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The progressive era of constitutional amendment*

A era progressiva das emendas constitucionais

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Abstract

In this Essay I explore the impetus for the Seventeenth Amendment, which was in large measure driven by an effort to curb corruption in senatorial elections. I begin by exploring the difficulty of formal amendment in the United States. I explain the rules of formal amendment and I review briefly the empirical literature suggesting that the United States Constitution is one of the world's most difficult to amend, if not the most difficult. Then, I discuss the Progressive Era, a period of time during which formal amendment seemed much easier than it is today. I review the movement and its purposes, and I situate the four Progressive Era amendments. Finally, I focus on one of these four amendments, the Seventeenth, and consider the motivations driving its adoption as well as current critiques about its effectiveness. I conclude by questioning whether repealing the Seventeenth Amendment would necessarily reinstate indirect senatorial elections

Resumo

Neste ensaio, explora-se a motivação que ensejou a 17^a Emenda à Constituição dos Estados Unidos, que foi em grande medida impulsionada por um esforço para combater a corrupção nas eleições senatoriais. Inicia-se explorando a dificuldade de alteração formal da Constituição nos Estados Unidos. São então explicadas as regras de alteração formal e analisados brevemente os estudos empíricos que apontam que a Constituição dos Estados Unidos é uma das mais difíceis de alterar do mundo, se não a mais difícil. Em seguida, discute-se a Era Progressiva, um período de tempo durante o qual a alteração formal da Constituição parecia muito mais fácil de ser empreendida do que é hoje. Esse movimento e seus propósitos são examinados, e em seguida são situadas as quatro emendas constitucionais da Era Progressiva. Finalmente, o estudo concentra-se em uma destas quatro emendas, a décima sétima, e investiga as motivações que conduziram à sua adoção, bem como

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as a matter of practice, whatever it would mean as a matter of formal law.

Keywords: constitutional amendments; Progressive Era; Seventeenth amendment; corruption; United States of America.

nas atuais críticas sobre sua eficácia. O trabalho é concluído questionando-se se a revogação da 17ª emenda iria necessariamente restabelecer as eleições senatoriais indiretas em termos práticos, independentemente do que isso viesse a significar em termos de lei formal.

Palavras-chave: emendas constitucionais; Era Progressiva; 17ª Emenda à Constituição dos Estados Unidos; corrupção; Estados Unidos da América.

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1. INTRODUCTION

As hard as it is today to formally amend the United States Constitution—and empirical studies confirm that it is one of the hardest, if not the hardest, to amend in the democratic world¹—the United States Constitution was once thought too easy to amend. During the Progressive Era, a period of significant social activism and institutional reform from the 1890s through the 1920s, political actors in the United States adopted four constitutional amendments in a short span of roughly 10 years: the Sixteenth Amendment, authorizing a direct income tax²; the Seventeenth Amendment, establishing direct elections to the United States Senate³; the Eighteenth Amendment, imposing prohibition⁴; and the Nineteenth Amendment, constitutionalizing women's suffrage.⁵

In this Essay prepared for a conference on corruption and institutional design in comparative perspective, I explore the impetus for the Seventeenth Amendment, which was in large measure driven by an effort to curb corruption in senatorial elections. The Amendment altered the way political candidates are selected for the United States Senate, moving from indirect to direct elections. Under the original terms of the Constitution, senatorial appointments were made by state legislative vote,⁶ but in 1913 the Seventeenth Amendment required that the people of each state elect their

¹ See *infra* Section 2.2.

² U.S. Const., amend. XVI (1913).

³ U.S. Const., amend. XVII (1913).

⁴ U.S. Const., amend. XVIII (1919).

⁵ U.S. Const., amend. XIX (1920).

⁶ U.S. Const., art. I, § 3, cl. 1. (1789).

senators by popular vote.⁷ It took less than one year to ratify the Amendment, no small feat given that formally amending the United States Constitution requires the approval of two-thirds of the Congress to propose an amendment and three-quarters of the states to ratify it.⁸

I begin, in Part 2, by exploring the difficulty of formal amendment in the United States. I explain the rules of formal amendment and I review briefly the empirical literature suggesting that the United States Constitution is one of the world's most difficult to amend, if not *the* most difficult. In Part 3, I discuss the Progressive Era, a period of time during which formal amendment seemed much easier than it is today. I review the movement and its purposes, and I situate the four Progressive Era amendments. In Part 4, I focus on one of these four amendments, the Seventeenth, and consider the motivations driving its adoption as well as current critiques about its effectiveness. Today, one hundred years since its entrenchment, the Seventeenth Amendment has attracted some dissidents proposing to repeal it, calling for a return to the pre-Amendment senatorial amendment rule of indirect election. The challenge for these opponents, however, is that it is much harder today to amend the Constitution than it was when it was first adopted. I conclude by questioning whether repealing the Seventeenth Amendment would necessarily reinstate indirect senatorial elections as a matter of practice, whatever it would mean as a matter of formal law. This Essay is part of a larger scholarly project aimed at understanding the evolving perception and reality of formal amendment difficulty in the United States. It is an exploratory set of reflections not intended to present definitive answers but rather to trace lines of future inquiry.

2. THE DIFFICULTY OF CONSTITUTIONAL AMENDMENT IN THE UNITED STATES

Studies of amendment difficulty confirm what scholars have long suspected: the United States Constitution is one of the world's most difficult, if not the most difficult, to formally amend.⁹ The rigidity of the Constitution today derives both from the design of formal amendment rules entrenched in the constitutional text and from sources external to the text, including the geographic expansion of the Union since the adoption of the Constitution and the polarization of political parties. Amending the United States Constitution today is so hard that it might well be impossible.

⁷ U.S. Const., amend. XVII (1913). The Amendment also establishes a procedure to fill Senate vacancies. See *ibid.*

⁸ U.S. Const., art. V (1789). Article V also sketches a way for constitutional amendment by constitutional convention. But this process has not yet been successfully used under the present Constitution. See FISCH, William B. Constitutional Referendum in the United States of America, *American Journal Comparative Law* (supplement), Ann Arbor, vol. 54, n.4 p.485, 490-491, 2006. p. 490.

⁹ See *infra* Section 2.2.

2.1. Amending the United States Constitution

There are two steps to formally amend the Constitution: proposal by a two-thirds supermajority and ratification by a three-quarters supermajority.¹⁰ Article V assigns each of these two tasks to different institutions—the Congress, the states, and state or national constitutional conventions—and pairs these two tasks in various ways to create four separate methods of formal amendment. First, two-thirds of Congress may propose an amendment and three-quarters of the states may then ratify it by constitutional conventions. Second, two-thirds of Congress may propose an amendment and three-quarters of the states may ratify it by state legislative vote. Third, two-thirds of the states may petition Congress to call a constitutional convention to propose an amendment and three-quarters of the states may then ratify it by constitutional conventions. Fourth, two-thirds of the states may petition Congress to call a constitutional convention to propose an amendment and three-quarters of the states may ratify it by state legislative vote. In all cases, Congress chooses the method of ratification, whether by state legislative vote or state convention.

Congresspersons have introduced thousands of amendments but only thirty-three have satisfied the two-thirds congressional supermajority requirement to officially propose an amendment to the states.¹¹ Of those, only twenty-seven have met the three-quarters ratification threshold to entrench the proposed amendment into the text of Constitution. The most recent formal amendment was ratified in 1992, having been first proposed by Congress and transmitted to the states two hundred years earlier in 1789. The Twenty-Seventh Amendment prohibits Congress from giving itself a salary raise until an intervening election has been held.¹² Given this long delay between the proposal and ratification, some scholars have raised doubts as to the validity of the amendment,¹³ all to no avail.¹⁴ The Twenty-Sixth Amendment, the next-most recent amendment ratified twenty years earlier in 1971, fixes the voting age in federal

¹⁰ U.S. Const., art. V (1789).

¹¹ SULLIVAN, Kathleen M. Constitutional Constancy: Why Congress Should Cure Itself of Amendment Fever. **Cardozo Law Review**. New York, v. 17, n. 3, p. 691-704, jan. 1996. p. 692.

¹² U.S. Const., amend. XXVII (1992).

¹³ See, e.g., KENNEDY, Christopher M. Is There a Twenty-Seventh Amendment: The Unconstitutionality of a New 203-Year-Old Amendment. **Marshall Law Review**. Chicago, v. 26, n. 4, p. 977-1019, jul./sept. 1993; LEVINSON, Sanford. Authorizing Constitutional Text: On the Purported Twenty-Seventh Amendment. **Constitutional Commentary**. Saint Paul, v. 11, n. 1, p. 101-113, dec./feb. 1994; SPOTTS, JoAnne D. The Twenty-Seventh Amendment: A Late Bloomer or a Dead Horse? **The Georgia State University Law Review**. Atlanta, v. 10, n. 2, p. 337-365, jan. 1994; STRICKLAND, Ruth Ann. The Twenty-Seventh Amendment and Constitutional Change by Stealth. **PS: Political Science & Politics**. New York, v. 26, n. 4, p. 716-722, dec. 1993; ALSTYNE, William Van. What do you Think About the Twenty-Seventh Amendment? **Constitutional Commentary**. Williamsburg, v. 10, n. 1, p. 9-18, nov. 1993.

¹⁴ Congress did not contest the validity of the amendment, see MCGREAL, Paul E. There is no Such Thing as Textualism: A Case Study in Constitutional Method. **Fordham Law Review**. New York, v. 69, n. 6, p. 2393-2469, may 2001. p. 2431. Nor did the Department of Justice, see Memorandum Opinion for Counsel to the President,

and state elections at 18 years old, the same age at which the military draft applies.¹⁵ Prior to 1970, formal amendment appears to have been more frequent: the first fifteen amendments were ratified from 1789 to 1870; from 1871 to 1933, there were six; and from 1934 to 1970, there were four.

The extraordinarily onerous formal amendment rules and the infrequency of modern formal amendment have prompted scholars to suggest that Article V is virtually impossible to use. Bruce Ackerman, for example, has referred to Article V as an 'obsolescent obstacle course'.¹⁶ Sanford Levinson argues that Article V 'mak[es] it functionally impossible to amend the Constitution with regard to anything controversial'.¹⁷ Richard Primus sees the possibility of formal amendment as 'generally remote'.¹⁸ Joel Colón-Ríos and Allan Hutchinson call Article V 'one of the most demanding constitutional amendment processes in the world'.¹⁹ And Jeffrey Goldsworthy has argued that 'the supermajoritarian requirements of Article V are so onerous as to be arguably undemocratic, by making it much too easy for minorities to veto constitutional amendments'.²⁰

What makes Article V so difficult to successfully use is more than just its design requiring supermajorities at both the proposal and ratification stages. It is also that the geographic expansion of the Union has exacerbated amendment difficulty by increasing the denominator for Article V amendments from thirteen in 1789 to fifty since 1967. Nearly quadrupling the denominator for the three-quarters requirement for state ratification has made it much harder to formally amend the Constitution, as Rosalind Dixon explains: 'On one calculation, if one were to try to adjust for this change in the denominator for Article V, the *functional* equivalent to the 75% super-majority requirement adopted by the framers would in fact now be as low as 62%'.²¹ In addition, the deepening political polarization in American society in general and specifically between the two dominant political parties has raised barriers to political agreement on

¹⁶ Op. Off. Legal Counsel 87 (Nov. 2, 1992), and a federal court declined to hear a challenge to it. See *Boehner v. Anderson*, 809 F. Supp. 138 (D.D.C. 1992).

¹⁵ *Idem.* at amend. XXVI (1971).

¹⁶ ACKERMAN, Bruce A. Transformative Appointments. *Harvard Law Review*. Cambridge, vol. 101, n. 6, p. 1164-1184, apr. 1988. p. 1183.

¹⁷ LEVINSON, Sanford. How I Lost my Constitutional Faith. *Maryland Law Review*. Prince George's, v. 71, n. 4, p. 956-977, oct. 2012. p. 969.

¹⁸ PRIMUS, Richard A. When Should Original Meanings Matter? *Michigan Law Review*. Ann Arbor, vol. 107, n. 2, p. 165-222, 2008. p. 211.

¹⁹ COLÓN-RÍOS, Joel; HUTCHINSON, Allan. Democracy and Revolution: An Enduring Relationship? *Denver University Law Review*. Denver, v. 89, n. 3, p. 593-611, jul./sept. 2012. p. 602.

²⁰ GOLDSWORTHY, Jeffrey. Constitutional Cultures, Democracy, and Unwritten Principles. *University of Illinois Law Review*. Champaign, v. 18, n. 2, p. 683-710, apr. 2012. p. 694.

²¹ DIXON, Rosalind. Partial Constitutional Amendments. *University of Pennsylvania Journal of Constitutional Law*. Philadelphia, v. 13, n. 3, p. 643-685, mar. 2011. p. 653..

fundamental changes.²² This political polarization has increased amendment difficulty, making it harder to gather the supermajorities required both to propose and ratify an amendment.

As hard as it is to formally amend the United States Constitution, it is not as rigid as it could be. The Constitution does not entrench a formally unamendable constitutional provision, as do many of the world's democratic constitutions.²³ The United States Constitution entrenches two provisions that once were temporarily unamendable, until the year 1808, but this unamendability has since expired and no longer constrains constitutional amendment.²⁴ The Constitution does, however, entrench a form of unamendability that I have called 'constructive unamendability', a reference to a non-textual form of unamendability that derives not from an outright prohibition on amendment but rather from a political climate that makes it practically impossible to assemble the supermajorities needed to propose and ratify a constitutional amendment.²⁵ The paradigmatic case of a constructively unamendable provision in the United States is the Equal Suffrage Clause, which guarantees that 'no State, without its Consent, shall be deprived of its equal Suffrage in the Senate'.²⁶ It is unlikely that a state would ever agree to diminish its representation in the United States Senate. Hence the clause's unamendability. It is important to stress, however, that constructive unamendability is not permanent; a constitutional provision may flow into and out of constructive unamendability over time in light of the prevailing political climate.

2.2. Empirical studies of amendment difficulty

Scholars have undertaken empirical studies to measure the difficulty of formal amendment. The leading study at the moment, by Donald Lutz, measures amendment difficulty in thirty-two democratic constitutions.²⁷ Lutz begins by quantifying the difficulty of each discrete step formal amendment procedures—Lutz identifies 68 possible steps from initiation through final assent—and then assigns a total value for a

²² See KYVIG, David E. **Explicit and Authentic Acts: Amending the U.S. Constitution, 1776-1995**. Lawrence: University Press of Kansas, 1996. p. 426; PILDES, Richard H. Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America. **California Law Review**. Berkeley, v. 99, n. 2. p. 273-333, apr. 2011. p. 332-33; LEVINSON, Daryl J.; PILDES, Richard H. Separation of Parties, Not Powers. **Harvard Law Review**. Cambridge, v. 119, n. 8, p. 2311-2386, june 2006. p. 2333.

²³ See ALBERT, Richard. The Structure of Constitutional Amendment Rules. **Wake Forest Law Review**. v. 49, p. 913-975, nov. 2014. p. 950-52.

²⁴ See ALBERT, Richard. Constitutional Disuse or Desuetude: The Case of Article V. **Boston University Law Review**, Boston, vol. 94, n. 3, p. 1029-1082, may 2014. p. 1041-42.

²⁵ See ALBERT, Richard. Constructive Unamendability in Canada and the United States. **Supreme Court Law Review**, v. 67, n. 2, p. 181-219, jan. 2014. p. 181-196..

²⁶ U.S. Const., art. V.

²⁷ LUTZ, Donald S. **Principles of Constitutional Design**. New York: Cambridge University Press, 2006. p. 166-77.

constitution's amendment difficulty by aggregating the sum of each step.²⁸ Lutz concludes that the United States Constitution is the world's most difficult to amend, ranked first with a total score of 5.10, well above the next-most difficult constitutions to amend, the Swiss and Venezuelan Constitutions, each tied with a score of 4.75.²⁹ There are some limitations to the Lutz study, but it nonetheless seems to support what scholars have long believed: that the United States Constitution is among the world's most rigid constitutions.³⁰

There are other empirical studies, albeit less prominent ones, of amendment difficulty. Astrid Lorenz has published a study measuring amendment difficulty in 39 constitutional democracies, concluding that the United States Constitution ranks second behind Belgium.³¹ Arend Lijphart has published his own classification of amendment difficulty, a four-category ranking of 36 democratic constitutions according to the kinds of majorities required to formally amend the constitution.³² In Lijphart's classification, the United States ranks in the top group for amendment difficulty along with Australia, Canada, Japan and Switzerland.³³

Measuring amendment difficulty is itself difficult, however. As Tom Ginsburg and James Melton have argued, convincingly I believe, amendment culture may be more important in quantifying how difficult it is to formally amend a constitution than assigning a value to various steps involved in the amendment process.³⁴ By 'amendment culture', Ginsburg and Melton mean the relative frequency and success of constitutional amendment and generally how the practice of constitutional amendment is perceived by those governed by the rules themselves.³⁵ Christopher Eisgruber makes this point about the difficulty of measuring amendment difficulty in the United States under the rules of Article V: 'their impact will turn upon a number of cultural considerations, such as the extent to which state politics differ from national politics and the extent to which people are receptive to or skeptical about the general idea of

²⁸ LUTZ, Donald S. *Idem. Ibidem.*

²⁹ LUTZ, Donald S. *Idem.* p. 170.

³⁰ One notable limitation is that Lutz did not include Canada in his study. The reason why, he explains, is that he found it difficult to identify what possesses 'constitutional status' in the country, and therefore what is subject to change by formal amendment. LUTZ, Donald S. *Idem.* p. 179 n. 6. Elsewhere, I have argued that the Constitution of Canada is more difficult to amend than the United States Constitution, and that Canada would have ranked above the United States had Lutz included Canada in his study sample. See ALBERT, Richard. The Difficulty of Constitutional Amendment in Canada. *Alberta Law Review*. Edmonton, v. 52, n. 5 (still unpublished)

³¹ LORENZ, Astrid. How to Measure Constitutional Rigidity. *Journal of Theoretical Politics*. [s.l.], v. 17, n. 3, p. 339-361, July 2005. p. 358-59.

³² LIJPHART, Arend. *Patterns of Democracy*. New Haven: Yale University Press, 1999. p. 220.

³³ LIJPHART, Arend. *Idem. Ibidem.*

³⁴ See GINSBURG, Tom; MELTON, James. Does the Constitutional Amendment Rule Matter at All? Amendment Cultures and the Challenges of Measuring Amendment Difficulty. *Chicago Working Papers on Law and Economics*. Chicago, n. 682, p. 1-29, May 2014.

³⁵ GINSBURG, Tom; MELTON, James. *Idem.*

constitutional amendment'.³⁶ Despite the challenge of measuring amendment difficulty, no one will disagree that the constitutional structure and politics of Article V make the United States Constitution very difficult to amend.

3. CONSTITUTIONAL AMENDMENT IN THE PROGRESSIVE ERA

But the United States Constitution was not always thought difficult to amend. In the 1910s, political actors proposed and ratified a series of four constitutional amendments in rapid succession. This burst of amendment activity prompted William Marbury, writing at the end of the decade, to suggest that the Constitution had become too easy to amend, a departure from the prevailing belief at the time, not unlike what it is today, that the Constitution was very difficult to amend: 'Until lately, it appears never to have occurred to any one in this country that there need be any fear that the Constitution could be too readily amended'; observed Marbury, referencing the outdated view that 'on the contrary, the prevailing impression was that it was almost impossible to amend that great instrument, except by something in the nature of a revolution'.³⁷ But the four amendments disrupted the conventional view of the difficulty of formal amendment in the United States. The ease of formal amendment then and its difficulty today suggest that amendment difficulty is variable across time, driven by the particularities of the moment, by the consolidation and disintegration of political forces, and also by the evolution of norms. The impetus behind the amendability of the Constitution in the 1910s was the progressive movement.

3.1. The movement and its purposes

Although scholars refer to the group engaged in promoting social change in American society from the 1890s to the 1920s as the "progressive movement," the truth is that the objectives pursued and the advancements achieved during this period were driven by a complex aggregation of agents and forces that defy such simple shorthand. It is nonetheless possible to identify the three objectives, broadly stated, that define what came to be known as the progressive movement: improving the exercise and tools of democracy, using government to help those in need, and curbing the influence of privileged interests. A leading analysis of the time sums it up as follows:

In this widespread political agitation that at first sight seems so incoherent and chaotic, there may be distinguished upon examination and analysis three tendencies. The first

³⁶ EISGRUBER, Christopher L. **Constitutional Self-Government**. Cambridge: Harvard University Press, 2001. p. 22.

³⁷ MARBURY, William L. The Limitations upon the Amendment Power. **Harvard Law Review**. Cambridge, v. 33, n. 2, p. 223-235, dec. 1919. p. 223.

of these tendencies is found in the insistence by the best men in all political parties that special, minority, and corrupt influence in government—national, state, and city—be removed; the second tendency is found in the demand that the structure or machinery of government, which has hitherto been admirably adapted to control by the few, be so changed and modified that it will be more difficult for the few, and easier for the many, to control; and, finally, the third tendency is found in the rapidly growing conviction that the functions of government at present are too restricted and that they must be increased and extended to relieve social and economic distress. These three tendencies with varying emphasis are seen to-day in the platform and program of every political party; they are manifested in the political changes and reforms that are advocated and made in the nation, the states, and the cities; and, because of their universality and definiteness, they may be said to constitute the real progressive movement.³⁸

The movement declined in the 1920s and ultimately lost its momentum. One of the movement's amendments, the Eighteenth, was repealed in 1933, fourteen years after it had been adopted in 1919.³⁹ The movement had never found the right political vehicle to formalize its program, nor could progressives even agree on a common program, perhaps as a result of the tensions among progressives themselves and the lack of a national leader or an organized structure of leadership.⁴⁰

But the movement has left a legacy that continues to shape American politics today. Concern about special interest control of public institutions led the movement to promote direct democracy in its many forms, including the ballot initiative, the popular referendum and the recall power.⁴¹ Reformers wanted to reduce the power of elites in the electoral process.⁴² The common denominator in these three devices, as Nathaniel Persily writes, was 'the delegation of political decisions to the ordinary voter'.⁴³ South Dakota was the first state to adopt the initiative and the referendum in 1898.⁴⁴ Roughly 20 other states followed suit from 1900 through 1918 as direct democracy grew in popularity and as progressives won an important victory on the constitutionality of direct

³⁸ WITT, Benjamin Parke De. **The Progressive Movement**. New York: MacMillan, 1915. p. 4-5.

³⁹ U.S. Const., amend. XXI (1933).

⁴⁰ See LINK, Arthur S. What Happened to the Progressive Movement in the 1920's? **American Historical Review**. Oxford, v. 64, n. 4, p. 833-851, oct. 1959. p. 842.

⁴¹ EULE, Julian N. Judicial Review of Direct Democracy. **Yale Law Journal**. New Haven, v. 99, p. 1503-1558, may 1990. p. 1546.

⁴² HENRETTA, James A. Foreword: Rethinking the State Constitutional Tradition. **Rutgers Law Journal**. Camden, v. 22. p. 819-839, 1991. p. 824.

⁴³ PERSILY, Nathaniel A. The Peculiar Geography of Direct Democracy: Why the Initiative, Referendum and Recall Developed in the American West. **Michigan Law & Policy Review**. Ann Arbor, v. 2, p. 11-41, jan. 1997. p. 13.

⁴⁴ See MAGLEBY, David B. Taking the Initiative: Direct Legislation and Direct Democracy in the 1980s. **PS: Political Science & Politics**. New York, v. 21, n. 3, p. 600-611, jul./sept. 1988. p. 602.

democracy in the United States Supreme Court.⁴⁵ The Court held that federal constitutional challenges to state constitutional provisions authorizing the initiative or referendum are non-justiciable political questions over which the Court has no jurisdiction.⁴⁶

3.2. The progressive amendments

Part of the legacy of the Progressive Era also includes constitutional amendments. In a span of roughly ten years, political actors entrenched four constitutional amendments. In 1909, Congress passed the Sixteenth Amendment, authorizing an income tax, and the states ratified it four years later in 1913; in 1912, Congress passed the Seventeenth Amendment, establishing direct elections to the United States Senate, and the states ratified it the next year in 1913; in 1917, Congress passed the Eighteenth Amendment, which imposed prohibition, and the states ratified it two years later in 1919; and in 1919, Congress passed the Nineteenth Amendment, prohibiting gender discrimination in the right to vote, and the states ratified it just over one year later in 1920.⁴⁷

David Strauss has argued that these four amendments simply formalized changes that had already become political facts. He may be right but these amendments still show how important a period of social change the Progressive Era was for the country, which Strauss himself recognizes.⁴⁸ Akhil Amar situates these progressive amendments along a 'democratizing trendline'⁴⁹ that 'call[s] dramatic attention to the arc of history,'⁵⁰ as Americans amended the Constitution to authorize progressive income taxation and the direct election of Senators, and to enfranchise women.⁵¹ Not all progressives supported prohibition but 'the various strands of progressivism were united, however, at the level of basic assumptions.'⁵² James Timberlake has connected the Eighteenth Amendment to the larger effort to limit the corrupting influence of the liquor industry.⁵³ Alan Grimes refers to these four as 'the western amendments' because they arose from what he sees as a 'struggle [that] pitted the West, for the most part the last eighteen

⁴⁵ See MILLER, Kenneth P. **Direct Democracy and the Courts**. New York: Cambridge University Press, 2009. p. 34-36.

⁴⁶ *Pacific States Telephone & Telegraph Co. v. Oregon*, 223 U.S. 118 (1912).

⁴⁷ See The U.S. National Archives and Records Administration: http://www.archives.gov/exhibits/charters/constitution_amendments_11-27.html (last accessed September 1, 2015).

⁴⁸ See STRAUSS, David A. The Irrelevance of Constitutional Amendments. **Harvard Law Review**. Cambridge, v. 114, n. 5, p.1457-1460, mar. 2001.

⁴⁹ AMAR, Akhil Reed. **America's Constitution: A Biography**. New York: Random House, 2005. p. 412.

⁵⁰ AMAR, Akhil Reed. *Idem*. p. 685.

⁵¹ AMAR, Akhil Reed. *Idem*. *Ibidem*.

⁵² KYVIG, David E. **Repealing National Prohibition**. Kent: The Kent State University Press, 2000. p. 8.

⁵³ See TIMBERLAKE, James H. **Prohibition and the Progressive Movement, 1900-1920**. Cambridge: Harvard University Press, 1963.

of the forty-eight states in the Union, against the states that had grown out of the initial thirteen colonies'.⁵⁴ He situates these amendments in the conflict between 'urban and rural constituencies', 'industrial and agrarian interests', and 'boss-oriented politics and chautauqua-style politics'.⁵⁵

Today, perhaps the most controversial of these progressive amendments is the Seventeenth. Scholars have called for its repeal,⁵⁶ as have political actors,⁵⁷ most notably current Supreme Court Justice Antonin Scalia, who, when asked what he would change about the United States Constitution answered that 'there's very little that I would change' although the Seventeenth Amendment is one of the few items he would change if he could, as he explained in a public forum:

*I would change [the Constitution] back to what they wrote, in some respects. The Seventeenth Amendment has changed things enormously. ... We changed that in a burst of progressivism in 1913, and you can trace the decline of so-called states' rights throughout the rest of the 20th century. So, don't mess with the Constitution.*⁵⁸

Justice Scalia's criticism of the Seventeenth Amendment is anchored in federalism. The critique has its strongest voice in Ralph Rossum, who had earlier suggested that the Amendment effectively repealed federalism by removing an important state check on the national government. Rossum argued that federalism, at least as it was understood by the authors of the Constitution, 'effectively died as a result of the social and political forces that resulted in the adoption and ratification of the Seventeenth Amendment'.⁵⁹ In the next Part, I focus not on this aspect of the Amendment but rather on a narrower inquiry into its corruption-fighting origins. I will then explore the bases for the calls today to repeal the Seventeenth Amendment.

⁵⁴ GRIMES, Alan P. **Democracy and the Amendments to the Constitution**. Lexington: Lexington Books, 1978. p. 66.

⁵⁵ GRIMES, Alan P. *Idem. Ibidem*.

⁵⁶ See, e.g., C.H. HOEBEKE, C.H. **The Road to Mass Democracy: Original Intent and the Seventeenth Amendment**. Brunswick: Transaction Publishers, 1995; BARNETT, Randy. The Case for the Repeal Amendment. **Tennessee Law Review**. Knoxville, v. 78, n. 12, p. 813-822, mar. 2011; ZYWICKI, Todd J. Beyond the Shell and Husk of History: The History of the Seventeenth Amendment and Its Implications for Current Reform Proposals. **The Cleveland State Law Review**. v. 45, n. 2, p. 165-234, mar./may 1997.

⁵⁷ See, e.g., SEITZ-WALD, Alex. Repeal the 17th Amendment! **Salon**. Available at: http://www.salon.com/2012/08/16/repeal_the_17th_amendment (last accessed September 1, 2015); JOHNSON, Keith. Anti-Washington Ire Kindles an Old Debate. **Wall Street Journal**. Available at: <http://www.wsj.com/articles/SB10001424052702304879604575582192395853212> (last accessed September 1, 2015); BAI, Matt. Tea Party's Push on Senate Election Exposes Limits. **N.Y. Times**, June 1, 2010, available at: <http://www.nytimes.com/2010/06/02/us/politics/02bai.html> (last accessed September 1, 2015).

⁵⁸ 'Scalia, Breyer Spar Over Supreme Court Issues', Associated Press, November 12, 2010, available at: <http://www.foxnews.com/politics/2010/11/12/scalia-breyer-spar-supreme-court-issues> (last accessed September 1, 2015).

⁵⁹ ROSSUM, Ralph A. **Federalism, the Supreme Court, and the Seventeenth Amendment: The Irony of Constitutional Democracy**. Lanham: Lexington Books, 2001. p. 3.

4. THE SEVENTEENTH AMENDMENT

The Seventeenth Amendment changed how political candidates are selected for the United States Senate. The senatorial selection process was once indirect but it is now direct: no longer are senators chosen by state legislatures; senators are now elected directly by voters in each state. Under the original design of the Constitution, the senatorial appointments rule required that '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'.⁶⁰ But, in 1913, the Seventeenth Amendment changed the appointments rule, and since then it requires that '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'.⁶¹ The amendment did not take long to ratify. Congress approved it on May 13, 1912, and three-quarters of the states had ratified it less than a year later by April 8, 1913.⁶²

The rapid ratification of the Seventeenth Amendment might suggest that political actors devoted little deliberation to it. But moving from indirect to direct senatorial elections had been a subject of national political interest for almost one hundred years prior. In 1826, a congressperson introduced an amendment to create direct elections for senators; this was followed by a similar proposal in 1835, and five more between 1850 and 1855.⁶³ Later in 1860, Andrew Johnson, then a senator but later president, renewed the calls for direct senatorial elections that he had earlier made as a member of the House of Representatives.⁶⁴ As president, Johnson continued to press for the change, sending a special message to Congress on the subject in 1868 and taking the position again in his State of the Union address that same year.⁶⁵ At the time, however, the nation was occupied with Reconstruction and as a result, as George Haynes writes, 'even if President Johnson's advocacy had been calculated to commend the measure to the favorable attention of Congress, little room was left for consideration of such a change in the Constitution'.⁶⁶

Public interest in moving from indirect to direct senatorial elections began to grow quickly shortly thereafter. There were more and more congressional resolutions

⁶⁰ U.S. Const., art. I, § 3, cl. 1. (1789).

⁶¹ U.S. Const., amend. XVII (1913). The amendment also establishes a procedure to fill Senate vacancies. See *ibid.*

⁶² See The U.S. National Archives and Records Administration: http://www.archives.gov/exhibits/charters/constitution_amendments_11-27.html (last accessed September 1, 2015).

⁶³ See HAYNES, George H. **The Election of Senators**. New York: Henry Holt and Co., 1912. p. 101-102.

⁶⁴ HAYNES, George H. *Idem*. p. 102.

⁶⁵ HAYNES, George H. *Idem*. *Ibidem*.

⁶⁶ HAYNES, George H. *Idem*. *Ibidem*.

and amendment proposals,⁶⁷ citizens and associations took up the cause, and state and national political parties made Senate reform part of their platform.⁶⁸ State legislatures, too, began pushing for the amendment, with California and Iowa, as early as 1874, petitioning Congress to amend the Constitution to create direct senatorial elections.⁶⁹ By 1902, three states had held separate referenda asking voters whether they would prefer direct senatorial elections, and in each case the vote was overwhelmingly in favor the change: 451,319 to 76,975 in Illinois in 1902; 187,958 to 13,342 in California in 1892; and 6,775 to 866 in Nevada in 1893.⁷⁰ By 1905, 31 state legislatures had in some way communicated to Congress its support for direct senatorial elections.⁷¹ Yet, even this number, as high as it was, did not reflect the full measure of state support because many states had already adopted state laws requiring direct senatorial election.⁷²

In 1906, 29 delegates from 11 states gathered in Iowa at what was called the Inter-State Senatorial Amendment Convention, an effort to accelerate the change that most states by then supported.⁷³ The goal of the convention was to coordinate efforts to ultimately petition Congress to call a convention to propose an amendment to create direct senatorial elections.⁷⁴ Although Iowans and others had long supported this idea for amending the Constitution, their efforts had borne no fruit. Faced with no congressional action on an amendment, the Governor of Iowa convened the event and made clear his objectives when he called the convention to order:

Hitherto this sentiment has not been productive of results, and during the last session of the General Assembly it seemed to the members who compose that body that there was but one effective and practical way in which to take the views of the people of this country upon the proposed change in the election of Senators. It was to adopt the other alternative provided in the Constitution of the United States, and ask our sister states to co-operate with us in presenting a petition to Congress that would require action upon the part of that body in the way of convening a constitutional convention.⁷⁵

The convention had been authorized by a joint resolution of the Iowa General Assembly. The Assembly directed the Governor of Iowa to invite other governors

⁶⁷ HAYNES, George H. *Idem.* p. 103-04.

⁶⁸ HAYNES, George H. *Idem.* p. 105.

⁶⁹ HAYNES, George H. *Idem.* p. 106.

⁷⁰ HAYNES, George H. *Idem.* *Ibidem.*

⁷¹ HAYNES, George H. *Idem.* p. 110.

⁷² HAYNES, George H. *Idem.* p. 111.

⁷³ Report of the Proceedings of the Inter-State Senatorial Amendment Convention, Des Moines, Iowa, December 5-6, 1906, at 23-24.

⁷⁴ *Idem.* at 14.

⁷⁵ *Idem.* *Ibidem*

to send representatives to the Inter-State Convention.⁷⁶ The joint resolution, passed in March 1906, noted that seventeen states were at the time on record as petitioning Congress to approve an amendment proposal establishing direct senatorial elections and that seven states had by that time petitioned Congress to call a convention for the purpose of proposing an amendment to create direct senatorial elections.⁷⁷

By the time Congress eventually approved the Seventeenth Amendment and transmitted it to the states in 1912, over half of the states had already adopted direct senatorial elections, or something quite close to it, as a matter of either law or practice.⁷⁸ For example, states would hold elections whose results were 'advisory' to the legislatures; the legislature of course retained the constitutional responsibility to select senators themselves, but their members found it difficult to ignore the results of those elections since they were essentially 'referenda instructing state legislators'.⁷⁹ States generally took three paths toward direct senatorial election even before the Seventeenth Amendment was proposed and ratified: amending their constitution, passing laws, and following political practices that 'sidestep legislative selection of senators'.⁸⁰ These subnational approaches reflected the distinctive strategy of the progressive movement: to pursue change at the state level, for instance through uniform state legislation or by piecemeal, to make it close to inevitable at the national level.⁸¹ By 1913, at least 34 states had effectively evolved by law or practice to elect their senators even before it was required by constitutional amendment.⁸²

4.1. The impetus for the Seventeenth Amendment

There were at least three motivations behind the move to direct senatorial elections: curbing corruption in state legislatures; avoiding deadlocks in senatorial

⁷⁶ HAYNES, George H. **The Election of Senators**... *Op. Cit.* p. 106.

⁷⁷ HAYNES, George H. *Idem.* at 106-08.

⁷⁸ STRAUSS, David A. The Irrelevance of Constitutional Amendments... *Op. Cit.* p. 1497.

⁷⁹ BYBEE, Jay S. Ulysses at the Mast: Democracy, Federalism, and the Sirens Song of the Seventeenth Amendment. **Northwestern Law Review**. Chicago, v. 91, n. 2, p. 500-569, sept./dec. 1997. p. 537.

⁸⁰ CLOPTON, Zachary D.; ART, Steven E. The Meaning of the Seventeenth Amendment and a Century of State Defiance. **Northwestern Law Review**. Chicago, v. 107, n. 3, p. 1181-1242, mar./jun. 2013. p. 1190.

⁸¹ GRAEBNER, William. Federalism in the Progressive Era: A Structural Interpretation of Reform. **The Journal of American History**. Oxford, v. 64, n. 2, p. 331-357, sept. 1977. p. 332.

⁸² WIEGAND, Elva. **A History of the Movement for the Direct Election of Senators**. Los Angeles, 1934. Thesis (Master in History) - Department of History, University of Southern California. f. 49. One of the leading models for direct senatorial election was the Oregon plan that invited candidates for state legislature to sign one of two statements, either pledging to vote for the U.S. Senate candidate who received the highest popular vote in the state or to see the vote as only advisory. KOBACH, Kris W. Rethinking Article V: Term Limits and the Seventeenth and Nineteenth Amendments. **Yale Law Journal**. New Haven, v. 103, n. 7, p. 1971-2007, may 1994. p. 1978.

elections; and giving greater voice to the people.⁸³ Under the prevailing method of indirect senatorial election—state legislators voting for the state's United States Senators—corruption in state legislative elections for senators was pervasive, as observers at the time commented that the process 'was so corrupt that it produced an unresponsive and unrepresentative Senate'.⁸⁴ State legislative corruption and interest group control of senatorial elections were, as Vikram Amar writes, 'perhaps the greatest evils associated with indirect election'.⁸⁵ The concern was that indirect senatorial elections would lead senatorial candidates to promise money, favors or offices to state legislators in return for their vote.⁸⁶ The corruption concern extended to state governments and also to influential yet unelected insiders who would pay off state lawmakers to direct their vote in senatorial elections.⁸⁷

As the legislative history of the Seventeenth Amendment suggests,⁸⁸ political actors believed the problem could be fixed by adopting direct senatorial elections that would give power directly to the people and would take it away from the corruptible state senators.⁸⁹ A 1911 report from the United States Senate Committee on the Judiciary referred to the 'instances of bribery and corruption which have taken place in the legislatures of the different States in the last 25 years, and which could not have occurred had popular elections prevailed'.⁹⁰ There was evidence that state legislators had sold their votes to elect senators that would not have otherwise been elected.⁹¹

A constitutional amendment was necessary to address the problem on a national scale.⁹² It 'completed the centralizing process that the public canvass began', after states had come onboard with their own reforms and in light of the popular support behind the idea of direct election.⁹³ Despite strong evidence of corruption in seven states in the fifteen years preceding the successful proposal of the Seventeenth Amendment

⁸³ BYBEE, Jay S. *Ulysses at the Mast...* *Op. Cit.* p. 538-47.

⁸⁴ SCHILLER, Wendy J.; STEWART III, Charles. **Electing the Senate: Indirect Democracy Before the Seventeenth Amendment**. Princeton: Princeton University Press, 2015. p. 10.

⁸⁵ AMAR, Vikram David. Indirect Effects of Direct Election: A Structural Examination of the Seventeenth Amendment. **Vanderbilt Law Review**. v. 49, n. 6, p. 1347-1407, nov. 1996. p. 1353.

⁸⁶ See TEACHOUT, Zephyr. **Corruption in America: From Benjamin Franklin's Snuff Box to Citizens United**. Cambridge: Harvard University Press, 2014. p. 123.

⁸⁷ AMAR, Akhil Reed. **America's Constitution: A Biography**. New York: Random House, 2005. p. 412.

⁸⁸ See LITTLE, Laura E. An Excursion into the Uncharted Waters of the Seventeenth Amendment. **Temple Law Review**. Philadelphia, v. 64, n. 3, p. 629-658, sept./dec. 1991. p. 640.

⁸⁹ CROOK, Sara Brandes; HIBBING, John R. A Not-so-distant Mirror: The 17th Amendment and Congressional Change. **American Political Science Review**. Washington, D.C., v. 91, n. 4, p. 845-853, dec. 1997. p. 845.

⁹⁰ Report No. 961 to accompany S.J. Res. 134, Committee on the Judiciary, 'Election of Senators by Popular Vote', January 11, 1911, 61st Cong. 3d Sess., at 14.

⁹¹ BYBEE, Jay S. *Ulysses at the Mast...* *Op. Cit.* p. 539.

⁹² HAYNES, George H. **The Election of Senators...** *Op. Cit.* p. 53.

⁹³ RIKER, William H. The Senate and American Federalism. **American Political Science Review**. New York, v. 49, n. 2, p. 452-469, July 1955. p. 467.

in 1912, the United States Senate was not keen to investigate these matters. Indeed, the Senate showed 'extreme reluctance to investigate such charges, and [] bound itself by precedents which ma[d]e not only the unseating of a member, but even the pursuit of a thoroughgoing investigation, practically impossible, except where the evidence of guild [was] overwhelming and notorious.'⁹⁴ Of the ten senators investigated by the Senate before 1900, only two senators ultimately resigned their seat, though in neither case had the Senate yet taken a vote on the specific resolution concerning allegations of corruption.⁹⁵

It is worth recalling one corruption case. On July 13, 1912, two months after the Congress had approved the Seventeenth Amendment and transmitted it to the states for ratification, the Senate invalidated the election of Illinois Senator William Lorimer.⁹⁶ Elected in 1909 under the original process of indirect senatorial election, Lorimer had been cleared of the corruption charges in 1911 when the Senate dropped the matter after a six-week inquiry.⁹⁷ But when new public charges came to light a week before the Senate voted on the proposed Seventeenth Amendment, the Senate reopened the Lorimer case.⁹⁸ Lorimer, it was proven to the Senate's satisfaction, had been elected to the United States Senate with the help of at least seven state legislators whose votes had been bought with \$100,000 raised by large Chicago corporations.⁹⁹ In the end, four of the seven gave confessions in open court.¹⁰⁰ This extraordinary case of corruption is not representative; it appears to have been the most egregious example that came to light at the time.

But David Schleicher questions the corruption narrative that is thought to have prompted the move from indirect to direct senatorial elections: if the corrupting forces 'had the power to sneak through senators over popular worry about corruption, there needs to be an additional explanation for why they did not have enough power to stop direct elections—and in fact did not want to'.¹⁰¹ This is an important question and perhaps one that will remain unanswered, at least with any certainty. But Todd Zywicki may have an answer. The Seventeenth Amendment, Zywicki writes, made rent-seeking

⁹⁴ RIKER, William H. *Idem. Ibidem.*

⁹⁵ RIKER, William H. *Idem.* p. 53-56.

⁹⁶ 'July 13, 1912: Senator Ousted', Senate History: 1878-1920, United States Senate, at: http://www.senate.gov/artandhistory/history/minute/Senator_Ousted.htm (last accessed September 1, 2015).

⁹⁷ *Idem.*

⁹⁸ *Idem.*

⁹⁹ See BUENKER, John D. Illinois and the Four Progressive-Era Amendments to the United States Constitution. *Illinois Historical Journal*. Springfield, v. 80, sept./dec. 1987. p. 215-16.

¹⁰⁰ BUENKER, John D. *Idem.* at 216. The number could be higher than seven. According to another source, supporters of Lorimer paid bribes to forty state legislators. See GRADEL, Thomas J.; SIMPSON, Dick. **Corrupt Illinois: Patronage, Cronyism, and Criminality**. Champaign: University of Illinois Press, 2014. p. 42-43.

¹⁰¹ SCHLEICHER, David. The Seventeenth Amendment and Federalism in an Age of National Political Parties. *Hastings Law Journal*. San Francisco, v. 65, n. 4, p. 1043-1099, may 2014. p. 1060.

easier, allowing interest groups to go directly to an elected Senator rather than having to canvass an entire state legislature to secure a majority for their preferred candidate: 'by making it possible for special interests to lobby Senators directly, rather than having to proceed through the intermediary of the state legislatures, the Seventeenth Amendment reduced the costs of lobbying for wealth transfers'.¹⁰² As the interest groups grew more national and as they sought national influence to advance their cause, it proved more effective to lobby one relatively small group of national leaders rather than several groups of state leaders: 'because these national interest groups (such as labor unions and railroads) were dispersed across several states, it was quite cumbersome and expensive for them to have to lobbying multiple state legislatures in order to get the Senate consent to a piece of legislation'.¹⁰³ Schleicher explains Zywicki's answer succinctly:

*[Interest groups] supported the Amendment for several reasons: it would reduce the cost of lobbying for favorable legislation by national interest groups because lobbyists would only have to engage with one body and not fifty; it would increase the length of senatorial tenures, permitting interest groups to form long-term relationships with senators; and it would reduce monitoring of senators because state legislatures were better at ensuring that senators did the bidding of the voting public rather than special interest groups. National interest groups thus had an interest in direct elections because it made the Senate easier to lobby.*¹⁰⁴

The point, then, according to Zywicki, is that there was more to the Seventeenth Amendment than an effort to curb corruption. It may be that the move to direct senatorial elections concealed a much less-public effort to redirect rent-seeking behavior so as to make it more efficient for interest groups to solicit favors from the federal government.¹⁰⁵ John McGinnis echoes this view, arguing that the Seventeenth Amendment facilitated 'the rise of the special-interest state'.¹⁰⁶ McGinnis writes that the Amendment 'increased monitoring costs and entrenched senators in office' and 'made it easier for interest groups to strike long-term deals' because the general electorate was much less competent than state legislators at monitoring senators.¹⁰⁷ Today, with the benefit of one century of political life under the Seventeenth Amendment, it is worth asking

¹⁰² ZYWICKI, Todd J. *Beyond the Shell and Husk of History...* *Op. Cit.* p. 215.

¹⁰³ ZYWICKI, Todd J. *Idem.* p. 216.

¹⁰⁴ SCHLEICHER, David. *The Seventeenth Amendment...* *Op. Cit.* p. 1061.

¹⁰⁵ ZYWICKI, Todd J. *Senators and Special Interests: A Public Choice Analysis of the Seventeenth Amendment.* **Oregon Law Review**. Eugene, v. 73, p. 1007-1055, 1994. p. 1054-55..

¹⁰⁶ MCGINNIS, John O. *The Original Constitution and its Decline: A Public Choice Perspective.* **Harvard Journal of Law & Public Policy**. Cambridge, v. 21, n. 1, p. 195-210, sept./dec. 1997. p. 205.

¹⁰⁷ MCGINNIS, John O. *Idem.* at 206.

whether scholars believe that direct senatorial elections has fulfilled the objective that first drove its proposal.

4.2. The Seventeenth Amendment today

On the occasion of the one hundredth anniversary of the Seventeenth Amendment, Wendy Schiller and Charles Stewart published a report inquiring whether the Amendment had fulfilled its intended objectives. They concluded that 'the 17th Amendment has failed to deliver on its promise, and has produced a Senate that is even less responsive to voters than it was under the indirect election system'.¹⁰⁸ The key finding concerned money in senatorial elections. They estimated that prior to the Seventeenth Amendment from 1871 to 1913, there was an average of \$214.88 million per year spent on senatorial elections.¹⁰⁹ This is roughly one-fifth of what was spent in the 2012 Senate election cycle: \$1.168 billion.¹¹⁰ For Schiller and Stewart, this contrast undermines the Amendment: 'Despite the blatant use of money to win indirect Senate elections, 100 years after the 17th Amendment was enacted, the modern Senate elections process is swamped with campaign money in ways that far outpace elections under the indirect elections system'.¹¹¹ A few years prior, another took a similar view of the Amendment but stressed more specific failures:

*In retrospect, the amendment failed to accomplish what was expected of it, and in most cases failed dismally. Exorbitant expenditures, alliances with well-financed lobby groups, and electioneering sleights-of-hand have continued to characterize Senate campaigns long after the constitutional nostrum was implemented. In fact, such tendencies have grown increasingly problematic. Insofar as the Senate also has participated in lavishing vast sums on federal projects of dubious value to the general welfare, and producing encyclopedic volumes of legislation that never will be read or understood by the great mass of Americans, it can hardly be the case that popular elections have strengthened the upper chamber's resistance to the advances of special interests.*¹¹²

The rise of money in senatorial elections has not been at the core of the call to repeal the Seventeenth Amendment. The repeal effort has instead relied largely on federalism, or 'states' rights', as the rallying cry behind the move to return to indirect

¹⁰⁸ SCHILLER, Wendy J.; STEWART III, Charles. The 100th Anniversary of the 17th Amendment: A Promise Unfulfilled. **Issues in Governance Studies**. Washington, v. 34, n. 59, p. 1-12, may 2013. p. 1.

¹⁰⁹ SCHILLER, Wendy J.; STEWART III, Charles. *Idem*. p. 6-7.

¹¹⁰ SCHILLER, Wendy J.; STEWART III, Charles. *Idem*. *Ibidem*.

¹¹¹ SCHILLER, Wendy J.; STEWART III, Charles. *Idem*. p. 7.

¹¹² HOEBEKE, C.H. Democratizing the Constitution: The Failure of the Seventeenth Amendment. **IX Humanitas - National Humanities Institute, Center for Constitutional Studies**. Available at: <http://www.nhinet.org/hoebeke.htm> (last accessed September 1, 2015).

senatorial elections. According to repeal proponents, doing away with direct senatorial elections would restore the federalist balance created by the Constitution: state legislatures would once again have the power to send to Washington only those senators they believed would be responsive to the state's needs.¹¹³ Ted Cruz, for example, has argued that the Seventeenth Amendment was a 'major step toward the explosion of federal power and the undermining of the authority of the states'.¹¹⁴ A common critique of the Amendment is that it disrupted the founding design of the Constitution, and that repeal would return the country to where it began and where it should be. One commentator, for instance, argues that a return to indirect senatorial elections 'would check the federal government's proclivity to pass laws binding the state to unfunded mandates. It would increase the sovereignty of the several states and restore true federalism back into our system of government'.¹¹⁵

It is worth wondering whether restoring the original method of indirect senatorial elections would have the effect that repeal advocates anticipate, that is to say a rebalancing of federalism. On one view, returning to indirect senatorial elections would align the tenure of senators to how well they defend their state's interest rather than the national interests. It is also likely the case, as one observer acknowledges, that 'senators still would be just as likely to be corrupted' but it also likely that 'the corruption would be dispersed to the 50 separate state legislatures' and even then, 'the corruption more often would be on behalf of state interests'. This corruption, the same observer notes, would be remediable 'by the vigilance of voters for more responsive state legislative seats (typically, about less than 50,000 residences per state legislator), rather than Senate seats (the entire population of the state—usually millions.)'.¹¹⁶ This is an honest defense of indirect senatorial elections insofar as it recognizes that corruption is inevitable in either case.

But it is not clear that repealing the Seventeenth Amendment would necessarily reinstate indirect senatorial elections as a matter of practice, whatever it would mean as a matter of formal law. Assume the Seventeenth Amendment were repealed today. The Constitution would revert to its original appointment rule, requiring state legislatures to select their senators. But, in my view, that direct election would nonetheless

¹¹³ HOEBEKE, C.H. *Idem*. One state senator has even called on his state legislature to rescind its ratification of the Seventeenth Amendment. See HACKEN, Kelsey. Rescind Seventeenth Amendment, Indiana Lawmaker Proposes. **Heartlander Magazine**. Available at: <http://news.heartland.org/newspaper-article/2015/02/19/indiana-lawmaker-proposes-rescinding-seventeenth-amendment> (last accessed September 1, 2015).

¹¹⁴ GREENBLATT, Alan. Rethinking the 17th Amendment: An Old Idea Gets Fresh Opposition. **NPR**. Available at: <http://www.npr.org/sections/itsallpolitics/2014/02/05/271937304/rethinking-the-17th-amendment-an-old-idea-gets-fresh-opposition> (last accessed September 1, 2015).

¹¹⁵ See KOEHL, Theodore. How to Repeal the 16th and 17th Amendments. **American Thinker**. Available at: http://www.americanthinker.com/articles/2013/07/how_to_repeal_the_16th_and_17th_amendments.html (last accessed September 1, 2015).

¹¹⁶ *Idem*.

remain a political and legal fact of senatorial selection. The laws mandating direct senatorial elections even before the Amendment, as discussed above,¹¹⁷ would likely be revived. It would be difficult for state legislators to justify denying voters their right, acquired by prior law and practice, to choose their own senators.¹¹⁸ What is perhaps more problematic for the effort to repeal the amendment while concurrently prohibiting voters from choosing their own senators is that the amendment repealing the Seventeenth would have to be designed to effectively preclude all the different devices state legislatures could use to promote popular election of senators. It would also have to be designed to preclude indirect forms of popular election, for instance where the state legislature would select the candidate who was ahead in public opinion polls. Not only would this design be difficult to perfect but it would be an unreasonable choice for designers to make.

5. CONCLUSION

It is unlikely that the effort to repeal the Seventeenth Amendment will turn grow into a movement like the one that first drove the Amendment's proposal and ratification one hundred years ago. But even if support continues to build to repeal the Amendment, the formal amendment rules of Article V will almost certainly lead to its defeat. Constitutional amendment in the United States is next to impossible, or at least it is today. It could of course in the future become much less daunting, just as it became during the Progressive Era, when constitutional amendment seemed for some too easy in comparison to what it had been before. Fewer than thirty years before the entrenchment of the Seventeenth Amendment, Woodrow Wilson, writing in 1885, highlighted the difficulty of constitutional amendment under the United States Constitution, referring to the 'cumbrous machinery of formal amendment erected by Article Five'.¹¹⁹

Today, political actors introduce constitutional amendments on all subjects. Congresspersons introduce proposals on subjects ranging from campaign finance,¹²⁰ to prayer in schools¹²¹ and to presidential term limits,¹²² and state legislatures petition Congress to propose amendments to repeal federal laws,¹²³ to require a balanced

¹¹⁷ See *supra* Section 4.1.

¹¹⁸ See SPIVAK, Joshua. Don't Repeal the 17th Amendment. **Forbes.com**. Available at: <http://www.forbes.com/2010/04/02/seventeenth-amendment-repeal-louie-gohmert-opinions-contributors-joshua-spivak.html> (last accessed September 1, 2015).

¹¹⁹ WILSON, Woodrow. **Congressional Government**. Boston and New York: Houghton Mifflin Company, 1885. p. 242.

¹²⁰ See H.R.J. Res. 31, 113th Cong. (2013).

¹²¹ See H.R.J. Res. 42, 113th Cong. (2013).

¹²² See H.R.J. Res. 19, 113th Cong. (2013).

¹²³ See H.R. Res. 12-1003, 68th Gen. Assemb., Reg. Sess. (Colo. 2012).

budget¹²⁴ and to prohibit abortion.¹²⁵ Some of these amendments, and indeed perhaps most of them, are introduced for narrow parochial purposes that David Mayhew categorizes as position taking, credit claiming, or advertising.¹²⁶

Perhaps the history and methods of the Progressive movement can offer modern American constitutional reformers a roadmap for achieving formal constitutional change. For those amendments whose proposers believe could have a legitimate chance at eventual proposal and ratification, the Progressive movement is a good model for how to create and ultimately entrench social change. Of course, it would be difficult if not impossible to replicate the success of the Progressive Era. Four amendments in the span of a decade is unprecedented in American history since the Bill of Rights, and it would be surprising if such a feat were ever to be repeated.

6. REFERENCES

ACKERMAN, Bruce A. Transformative Appointments. **Harvard Law Review**. Cambridge, vol. 101, n. 6, p. 1164-1184, apr. 1988.

ALBERT, Richard. Constitutional Disuse or Desuetude: The Case of Article V. **Boston University Law Review**, Boston, vol. 94, n. 3, p. 1029-1082, may 2014.

ALBERT, Richard. Constructive Unamendability in Canada and the United States. **Supreme Court Law Review**, v. 67, n. 2, p. 181-219, jan. 2014.

ALBERT, Richard. The Difficulty of Constitutional Amendment in Canada. **Alberta Law Review**. Edmonton, v. 52, n. 5 (still unpublished).

ALBERT, Richard. The Structure of Constitutional Amendment Rules. **Wake Forest Law Review**. v. 49, p. 913-975, nov. 2014.

ALSTYNE, William Van. What do you Think About the Twenty-Seventh Amendment? **Constitutional Commentary**. Williamsburg, v. 10, n. 1, p. 9-18, nov. 1993.

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

AMAR, Vikram David. Indirect Effects of Direct Election: A Structural Examination of the Seventeenth Amendment. **Vanderbilt Law Review**. v. 49, n. 6, p. 1347-1407, nov. 1996.

BAI, Matt. Tea Party's Push on Senate Election Exposes Limits. **N.Y. Times**, June 1, 2010, available at: <http://www.nytimes.com/2010/06/02/us/politics/02bai.html> (last accessed September 1, 2015)

BARNETT, Randy. The Case for the Repeal Amendment. **Tennessee Law Review**. Knoxville, v. 78, n. 12, p. 813-822, mar. 2011.

¹²⁴ See S. Con. Res. 4007, 62d Leg. Assemb., Reg. Sess. (N.D. 2011).

¹²⁵ See S. Con. Res. 132, 45th Leg. Assemb., Reg. Sess. (Idaho 1980).

¹²⁶ MAYHEW, David R. **Congress: The Electoral Connection**. New Haven: Yale University Press, 1974. p. 49-61.

BUENKER, John D. Illinois and the Four Progressive-Era Amendments to the United States Constitution. **Illinois Historical Journal**. Springfield, v. 80, sept./dec. 1987.

BYBEE, Jay S. Ulysses at the Mast: Democracy, Federalism, and the Sirens Song of the Seventeenth Amendment. **Northwestern Law Review**. Chicago, v. 91, n. 2, p. 500-569, sept./dec. 1997.

CLOPTON, Zachary D.; ART, Steven E. The Meaning of the Seventeenth Amendment and a Century of State Defiance. **Northwestern Law Review**. Chicago, v. 107, n. 3, p. 1181-1242, mar./jun. 2013.

COLÓN-RÍOS, Joel; HUTCHINSON, Allan. Democracy and Revolution: An Enduring Relationship? **Denver University Law Review**. Denver, v. 89, n. 3, p. 593-611, jul./sept. 2012.

CROOK, Sara Brandes; HIBBING, John R. A Not-so-distant Mirror: The 17th Amendment and Congressional Change. **American Political Science Review**. Washington, D.C., v. 91, n. 4, p. 845-853, dec. 1997.

DIXON, Rosalind. Partial Constitutional Amendments. **University of Pennsylvania Journal of Constitutional Law**. Philadelphia, v. 13, n. 3, p. 643-685, mar. 2011.

EISGRUBER, Christopher L. **Constitutional Self-Government**. Cambridge: Harvard University Press, 2001.

EULE, Julian N. Judicial Review of Direct Democracy. **Yale Law Journal**. New Haven, v. 99, p. 1503-1558, may 1990.

FALLON, Richard H. Strict Judicial Scrutiny. **UCLA Law Review**. Los Angeles, vol. 54, n. 5, 2007.

FISCH, William B. Constitutional Referendum in the United States of America, **American Journal Comparative Law** (supplement), Ann Arbor, vol. 54, n. 4 p. 485, 490-491, 2006.

GINSBURG, Tom; MELTON, James. Does the Constitutional Amendment Rule Matter at All? Amendment Cultures and the Challenges of Measuring Amendment Difficulty. **Chicago Working Papers on Law and Economics**. Chicago, n. 682, p. 1-29, may 2014.

GOLDSWORTHY, Jeffrey. Constitutional Cultures, Democracy, and Unwritten Principles. **University of Illinois Law Review**. Champaign, v. 18, n. 2, p. 683-710, apr. 2012.

GRADEL, Thomas J.; SIMPSON, Dick. **Corrupt Illinois: Patronage, Cronyism, and Criminality**. Champaign: University of Illinois Press, 2014.

GRAEBNER, William. Federalism in the Progressive Era: A Structural Interpretation of Reform. **The Journal of American History**. Oxford, v. 64, n. 2, p. 331-357, sept. 1977.

GREENBLATT, Alan. Rethinking the 17th Amendment: An Old Idea Gets Fresh Opposition. **NPR**. Available at: <http://www.npr.org/sections/itsallpolitics/2014/02/05/271937304/rethinking-the-17th-amendment-an-old-idea-gets-fresh-opposition> (last accessed September 1, 2015).

GRIMES, Alan P. **Democracy and the Amendments to the Constitution**. Lexington: Lexington Books, 1978.

HACKEN, Kelsey. Rescind Seventeenth Amendment, Indiana Lawmaker Proposes. **Heartlander Magazine**. Available at: <http://news.heartland.org/newspaper-article/2015/02/19/indiana-lawmaker-proposes-rescinding-seventeenth-amendment> (last accessed September 1, 2015).

HAYNES, George H. **The Election of Senators**. New York: Henry Holt and Co., 1912.

HENRETTA, James A. Foreword: Rethinking the State Constitutional Tradition. **Rutgers Law Journal**. Camden, v. 22. p. 819-839, 1991.

HOEBEKE, C.H. Democratizing the Constitution: The Failure of the Seventeenth Amendment. **IX Humanitas - National Humanities Institute, Center for Constitutional Studies**. Available at: <http://www.nhinet.org/hoebeke.htm> (last accessed September 1, 2015).

HOEBEKE, C.H. **The Road to Mass Democracy: Original Intent and the Seventeenth Amendment**. Brunswick: Transaction Publishers, 1995.

JOHNSON, Keith. Anti-Washington Ire Kindles an Old Debate. **Wall Street Journal**. Available at: <http://www.wsj.com/articles/SB10001424052702304879604575582192395853212> (last accessed September 1, 2015).

KENNEDY, Christopher M. Is There a Twenty-Seventh Amendment: The Unconstitutionality of a New 203-Year-Old Amendment. **Marshall Law Review**. Chicago, v. 26, n. 4, p. 977-1019, jul./sept. 1993.

KOBACH, Kris W. Rethinking Article V: Term Limits and the Seventeenth and Nineteenth Amendments. **Yale Law Journal**. New Haven, v. 103, n. 7, p. 1971-2007, may 1994.

KOEHL, Theodore. How to Repeal the 16th and 17th Amendments. **American Thinker**. Available at: http://www.americanthinker.com/articles/2013/07/how_to_repeal_the_16th_and_17th_amendments.html (last accessed September 1, 2015).

KYVIG, David E. **Explicit and Authentic Acts: Amending the U.S. Constitution, 1776-1995**. Lawrence: University Press of Kansas, 1996.

KYVIG, David E. **Repealing National Prohibition**. Kent: The Kent State University Press, 2000.

LEVINSON, Daryl J.; PILDES, Richard H. Separation of Parties, Not Powers. **Harvard Law Review**. Cambridge, v. 119, n. 8, p. 2311-2386, june 2006.

LEVINSON, Sanford. Authorizing Constitutional Text: On the Purported Twenty-Seventh Amendment. **Constitutional Commentary**. Saint Paul, v. 11, n. 1, p. 101-113, dec./feb. 1994.

LEVINSON, Sanford. How I Lost my Constitutional Faith. **Maryland Law Review**. Prince George's, v. 71, n. 4, p. 956-977, oct. 2012.

LIJPHART, Arend. **Patterns of Democracy**. New Haven: Yale University Press, 1999.

LINK, Arthur S. What Happened to the Progressive Movement in the 1920's? **American Historical Review**. Oxford, v. 64, n. 4, p. 833-851, oct. 1959.

LITTLE, Laura E. An Excursion into the Uncharted Waters of the Seventeenth Amendment. **Temple Law Review**. Philadelphia, v. 64, n. 3, p. 629-658, sept./dec. 1991.

LORENZ, Astrid. How to Measure Constitutional Rigidity. **Journal of Theoretical Politics**. [s.l.], v. 17, n. 3, p. 339-361, july 2005.

LUTZ, Donald S. **Principles of Constitutional Design**. New York: Cambridge University Press, 2006.

MAGLEBY, David B. Taking the Initiative: Direct Legislation and Direct Democracy in the 1980s. **PS: Political Science & Politics**. New York, v. 21, n. 3, p. 600-611, jul./sept. 1988.

MARBURY, William L. The Limitations upon the Amendment Power. **Harvard Law Review**. Cambridge, v. 33, n. 2, p. 223-235, dec. 1919.

MAYHEW, David R. **Congress: The Electoral Connection**. New Haven: Yale University Press, 1974. p. 49-61.

MCGINNIS, John O. The Original Constitution and its Decline: A Public Choice Perspective. **Harvard Journal of Law & Public Policy**. Cambridge, v. 21, n. 1, p. 195-210, sept./dec. 1997.

MCGREAL, Paul E. There is no Such Thing as Textualism: A Case Study in Constitutional Method. **Fordham Law Review**. New York, v. 69, n. 6, p. 2393-2469, may 2001.

MILLER, Kenneth P. **Direct Democracy and the Courts**. New York: Cambridge University Press, 2009.

PERSILY, Nathaniel A. The Peculiar Geography of Direct Democracy: Why the Initiative, Referendum and Recall Developed in the American West. **Michigan Law & Policy Review**. Ann Arbor, v. 2, p. 11-41, jan. 1997.

PILDES, Richard H. Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America. **California Law Review**. Berkeley, v. 99, n. 2, p. 273-333, apr. 2011.

PREUSS, Ulrich K. The Implications of 'Eternity Clauses: The German Experience. **Israel Law Review**. Cambridge, vol. 44, n. 3, p. 429-448, 2011.

PRIMUS, Richard A. When Should Original Meanings Matter? **Michigan Law Review**. Ann Arbor, vol. 107, n. 2, p. 165-222, 2008.

RIKER, William H. The Senate and American Federalism. **American Political Science Review**. New York, v. 49, n. 2, p. 452-469, july 1955.

ROSSUM, Ralph A. **Federalism, the Supreme Court, and the Seventeenth Amendment: The Irony of Constitutional Democracy**. Lanham: Lexington Books, 2001.

SCHAUER, Frederick. Deliberating About Deliberation. **Michigan Law Review**. Ann Arbor, v. 90, p. 1187-1202, 1990.

SCHILLER, Wendy J.; STEWART III, Charles. **Electing the Senate: Indirect Democracy Before the Seventeenth Amendment**. Princeton: Princeton University Press, 2015.

SCHILLER, Wendy J.; STEWART III, Charles. The 100th Anniversary of the 17th Amendment: A Promise Unfulfilled. **Issues in Governance Studies**. Washington, v. 34, n. 59, p. 1-12, may 2013.

SCHLEICHER, David. The Seventeenth Amendment and Federalism in an Age of National Political Parties. **Hastings Law Journal**. San Francisco, v. 65, n. 4, p. 1043-1099, may 2014.

SEITZ-WALD, Alex. Repeal the 17th Amendment! **Salon**. Available at: http://www.salon.com/2012/08/16/repeal_the_17th_amendment (last accessed September 1, 2015).

SPIVAK, Joshua. Don't Repeal the 17th Amendment. **Forbes.com**. Available at: <http://www.forbes.com/2010/04/02/seventeenth-amendment-repeal-louie-gohmert-opinions-contributors-joshua-spivak.html> (last accessed September 1, 2015).

SPOTTS, JoAnne D. The Twenty-Seventh Amendment: A Late Bloomer or a Dead Horse? **The Georgia State University Law Review**. Atlanta, v. 10, n. 2, p. 337-365, jan.1994.

STRAUSS, David A. The Irrelevance of Constitutional Amendments. **Harvard Law Review**. Cambridge, v. 114, n. 5, p.1457-1460, mar. 2001.

STRICKLAND, Ruth Ann. The Twenty-Seventh Amendment and Constitutional Change by Stealth. **PS: Political Science & Politics**. New York, v. 26, n. 4, p. 716-722, dec. 1993.

SULLIVAN, Kathleen M. Constitutional Constancy: Why Congress Should Cure Itself of Amendment Fever. **Cardozo Law Review**. New York, v. 17, n. 3, p. 691-704, jan. 1996.

TEACHOUT, Zephyr. **Corruption in America: From Benjamin Franklin's Snuff Box to Citizens United**. Cambridge: Harvard University Press, 2014.

TIMBERLAKE, James H. **Prohibition and the Progressive Movement, 1900-1920**. Cambridge: Harvard University Press, 1963.

WIEGAND, Elva. **A History of the Movement for the Direct Election of Senators**. Los Angeles, 1934. Thesis (Master in History) - Department of History, University of Southern California.

WILSON, Woodrow. **Congressional Government**. Boston and New York: Houghton Mifflin Company, 1885.

WITT, Benjamin Parke De. **The Progressive Movement**. New York: MacMillan, 1915.

ZYWICKI, Todd J. Beyond the Shell and Husk of History: The History of the Seventeenth Amendment and Its Implications for Current Reform Proposals. **The Cleveland State Law Review**. v. 45, n. 2, p. 165-234, mar./may 1997.

ZYWICKI, Todd J. Senators and Special Interests: A Public Choice Analysis of the Seventeenth Amendment. **Oregon Law Review**. Eugene, v. 73, p. 1007-1055, 1994.