nation's political life, seeking to block or divert government action harmful to their interests and foster government action beneficial to them.

Few methods of influencing government were as effective as the manipulation of state legislatures' choice of U.S. senators. State legislatures had long used this power to reward prominent politicians who could be trusted to be zealous advocates of their state's interests—or to punish those who "betrayed" their constituents. By the 1880s and 1890s, advocates of constitutional reform charged, special interests had infiltrated the state legislatures, focusing their attention on the election of U.S. senators. In so doing, they had conspired with compliant state politicians to hold the Senate hostage. The documentation muckraking journalists presented to the public, via newspaper and magazine exposes, painted a horrifying picture of a widespread network of corrupt bargains, in which wealth and power were exchanged for influence and votes. Money and other forms of political corruption all too often subverted rational choice and calm deliberation.

Sometimes, however, it was not necessary for outside interests to corrupt Senate elections; political machines in state legislatures were competent to the task all by themselves. In 1897, for example, New York's legislature had before it the choice of a senator. One sardonic journalistic account described the process:

> On January 14, the Republican members of the Legislature of New York met in caucus and selected their candidate to succeed Mr. D. B. Hill. The most eminently qualified man in the State of New York (the Hon. Joseph H. Choate) was duly presented to the caucus. No other names were presented or mentioned. There are 151 Republican members of the present state legislature. A vote was taken, and seven members were found to be in favor of Mr. Choate. All the rest, with a notable expression of spontaneity, declared themselves in favor of Thomas C. Platt. A few days later Mr. Platt was formally elected. His control of the legislature is more complete than his control of any office boy in his private employ; for the office boy, after all, is not owned by Mr. Platt, and could quit work if he did not find that the place suited him, but the legislature seems to be his, both soul and body.

One New York legislator described the dilemma he faced for this journalist:

> I am uncertain what to do. I have various important measures which I desire to introduce in the assembly, and if I do not vote for Platt, none of them will be allowed to go through. You have no idea of the pressure which has been brought to bear upon me to vote for Platt, and I am not sure that it is the part of wisdom for me to refuse to support him.

Besides influence and corruption, other problems plagued state legislatures' elections of U.S. senators. All too often, a state legislature's strug-

gle to choose a senator became a three-ring circus. Divisions between the parties, clashes among powerful interest groups, and competition among supporters of one or another notable politician seeking elevation to the Senate all combined to create legislative train-wrecks. The need to fill a vacancy in the Senate often mired state legislative business in days, weeks, or months of elaborate parliamentary wrangling, sometimes giving rise to what George H. Haynes, the leading historian of the Senate, called "riotous demonstrations more appropriate to a prize-fight than to a senatorial election." For example, in 1905 the Missouri legislature degenerated into chaos as it bickered over choosing a senator:

> Lest the hour of adjournment should come before an election was secured, an attempt was made to stop the clock upon the wall of the assembly chamber. Democrats tried to prevent its being tampered with, and when certain Republicans brought forward a ladder, it was seized and thrown out of the window. A fist-fight followed, in which many were involved. Desks were torn from the floor and a fusillade of books began. The glass of the clock-front was broken, but the pendulum still persisted in swinging until, in the midst of a yelling mob, one member began throwing ink bottles at the clock, and finally succeeded in breaking the pendulum. On a motion to adjourn, arose the wildest disorder. The presiding officers of both houses mounted the speaker's desk, and, by shouting and waving their arms, tried to quiet the mob. Finally, they succeeded in securing some semblance of order.

The Missouri case was only the most extreme of a succession of disputed Senate elections in the late nineteenth and early twentieth centuries that derailed state government, left gaps in the Senate's ranks, and disgraced state legislatures and besmirched the U.S. Senate in the public mind. In the words of one journalist covering the Missouri dispute, "It is ridiculous to suggest that amid scenes like these the choice of a senator retains anything of the character of an exercise of cool judgment."

The institutional paralysis that resulted from such quarrels frequently prevented the selection of any Senator at all—leaving a state either partly or totally unrepresented in the Senate. For example, in the Fifty-seventh Congress (1901–3), Delaware was not represented at all because its legislature could not manage to elect even one senator.

Many journalists and reformers denounced the effects of Senate elections on state government. Other observers asked, "What kind of institution resulted from these distorted processes of electing Senators?" In 1906, an analyst of the Senate in the Fifty-eighth Congress (1903–5) conducted a confidential survey of numerous observers of the national political scene. The survey concluded that four out of nine senators possessed either "high powers of leadership" or "qualities of courage, intelligence and integrity"—qualities traditionally identified as central values of the Senate that were supposed to be fostered by giving state legislatures the power to choose senators. But the survey also turned up troubling assessments of the other members of "the world's greatest deliberative body":

> One senator out of every three owes his election to his personal wealth, to his being the candidate satisfactory to what is coming to be called the "System," or to his expertness in political manipulation—qualifications which make their usefulness as members of the dominant branch of Congress decidedly open to question.

Thus, by the end of the nineteenth century, reformers of all parties united in demanding change in the method of electing senators. As the historian Herman V. Ames wrote in his 1897 study of the amending process, "Scarcely a session of Congress passes in which one or more resolutions are not offered to secure this amendment." Between 1825 and 1912, Congress received 287 proposals for a direct-election amendment, the vast majority of them after 1893.

Though most proposed constitutional amendments in this category focused on changing the method of electing senators, other proposals went beyond that issue to attack the other major federalism-based feature of the Senate grounded in the Connecticut Compromise—equality of state representation. For example, one 1882 proposal would have conferred an additional senator for each "million of inhabitants of any State in excess of two million"; another, offered in 1892, would have given each state one senator with another senator for each additional million inhabitants. Such proposals responded to the growing perception that the United States was no longer a collection of semi-sovereign states (if it had ever been such) but a unified nation, a mass democracy for which the old principle of equality of state representation was becoming increasingly irrelevant.

A development more ominous for the constitutional system than the mere quest for a direct-election amendment began in 1893; advocates of direct election of senators sought to launch a cam-

paign to bypass the Senate by triggering the other method for amending the Constitution provided in Article V: the convention method. Although these advocates insisted that they would seek only a convention limited to the proposing of a direct-election amendment, political observers recalled that the only other constitutional convention in American history had had a limited mandate as well—and had exceeded it by proposing an entirely new Constitution rather than simply offering revisions to the Articles of Confederation. Given the worries usually touched off by any attempt to seek a second constitutional convention, the demand for a convention to achieve direct election of senators was a threatening indication of just how high the stakes were in the contest between advocates of democratization and the Senate.

The Twentieth Century

By 1900, direct election of senators had become a goal desired by the majority of the nation, yet bitterly and successfully opposed by the Senate. Five times between 1893 and 1902, the House of Representatives had proposed direct-election amendments by the requisite number of votes—only to see them blocked or scuttled by the Senate. A constitutional crisis was brewing, the result of which was uncertain.

The battle, and its persistently inconclusive results, began to sap public confidence in the government. This problem was intensified by a series of inflammatory articles published by the Hearst magazine *Cosmopolitan* under the running title "The Treason of the Senate." David G. Phillips's slashing attacks on the Senate's truckling to special interests such as the railroad and manufacturing trusts, and on the corruption that tainted what senators still hailed as the world's greatest deliberative body, infuriated his readers; though other political observers attacked Phillips's expose as biased and unfair, he stuck to his guns, collecting the series in book form in 1906. *The Treason of the Senate* became a bestseller and spurred the campaign for a direct-election amendment.

Against the backdrop of the impending showdown over amending the Constitution, whether by an amendment proposed by Congress or by the untried convention method, the attempts by many politicians to avoid the issue by jury-rigging informal democratic methods of choosing senators seemed increasingly ineffective. For example, by the dawn of the twentieth century, advocates of democratizing the process of choosing senators recognized that the party-caucus method devised in the nineteenth century was no longer an effective means to this end. The caucus's principal limitation was that, like election by state legislatures, it was too vulnerable to control by political bosses and potential for corruption by special interests.

Thus, advocates of democratizing the Senate turned to another electoral innovation: the primary election. Under this system, first adopted in Oregon between 1901 and 1904, the voters would choose their state's senators in a Senate "primary;" the results of the primary would be placed before the state legislature, which then would officially elect the winner of the primary to the Senate—thus preserving the fiction that the legislature retained the power to choose senators. Despite the failure of the system's first test in 1901, the voters of Oregon would not abandon the experiment; instead, they used their power to adopt legislation by initiative and referendum to adjust the procedures of the "Senate primary." Taking its final shape by 1904, the Oregon system became increasingly popular; by 1910, 14 of the 30 senators to be chosen by state legislatures already had been designated by popular vote in "primaries." Even the popular Oregon system, however, seemed more an evasion of the Constitution's provisions governing election of senators than an actual informal amendment of them. Increasingly, Americans began to demand that the gap between democracy and the process of choosing senators be closed once and for all.

The campaign for direct election of senators thus went forward on two parallel tracks—the push to have Congress propose an amendment to the states and the crusade to compel Congress to call a constitutional convention. At first, the movement for a constitutional convention picked up momentum and urgency, fueled by the Senate's stubborn refusal to accept any of the direct-election amendments proposed by the House. By 1905, 31 of the 45 states (more than the two-thirds required by Article V) had taken some form of action to endorse a direct-election amendment. Some legislatures adopted resolutions requesting Congress to propose such an amendment; others asked for a national referendum on the issue; still others demanded a convention to propose such an

amendment; and, finally, others proposed that the states hold a convention to discuss the best means of securing an amendment. The movement for a convention had its greatest strength in the Southern, Midwestern, and Western states—but even in the New England and Mid-Atlantic states, movements sprang up to secure a constitutional change by whatever means.

As the stakes continued to rise, the debate over the merits of the proposal came to dominate the national political agenda. Supporters of a direct-election amendment insisted that the existing system was an obsolete relic having its roots in the political world that the Civil War had swept away. Transferring the power to choose senators from the state legislatures to the people of each state, they added, actually would strengthen the principle of state equality. Direct election would elevate the Senate's tone and membership, improve its functioning, and increase its responsibility to the people. Rather than depriving the states of necessary power over the federal government, they concluded, the change would benefit the state governments by ensuring full representation of the states in the Senate and eliminating a persistent clog on the processes of state government. Finally, they argued, reforming the process of choosing senators would augment the Senate's legitimacy in the people's eyes and thus would increase the favor with which the people viewed the Constitution.

Opponents of the amendment protested that it was unnecessary, that it would invade states' rights, and that it was a means to distract the American people from the truly important issues facing the nation. The existing system, they maintained, was the product of wise planning and thorough deliberation by the greatest collection of statesmen in American history; as a result, it had helped to raise the Senate to its present level as the world's preeminent deliberative body. Indeed, one critic of direct election insisted, "[i]t may be said in support of the present method that it has secured to the United States the only effective second chamber in the world." The proposed amendment, they added, also would infect the Senate with the pernicious spirit of party, undermining the Senate's core value of considered deliberation on the general good. Moreover, they declared, giving the people the power to elect senators directly would undermine the virtues of conservatism built into the Senate by the Founding Fathers.

Opponents of the amendment cited yet another reason to oppose it: it would be "the first change in the organic structure of the government under the Constitution," and should be defeated on that ground alone. (Actually, this argument is vulnerable to challenge; the Twelfth Amendment, adopted in 1804, had altered the structure of the presidential and vice presidential electoral process by requiring electors to cast distinct ballots for president and vice president.) Moreover, the amendment's opponents charged, few constitutional amendments ever fulfilled the glowing promises of their advocates and supporters; for this reason, they said, the Constitution was better modified through custom, usage, and judicial interpretation than through the use of the amending process.

Yet again, in 1910, the House passed a direct-election amendment and sent it to the Senate. Previously, the Senate's leadership had sent all direct-election amendments to the body's Committee on Elections and Privileges, which had consistently disposed of them. This time, by contrast, the proposal went to the Judiciary Committee—reflecting the Senate's recognition that popular anger on the direct-election issue was approaching the danger point. On January 1, 1911, for the first time in the Senate's history, the Judiciary Committee issued a report to the full Senate endorsing the proposed direct-election amendment. And yet, the Judiciary Committee's proposal contained a new provision, not present in the House version, that threatened to doom the amendment.

Quickly dubbed the "race rider," on its face the added provision seemed innocent; it vested control of Senate elections entirely in the hands of state governments. Its defenders suggested that the rider was needed to preserve the Senate's place as a guardian of state interests in the system of constitutional federalism. Not only would the race rider have modified Article I, Section 4, of the Constitution, which gives Congress the power to make or alter state laws regulating both House and Senate elections—it also would have had the effect of overturning the Fifteenth Amendment, thus leaving states free to discriminate on the basis of race in permitting voters to take part in Senate elections.

The fight over the race rider overshadowed what was supposed to be the central issue posed by the proposed amendment—providing for the direct election of senators; indeed, such distrac-

tion may well have been the purpose for which the Judiciary Committee framed the race rider. As the debate embroiled the House and the Senate, both chambers shifted their positions on the rider with bewildering frequency, leaving political observers and the public in frequent doubt about the amendment's status. For two solid months, battle raged over the rider; on February 28, 1911, it finally fell to a concerted push by Northern senators, who carried their motion to strike the provision by a vote of 50-37. However, that same day, when the Senate voted to approve the amendment without the race rider, the measure passed by only 54-33 (with four not voting), four votes short of the two-thirds supermajority needed to propose a constitutional amendment to the states.

There the amendment issue lay until April of 1911, when Rep. Walter Rucker (Democrat-Missouri) reintroduced the direct-election amendment in the House, this time with the race rider included. Rucker's measure sailed through the House, 296-16 (with 70 not voting), but again ran into a firestorm in the Senate—even though most senators had come by this point to favor the direct-election amendment. On a motion by Sen. Joseph Bristow (Republican-Kansas) to delete the race rider from the amendment, the Senate held a roll-call vote and deadlocked, 44-44. When Vice President James S. Sherman exercised his power to break tie votes and cast his vote in favor of Bristow's motion, the Senate then decisively accepted the amendment by 64-24 (with three not voting), finally achieving the two-thirds supermajority. This time, however, when the Senate sent its revised version of the amendment back to the House, expecting swift concurrence, the House balked—apparently because the Senate's action in dropping the race rider somehow insulted the prerogative of the House. Another legislative impasse resulted. Not until May 13, 1912 did Representative Rucker move that the House abandon the race rider, thereby securing a version of the amendment that both the House and the Senate could accept. On his motion, the House approved the amendment, 238-39 (with five voting "present" and 110 not voting).

Once Congress proposed the direct-election amendment to the states, it sailed through the state legislatures in less than a year, becoming the Seventeenth Amendment on April 8, 1913. The swift adoption of the Seventeenth Amendment by the states carried with it several ironies. First, despite all the furor over the amendment's supposed attack on states' rights, the state legislatures accepted their loss of control over Senate elections without a murmur of complaint. State legislators had come to regard their responsibility to choose senators not as a source of power but as a burden; giving up this power was a small price to pay for the great benefits the amendment conferred on the states in return: (1) the increased democracy of choosing senators by direct popular election and (2) the equally greater order and coherence of state legislative proceedings once legislatures gave up the burden of electing senators. Moreover, despite all the furor occasioned in the House and the Senate over the race rider, that provision's absence from the amendment had no discernible effect on its adoption. Second, the swift compliance of the state legislatures refuted the concern expressed at early stages of the campaign by some amendment advocates that the amendment ought instead to be submitted to specially chosen ratifying conventions, an option provided in Article V but never before used. By 1912, however, public opinion had shifted so strongly in favor of the amendment that its champions made no effort to require the use of state ratifying conventions.

By 1919, every member of the U.S. Senate owed his election to the people rather than the legislature of his state. However, the growing popularity of the "Oregon system" of primary elections before the amendment's adoption rendered it a moot question whether the Seventeenth Amendment merely codified in law a development—the democratization of the Senate—that was all but settled fact.

Few constitutional amendments have accomplished more swiftly and effectually what their framers intended them to do with fewer constitutional byproducts than the Seventeenth Amendment. Indeed, 25 years after the amendment's ratification, George H. Haynes noted in his classic treatise *The Senate of the United States* (1938) that, with the amendment's adoption, "this chapter of our constitutional development is now closed."

By transferring control of the membership of the Senate from state legislatures to the people of the states, the Seventeenth Amendment has transformed the Senate into a quasi-democratic branch of the national legislature. Even though the people of Rhode Island may have a greater proportional influence over the Senate than do the people of

California, the entire electorate now has more direct access to the Senate and can shape senators' consideration of such institutional responsibilities as the ratification of treaties and the confirmation of executive and judicial appointments. Examples of public opinion's increased importance for such Senate decisions—and, conversely, the increased significance of the Senate's handling of these responsibilities for the currents of American politics—immediately suggest themselves:

- The Senate's debate in 1919 and 1920 over the Treaty of Versailles and its companion pact, the Covenant of the League of Nations, both reflected and spurred a wider public debate over the place of the United States in the community of nations and the role the United States should assume in world affairs. The Senate's rejection of the unamended Treaty and the Covenant, in turn, reflected the senators' reading of public opinion, which was turning against activist American involvement in world politics.

- The Senate's wrangling over the 1979 Panama Canal Treaty similarly reflected the divisive public argument over the wisdom of the treaty negotiated by President Jimmy Carter's administration. Although the Senate approved the treaty in response to its likely beneficial effect on relations between the United States and Latin American nations, its domestic political effects damaged President Carter's chances for reelection.

- President Ronald Reagan's nomination in 1987 of Judge Robert H. Bork to the U.S. Supreme Court occasioned a firestorm of public controversy about Judge Bork's conservative judicial philosophy, his espousal of a strict original-intent method of interpreting the Constitution, and the views he expressed in more than two decades of scholarly writings on legal issues. Bork's defenders charged that his opponents had shifted the focus of the confirmation fight from the floor of the Senate and its Judiciary Committee to the arena of public opinion—a criticism that had at least some truth to it. The public's shift against Bork's nomination resulted in his decisive rejection by the Senate.

- The marked increase in the number of women senators in 1992 was a direct product of American women's reactions to the controversial Senate Judiciary Committee hearings on the confirmation of Clarence Thomas to the Supreme Court in the face of sexual harassment charges brought against him by a former employee, Anita Hill, then a professor at the University of Oklahoma Law School.

- Thus, in light of President Reagan's failed 1987 nomination of Judge Bork and President George Bush's successful appointments of Justices David H. Souter (1990) and Clarence Thomas (1991), some observers of the politics of judicial appointment have suggested that the Senate's vulnerability to public opinion has spurred presidents to prefer relatively obscure judges with scanty track records and few controversial publications for Supreme Court vacancies.

Not only has the amendment had a direct impact on the Senate and its constitutional responsibilities—it also has had an important though indirect impact on state government. The Seventeenth Amendment has fostered the development of constitutional federalism, in which federal and state governments coexist in a relationship of mutual respect and fruitful tension, sometimes working concurrently to address complementary aspects of the same issue, sometimes allotting important governmental problems to one or the other level of the federal system. Senators today are more effective representatives of their states than they were in the years before 1913. The need to secure a majority of the electorate to win election compels senators to pay close attention to their constituents' needs and interests. Senators thus have become increasingly important to the political lives of their states and of the nation as a whole.

The Seventeenth Amendment's transfer of the power to choose senators from state legislatures to the people not only transformed the Senate but also took away the state governments' power to exert direct influence over the federal government by choosing senators. No longer are senators the state governments' ambassadors in the nation's capital (nor are they envoys of those able to "buy" a Senate seat by corrupting a state legislature). State governments today exert only indirect influence over such matters as adoption of treaties or confirmation of executive or judicial appointments. At the same time, the amendment lifted from the states a divisive responsibility that often

David H. Souter *(1939–)*

David H. Souter was born on September 17, 1939, in Melrose, Massachusetts. At the age of 11, Souter and his family moved to Weare, New Hampshire. Souter attended public schools and entered Harvard College in 1957, majoring in philosophy and writing his senior honors thesis on the jurisprudence of Justice Oliver Wendell Holmes, Jr. After graduating *magna cum laude* and Phi Beta Kappa, he won a Rhodes scholarship to attend Magdelan College at Oxford University, where he studied law and philosophy for two years. In 1963 he enrolled in Harvard Law School, and received his law degree in 1966.

Souter returned home to Weare and began his legal career in a Concord law firm, but disliked private practice and turned to the public sector. In 1968 he joined the staff of the New Hampshire attorney general. Warren Rudman became attorney general of New Hampshire in 1970 and promoted Souter to be his top aide. Rudman resigned as attorney general in 1976 and persuaded the governor to name Souter as his successor.

Souter was apppointed to the state superior court in 1978. He served there for five years before Governor John Sununu named him to the New Hampshire Supreme Court in 1983. In the spring of 1990 President Bush nominated Souter to the U.S. Court of Appeals for the First Circuit in Boston. Souter had not even be assigned an office in Boston when the president made his surprise announcement nominating him to the U.S. Supreme Court on July 23, 1990.

Souter's nomination easily cleared the Senate Judiciary and the full Senate was equally favorable. The new justice was sworn in October 9, 1990, and began work almost immediately on the fall term of the Court.

As a Justice, Souter focused on legal process in many of his decisions. In his dissent of *Missouri v. Jenkins* (1995) he began with: "The Court's process of orderly adjudication has broken down in this case." Some critics claimed that his focus on process was an attempt to flee substance. Important opinions written by Souter included issues related to free speech and separation of church and state in *Rosenberger v. University of Virginia* (1995) (free speech and a student run newspaper) and *Lee v. Weisman* (separation of church and state).

clogged the processes of state government; the amendment thus improved the functioning of state legislatures, in turn rendering them more responsive, at least in theory, to the needs of their constituents on issues of local and state concern.

Finally, the Seventeenth Amendment has affected the Senate in an immediate and practical way—and one that subtly subverts the process of democratizing the Senate the amendment was designed to put into effect. Because its members now have to campaign for election and reelection, senators of necessity must be more responsive—or must cultivate the appearance of being more responsive—to the needs of all the people of their states. In part to further this goal, and in part to adapt to the changing realities of modern public life, senators also have had to develop the campaigning and governing skills of modern democratic politicians, further altering the institution's character. No longer is the Senate an exclusive gentleman's club; although senators still like to stress their institution's traditions of deliberation and collegial debate, and still call themselves the "upper house" of Congress, the Senate of the 1990s is a far different place from the Senate of the 1790s, the 1840s, the 1890s, or even the 1960s.

These changes, products of the democratization of the Senate, have also exacted a price that itself raises troubling questions about the costs of democratization. The growing expense of political campaigning has made the raising of campaign funds a central part of a senator's life—and one far greater, both proportionately and in absolute terms, than had been the case before 1913. This unintended consequence of the Seventeenth Amendment has imposed on incumbents, by at least one modern estimate, the need to raise $15,000 each and every week of a senator's six-year term to have a sufficient campaign war chest to finance a reelection campaign; it has also

imprisoned senators in a tightening network of obligations to campaign donors. No matter how many senators denounce this worsening state of affairs, however, and no matter how many candidates of both parties pledge reform of the problem of "money in politics," Congress has proved curiously resistant to enacting campaign-finance legislation. In part, this reluctance is traceable to the Supreme Court's 1976 decision in *Buckley v. Valeo,* under which campaign contributions and spending are forms of free expression protected by the First Amendment. In part, congressional reluctance to respond to increasing public demands for reform of campaign financing is analogous to the Senate's decades-long resistance to demands for what became the Seventeenth Amendment. Thus, the lessons of that amendment's history have continuing relevance to modern problems of American political democratization.

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