TODD J. ZYWICKI*

Senators and Special Interests: A Public Choice Analysis of the Seventeenth Amendment

TABLE OF CONTENTS

* Associate, Alston & Bird, Atlanta, GA. J.D., University of Virginia (1993); M.A. (Economics), Clemson University (1990); A.B., Dartmouth College (1988). I would like to thank the Honorable Jerry E. Smith, U.S. Court of Appeals for the Fifth Circuit, David H. Steinberg, Richard T. Morrison, Scott A. Kupor, Kimberly M. Zywicki, Donald J. Boudreaux, A.C. Pritchard, Roger E. Meiners, William Dougan, Robert McCormick, Dan Benjamin, Bruce Yandle, Robert Staaf, David Laband, David Wheeler, and the participants at the Clemson University Law and Economics workshop for contributing to this Article. I would also like to thank the Institute for Humane Studies at George Mason University and the H.W. Close Foundation at Clemson University for financial support. The views and opinions expressed in this Article do not necessarily represent the views of Alston & Bird or its employees.

Americans believe in the principles of democracy and majority rule.[1] Nonetheless, the Federal Constitution established a republic of limited and enumerated powers.[2] Indeed, the Founders likened democracy to mob rule and chaos.[3] In order to channel the potentially destructive forces of democracy, the Founders restrained the majority's will through federalism, separation of powers, and other "auxiliary"[4] institutions designed to alleviate the excesses of democracy.[5]

---

[1] *See* Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 781 (1991) (calling democracy the "linchpin of our political system"); Michael J. Klarman, Review Essay, *Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments*, 44 STAN. L. REV. 759, 794-96 (1992) (reviewing BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991)) (arguing that we live in a democratic society and that any theory of constitutionalism must be consistent with this premise); David G. Savage, *Paper Trail Could Block Nominee for Justice Post*, L.A. TIMES, May 22, 1993, at A1 (referring to majority rule as "the cherished principle" of American democracy); Lally Weymouth, *Lani Guinier: Radical Justice*, WASH. POST, May 25, 1993, at A19 (calling majority rule "one of the cornerstones of American democracy").

[2] *See* Elbert P. Tuttle & Dean W. Russell, *Preserving Judicial Integrity: Some Comments on the Role of the Judiciary Under the "Blending" of Powers*, 37 EMORY L.J. 587, 589 & n.18 (1988).

[3] *See* 3 CHARLES A. BEARD & MARY R. BEARD, AMERICAN IN MIDPASSAGE 922-23 (1966) (noting that the Constitution does not establish a democracy, never mentions the word democracy, and that at the time "the Constitution was framed no respectable person called himself or herself a democrat"); ANDREW HACKER, CONGRESSIONAL DISTRICTING 7-8 (1963) (stating that the participants at the Constitutional Convention were "by no means committed to popular government," and that most delegates "interpreted democracy as mob rule").

[4] THE FEDERALIST NO. 51, at 349 (James Madison) (Jacob E. Cooke ed., 1961).

[5] *See* Frank H. Easterbrook, *The State of Madison's Vision of the State: A Public*

The ratification of the Seventeenth Amendment in 1913,[6] providing for the direct election of U.S. senators, undermined the twin structural pillars of the Constitution: federalism and the separation of powers.[7] In so doing, it paved the way for the bloated, special-interest riven federal government we see today. As Judge Easterbrook observes, "Private interest legislation is common to-

---

Choice Perspective, 107 HARV. L. REV. 1328, 1332-33 (1994). Under the Constitution:

> Fragmentation [was] to be pursued in a thoroughgoing manner: different state qualifications for voting; different districts for officials to represent (portions of states for members of the House, whole states for senators, the entire nation for the President); different electors (the people for members of the House, state legislatures for senators, the electoral college for the President); different tenures for officeholders (from two years for members of the House to life for judges).

Id. (citations omitted); *see also* Todd J. Zywicki, *Federal Judicial Review of State Ballot Access Laws: Escape From the Political Thicket*, 20 T. MARSHALL L. REV. (forthcoming Spring 1995).

[6] Prior to the Seventeenth Amendment, U.S. CONST. art. I, § 3, cl. 1 (amended 1913) provided: "The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote."

The Seventeenth Amendment states, in relevant part:

> 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.

U.S. CONST. amend. XVII.

The following states voted to ratify the Seventeenth Amendment (listed in alphabetical order): Arizona, Arkansas, California, Colorado, Connecticut, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana (ratified after the issuance of the proclamation), Maine, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. CONGRESSIONAL QUARTERLY INC., GUIDE TO CONGRESS (3d ed. 1982).

The following states did not vote to ratify: Alabama, Delaware, Florida, Georgia, Kentucky, Maryland, Mississippi, Rhode Island, South Carolina, Utah, and Virginia. *Id.*

Alaska and Hawaii were not yet states.

[7] The Supreme Court has recognized the critical blow dealt to federalism by the Seventeenth Amendment. *See, e.g.*, Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 554 (1985) (recognizing the part the Seventeenth Amendment played in weakening the role of the states in the federal structure); *id.* at 565 n.9 (Powell, J., dissenting); *id.* at 584 (O'Connor, J., dissenting); *see also* Roger G. Brooks, Comment, Garcia, *The Seventeenth Amendment, and the Role of the Supreme Court in Defending Federalism*, 10 HARV. J.L. & PUB. POL'Y 189, 192 (1987); Martha A. Field, Garcia v. San Antonio Metropolitan Transit Authority: *The Demise of a Misguided Doctrine*, 99 HARV. L. REV. 84, 101 (1985). The indirect election of senators was also an integral part of bicameralism and the separation of powers. *See infra* notes 131-54 and accompanying text.

day, much more so than in 1787, and more common at the national level than among the states."[8] Nonetheless, the Seventeenth Amendment has received little mention in recent legal scholarship. Most historians have treated it as just one element of the greater Progressive Movement of the era, "a detail of 'historical progress' . . . in a beneficial process of change."[9]

Ratification of the Seventeenth Amendment marked the end of an intense decades-long struggle.[10] Contemporaries hailed it as a hard-earned and much-needed triumph of "the people" over special interests.[11] One observer exclaimed, "We shall find [the Seventeenth Amendment] in complete harmony with the direction now finally taken in modern political experience by those forces which are swiftly bringing the true sovereign elements in every constitutional organization into a position of deserved control."[12]

Historians have begun to reevaluate the idealistic motives imputed to the Progressive Movement.[13] They have discovered that far from embodying the myth of selfless reformers, the backers of the various elements of the Progressive platform were motivated by "a healthy mixture of idealism and self-interest."[14] However, the skepticism that challenges the intent behind the Progressive

---

[8] Easterbrook, *supra* note 5, at 1334.

[9] Roger E. Meiners, *Economic Considerations in History: Theory and a Little Practice*, *in* ECONOMIC IMPERIALISM 79, 93 (Gerard Radnitzky & Peter Bernholz eds., 1987).

[10] For the entertaining history of the movement culminating in the passage of the Seventeenth Amendment, see 1 ROBERT C. BYRD, THE SENATE, 1789-1989, at 395-404 (1988).

[11] *See, e.g.*, GEORGE H. HAYNES, THE ELECTION OF SENATORS (1906) [hereinafter HAYNES, ELECTION]; 2 GEORGE H. HAYNES, THE SENATE OF THE UNITED STATES: ITS HISTORY AND PRACTICE (1938) [hereinafter HAYNES, SENATE]; George H. Haynes, *The Changing Senate*, 200 N. AM. REV. 222 (1914) [hereinafter Haynes, *The Changing Senate*].

[12] Gordon E. Sherman, *The Recent Constitutional Amendments*, 23 YALE L.J. 129, 130 (1913).

[13] *See, e.g.*, JOHN D. BUENKER, URBAN LIBERALISM AND PROGRESSIVE REFORM (1973) (arguing that urban machine politicians favored the reforms of the Progressive Era) [hereinafter BUENKER, URBAN LIBERALISM]; GABRIEL KOLKO, THE TRIUMPH OF CONSERVATISM: A REINTERPRETATION OF AMERICAN HISTORY, 1900-1916, at 57-58 (1963) (contrary to accepted understanding, "[t]he dominant fact of American political life at the beginning of this century was that big business led the struggle for the federal regulation of the economy"); John D. Buenker, *The Urban Political Machine and the Seventeenth Amendment*, 56 J. AM. HIST. 305 (1969) (showing machine support for Seventeenth Amendment) [hereinafter Buenker, *Urban Political Machine*].

[14] Buenker, *Urban Political Machine*, *supra* note 13, at 305.

Era changes has not yet resulted in any thorough reexamination of the history of the Seventeenth Amendment. This silence is remarkable in that many aspects of the Progressive Era, and its later cousins, the New Deal and Great Society, may not have been possible without the institutional reform of the direct election of senators.

In recent years, there has been a fundamental change in the way scholars examine governmental behavior. Borrowing from the tools of economics, "public choice" scholars have applied economic principles to politics to locate processes and results designed to benefit special interests at the expense of the dispersed public.[15] By viewing constitutional amendments as merely a more permanent form of legislation designed to transfer wealth to favored interest groups, public choice scholars also have been able to explain some facets of the constitutional amendment process.[16]

Changing constitutional rules can alter the playing field upon which interest groups compete for beneficial legislation. "[C]onstitutions, in establishing the structure of government, establish the procedures that interest groups must follow in order to obtain passage of the laws they favor."[17] We generally take the constitutional structure for granted and only examine the way people act within that framework. Constitutional institutions generally are seen as the channels through which the forces of history flow. The Seventeenth Amendment, however, fundamentally changed the balance of power between the state and federal governments and upset the bicameral legislative system. While demands for legislation probably did not change with the passage of the Seventeenth Amendment, the ability of senators

---

[15] *See* Robert E. McCormick, *A Review of the Economics of Regulation: The Political Process*, *in* REGULATION AND THE REAGAN ERA 6, 16 (Roger Meiners & Bruce Yandle eds., 1989); Sam Peltzman, *Toward a More General Theory of Economic Regulation*, 19 J. L. & ECON. 211 (1976); Richard A. Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCIENCE 335 (1974); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCIENCE 3 (1971).

[16] *See* Donald J. Boudreaux & A.C. Pritchard, *The Price of Prohibition*, 36 ARIZ. L. REV. 1 (1994) [hereinafter Boudreaux & Pritchard, *Prohibition*]; Donald J. Boudreaux & A.C. Pritchard, *Rewriting the Constitution: An Economic Analysis of the Constitutional Amendment Process*, 62 FORDHAM L. REV. 111 (1993) [hereinafter Boudreaux & Pritchard, *Rewriting*].

[17] Jonathan R. Macey, *Competing Economic Views of the Constitution*, 56 GEO. WASH. L. REV. 50, 72 (1987); *see also* JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT 119-262 (1962).

and the entire federal government to supply the legislation demanded did.

Without denying that "healthy idealism" animated some supporters of the Seventeenth Amendment,[18] this Article examines the previously ignored forces of self-interest that lay behind the ratification of the Seventeenth Amendment. Relying on the tools of econometrics to test the hypothesis, this Article demonstrates that the Seventeenth Amendment eliminated institutional arrangements which restrained special-interest groups' use of the federal government as a tool for wealth redistribution. In so doing, the Seventeenth Amendment made possible the explosion in the size of the federal government in the twentieth century. Without the Seventeenth Amendment, most major political initiatives of the twentieth century likely would have failed, as had occurred in previous centuries.

Section I of this Article reviews the reasons for the universal support for selection of senators by state legislatures at the time the Constitution was adopted.

Section II chronicles the growing support for direct election that culminated in adoption of the Seventeenth Amendment. One hundred years of contentment with the original system eventually yielded to escalating calls for its abandonment during the final thirty years of the period. Two proposed classes of explanations to explain this evolution are discussed and found wanting.

Section III describes the interest-group model of government as developed in the public choice literature. This discussion builds on previous public choice research and extends it to model constitutional process, a previously neglected area.[19]

Section IV develops an interest-group explanation for the Seventeenth Amendment. Drawing on the tools of public choice

---

[18] The political process frequently creates strange bedfellows. *See, e.g.*, Boudreaux & Pritchard, *Prohibition*, *supra* note 16, at 2 (noting that Prohibition was repealed as a result of changing social mores and a desire to increase government tax revenues in response to the Depression); Bruce Yandle, *Bootleggers and Baptists*, 7 REGULATION 12 (May/June 1983) (noting that devout Christians and makers of bootleg whiskey share an interest in limiting the sale of liquor).

[19] *See* Boudreaux & Pritchard, *Rewriting*, *supra* note 16, at 114 (noting a "relative inattention to the economics of constitutional change" in the public choice literature). Even some scholars who recognize the role played by special interests in the passage of statutes believe that constitutional rules are immune from these forces. *See, e.g.*, BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 6-7 (1991).

theory, an explanation is offered for why dissatisfaction with the established regime developed around the turn of the century.

Section V constructs a statistical test of the model. It finds strong support for the interest-group explanation of the Seventeenth Amendment.

The final section concludes that the passage of the Seventeenth Amendment can be explained by the special interest theory of government and presents suggestions for further research.

I

SENATORS AT THE CONSTITUTIONAL CONVENTION

The proposal that senators be elected by state legislatures was one of the few non-controversial decisions reached by the Constitutional Convention. Facing the heavy burden of persuading a skeptical public to ratify the Convention's work, the authors of the *Federalist Papers* found little reason to dawdle over an explanation for their decision to give state legislatures the power to choose U.S. senators. Hamilton made little mention of the manner for selecting senators, other than to observe that, "[a]mong the various modes which might have been devised for constituting this branch of the government, that which has been proposed by the convention is probably the most congenial with the public opinion."[20]

James Wilson was the sole advocate of senatorial election by popular vote. His proposal received only the support of his Pennsylvania delegation and was soundly defeated ten to one in a straw poll at the Convention.[21] By contrast, the selection of senators by state legislatures was carried by a ten vote majority of the state delegations represented at the Convention.[22] As a Senate historian and early-twentieth century advocate of direct election, George Haynes admitted, "Outspoken opposition to the choice of senators by the state legislatures, it should be noted, . . . was confined to this one man [Wilson]. On the other

---

[20] THE FEDERALIST NO. 62, at 416 (James Madison) (Jacob E. Cooke ed., 1961); *see also* 1 HAYNES, SENATE, *supra* note 11, at 35 ("The election of senators by state legislatures—the provision which later was to arouse greatest antagonism—was passed over [in the Federalist Papers] with a single laudatory paragraph, characterizing it as the mode 'probably most congenial with public opinion'—as beyond question it then was.").

[21] DEBATES IN THE FEDERAL CONVENTION OF 1787, S. DOC. NO. 404, 57th Cong., 1st Sess. 8 (1902) [hereinafter DEBATES].

[22] *Id.*

hand, hardly any proposition before the convention brought forth so many members to speak in its favor."[23]

When the Constitution was submitted to the states for ratification, selection of U.S. senators by state legislatures met with similar approval. Despite misgivings about much of the document, "not a word of criticism was directed at the election of senators by the legislatures."[24]

The Constitution established a federal form of government. Not only was sovereignty divided among the constituent branches of the federal government, but authority was also divided between the state and national governments.[25] Election of senators provided the state governments with a means to defend themselves from the potentially overwhelming force of a powerful central government.[26] In addition to increasing the likelihood that those of high character and achievement would be chosen as senators, selection of senators by state legislatures would "giv[e] to the state governments such an agency in the formation of the federal government, as must secure the authority of the former; and [would] form a convenient link between the two systems."[27]

The necessity of providing state governments with a "veto" over federal actions led even the most democratically-minded Anti-Federalists to abandon Wilson on the issue of direct election of senators. Anti-Federalist John Dickinson noted that election by state legislatures would "produce that collision between the different authorities which should be wished for in order to check each other."[28] Anti-Federalist George Mason also feared that without the representation of the states, as states, in the national government, "the national Legislature [would] swallow up legislatures of the States. The protection from this occurrence [would] be the securing to the state legislatures the choice of the senators of the United States."[29] Mason, like Madison, favored

---

[23] HAYNES, ELECTION, *supra* note 11, at 8.

[24] *Id.* at 14.

[25] *See* THE FEDERALIST NO. 51, *supra* note 4.

[26] *See* THE FEDERALIST NO. 62, *supra* note 20, at 417; 2 JONATHAN ELLIOT, THE DEBATES OF THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 319 (1901) ("The *equal vote in the senate* was given to secure the rights of the states . . . .") (remarks of Alexander Hamilton at New York ratifying convention).

[27] THE FEDERALIST NO. 62, *supra* note 20, at 416.

[28] DEBATES, *supra* note 21, at 6 (statement by John Dickinson).

[29] HAYNES, ELECTION, *supra* note 11, at 12-13, n.7; *see also* DEBATES, *supra* note 21, at 10 (statement by George Mason).

direct popular election of representatives, not senators.[30]

For over a century, election of senators by state legislatures restrained the growth of the federal government relative to the states. As a share of national income, expenditures by the federal government remained fairly stable during the nineteenth century.[31] While federal expenditures increased during periods of war, peace was accompanied by a return to original levels of federal spending.[32] In short, for a century, the Senate admirably performed the function the Framers had designed for it by protecting state sovereignty against encroachment by the national government and limiting the ability of the federal government to misuse its power to transfer wealth to special interests.

II

THE PUSH FOR DIRECT ELECTION

Beginning in the 1880s, dissatisfaction with the existing system began to arise. No one has fully explained why the universal popularity of indirect election of senators in 1789 yielded to a growing dissatisfaction in the 1880s.[33] While historians may have exaggerated the degree and uniformity of support in favor of change,[34] strong support was evidenced in many parts of the country, especially in the western states.[35]

Historians have used two approaches to explain the rise in support for direct election. The first model will be called the "external" explanation. Advocates of external explanations view the Seventeenth Amendment as one small element in the larger Progressive Movement of the late nineteenth and early twentieth centuries.[36] These authors connect the adoption of the Seventeenth Amendment to the same forces that instigated the Progressive pieces of legislation that marked the era.[37] While

---

[30] HAYNES, ELECTION, *supra* note 11, at 13 n.8.

[31] *See* Thomas E. Borcherding, *One Hundred Years of Public Spending, 1870-1970*, *in* BUDGETS AND BUREAUCRATS: THE SOURCES OF GOVERNMENT GROWTH 19, at 19-44 (Thomas E. Borcherding ed., 1977).

[32] *See* Meiners, *supra* note 9, at 95.

[33] *See* Brooks, *supra* note 7, at 206 (noting that "demand for popular election was 'quite negligible' before the 1870s") (quoting H.R. DOC. No. 551, 70th Cong., 2d Sess. 216 (1928)).

[34] *See* Feb. 10, 1911 CONG. REC. 2241, 2242 (statement of Sen. Elihu Root) [hereinafter Root].

[35] *See* HAYNES, ELECTION, *supra* note 11, at 100-15.

[36] *See* Meiners, *supra* note 9, at 93.

[37] *See infra* notes 42-60 and accompanying text.

disagreeing over which forces dominated the Progressive Movement, advocates of external explanations agree that explaining the movement also explains ratification of the Seventeenth Amendment.[38]

The second model will be called the "internal" explanation. Advocates of internal explanations view direct election as a pragmatic response to a perceived inability of state legislatures to perform their electoral function.[39] These authors see the process of senatorial elections by state legislatures as characterized by corruption, irresponsibility, unresponsiveness to public demands, and back-room dealing.[40] Popular election, according to the internal explanation, was not an ideological issue, but a necessary response to the incompetence of state legislators in performing their constitutional duty.

A. External Explanations

There are two primary external explanations for the Seventeenth Amendment. Progressive historians see support for direct election as forged in the ideological fires of expanding democracy.[41] They view the Seventeenth Amendment as a "foregone conclusion[ ] . . . not worthy of much discussion beyond the passing observation that [it was] the product of a 'reform movement.'"[42]

Revisionist historians have challenged the Progressives' characterization of the Progressive Movement as a "good guys versus bad guys scenario."[43] They see the Progressive Movement not as an ideological struggle for the principles of good government and greater democratization. Rather, they see Progressive legislation as the result of competing interest groups, especially big business, seeking government largess and protection.

1. Progressive Historians

To Progressive historians, the increasing democratization of the political process was an ideological struggle intended to wrest control from corrupt political elites. The driving figures behind

---

38 *See* Meiners, *supra* note 9, at 93.
39 *See, e.g.*, 1 HAYNES, SENATE, *supra* note 11, at 95.
40 *See infra* notes 77-84 and accompanying text.
41 *See* Sherman, *supra* note 12, at 129.
42 Meiners, *supra* note 9, at 93.
43 *Id.*

the Progressive Movement were "good government" elites committed to an ideological crusade to break the power of political machines.[44]

Progressive historians and the intellectual elites of the Progressive Era share a belief in the inherent justice of the crusade for more professional and democratic government. Writing in the *Yale Law Journal* immediately following the amendment's ratification, Gordon Sherman advocated this view.[45] He pointed to popular election of senators as the culmination of a world-wide movement asserting the legitimacy of the people's democratic right to elect their representatives directly.[46] The continued election of senators by state legislatures was considered a fossilized relic of elite control of politics and distrust of democracy.[47] While perhaps appropriate for an earlier stage in the country's history, the intermediary function of state legislatures had become an affront to the ideals of democratic progress.[48] Combined with direct election of House members and *de facto* direct election of the President, the national government was now free of the "official guardianship" imposed by the Framers in the original design.[49] Not content to place the Seventeenth Amendment within the context of political developments in the just United States, Sherman waxes rhapsodic about the democratizing historical forces sweeping the world. He writes:

> Time . . . has effectualy [sic] demonstrated the peril or ineffectiveness of such intermediates [as the electoral college and indirect election of senators], nor is the spirit of modern self-government easily tolerant, as may be gathered from recent discussions in the British and French parliaments, of legislators whose immediate choice is not confided to the hands of those for whose benefit it is supposed to have been made.[50]

In short, election of senators by state legislatures was little more

---

[44] *See, e.g.*, RICHARD HOFSTADTER, THE AGE OF REFORM: FROM BRYAN TO F.D.R. (1961) [hereinafter HOFSTADTER, AGE OF REFORM]; Richard Hofstadter, *Introduction: The Meaning of the Progressive Movement*, *in* THE PROGRESSIVE MOVEMENT 1-15 (Richard Hofstadter ed., 1963) [hereinafter Hofstadter, *Progressive Movement*].

[45] *See* Sherman, *supra* note 12.

[46] *Id.* at 151-56.

[47] Although, of course, the state legislatures themselves were elected by the people.

[48] *See* Sherman, *supra* note 12, at 129.

[49] *See id.*

[50] *Id.* at 129.

than an "outworn" relic of a bygone era.[51] The "modern age" was one of expanding democracy and direct popular control, trusting a more sophisticated electorate to control the parameters of government, rather than the institutional arrangements that previously controlled.[52]

Progressive politicians saw popular election as a panacea for all of the Senate's real and perceived ills.[53] Not only would popular government break the control of political machines,[54] but it would also replace self-interest in government with control by a public-spirited citizenry.[55]

Subsequent Progressive historians have continued the tradition of viewing Progressivism as mainly a collection of public-spirited reformers using government to mitigate the dislocations caused by rapid industrial growth.[56] Government would serve as a social conscience for an industrial system run amuck. A responsible, active citizenry was called upon to advance the public good through a "revivification of democracy" and the election of "new and vigorous popular leaders."[57] Through greater democratization and public-spiritedness, there was no limit to the positive results government could generate.[58]

The solution to dissatisfaction with the members of the U.S. Senate was radical democratization, not incremental reform of the respective state legislatures that selected them. The U.S. Senate was targeted as a "millionaire's club," beholden to corporate and machine interests.[59] Nonetheless, Progressive historians likely would characterize the struggle for direct election as Hofstadter characterized the Progressive Movement, as not so much a "movement of any social class, or coalition of classes, against a particular class or group as it was a rather widespread and remarkably good-natured effort of the greater part of society to achieve some not very clearly specified self-reformation."[60]

---

[51] *Id.* at 144.

[52] *Id.* at 129.

[53] *See, e.g.*, *Popular Versus Delegated Government*, S. Doc. No. 524, 61st Cong., 2d Sess. 1 (1910) (statement of Sen. Bourne).

[54] *Id.* at 2.

[55] *Id.*

[56] *See* Hofstadter, *Progressive Movement*, *supra* note 39, at 3.

[57] *Id.* at 4-5.

[58] *Id.* at 5.

[59] *Id.*

[60] HOFSTADTER, AGE OF REFORM, *supra* note 44, at 5.

2. *Revisionist Historians*

The Progressive historian's portrayal of the movement has fallen into disrepute in recent years. Advocates of external explanations have attacked from several directions to demolish the view of Progressivism as a selfless, good-government movement. These scholars have proffered explanations rooted in struggles between powerful special-interest groups seeking wealth through the political process, rather than pure ideological motives.

Gabriel Kolko, for instance, has established that much Progressive legislation and regulation was not sought by public-spirited citizens and politicians trying to temper the excesses of rapid industrialization.[61] Instead, industrial regulation was actively cultivated by business leaders as a means of counteracting the uncertainties of an increasingly national and competitive market. Far from fearing intervention by the national government, businessmen were early and ardent advocates of virtually every important measure that came out of Progressive Era congresses, and "many key businessmen articulated a conscious policy favoring the intervention of the national government into the economy."[62] Businessmen frequently worked alongside, not against, the efforts of "well-intentioned reformers," implying that "federal economic regulation was generally designed by the regulated interest to meet its own end, and not those of the public or the commonweal."[63]

Big business, however, was just one of many groups that turned to the federal government for protection during the Progressive Era. The fundamental characteristic of the Progressive Movement was not a desire to aid those suffering economic privation, but a tendency for interest groups of all kinds to demand that the government transfer wealth to them.[64]

With regard to the Seventeenth Amendment specifically, the thesis that the Progressive Movement was spearheaded by public-spirited reformers has been fatally discredited by historian John Buenker.[65] Buenker notes that the amendment presents a

---

[61] *See* KOLKO, *supra* note 13.

[62] *Id.* at 3-5.

[63] *Id.* at 59; *see also supra* note 16 for similar examples.

[64] *See* ROBERT HIGGS, CRISIS AND LEVIATHAN: CRITICAL EPISODES IN THE GROWTH OF AMERICAN GOVERNMENT 113-14 (1987).

[65] *See* BUENKER, URBAN LIBERALISM, *supra* note 13; Buenker, *Urban Political Machine*, *supra* note 13.

"clear-cut test case" of the Progressive thesis.[66] The amendment "theoretically[ ] struck at the big city organization's control of patronage by removing the selection of United States senators from the state legislatures, where it could be readily manipulated, and placing it in the hands of the voters where, presumably, it could not."[67] The Seventeenth Amendment, he continues, "was one of the cardinal achievements of the Progressive Era, one which transformed the upper chamber from a bastion of private privilege into the more liberal of the two houses of Congress; yet, almost without exception, it was one which had the overwhelming support of the urban machines' minions in the major industrial states."[68]

Urban machines supported the Seventeenth Amendment as a way of circumventing the dominance of rural interests in state legislatures.[69] Direct election played into the strength of urban machines by putting a premium on organizing and delivering voting blocks.[70] The urban machines were well positioned to reach the concentrated masses in the modern city when compared to the difficulties organizing dispersed rural populations.[71] The success of the Seventeenth Amendment was "owed in large measure to the support of [a] . . . segment of society . . . generally considered antagonistic to the aims of the Progressive movement."[72]

The external theories of Kolko and Buenker are superior to the Progressives' now-discredited thesis. Nonetheless, their explanations also remain incomplete.

Kolko's explanation does not account for the differences between lobbying for specific pieces of legislation within a given institutional structure, and efforts to alter the institutional structure itself through constitutional amendment. It is obvious how business benefits from Progressivism's specific legislative enactments. But he proffers no explanation as to why business would care, or benefit, from changing to direct election of senators. Indeed, if the Senate really was a "millionaire's club" beholden to big business, business presumably would have preferred to maintain the beneficial status quo rather than tamper with the meth-

---

66 Buenker, *Urban Political Machine*, *supra* note 13, at 305.
67 *Id.*
68 *Id.*
69 *Id.* at 320.
70 BUENKER, URBAN LIBERALISM, *supra* note 13, at 134.
71 *Id.*
72 Buenker, *Urban Political Machine*, *supra* note 13, at 322.

ods that put senators in place. Nor do the explanations that focus on other discrete interest groups explain how their fate was tied to direct election of senators.

Buenker draws attention to machine support for the Seventeenth Amendment.[73] Machine support explains why the initiative would gain support in states with large urban populations. It does not explain why the rural-dominated state legislatures in the states he examined voted to ratify the amendment, nor why instigation for direct election was strongest in the agrarian west, far from the reach of political machines.[74]

B. Internal Explanations

Advocates of the internal explanation analyze the Seventeenth Amendment as an independent event, with causes distinct from those of the larger Progressive Movement.[75] The Seventeenth Amendment is characterized not as a historical detail swept along as part of a larger movement, but as a pragmatic response to perceived inefficiencies in the political system.[76]

Under this view, there was no ideological opposition to allowing state legislatures to select senators. In practice, however, the state legislatures had broken down, and their inability to perform the function properly necessitated relieving them of the duty. As one observer remarked, "The change [to direct election] was due to [a] determination to take the matter out of the hands of the Legislature rather than to an inclination on the part of the people themselves to make their own selection."[77] Direct election resulted from the default of state legislatures, not from the determination of Progressive reformers.

Until about 1860, the system of direct election by state legislatures worked effectively.[78] Although the Senate was frequently branded a "millionaire's club" because of the wealth of its individual members,[79] there was little dissatisfaction with the system

---

[73] *Id.* at 305.

[74] *See infra* notes 198-205 and accompanying text (noting and explaining the predominance of the western states in the movement for the Seventeenth Amendment).

[75] *See, e.g.*, 1 HAYNES, SENATE, *supra* note 11, at 95.

[76] *See, e.g., id.*

[77] ALLEN H. EATON, THE OREGON SYSTEM: THE STORY OF DIRECT LEGISLATION IN OREGON 92 (1912).

[78] *See* BYRD, *supra* note 10, at 390.

[79] *See id.* at 395. Of course, the system of indirect election was intended to produce precisely this type of person: those of wealth, experience, and achievement. This result was ensured by requiring a higher age and longer period of citizenship

by which they were elected.[80] Calls for change were directed at the men who held the offices, not at the system itself.

Beginning in the 1860s, however, discontentment with the electoral system started to grow. Charges of corruption and bribery became more commonplace. In the first seventy years that the Constitution was in force, the Senate investigated only one case of election bribery.[81] The next thirty-five years saw nine such cases.[82] Most dramatically, there was an increase in the number of "deadlocks": situations where a senator was elected only after great time and effort, or no one was elected at all.[83] Deadlocks often led to the absence of a senatorial representative from the state for part or all of a session. Numerous ballots were taken, and legislative business often was interrupted for some time. Between 1891 and 1905, there were forty-six deadlocks across twenty states.[84] Several deadlocks were broken only with the

---

before one could serve as a senator, relative to serving in the House. It was also believed that state legislators would select as senators only individuals known throughout the state and those with a distaste for popular campaigning and politics. *See* THE FEDERALIST NOS. 62, 63 (James Madison) (Jacob E. Cooke ed., 1961); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 557 (1969).

[80] Haynes observes that "the Senate attained its highest prestige" during the period that its members were chosen by state legislatures. 1 HAYNES, SENATE, *supra* note 11, at 85.

[81] *Id.* at 91.

[82] BYRD, *supra* note 10, at 393.

[83] 1 HAYNES, SENATE, *supra* note 11, at 86.

[84] HAYNES, ELECTION, *supra* note 11, at 38-39. The deadlocks (situations that resulted in no one being selected) in state legislatures from 1891-1905, as well as the number of days and ballots needed to reach a decision where available, are summarized in the following lists. 1891: Florida (35 days, 75 ballots, as estimated by Secretary of State); North Dakota (3 days, 17 ballots); South Dakota (27 days, 40 ballots). 1892: Louisiana (44 days, no election). 1893: Montana (50 days, 44 ballots, no election); Nebraska (21 days, 17 ballots); North Dakota (33 days, 61 ballots); Washington (51 days, 101 ballots, no election); Wyoming (no election). 1895: Delaware (114 days, 217 ballots, no election); Idaho (51 days, 52 ballots); Oregon (32 days, 58 ballots); Washington (9 days, 28 ballots). 1896: Kentucky (58 days, 52 ballots, no election); Louisiana (9 days, 6 ballots); Maryland (8 days, 7 ballots). 1897: Florida (24 days, 45 ballots, as estimated by Secretary of State); Idaho (15 days); Kentucky (36 days, 60 ballots); Oregon (53 days, no election); South Dakota (29 days, 27 ballots); Utah (17 days, 53 ballots); Washington (7 days, 25 ballots). 1898: Maryland (7 days, 10 ballots); Tennessee (7 days, 7 ballots). 1899: California (67 days, 104 ballots, no election); Delaware (64 days, 113 ballots, no election); Montana (17 days, 17 ballots); Nebraska (50 days, 43 ballots); Pennsylvania (92 days, 79 ballots, no election); Utah (52 days, 104 ballots, no election); Wisconsin (8 days, 6 ballots). 1901: Delaware (52 days, 46 ballots, no election); Delaware (52 days, 46 ballots, no election); Montana (51 days, 66 ballots); Nebraska (72 days, 54 ballots); Nebraska (72 days, 54 ballots); Oregon (22 days, 53 ballots). 1903: Delaware (41 days, 36 ballots); Dela-

nomination of compromise candidates elected in "stampede" elections at the end of a session.[85] Proponents of the internal explanation insist that it was a growing impatience with deadlocks, bribery, and general incompetence on the part of state legislatures that led to the call for direct election.

> Experiences such as these, exceptional though they were, nevertheless became so frequent and so widespread that they gave rise to a determined movement which no longer contented itself with attempts to correct obvious defects in the law by which Congress had regulated the election of Senators, but which demanded that these elections be taken from the legislatures and be placed directly in the hands of the people.[86]

The internal argument has some merit at first glance. Under closer scrutiny, however, it does not fully explain the demand for the Seventeenth Amendment. First, deadlocks remained the exception rather than the rule for senatorial elections, and thus it cannot explain the intensity or pattern of support for the movement. Second, the internal explanation does not explain why the movement for direct election took the form of a constitutional amendment, making the reform difficult to accomplish, rather than turning to less intrusive and simpler means for achieving the same ends.

1. Deadlocks Were Exceptional

Although several states faced deadlocks in electing senators, many more did not. As Senator Elihu Root commented on the floor of the Senate during the debate on the ratification of the Seventeenth Amendment:

> [W]e are too apt in having our attention fixed upon the exceptional to forget the usual. It is true that what have long been known in this Chamber as forbidden and abhorrent forces do sometimes affect the election of a Senator, but it is only occasional, and the great body of the Members of the Senate are, and always have been, elected as the free and intelligent judgment of the State legislatures dictate.[87]

Concentrating on the number of deadlocks rather than the number of successful elections conceals the dynamics of the elec-

---

ware (41 days, 36 ballots); North Carolina (10 days, 9 ballots); Oregon (32 days, 42 ballots); Washington (9 days, 13 ballots). 1904: Maryland (16 days, 12 ballots). 1905: Delaware (80 days, 51 ballots, no election); Missouri (60 days, 67 ballots). *Id.*

[85] 1 HAYNES, SENATE, *supra* note 11, at 88-93.

[86] *Id.* at 95.

[87] Root, *supra* note 34, at 2242.

toral process over time. In the fifteen year span examined, only thirteen states deadlocked more than once; only six states twice or more.[88] In most states, it took only one or two deadlocks for the legislature to learn not to repeat the process again. Furthermore, many of the states with repeated deadlocks were newly-admitted western states with inexperienced legislatures and weak party discipline.[89] As western legislators gained experience, deadlocks became less frequent. As one historian has written of the Utah deadlocks of 1897 and 1899, "[T]he struggle of 1897, and the failure of 1899, seemed to be a good teaching experience and Utah's legislature never again failed to elect a senator so long as it had that responsibility."[90]

There also is no correlation between the states that experienced deadlocks, where presumably frustration with deadlocks would be greatest, and those that voted to ratify the Seventeenth Amendment. Delaware suffered seven deadlocks in ten years, including five that resulted in vacant seats.[91] Yet Delaware did not vote to ratify the amendment.[92] Florida suffered two deadlocks, Kentucky one, Utah two, and Maryland three, yet none of those states voted to ratify the Seventeenth Amendment.[93] Louisiana suffered two deadlocks but did not vote to ratify until after the amendment had already passed.[94]

The internal explanation also begs the question of why state legislatures suddenly became incapable of competently electing senators when they had done so successfully for a century. Without knowing why deadlocks occurred, it is difficult to identify direct election as a solution to a problem.

Meanwhile, most states that did not face deadlocks nevertheless voted to ratify.[95] The desire in these states for direct election is particularly difficult for the internal explanation to explain because these states presumably benefitted at the expense of states that went unrepresented in the Senate.

---

[88] *See supra* note 84.

[89] Stewart L. Grow, *Utah's Senatorial Election of 1899: The Election that Failed*, 39 UTAH HIST. Q. 30, 38 (1971).

[90] *Id.*

[91] *See supra* note 84.

[92] *See supra* note 6.

[93] *See supra* notes 6, 84.

[94] *See id.*

[95] *See id.*

2. *Less Intrusive Remedies Were Available*

The internal explanation is also unable to explain why the movement for direct election took the form of a constitutional amendment, a difficult and time-consuming means of achieving the desired end. There were several reforms short of a constitutional amendment that could have been used to alleviate the deadlock problem.

A federal statute passed in 1866 had required state legislatures to elect senators by majority vote, rather than allowing election by plurality.[96] Amending that statute to allow for election by a plurality or requiring run-offs would have eliminated the deadlock problem.[97] Indeed, Senator Root introduced a bill abolishing the requirement of election by majority, but it was not adopted.[98] The ascent of the Progressive Party and related parties and factions around the turn of the century made it especially difficult for one candidate to gain a majority in state legislatures.

States also could have been left to deal with the problem on their own. The first attempt to involve the people directly in the process of electing senators was the "public canvass," in which candidates for the Senate campaigned on behalf of state legislators who promised to vote for them.[99] The public canvass was popularized by the famous Lincoln-Douglas Senate campaign of 1858. "In that campaign, for the first time, each party formally endorsed a senatorial candidate prior to the state legislative election, pledging all party candidates for state office to vote for the party nominee."[100] During the Civil War years, campaigns for the state legislature were dominated by questions of whom the candidates would support for the Senate.[101]

The public canvass evolved into the direct primary. Southern states led the way in adopting the direct primary to choose senators.[102] The Electoral College, initially designed as a system of indirect election,[103] had already evolved into system of *de facto*

---

[96] *See* BYRD, *supra* note 10, at 392; 1 HAYNES, SENATE, *supra* note 11, at 84 (characterizing the bar on plurality election as "probably the law's most serious defect").

[97] 1 HAYNES, SENATE, *supra* note 11, at 114 n.1.

[98] *Id.*

[99] Brooks, *supra* note 7, at 207.

[100] *Id.*

[101] *Id.*

[102] *See id.*

[103] *See* U.S. CONST. art. II, § 1.

direct election. States easily could have copied this model if they sought direct election.[104]

There were no obstacles to state parties establishing *de facto* direct election within their states, as Oregon did with the famous "Oregon Plan."[105] In Oregon, each state legislator was required to sign one of two statements before running for office. One statement pledged the candidate to vote for whomever the population voted for in a state-wide primary.[106] Signing the other meant that the candidate would not so pledge and would retain discretion to vote for whomever he desired.[107] "On the whole, [the Oregon] system worked well, and many states adopted variations of it."[108] Eventually, Oregon and several other states memorialized the Oregon system by state constitutional amendment.[109] Thus, direct election and an end to deadlocks could have been accomplished by means short of a federal constitutional amendment.

There was no correlation between support for the Seventeenth Amendment and whether a state had adopted direct election unilaterally. Southern states adopted direct election via state primary relatively early in the process,[110] yet they did not vote for a federal constitutional amendment to accomplish the same end. Oregon, by contrast, also had direct primaries, but tirelessly promoted a constitutional amendment.

III

SPECIAL-INTEREST THEORY OF GOVERNMENT

The special-interest theory of government is distinguished from the desires of special interest groups to secure the passage of favorable legislation, in that it describes a model of the process by which legislation is enacted. While the special-interest theory of government is probably as old as the political state itself,[111]

---

104 "By 1910, 28 of 46 states had direct primary laws." Brooks, *supra* note 7, at 207.

105 *See id.* at 208.

106 EATON, *supra* note 77, at 93.

107 *Id.* at 95.

108 Larry J. Easterling, *Sen. Joseph L. Bristow and the Seventeenth Amendment*, 41 KAN. HIST. Q. 488, 490 (1975).

109 *See* Brooks, *supra* note 7, at 208.

110 *See id.* at 206.

111 For general theories of government preceeding the special-interest theory, see, for example, JOHN C. CALHOUN, A DISQUISITION ON GOVERNMENT (1953); AL-

economists have formalized it into a descriptive model of politics.[112]

The lawmaking process can be viewed as a market in which legal rules are designed according to the desires of the individual or group that values them most, as measured by willingness and ability to pay.[113] "The currency used for payment comes in the form of political support for politicians, bureaucrats, and other political actors who 'essentially act like brokers in a private context—they pair demanders and suppliers of legislation.'"[114] In an electorate of millions, most individuals lack the incentive to study the issues and vote.[115] This "rational ignorance"[116] allows well-organized interest groups to use the political process to transfer wealth, or economic "rents,"[117] from the dispersed public to themselves.[118]

Successful politicians are those most adept at orchestrating these transfers. If a politician fails at this task, groups will organize into political coalitions to remove him and replace him with someone who is better able to maximize political support.

> Thus the process of political support maximization in the economic theory of legislation is exactly analogous to the process of profit maximization by private firms in microeconomic theory. Just as those firms that pursue goals other than profit maximization are weeded out, so too are those politicians who pursue goals besides political support maximization.[119]

A legislator's reelection chances are linked to the efficiency with

---

BERT JAY NOCK, OUR ENEMY, THE STATE (1946); FRANZ OPPENHEIMER, THE STATE (1975).

[112] *See, e.g.*, William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J. LAW & ECON. 875 (1975); George J. Stigler, *The Sizes of Legislatures*, 5 J. LEGAL STUD. 17 (1976).

[113] Macey, *supra* note 17, at 62-63.

[114] *Id.* (quoting Robert D. Tollison, *Public Choice and Legislation*, 74 VA. L. REV. 339, 343 (1988)).

[115] *See* ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY 260-76 (1957).

[116] *See* DENNIS C. MUELLER, PUBLIC CHOICE II 205-06 (1989).

[117] Boudreaux & Pritchard, *Rewriting*, *supra* note 16, at 116. "In economic theory, a rent is a payment to a supplier exceeding the supplier's costs." *Id.* at 116 n.20; *see also* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 10 (4th ed. 1992) (defining "rent" as "a (positive) difference between total revenues and total opportunity costs"). "Rent-seeking" describes the process by which special interests lobby the government for anti-competitive protection that will allow them to recover long-term rents which would be dissipated in absence of government protection. Boudreaux & Pritchard, *Rewriting*, *supra* note 16, at 116.

[118] *See* MANCUR OLSON, JR., THE LOGIC OF COLLECTIVE ACTION 53-57 (1965).

[119] Macey, *supra* note 17, at 63.

which he can buy votes through legislation that transfers wealth to politically powerful groups.[120]

Most regulation does not provide a single lump-sum payment to an interest group.[121] The benefits of a piece of legislation are meted out to the favored group over time. For instance, licensing laws that limit entry into a profession provide some benefit each year to members of the protected class. As a result, the total amount of wealth transferred to the favored groups will be a function of both the total potential amount of wealth transferred and the expected life of the stream of payments resulting from the beneficial legislation. Innovations that increase the lifespan of the legislation and make it more difficult to repeal[122] raise the durability of legislation. As durability rises, the amount of the potential wealth transfer also rises. The economic rents resulting from legislation create potential gains from trade that can be shared between the interest group and the politicians delivering the favorable legislation.[123] A "contract" is formed between the legislator and the interest group: The legislator promises his support for the bill; the interest group promises its support for the legislator.

A. Effect of Increased Tenure Within Legislatures

Legislative contracts differ from other market contracts, however, in that the interest group has no way of enforcing its claim to the benefits of the bargain.[124] Performance is not simultaneous: Buyers make their bids, in the form of efforts to elect a legislator, before the legislator can produce the desired law.

More importantly, a legislator may be unable to provide the maximum potential benefit of the bargain. One legislative session cannot bind the decisions of a subsequent session. A bargain agreed to today can be broken next year if there is enough turnover or legislative reneging to disrupt the coalition of legisla-

---

120 *See* Stigler, *supra* note 112, at 18.

121 *See* POSNER, *supra* note 117, at 526 (arguing that transferring wealth implicitly through regulatory limits on competition raises the information costs of opposing the transfer when compared to a one-time lump-sum transfer equal to the present value of the transfer).

122 These institutions include things such as the system of legislative committees, Landes & Posner, *supra* note 112, at 878; judicial review, *id.* at 879; and the executive veto, *see* W. Mark Crain & Robert D. Tollison, *The Executive Branch in the Interest-Group Theory of Government*, 8 J. LEGAL STUD. 555 (1979).

123 *See* R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

124 Landes & Posner, *supra* note 112, at 877.

tors that passed the bill. Legislative churning can lead to the perpetual overturning of one piece of legislation in favor of another. If the effectiveness of a legislative act can be guaranteed only until the next electoral session, the value of legislation to interest groups will decline. As a result, these groups will be unwilling to make substantial investments in purchasing legislation that may be obsolete within a few months or years, or which may require investment of further resources at a later date. "[T]he most basic issue related to the demand for legislation is how to explain why laws persist over time. That is, why is the work of one legislature not overturned by the next legislature?"[125]

The most effective way to increase the durability of legislation is to increase the durability of the legislative coalition that initially supported it. For example, a hypothetical legislature that could pass laws with a perpetual lifespan could capture the full present value of the expected benefits that piece legislation could produce over its entire effective life. Increasing the expected tenure of legislators will increase the present value of the legislation they pass. This increases the gains available to be shared between legislators and special interests. Thus, increasing the tenure of legislators will directly increase the value of wealth transfers to special interest groups.

Increasing the tenure of legislators will also indirectly increase the number and value of special interest contracts by reducing transaction costs within the legislature itself.[126] The dilemma confronting intra-legislative deal-making among legislators is similar to the problem confronting different legislative sessions over time. Each legislator has an incentive to form majority coalitions for his own bill by promising to exchange his own vote on colleagues' bills, i.e., logrolling. Once a given legislator's bill is passed, however, he has an incentive to breach his promise by shirking on his promise to help pass the bills desired by his allies. In the extreme situation, if all legislators could serve only one term, all bills would have to be passed simultaneously or not at all. This would substantially raise the transaction costs of passing legislation. Where legislators serve more than one term, this problem is mitigated because reneging would undermine a legislator's ability to form agreements in subsequent sessions. Thus, a

---

[125] Tollison, *supra* note 114, at 344.

[126] *See* David N. Laband, *Transaction Costs and Production In a Legislative Setting*, 57 PUB. CHOICE 183 (1988).

more senior legislator is a more "trustworthy" legislator from the perspectives of special interests and other legislators. Seniority alleviates the problems caused by the lack of simultaneity in the legislative process by enforcing contracts among the members of the legislature. Legislators will deal more readily with those who have invested in a reputation for trustworthiness.

By decreasing transaction costs, increased seniority can make it easier to produce new legislation. Increased tenure will increase the durability of legislation once passed. By making legislation easier to pass and more difficult to repeal, more wealth transferring legislation can be produced.[127]

B. Increased Tenure Among Legislators

A similar relationship holds when comparing the effects of seniority among legislators within a given legislature. A more senior legislator will be able to form disproportionate numbers of legislative coalitions relative to those formed by his less-senior colleagues. Thus, more senior legislators will be better able to deliver wealth-producing legislation for their supporters than less senior, less "trustworthy" colleagues.

More senior members benefit from a number of comparative advantages. Having already invested in brand-name capital that establishes their reliability, they may be able to produce reciprocal promises at a lower cost than those without a track-record. Legislative institutions often reward more senior members through preferred committee appointments, chairmanships, and other powerful positions. Indeed, making senior members the "gatekeepers" for legislation through committee control helps to protect the durability of legislation by blocking its reconsideration.[128]

Moreover, within a given legislature, the bills of more senior legislators are voted on before the bills of less-senior mem-

---

[127] Because it both increases the durability of legislation and decreases the transaction costs of achieving legislation, increased seniority has an asymmetrical effect of making new legislation easier to achieve without the risk of overturning prior legislation. Thus, increased tenure could conceivably increase both the quality and quantity of special-interest legislation produced. This dual result of increased tenure runs counter to the accepted wisdom that increased duration of legislation can be bought only at the cost of a decreased quantity of legislation. *See, e.g.*, POSNER, *supra* note 117, at 531.

[128] *See* Landes & Posner, *supra* note 112, at 878.

bers.[129] This is because these legislators can be relied on to participate in subsequent votes and to carry out their legislative *quid pro quos*.[130] Less senior and less tested legislators are less trustworthy with regard to their voting behavior, so their bills are voted on last.[131] As a result, more senior members exercise agenda control to determine when bills will be considered during a legislative session.

Thus, if a state's congressional delegation is more senior than those of other states, that state should be expected to receive more than its pro-rata share of federal spending. Empirical research has demonstrated this to be the case, most dramatically in the House,[132] where spending bills originate, but also in the Senate.[133]

C. Bicameralism

Bicameralism constrains the ability of legislatures and special interests to enter into contracts. Bicameralism makes formation of special interest contracts by one house contingent on majority support in the other house as well. If the support of the winning coalition in one house overlaps with the other, bicameralism poses little obstacle to passage of legislation. If, however, the two houses are drawn from different constituencies, the logrolling coalitions necessary to generate passage in both houses become more complicated, thereby reducing the number of contracts formed. Where overlap is substantial, the goals of politicians and interest groups from a given geographic area will be similar. For example, if identical districts elect an equal number of senators and representatives, the majority coalition supporting a bill in one house will mirror the majority in the other.[134] As

---

[129] W. Mark Crain et al., *Final Voting in Legislatures*, 76 AM. ECON. REV. 833, 833-35 (1986).

[130] *Id.* at 834.

[131] *Id.*

[132] *See* W. Mark Crain & Robert D. Tollison, *Representation and Influence: A Reply*, 10 J. LEGAL STUD. 215, 218 (1981) (legislator influence exerts an impact on federal allocations that is independent of the number of representatives, and hence the population, that a state has); W. Mark Crain & Robert Tollison, *The Influence of Representation on Public Policy*, 6 J. LEGAL STUD. 355, 357 (1977) (more senior delegations to the House are related to larger expenditure proportions of the federal budget).

[133] *See* Stigler, *supra* note 112, at 26-27 (seniority of U.S. senators impacts the dispersal of federal grants and employment relative to its entire representative delegation).

[134] If only a bare majority of a house's representatives is needed to pass legisla-

overlap decreases, the constituencies of the members of the two houses are more likely to differ and the goals of the two houses are more likely to be at odds. A decrease in the similarity of representatives' constituencies increases the size of the group necessary to enact legislation.[135] Reducing the overlap of the constituencies of the two houses ensures that legislation reflects the wishes of more than a small minority.

For a given polity size and number of representatives, an increase in the size of one house relative to the size of the other alters the basis of representation within each house, reducing the similarity or homogeneity of the constituencies between the two houses.[136] As the constituent bases of the two houses become more disparate, conflict over desired courses of action increases and developing bargains suitable to everyone becomes increasingly necessary.[137]

Interest groups will seek to maximize their potential return from lobbying both houses.[138] In other words, production of legislation by a "generous" house with which special-interest contracts are easily formed can be reduced by a more reluctant house. The difficulty of reaching agreement with the second house will influence the amount that interest groups will be willing to spend to influence the first.[139] As the sizes of the two houses become more disparate and the constituencies legislators represent become more diverse, obtaining majorities in both houses becomes more costly.[140]

---

tion, and each representative in the governing majority needs just over one-half of the voters in his district, then, in theory, one-quarter of the voters (i.e., one-half of the voters in one-half of the districts) could control the elected legislature. *See* BUCHANAN & TULLOCK, *supra* note 17, at 233-35.

[135] *Id.*; W. Mark Crain, *Cost and Output in the Legislative Firm*, 8 J. LEGAL STUD. 607, 612 (1979).

[136] Crain, *supra* note 135, at 612.

[137] *Id.* at 612-13. The Framers understood the protection provided by increasing the diversity between the two houses of a bicameral legislature. *See* THE FEDERALIST NO. 62, *supra* note 20, at 418. Madison recognized that "the improbability of sinister combinations [was] in proportion to the dissimilarity in the genius of the two bodies"; thus, it was considered "politic to distinguish them from each other by every circumstance." *Id.*

[138] Robert E. McCormick & Robert D. Tollison, *Wealth Transfers in a Representative Democracy*, *in* TOWARD A THEORY OF THE RENT-SEEKING SOCIETY 293, 295 (James M. Buchanan et al. eds., 1980).

[139] In fact, increasing homogeneity increases legislative activity at a greater than proportional rate. *See* Crain, *supra* note 135, at 621.

[140] William Shughart II & Robert Tollison, *On the Growth of Government and the Political Economy of Legislation*, 9 RES. L. & ECON. 111, 121 (1986).

Therefore, where a large disparity in the production of special-interest legislation exists between the two houses of a bicameral legislature, interested parties would be expected to demand a change that would make the houses more homogeneous. Special-interest groups will seek homogeneity to increase the return on their lobbying investments. The more generous house will also seek homogeneity because the penuriousness of the other house will limit its own ability to form special-interest contracts.

IV

SPECIAL-INTEREST ANALYSIS OF THE SEVENTEENTH AMENDMENT

This section explains how the special-interest group model applies to the passage of the Seventeenth Amendment. The Seventeenth Amendment loosened constraints that had previously limited the ability of the federal government to transfer wealth to organized special-interest groups. By loosening oversight of senators, the Seventeenth Amendment made possible massive wealth transfers by the federal government that had been impossible throughout the nineteenth century.[141] The Seventeenth Amendment changed the "playing field" upon which rent-seeking behavior took place.

Understanding why the Seventeenth Amendment increased the ability of special interests to secure favorable legislation at the federal level first requires an explanation of how the original system thwarted federal rent-seeking activity so effectively. After understanding how the original system worked, we can identify the forces that led special-interest groups to favor the Seventeenth Amendment.

Changing the system for electing senators made monitoring the behavior of senators more difficult and thereby permitted more legislation advancing causes of particular interest groups. In addition, the rise of a national economy changed the traditional structure of relationships between politicians and interest groups. Interest groups extended beyond state boundaries, necessitating new legislation to further their goals. Finally, the Seventeenth Amendment was not uniformally supported throughout the country; it was strongest in regions that stood to gain financially from the reform.

---

[141] *See* Boudreaux & Pritchard, *Rewriting*, *supra* note 16, at 146.

A. Pre-Amendment History: Senators as Agents

The Constitutional Convention provided for selection of senators by state legislatures for two reasons. First, the Senate was intended to protect the independence of the states from being trampled by the federal government.[142] Second, election of senators by the state legislature rather than a vote of the people was intended to create a true bicameral legislative branch.[143] Having the legislature draw authority from two different sources made it more difficult for special-interest "factions" to divert the powers of government toward private ends.[144]

Allowing state legislatures to select senators provided the states with an institutional weapon to defend their sphere of action. The people at large could speak through the House of Representatives and the President. The Senate provided a forum for states to preserve their power as states and thereby prevented the federal government from swallowing them.[145] Without ratification of federal actions by the states in their sovereign authority, state action would be subject to the mercy of the federal government. As Joseph Story observed, "The equal vote in the Senate is, . . . at once a constitutional recognition of the sovereignty remaining in the states, and an instrument for the preservation of it. It guards them against a consolidation of the states into one simple republic."[146]

Federalism, however, was not an end in itself. As evidenced in other provisions of the Constitution, the purpose of preserving federalism was to restrain the power of factions to divert the power of the federal government towards private ends.[147] This goal was achieved through bicameralism: two legislative houses with members accountable to distinct constituencies. Before taking effect, legislation would have to be ratified by two independent power sources: the people's representatives in the House, and the state legislatures' agents in the Senate.

The purpose of bicameralism was to make passing legislation

---

142 *See supra* note 26 and accompanying text.

143 THE FEDERALIST NO. 51, *supra* note 4, at 350.

144 *Id.*

145 *See* Vik D. Amar, Note, *The Senate and the Constitution*, 97 YALE L.J. 1111, 1116 (1988).

146 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 179 (Thomas M. Cooley ed., 1873).

147 *See* THE FEDERALIST NO. 10 (James Madison) (Benjamin Fletcher Wright ed., 1961).

more difficult.[148] This purpose could be achieved by making the House and Senate accountable to different constituencies. Madison wrote:

> In republican government, the legislative authority, necessarily, predominates. The remedy for this inconveniency is, to divide the legislature into different branches; and to render them by different modes of election, and different principles of action, as little connected with each other, as the nature of their common functions and their common dependence on the society, will admit.[149]

Different constituencies for the two houses protect the public by ensuring that legislation represents the views of a majority of the populace. This limits the ability of special interests to pervert the legislative process:

> Another advantage accruing from . . . the constitution of the senate is, the additional impediment it must prove against improper acts of legislation. No law or resolution can now be passed without the concurrence first of a majority of the people, and then of a majority of the States. It must be acknowledged that this complicated check on legislation may in some instances be injurious as well as beneficial; . . . [but] as the facility and excess of law-making seem to be the diseases to which our governments are most liable, it is not impossible that this part of the constitution may be more convenient in practice than it appears to many in contemplation.[150]

Requiring the consent of a second house "distinct from, and dividing the power with, [the] first . . . [would] double[ ] the security to the people, by requiring the concurrence of two distinct bodies in schemes of usurpation or perfidy."[151]

The role of the Senate in limiting the scope of factions was also noted in the ratifying conventions. Charles Cotesworth Pinckney of South Carolina observed that basing representation on population alone would "have operated as [a] temptation[ ] to designing and ambitious men to sacrifice the public good to private views."[152] Selection of senators by state legislatures mitigated

---

148 *See* Easterbrook, *supra* note 5.

149 THE FEDERALIST NO. 51, *supra* note 4, at 350; *see also* Edmund Burke, *Reflections on the Revolution in France*, *in* 8 THE WRITINGS AND SPEECHES OF EDMUND BURKE 53, 110 (Paul Langford ed., Clarendon Press 1989) (noting the importance of the tricameral system of the Estates General in pre-Revolution France in preserving ordered liberty).

150 THE FEDERALIST NO. 62, *supra* note 20, at 417.

151 *Id.* at 418.

152 4 ELLIOT, *supra* note 26, at 257 (1836); *see also* 1 THE RECORDS OF THE CON-

Pinckney's fears:

> This cannot be the case at present; the different mode of representation for the Senate will, as has already been observed, most effectually prevent it. The purpose of establishing different houses of legislation was to introduce the influence of different interests and principles; and [Pinckney] thought that we should derive, from this mode of separating the legislature into two branches, those benefits which a proper complication of principles is capable of producing, and which must, in [Pinckney's] judgment, be greater than any evils that may arise from their temporary dissensions.[153]

The Senate was seen as the forum for the states to speak as sovereign entities. State governments ensured that senators represented their interests through the historic practice of "instructing" senators. Under this practice, state legislatures told senators how to vote on particular legislative items.[154] A senator served as "an ambassador of the State to the nation while the [House] representative was simply a member of his branch of congress and not in any way subject to other authority than that of his constituents and of the nation as a whole."[155] "As the 'constituency' of U.S. senators, the state legislatures regularly instructed them."[156] Senators who failed to heed their instructions were usually forced to resign, even if their terms were not complete.[157] As agents of the state legislatures, the primary duty of senators was to protect the sphere in which state and local governments could operate, free from the potentially strong arm of Washington.

It is important to note, however, that this institutional con-

---

STITUTIONAL CONVENTION 254 (Max Farrand ed., 1911) (statements of James Wilson).

153 4 ELLIOT, *supra* note 26, at 257.

154 Kenneth Bresler, *Rediscovering the Right to Instruct Legislators*, 26 NEW ENG. L. REV. 355, 365 (1991).

155 William E. Dodd, *The Principle of Instructing United States Senators*, 1 S. ATLANTIC Q. 326, 327 (1902).

156 Bresler, *supra* note 154, at 365 (footnotes omitted). Bresler also notes that "[a] common formula was for state legislatures to instruct U.S. Senators and request that U.S. Representatives vote in a certain way. The formula recognized that individual citizens, and not the legislatures, were the constituencies of U.S. Representatives." *Id.*

157 Bresler provides several examples of situations where senators were forced to resign for disobeying instructions. *See id.* at 365-67. In Virginia, the General Assembly declared that instructions could be disobeyed only if the instruction required violating the Constitution or committing an act of moral turpitude. *Id.* at 366. Moreover, it commanded that any Virginian who did not feel bound by instructions should not accept appointment as a U.S. senator. *Id.* at 366.

straint on the domain of the federal government did not impair its ability to function in times of national crisis. Federal action was permitted when necessary, most notably during times of war.[158] After a national crisis subsided, however, federal expenditures returned to their traditional level as measured as a percentage of national income.[159] The "ratchet effect" of federal intervention, persisting after the dissipation of the crisis that spawned it,[160] was absent from American history until World War I. The predominance of state and local action was reasserted soon after each crisis abated. By contrast, post-Seventeenth Amendment history has been marked by the increasing dominance of the federal government relative to the state and local authorities.[161]

In general, the activity of the federal government in the nineteenth century was confined to the provision of "public goods," such as defense and international relations.[162] Redistributive activity to special-interest groups was virtually non-existent at the federal level.[163]

A low level of federal redistributive activity does not rule out the presence of special-interest legislation on the state level. On the state level, however, special-interest legislation is likely to be lower than comparable federal activity. If a state's special-interest activity becomes too expensive to the public at large, residents can move to a state with lower redistributive activity costs.[164] This ability to flee the costs of rent-seeking activity limits the ability of state and local authorities to engage in such practices. However, this limitation is absent on the national level because moving to another country is not a practical nor desirable alternative for most citizens. Accordingly, rent-seeking at the state level is usually less destructive to the economy than rent-seeking at the national level because the possibility of exit limits

---

158 *See* Meiners, *supra* note 9, at 95.

159 *Id.*

160 *See* HIGGS, *supra* note 64, at 30.

161 *See* Borcherding, *supra* note 31, at 25-26.

162 *See* HIGGS, *supra* note 64, at 114.

163 *See id.* at 26.

164 *See* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 52-53 (1990); POSNER, *supra* note 117, at 533; Easterbrook, *supra* note 5, at 1333; Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 418-24 (1956).

the costs imposed on those paying the bills.[165]

Election of senators by state legislatures made it difficult for special interests to engage in rent-seeking activity. While they could directly lobby the popularly-elected members of the House, pushing a bill through the Senate required the acquiescence of majorities in the state legislatures that senators represented. The costs of persuading a majority of both houses of a majority of states to permit their senators to vote in the desired manner were likely to be extremely high. Influencing a senator required working through numerous intermediaries on the state level. Interest groups would spread their expenditures across the various state delegations to equalize the marginal benefit to the interest group of each dollar spent on all delegations.[166] As a result, states with lower marginal returns to lobbying would tend to decrease the amount spent in rent-seeking activity as well as the overall amount of wealth transferred.

The costs of influencing the state legislators to permit senators to vote for wealth-transferring acts were even higher because state legislators considered that realm of legislation their domain. State legislators prevented the federal government from carrying out wealth-transferring activity because they wanted to preserve that power for themselves. By retaining sole authority to pass out economic rents, state legislators could receive the benefits that accompany this power.[167] They would be compensated not just for allowing the senator to vote in the way requested, but also for the opportunity cost of foregoing the use of their own power to deliver the proposed regulation themselves.

Little federal rent-seeking activity occurred throughout the nineteenth century as a result of the high costs of forming special-interest contracts on the federal level. As one commentator has observed, "The whole structure of checks and balances, the indirect representation of senators, the tripartite division of powers, as well as the reservation of power by the states, made any governmental efforts to redistribute income . . . very costly."[168] Moreover, because most redistributive activity occurred on the

---

165 *See* Easterbrook, *supra* note 5, at 1338. Of course, this is the opposite of Madison's belief that faction was more dangerous on the state level. *See id.* at 1338.

166 *See* McCormick & Tollison, *supra* note 138, at 295.

167 *See supra* part III.

168 AMERICAN ECONOMIC GROWTH: AN ECONOMIST'S HISTORY OF THE UNITED STATES 647 (Lance E. Davis et al. eds., 1972) [hereinafter AMERICAN ECONOMIC GROWTH].

state level, inter-jurisdictional competition limited the total amount of rent-seeking activity in the economy.[169]

B. The Push for Direct Election

1. Development of a National Economy

The inability of the federal government to produce special-interest legislation during the nineteenth century led to pressures for institutional change. The post-Civil War Era was characterized by a rapid rise in interstate commerce and a rise in the influence of national interest groups.[170] Whereas interest groups had previously been linked to local economic interests, the latter half of the nineteenth century saw the rise of organized labor unions[171] and increased interstate commerce through railroads and other improved transportation and information systems. Moreover, the increased national wealth that accompanied the spread of labor across a national market also increased the gains available to any group that could tap into this wealth through the political process.[172]

The rise in interstate economic activity was accompanied by a rise in the number of interest groups with interstate concerns. The growing national power of railroads, labor unions, and trusts made national political action more important. "[T]he size of the market underwent radical expansion. At the beginning of the century, except for those in international trade, markets were predominantly local, and most economic units either were self-sufficient or produced for local consumption."[173] But, "[a]s markets shifted from local to state to national, the scope of political activity and its potential gains moved in the same direction."[174]

Given the interstate nature of the demanding interest groups, a Senate responsible to state governments would tend to underproduce legislation demanded by national special-interest

---

169 *See supra* note 164 and accompanying text.

170 *See* Easterbrook, *supra* note 5, at 1335-36.

171 Higgs notes that labor union membership grew from less than half a million in 1897, to about two million in 1904, and finally reached three million in 1917. The greatest strongholds were made in the railroad and coal mining industries. HIGGS, *supra* note 64, at 108.

172 *See* Easterbrook, *supra* note 5, at 1338.

173 AMERICAN ECONOMIC GROWTH, *supra* note 168, at 647.

174 *Id.* at 649; *see also* KOLKO, *supra* note 13, at 6 (noting that business advocacy of federal regulation was driven by a desire "to stabilize industries that had moved beyond state boundaries" and to fend off less-beneficient state regulation).

groups.[175] Each senator would be pressured to reward only the interests of his state and to protect the state legislature's hold on the power to redistribute wealth. Passing legislation for groups whose strengths were dispersed among several states would impose costs on the state legislatures that chose a senator to protect home state interests. In contrast, House members could trade off support for national interest groups in return for political support more readily than could members of the Senate. For House members, the money and other support interest groups provided could be converted directly into votes, rather than all lobbying being funnelled through the state legislatures.

Direct election allowed senators to act similarly to representatives. Senators could now convert special-interest support into reelection assets. While senators' new independence raised the costs of influencing them, this increase was dwarfed by the decrease in costs resulting from their ability to contract with senators directly, rather than work through the state legislatures.[176] Rent-seeking expenses could be equated across the House and the Senate, rather than through the less-efficient process of having to spread resources across the House and the various state legislatures.

In the decades leading up to the passage of the Seventeenth Amendment, the Senate consistently frustrated the redistributive desires of the House. Special-interest legislation frequently passed the House, only to stall in the Senate.[177] For instance, in 1911 alone, the House passed twenty-seven pro-labor measures, eighteen of which were rejected by the Senate.[178]

Because all legislation must pass both houses, the Senate's reluctance to follow the House's lead in passing redistributive legislation drove down the marginal return of lobbying either house. Spending money to influence House members was worthless if the Senate could not be induced to go along. Because marginal expenditures on lobbying will be equated across both houses of a

---

[175] As noted earlier, there is no indication that public goods which could be provided only on the national level, such as national defense, were underproduced during the time when senators were selected by state legislatures. *See supra* notes 162-63 and accompanying text.

[176] *See* Easterbrook, *supra* note 5, at 1338; Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 79 (1985) (observing that the democratization of the Senate is one factor that has made it easier for private interest groups to exert influence upon legislators); Amar, *supra* note 145, at 1129.

[177] *See* Meiners, *supra* note 9, at 93.

[178] BUENKER, URBAN LIBERALISM, *supra* note 13, at 85.

bicameral system, the penuriousness of the Senate decreased the price that House members could charge for their services.

As a result, House members would likely favor institutional changes increasing the similarity in the constituency between themselves and senators. Thus, it is not surprising that between 1893 and 1911, proposals for direct election of senators passed the House six times, only to die each time in the Senate.[179] The House had become a body responsive to national impulses, while the Senate continued to fight the tendency toward the federal government's aggrandizement of power.

2. *Decreased Monitoring*

A second characteristic of the movement to direct election was that it made monitoring a senator's behavior more difficult. As monitoring became more difficult, it became easier for senators to sacrifice their constituents' concerns for their own desires and those of special-interest groups.

State legislators had the ability and incentive to monitor senators much more closely than could the dispersed public. Members of state legislatures were in a better position than the dispersed public to secure and deal with information from Washington. Because of the small size of state legislatures, each legislator had an incentive to monitor the senator's behavior.[180] One legislator in a body of forty legislators can have some practical control over a senator's behavior; one voter in a constituency of several million cannot. Moreover, because they elected and instructed senators, legislators had an incentive to monitor their behavior; the legislator could be made to suffer at the polls for unpopular decisions by senators.[181] Thus, while some agency problems existed, senators generally acted on the orders of state legislatures. While senators were often recalled for violating the orders of state legislatures, the threat of such action was usually enough to deter the others.[182]

The nineteenth century was a time of rapid economic growth. Per capita Gross National Product increased by approximately

---

[179] 1 HAYNES, SENATE, *supra* note 11, at 178.

[180] *See supra* notes 154-57 and accompanying text; *see also* Easterbrook, *supra* note 5, at 1332 ("representatives, being fewer in number than the electorate as a whole, are more apt to conclude that their votes *do* matter and therefore to make the effort necessary to choose wisely").

[181] *See supra* notes 154-57 and accompanying text.

[182] *See supra* notes 156-57 and accompanying text.

four percent annually from 1840-1900.[183] As income increased, the opportunity cost to voters of spending time monitoring the political process also increased, leading to a reduction in monitoring activities.[184] State legislators would have continued to monitor senators closely. In contrast, increasingly wealthy private citizens would have found it expensive to spend time and energy monitoring politicians when compared to alternative uses of their time.[185]

Contemporaneous expansions of the franchise to new voters also reduced the marginal value of each individual's vote, leading to a reduced incentive for public monitoring.[186] New recipients of the franchise also tended to be poorly-educated recent immigrants who lacked knowledge of the political process.[187] This combination of increased wealth and an enlarged, less-informed electorate meant that a transition to direct election would tend to further decrease the degree of monitoring to which a senator would be subject.

3. *Seniority Differences*

The special-interest theory of government can also explain why the push for popular election became a national movement, rather than a state-by-state reform movement. Several states had systems approximating direct election by the turn of the century, through primaries, pledges, and other similar methods.[188] Other

---

183 AMERICAN ECONOMIC GROWTH, *supra* note 168, at 35.

184 *See* McCormick & Tollison, *supra* note 138, at 296. McCormick and Tollison find a substitution effect for increased wealth: As wealth increases, monitoring declines. An individual can make income either by producing it through voluntary exchange in the market or by investing it in trying to gain or maintain political favors that provide him with wealth. As wealth increases, the marginal benefit of market activities increases relative to political activities. Thus, the marginal benefit of investing time and resources in monitoring the political process falls. As a result, as the economy grows, monitoring falls. McCormick and Tollison's empirical demonstration of this substitution effect rebuts the claim that government is a normal good, i.e., that people demand more government as wealth increases. It is more accurate to say that as wealth increases, people get more government—even though they do not want it.

185 It is interesting to note that the practice of instructing senators died with the Seventeenth Amendment. The end of the power of instruction raised monitoring costs even more. *See* Bresler, *supra* note 154 (arguing for a return to the system of instruction).

186 *See* Boudreaux & Pritchard, *Rewriting*, *supra* note 16, at 143-44.

187 *See* BUENKER, URBAN LIBERALISM, *supra* note 13, at 1-6; Boudreaux & Pritchard, *Rewriting*, *supra* note 16, at 143.

188 1 HAYNES, SENATE, *supra* note 11, at 98-104.

states eschewed these innovations,[189] suggesting that a diversity of opinion existed as to the "justice" and efficiency of election by state legislatures. Most elections in most states were uneventful, and some adopted reforms voluntarily.

Relative differences among states in the seniority of their delegations produce differences in power. More senior delegations have more influence because of their increased status on committees, greater reliability in maintaining contracts with special interests,[190] and greater ability to logroll with other legislators.[191]

States with less-senior delegations, therefore, are net losers to more senior states in the struggle for federal money. Moreover, differences in state election processes may result in consistent differences in seniority: classes of permanent "winners" and "losers." If consistent inequalities in seniority result from using different electoral systems, adoption of a uniform rule, such as direct election, will eliminate the disparities. Removing institutions that give some states a comparative advantage in developing more-senior delegations levels the playing field, allowing all states to compete equally.

One-party southern states after the Civil War repeatedly were able to return the same senators to Washington.[192] Politics in the western states, by comparison, were chaotic throughout the pre-Seventeenth Amendment period.[193] The western states saw a succession of third parties and intra-party insurgencies constructed on populist and progressive lines that made it impossible to achieve a steady majority for any length of time.[194] As a result, there was a "churning" in Senate delegations: each time a new coalition came to power, senators were replaced by representatives of the new coalition.[195]

The differences in influence between the more-senior southern delegations and less-senior western delegations are reflected in the allocation of federal funds during that period. Federal expenditures rose dramatically throughout the southern states in

---

189 *See* 1 HAYNES, SENATE, *supra* note 11, at 104 (in the 1910 session, fourteen out of thirty senators had been chosen by some form of direct election).

190 *See supra* notes 122-23 and accompanying text.

191 *See supra* notes 126-27 and accompanying text.

192 *See* Haynes, *The Changing Senate*, *supra* note 11, at 229-30.

193 *See* 1 HAYNES, SENATE, *supra* note 11, at 100.

194 *See* Haynes, *The Changing Senate*, *supra* note 11, at 229-30.

195 *See* E. Daniel Potts, *William Squire Kenyon and the Iowa Senatorial Election of 1911*, 38 ANNALS OF IOWA 206 (1966).

the period from 1870 to 1900.[196] By contrast, western influence declined during the same period.[197]

The South's one-party system isolated U.S. senators from developments in the state legislatures by permitting the same person to be returned repeatedly. In contrast, each gyration in state politics in the western states was reflected in a change in the senator chosen. Southern senators could enter into long-term contracts with special-interest groups because they were assured of remaining in Washington for multiple terms. Senators from western states could not promise that the contracts they formed with special-interest groups would have the same degree of durability. Thus, southern senators were able to increase the number and value of their contracts with special interests. Combined with the other institutional arrangements favoring seniority, such as the committee system, southern senators exercised a disproportionate amount of power, especially relative to their western brethren.

Direct election of senators provided a means for western interests to break this cycle of southern dominance. By removing the decision from the hands of state legislatures, popular election could shield senators from the disruptions caused by party competition on the state level. Direct election allowed state legislatures to tie their own hands and maintain a stable delegation to Washington, even if state politics were unstable. By allowing voters to bypass the issues causing dissension on the state level, direct election would allow a state's senatorial delegation to maintain the same stability as southern delegations.

Western states provided most of the impetus for the Seventeenth Amendment.[198] By contrast, southern states were disproportionately represented in the group of states that opposed ratification.[199] Moreover, the rhetoric of western politicians indicated that they supported popular election of senators as a means of rectifying imbalances in power in Washington.[200]

---

196 *See* Lance Davis & John Legler, *The Government in the American Economy, 1815-1902: A Quantitative Study*, 26 J. ECON. HIST. 514, 529 (1966).

197 *Id.*

198 *See* HAYNES, ELECTION, *supra* note 11, at 108-09.

199 Alabama, Delaware, Florida, Georgia, Kentucky, Maryland, Mississippi, South Carolina, and Virginia refused to ratify the amendment and Louisiana did so only after it had already passed. Of the states opposing ratification, only Rhode Island and Utah could not be considered southern. *See supra* note 6.

200 *See, e.g.*, Easterling, *supra* note 108, at 493, 501.

Western politicians in the post-Civil War Era were acutely aware of their diminishing influence, giving rise to a group of midwestern senators known as the "Insurgents," who were dedicated to the self-proclaimed goal of "balancing the scales which had been weighed against agrarian interests."[201] The increasing nationalization of the economy had overwhelmed the regional interests of the agrarian states:

> For years Western farmers had patiently subscribed to an alliance with the commercial and industrial classes of the East to stimulate the economic growth of the nation. But as the economy grew more centralized, Midwestern farmers lost their economic independence, and the benefits they received in return for supporting a protective tariff and lax regulation of corporations and railroads, lost their former value. The partners in this alliance no longer shared its benefits equally.[202]

Western politicians saw popular control of government as a means to rectify the imbalances under which they suffered:

> The Insurgents were concerned with two major reforms: first, the control or destruction of the powerful corporate interests in the East; and second, the expansion of "popular government." These two goals were inter-related because Insurgents assumed that the extension of popular control over government would automatically weaken the influence of the corporate interests. To . . . Insurgents, the direct election of senators promised to take control of the senate away from these interests and restore it to "the people." Implicit in this maneuver was the hope that it would relieve the economic discrimination against their region.[203]

In contrast to the Insurgents' zeal for direct election, southern senators led the opposition to the Seventeenth Amendment on the Senate floor.[204]

While claiming an affinity with the broader Progressive agenda, western senators' concrete legislative goals were driven mainly by a desire to advance the interests of the economic forces in their region, not ideological considerations. As one historian observes of the Insurgents:

> Under direct elections, [the Insurgents] believed the people would elect senators who were free from the influence of the

---

201 *Id.* at 492.

202 *Id.*

203 *Id.* at 492-93 (internal footnote omitted); *see also id.* at 501 (explaining Kansas Senator Joseph Bristow's conversion to a belief in direct election of senators as a means of "end[ing] the economic discrimination against his region").

204 *Id.* at 497.

> great corporate interests, and who would work to correct the economic imbalance that favored the commercial and industrial interests of the East over the agrarian interests of the Midwest. Comparatively, [the Insurgents'] legislative goals were restricted and did not extend far beyond the narrow interests of [their] own region. [They], for example, were not especially concerned about social reforms that affected city workers, such as minimum wage and maximum hours legislation, old age pensions, and workmen's compensation. As one historian has noted, it was "not so much that they opposed these measures, but just that they paid them little attention." What interested Insurgents more were matters that directly affected their constituents, such as tariff revision and railroad regulation. Consequently, when [Insurgents] spoke of restoring control of the government to "the people" through the 17th Amendment, implicitly [they] meant the people of [their states].[205]

Western senators sought to redress the balance of power between the regions through direct election. The adoption of popular election could eliminate imbalances in political power caused by the generally shorter tenures of western senators.

4. Popular Election as a Constitutional Movement

The special-interest theory of government also explains why constitutional amendment, rather than statute, was the course chosen for imposing a uniform national rule on all the states. The interest-group theory suggests that a constitutional amendment was pursued as a means to ensure a more stable reform than could be achieved through standard legislation.[206] Legislation or constitutional revision at the state level would be subject to future state legislatures overturning previous agreements for popular election. The power to elect senators was potentially one of the most important responsibilities of a state legislator, providing a strong incentive to reclaim this power where possible. As a result, state laws limiting legislators' discretion would be in danger of being overturned. A federal constitutional amendment would remove the ability of state legislatures to reassert control over Senate selections.

Moreover, the costs of passing the Seventeenth Amendment were reduced by a variety of factors. The House support for popular election of senators further entrenched the Amendment by making it difficult to repeal. The House indicated its support

---

[205] *Id.* at 510-11 (internal footnote omitted).

[206] *See* Boudreaux & Pritchard, *Rewriting*, *supra* note 16, at 115-23.

repeatedly between 1893 and 1911.[207] Strong House support made the costs of passing the Amendment lower than the costs of repealing it later.

Nor can the presence of ideologically-committed reformers in the Progressive Movement be ignored. The opportunity for less-idealistic reformers to clothe their ambitions in the dress of the public interest also made passage easier. Moreover, once power was given to the people, it became inconceivable to think of it being reclaimed.

Thus, while the marginal costs of achieving popular election through a federal constitutional amendment were higher than for alternative means,[208] asymmetries in relative costs made passage more likely while repeal by a subsequent amendment remained difficult. As a result, it was more efficient for interest groups to pursue a constitutional amendment, rather than settling for mere legislative changes.[209] Once enacted, the Seventeenth Amendment entrenched the popular electoral regime, allowing for a long-term exploitation of the benefits such a regime would produce.

V

TESTING THE INTEREST-GROUP EXPLANATION

The model described leads to empirically testable implications for the validity of the interest-group explanation of the Seventeenth Amendment. This Section presents two tests of the interest-group explanation. First, it tests the proposition that the push for direct election was an attempt to increase the tenure of senators. Increasing tenure would increase both the number of special-interest contracts formed, as well as their value. Second, the support of the western states is tested to see whether direct election was intended to correct seniority imbalances that had redounded to the disadvantage of the westerners. The first part of this Section develops the tests of the interest-group theory. The second part presents the results and conclusions of the tests.

---

[207] 1 HAYNES, SENATE, *supra* note 11, at 178.

[208] *See id.* at 118-20 (detailing the factors that make constitutional amendments more difficult and costly to obtain than enactment of a law).

[209] *See id.* at 118 ("If the benefits of amendment are greater than the costs of obtaining one, a group will opt for constitutional change. If the added cost of constitutional protection exceeds the added benefit for an interest group, that group will pursue statutory protections.").

A. Hypotheses

1. Legislative Longevity

The special-interest group theory of government suggests that one purpose of the Seventeenth Amendment was to make rent-seeking activity more effective by increasing the longevity of senators. Increasing the tenures of senators would decrease transaction costs within the Senate and increase the durability that senators could provide for special-interest legislation. Thus, both the quantity and value of special-interest legislation passed would rise. It is predicted that the average tenure of U.S. senators should rise in the post-Seventeenth Amendment period relative to the pre-Amendment period.

2. Western States

Support for the Seventeenth Amendment was especially intense in the western region of the country. The Progressive Party and the Insurgent wing of the Republican Party were more prominent in these farm states than elsewhere. The strength of western support for the Seventeenth Amendment, as well as the West's persistent complaints about perceived economic discrimination against their region, suggests a second test of the interest-group explanation of the Seventeenth Amendment.

If influence in Washington is a function of the relative seniority of a state's senatorial delegation, then complaints about "economic discrimination" may have been rooted in disparities in seniority across regions. It would be expected that empirical data would demonstrate that before the Seventeenth Amendment the average level of seniority in the western states was lower than in the remainder of the country. Interregional differences in seniority would be eliminated following the transition to direct election. Direct election may have been a means of halting the decline of western influence that had characterized the era preceding the passage of the Seventeenth Amendment.

B. The Data Set

The data supplying the basis for the test are taken from *Congressional Quarterly's Guide to Congress*.[210] A data set was constructed containing the years of service for each senator, his tenure, and whether he was from a western state. The data in-

[210] CONGRESSIONAL QUARTERLY INC., *supra* note 6, at 1005-157.

clude all senators who began their tenure in the Senate from 1789 up to 1971.

The data were characterized by a high degree of heteroskedasticity between odd and even years.[211] Newly-elected senators are sworn into office in January of the year after an election, meaning that they begin their term in an odd-numbered year. Senators who begin during an even-numbered year are interim appointees completing a partial term. Therefore, odd-year tenures are significantly larger in number and longer in duration than even-numbered years. Hence, even-numbered year observations are eliminated and only the tenures of senators who entered office in an odd-numbered year (i.e., elected senators) are considered.[212]

A more serious consideration regarding the data set is the dilemma of dealing with occasions where a state suffered a vacancy in its delegation. To account for this, each regression was run twice: first ignoring the existence of vacancies, and second by treating each vacancy as a "senator" with a tenure equal to zero. Treating these observations differently will in some cases impact the outcome of regressions. Where the results differ, both are discussed.

Finally, any upward trend in the data is dealt with by the inclusion of a variable "begin" in order to trace upward trends resulting from influences other than those being tested. While important for the time series as a whole, the trend variable is insignificant for the portion tested.[213]

C. Empirical Results

This Section presents the results of the empirical tests de-

---

[211] A data set can be characterized as "heteroskedastic" when there is a high degree of variance in the value of the recorded observations as a result of factors that are "random" in relation to the overall data set. The presence of heteroskedasticity can bias the estimated variances of the data points and undermine the attempt to plot an accurate regression line. *See* 2 THE NEW PALGRAVE DICTIONARY OF ECONOMICS 640-41 (John Eatwell et al. eds. 1987) (defining "heteroskedasticity").

[212] Running the same tests while including even-numbered year observations does not change the results, however, probably due to the small number of data points that these appointed senators represent.

[213] The upward trend over the full length of the time series may reflect an increase in average lifespans from 1789 to 1971. The minimum age for service as a senator has remained at thirty years, U.S. CONST. art. I, § 3, while average life expectancy has increased dramatically over time. Over time fewer senators were forced to leave office involuntarily, for reasons such as death or illness in office.

scribed. The results show strong support for both elements of the interest-group explanation of the Seventeenth Amendment.

1. Popular Election as a Means to Increase Tenure

To test the proposition that popular election of senators was advocated as a means to increase the durability of legislation by increasing the tenure of senators, regressions are run to check for a break in the time series as a result of the adoption of the Amendment in 1913. Regressions include average tenure as the dependent variable, using a trend variable, "begin," and a dummy variable to test for a break in the trend in 1913. Regressions are run for four time periods: 1870-1920, 1885-1920, 1870-1933, and 1885-1933. 1870 marks the date by which most of the southern states had regained representation in the Senate following the Civil War, therefore marking one possible beginning point to identify trends in tenure. 1885 is included as an approximate date identifying the first nascent calls for direct elections. Deadlocks first began to appear in the late 1880's. 1920 is a date identifying the direct impact of the Amendment on tenure. It isolates the first senators elected immediately following the transition to the new electoral regime. Finally, 1933 is a date identifying some of the long-term impacts of the Amendment, as it identifies the period preceding the New Deal, which should probably be treated as an independent event in itself.

The interest-group theory predicts that the sign on the "amendment" dummy variable should be positive, indicating an increase in average senatorial tenure because of the Seventeenth Amendment. The results are reproduced in Table 1.

TABLE 1: TIME SERIES ON AVERAGE TENURE

VACANT SEATS INCLUDED

TIME PERIOD:	1870-1920			
Variable	Coefficient	Std. Error	t	Prob > t
Begin	-.006	.027	-.223	.824
Amendment	2.552	1.425	1.790	.074
Constant	20.020	51.869	.386	.700
TIME PERIOD:	1885-1920			
Variable	Coefficient	Std. Error	t	Prob > t
Begin	.018	.057	.317	.751
Amendment	2.336	1.590	1.469	.143
Constant	-25.956	107.885	-.241	.810
TIME PERIOD:	1870-1933			
Variable	Coefficient	Std. Error	t	Prob > t
Begin	-.011	.026	-.398	.691
Amendment	1.034	1.097	.942	.347
Constant	28.398	50.134	.566	.571
TIME PERIOD:	1885-1933			
Variable	Coefficient	Std. Error	t	Prob > t
Begin	-.002	.051	-.042	.966
Amendment	.985	1.385	.711	.477
Constant	12.370	97.293	.127	.899

VACANT SEATS EXCLUDED

TIME PERIOD:	1870-1920			
Variable	Coefficient	Std. Error	t	Prob > t
Begin	.019	.028	.673	.501
Amendment	1.396	1.423	.981	.327
Constant	-26.037	52.081	-.500	.617
TIME PERIOD:	1885-1920			
Variable	Coefficient	Std. Error	t	Prob > t
Begin	.009	.057	.155	.877
Amendment	1.630	1.581	1.031	.303
Constant	-7.744	108.592	-.071	.943
TIME PERIOD:	1870-1933			
Variable	Coefficient	Std. Error	t	Prob > t
Begin	.013	.027	.484	.628
Amendment	-.232	1.109	-.209	.834
Constant	-15.395	50.383	-.306	.760
TIME PERIOD:	1885-1933			
Variable	Coefficient	Std. Error	t	Prob > t
Begin	-.011	.051	-.206	.837
Amendment	.317	1.388	.229	.819
Constant	29.259	97.779	.299	.765

As seen in Table 1, the results for the test variable "amendment" are altered by the decision of how to deal with Senate vacancies. When vacant seats are ignored, the impact of the

"amendment" dummy variable is insignificant. When vacancies are treated as senators with tenure equal to zero, however, the impact of the dummy variable is significant at a 10% level of significance and positive in sign for the period 1870-1920. This indicates that the Seventeenth Amendment caused a large jump in average senatorial tenure, confirming the predictions of the interest-group theory.

Although statistically insignificant, the negative sign on the "begin" variable for the pre-Amendment period from 1870-1913 signifies a negative trend in average tenure, suggesting that average tenure was actually constant or may have been falling during that period. This constant or negative trend stands in contrast with a strong upward trend for the data as a whole. Movement to popular election not only halted this downward trend, but reversed it. Extending the time series to 1933 shows that the immediate post-Amendment jump in tenure tapered off a bit until the dawn of the New Deal.[214]

2. *The West*

To test the thesis that direct election was a means for western states to eliminate sectional imbalances in tenure, western and non-western subsamples were created out of the entire sample, using the classifications adopted by Haynes.[215] Average tenures were calculated for each subsample, and cross-section t-tests were performed for the pre- and post-Amendment periods. The results are given in Table 2.

TABLE 2: WESTERN VERSUS NON-WESTERN STATES
TEST: AVERAGE TENURE WEST = AVERAGE TENURE NON-WEST
BEFORE AMENDMENT
VACANT SEATS INCLUDED

TIME PERIOD: 1870-1913

Variable	Number Observations	Mean	Std. Dev.
West	183	7.743	6.745
Non-West	207	9.029	7.559

t-statistic = -1.76 with 388 degrees of freedom
Prob > t = .079

TIME PERIOD: 1885-1913

Variable	Number Observations	Mean	Std. Dev.
West	122	7.713	6.675

[214] This may be due to the onset of the Great Depression.
[215] HAYNES, ELECTION, *supra* note 11, at 108-09.

Non-West	115	8.600	7.665

t-statistic = -0.95 with 235 d.f.
Prob > t = .3424

VACANT SEATS EXCLUDED

TIME PERIOD: 1870-1913

Variable	Number Observations	Mean	Std. Dev.
West	171	8.287	6.650
Non-West	195	9.585	7.437

t-statistic = -1.75 with 364 d.f
Prob > t = .0810

TIME PERIOD: 1885-1913

Variable	Number Observations	Mean	Std. Dev.
West	110	8.555	6.496
Non-West	103	9.602	7.480

t-statistic = -1.09 with 211 d.f.
Prob > t = .2756

AFTER AMENDMENT

TIME PERIOD: 1913-1920

Variable	Number Observations	Mean	Std. Dev.
West	16	10.625	9.208
Non-West	22	11.045	8.232

t-statistic = -.15 with 36 d.f
Prob > t = .8832

TIME PERIOD

Variable	Number Observations	Mean	Std. Dev.
West	63	8.905	7.783
Non-West	67	9.433	6.985

t-statistic = -.41 with 128 d.f.
Prob > t =.6842

As shown in Table 2, prior to the Seventeenth Amendment, the average tenure of senators from western states was significantly lower than that of senators from non-western states. This difference is accentuated when vacancies are included. Following the Amendment, however, the difference disappears, and average tenure for the two groups is not significantly different. Western senate delegations no longer suffered chronic disadvantages in seniority.

Popular election arrested the western states' declining influence in Washington. By forcing popular election on the country as a whole, they were able to overcome the contentiousness of the state politics that handicapped them in the national political arena. Direct election negated the advantages conferred by greater stability in the legislatures of rival states. By insulating senators from the squabbles of state politics, senators could more

easily be returned to Washington for several terms. The rising seniority of western delegations made them more competitive in the fight for federal funds and federal regulations. Thus, they were able to eliminate the "economic discrimination" complained of in earlier days.[216]

CONCLUSION

This Article has developed and tested an interest-group explanation for the Seventeenth Amendment. Empirical tests have demonstrated support for the proposition that the movement for direct election of senators was an attempt to change the institutional structure in which rent-seeking behavior took place. The Seventeenth Amendment increased the average tenure of senators, thereby making available a greater number of special-interest contracts, as well as increasing their durability and value. This Article has also shown that western support for popular election was rooted in perceptions of economic discrimination against the region manifested in a dwindling share of federal funds. Direct election placed the politically turbulent western states on equal footing with the rest of the country in the competition for federal money.

This Article has not identified particular interest groups that profited by the movement to direct election.[217] It has suggested that new interest groups whose support was dispersed among several states, such as labor unions, would profit most from the new innovation. Similarly, new issues of purely national concern, such as immigration controls, may also have spurred a need for the Senate to be more responsive to national interest groups.[218]

---

216 *See supra* notes 190-205 and accompanying text.

217 It appears that the Seventeenth Amendment was part of a logrolling deal with the Sixteenth Amendment (making income tax constitutional). The two were passed within approximately one month of each other. Although the Sixteenth Amendment was introduced first, its passage was suspended until the Seventeenth Amendment was ratified. Southerners favored the income tax because it would fall heaviest on the wealthy north. At the same time, the South's disproportionate ability to secure federal funds, *see supra* note 196, would have allowed it to capture most of this wealth for itself. The North was unwilling to ratify the Sixteenth Amendment until it could be certain that all of the income tax revenues would not go to the South. *See* ALAN P. GRIMES, DEMOCRACY AND THE AMENDMENTS TO THE CONSTITUTION 66-74 (1978). In fact, northern states demanded a greater share of the federal budget in return for supporting the Sixteenth Amendment. *See* Bennett D. Baack & Edward John Ray, *Special Interests and the Adoption of the Income Tax in the United States*, 45 J. ECON. HIST. 607 (1985).

218 For instance, labor unions would have demanded immigration controls in or-

The findings of this Article suggest that special interests can manipulate the Constitution in the same way they manipulate the legislative process. The ability of special interests to force passage of the Seventeenth Amendment in order to increase senatorial tenure implies that they should also be able to frustrate measures designed to reduce legislative tenure, such as term limits.[219]

This Article confirms Boudreaux and Pritchard's theory that most of the post-Bill of Rights amendments to the U.S. Constitution increased agency costs, thereby making possible an expansion of the federal government and increased rent-seeking activity.[220] By changing the way in which special-interest groups solicited favors from the federal government, the Seventeenth Amendment made possible the dramatic rise in the size and scope of the federal government during this century. Not only does the Constitution condition the way groups fight for government funds, it is also conditioned by them.

---

der to limit the influx of competitors that would bid down wage rates. Although the U.S. Immigration Commission recommended in 1910 limiting admission of immigrants from southern and eastern Europe, no indirect limits were passed until 1917 (literacy requirements), and no effective legal barriers were imposed until the 1970s. World War I, however, slowed immigration considerably from 1915-1920. *See* HIGGS, *supra* note 64, at 109.

[219] *See* Boudreaux & Pritchard, *Rewriting*, *supra* note 16, at 157-59 (predicting that term limits on Congress and the Senate will never be ratified on the national level because it would reduce the ability of politicians and special interests to engage in rent-seeking activity).

[220] *See id.* at 140-52.