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THE SEVENTEENTH AMENDMENT AND FEDERALISM IN AN AGE OF NATIONAL POLITICAL PARTIES

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Abstract:

Despite it being the constitutional amendment that most altered the design of the federal government, and despite recent efforts by many prominent figures to repeal it, little is known about why the Seventeenth Amendment passed in 1913. Existing histories of why the Constitution was amended to require direct elections for U.S. Senators, rather than having them appointed by state legislatures, cannot account for two major historical puzzles. Why were state legislatures eager to give away the power to choose Senators? And why was there virtually no discussion of federalism during debates over removing a key constitutional protection for states?

Using both positive political theory and historical evidence, this Article offers a theory that can provide an answer to these questions. Support for direct elections was, at least in part, a result of the rise of ideologically coherent, national political parties. The development of national parties meant that state legislative elections increasingly turned on national issues, from war to currency policy to international trade, as voters used these elections as means to select Senators. State politicians and interest groups supported direct elections as a way of separating national and state politics. Federalism was not invoked against the Seventeenth Amendment because state legislative appointment was frustrating a precondition for the variety of benefits that come from republican federalism, the ability of state majorities to choose state policies. Modern advocates of repealing the Seventeenth Amendment, from Justice Scalia to Gov. Rick Perry, claim the mantle of federalism, but they have the case almost entirely backwards. Repealing the Seventeenth Amendment would reduce the benefits of federalism, as it would turn state legislatures into electoral colleges for U.S. Senators.

While important in its own right, the history of the Seventeenth Amendment can also teach us a great deal about how federalism functions in the real world of politics more generally. First, contrary to the claims of scholars like Larry Kramer, national political parties do not necessarily serve as “political safeguards of federalism,” but instead can make state politics turn on national issues, reducing the influence of the preferences of state citizens on state policy. Second, certain state governmental powers – from the power to gerrymander to control over issues normally associated with the federal government – reduce the democratic accountability of state officials that undergirds most normative theories of federalism. Finally, despite the Seventeenth Amendment, state elections today still largely turn on national politics. Although state issues are sometimes important, the most important factor in state legislative elections is the popularity of the President. If the benefits for state democracy sought by supporters of the Seventeenth Amendment are to be achieved, electoral reform is a more promising avenue than structural constitutional change.

¹ Associate Professor, George Mason University School of Law. I would like to thank Matt Kelly, Justin Raphael and, particularly, Mark Quist and Mary Watson for their extremely helpful research assistance. I would also like to thank Jessica Bulman-Pozen, Christopher Elmendorf, David Fontana, Heather Gerken, Michael Gilbert, Bruce Johnsen, Todd Zywicki and participants at workshops at George Mason, Marquette and the University of Virginia for their comments on this draft.

For a brief moment in 2010, the Seventeenth Amendment suddenly and surprisingly became news. Before the Seventeenth Amendment gave a state's citizens the power to directly elect U.S. Senators, state legislators had the power to appoint them.² After years of being a niche cause for a few legal scholars and a small number of fringe political activists,³ repeal of the Seventeenth Amendment became popular among Tea Party figures and Republican candidates for office.⁴ Prominent conservative figures like Texas Governor Rick Perry, Justice Antonin Scalia, and columnist George Will came out in favor of repeal.⁵ The movement to repeal the Seventeenth Amendment, once well outside of the popular mainstream, was hot.

And then it went cold, with attention dying down and no legislative action, despite several proponents of repeal getting elected to Congress.⁶ But this upsurge in attention to the

² The Constitution originally read: "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." U.S. Const. art. I, § 3, cl. 1 (amended 1913). The Seventeenth Amendment changed this provision to read: "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.

³ The leading scholars pushing repeal were (now-Judge) Jay Bybee, C.H. Hoebeker, and Todd Zywicki. Todd J. Zywicki, *Beyond the Shell and Husk of History: The History of the Seventeenth Amendment and Its Implication for Current Reform Proposals*, 45 CLEV. ST. L. REV. 165 (1997); Todd J. Zywicki, *Senators and Special Interests: A Public Choice Analysis of the Seventeenth Amendment*, 73 OR. L. REV. 1007 (1994); C.H. HOEBEKE, *THE ROAD TO MASS DEMOCRACY: ORIGINAL INTENT AND THE SEVENTEENTH AMENDMENT* (1995). Jay S. Bybee, *Ulysses At the Mast: Democracy, Federalism, and the Sirens' Song of the Seventeenth Amendment*, 91 N.W. L. REV. 500 (1997). For a discussion of support for repeal among political activists, see Kevin Drum, *Repeal the Seventeenth Amendment!*, Mother Jones, Aug. 15, 2011 (discussing long-term support for repeal in John Birch Society and others on the "fringe of movement conservatism.").

⁴ See Alex Seitz-Wald, *Repeal the 17th Amendment! The surprising Republican movement to strip voters of their right to elect senators*, Salon, August 16, 2012, http://www.salon.com/2012/08/16/repeal_the_17th_amendment (noting support among Tea Party activists, leading figures like Justice Scalia and Gov. Perry, and candidates for office); George Will, *Sen. Feingold's Constitution*, Wash. Post, February 22, 2009 (supporting repeal).

⁵ It even became a campaign issue, with several Democrats running ads criticizing Republican candidates for supporting repeal. See Greg Sargent, *Can Dems use Tea Party against GOP on 17th amendment?*, The Plum Line, WASH. POST, Sept. 8, 2010, available at http://voices.washingtonpost.com/plum-line/2010/09/can_vulnerable_dems_teabag_gop.html (describing Democratic attack ads based on Republican candidate's support for repeal).

⁶ In 2010, the most notable supporter who was elected was Senator Michael Lee (R-UT). Support for repeal was still alive in campaigns in 2012, when it was endorsed by at least four Republican candidates for Senate -- Todd Akin, Jeff Flake, Peter Hoekstra and Richard Mourdock. See Seitz-Wald, *supra* note 4 (noting support from Akin, Mourdock, Flake and Hoekstra and support among several elected officials including Sen. Lee). Among these repeal supporters, only Flake was elected. See Ken Belson et al., *Northeast, South, Midwest, West*, N.Y. TIMES, November 8, 2012 at A16 (discussing election results).

Seventeenth Amendment – and the continuing support for repeal in Congress and beyond – raises one of the great, unanswered questions in constitutional history. Why did we take away from state legislatures the power to select Senators, which James Madison described in Federalist 62 as so "congenial with the public opinion" that it was "unnecessary to dilate" upon?⁷

The academic literature has struggled with this question, pointing to explanations that are at best somewhat incomplete, telling stories that contain some of the evidence but seem to weak to explain the passage of a Constitutional amendment, or at worst that run counter to much available evidence. Most problematically, existing theories tell us little about the central puzzle in the historical record: why state legislatures, state-based interest groups, and political figures committed to states' rights in other contexts did not contest an Amendment that removed a substantial power from state governments. Instead, direct election of Senators was wildly popular among state legislators, the very people it disempowered. Thirty-one state legislatures passed resolutions calling for a constitutional amendment providing for direct elections.⁸ In many states, the direct election of Senators had already been implemented, in one form or another, before the passage of the Seventeenth Amendment. Further, in the debates over the Seventeenth Amendment in Congress, there was little discussion of its implications for federalism.⁹ As Alan Grimes has noted, "no amendment has so fundamentally altered the design of the original structure of the government," but scholars have still yet to answer even the most basic questions about the passage of the Seventeenth Amendment.¹⁰

⁷ THE FEDERALIST No. 62 (Madison), in THE FEDERALIST PAPERS 377 (Clinton Rossiter Ed., 1961).

⁸ See note 39 and accompanying text

⁹ There was a substantial debate over states rights and the Seventeenth Amendment, but it was not about direct election of Senators, but was instead about whether the Seventeenth Amendment should include a change to the Elections Clause of Article I. See note 44 and accompanying text

¹⁰ ALAN P. GRIMES, DEMOCRACY AND THE AMENDMENTS TO THE CONSTITUTION 2 (1978)

This Article argues that existing scholarship has ignored a major change in American political life concurrent with the movement for direct election of Senators, the rise of truly national political parties. The combination of having state legislatures appoint U.S. Senators and the increasing nationalization and ideological coherence of the major parties at the turn of the last century ensured that *state* legislative elections were fundamentally about *national* politics. Voters used state legislative elections to choose U.S. Senators rather than use them to hold state legislators accountable for their performance in office. The movement for direct elections of U.S. Senators was driven in part by a felt need – by state politicians, state voters and state interest groups – to save elections at the state level from becoming a mere referenda on national issues and officials.

I will offer both a theoretical argument why changes in the party system likely had this effect and some historical evidence that shows that at least some supporters of the Seventeenth Amendment did in fact see direct election of Senators as a method of preserving state democracy. The fear that state democracy was under threat was surely not the only reason why the Seventeenth Amendment passed, but it was an important and largely ignored factor in explaining this substantial constitutional change.

The history of the Seventeenth Amendment is important in its own right, but it can also teach us a great deal about how our multi-level democracy works in practice. While there is an enormous literature debating the benefits and costs of federalism, most legal scholarship and judicial opinions in the field are premised on a belief that giving more power to state governments enhances the values we associate with federalism. But virtually all the normative justifications for "our federalism" – varied though they are – turn on the ability of state citizens to use elections to express preferences about state policies and to hold state officials

accountable.¹¹ To the extent that a constitutional change makes it *harder* for state residents to use the apparatus of their state government to achieve policy ends, it should be considered a move *away* from realizing the benefits of federalism. The original Constitution's delegation of the power to choose U.S. Senators was a substantial power held by state governments.

However, given the increasing nationalization of political parties at the turn of the last century, state legislative appointment served to harm the quality of state elections as referenda on the performance of state officials. Because it reduced the degree to which state government was representative of the preferences of state residents, it made federalism work less well.

Modern proponents of repealing the Seventeenth Amendment claim the mantle of federalism, but they have the case almost entirely backwards. Rather than serving to enhance the values of federalism, repealing the Seventeenth Amendment would turn state legislative elections into referenda on U.S. Senators, meaning that state legislatures would be free from almost accountability. This is only “pro-federalism” if one’s view of federalism is purely formal – a flowchart of powers and responsibilities. To the extent one cares about federalism because of its effects, repealing the Seventeenth Amendment would be harmful.

However, the pro-federalism story of the Seventeenth Amendment has an ironic end. Even after the Seventeenth Amendment, voters in state legislative elections still respond mostly to national rather than state inputs, leaving state legislatures substantially unaccountable and unrepresentative. While repealing the Seventeenth Amendment would make this worse, the most important factor today in determining which party wins state legislative elections is still the popularity of the President.

This is largely a function of the fact that the parties voters see on the ballot -- Democrats and Republicans -- are national in scope. The national parties face legal and practical hurdles in

¹¹ The term "our federalism" was coined in *Younger v. Harris*, 401 U.S. 37, 44 (1971).

their efforts to create differentiated state party brands that are understood by state voters as distinct from their national parents. They are, as I have argued in previous work, "mismatched" to the level of government, leaving voters without informative party labels to help them overcome their lack of knowledge about individual legislative candidates.¹²

The failures of party democracy at the state level are an important limitation on the functioning of American federalism. Contrary to arguments of scholars like Larry Kramer, rather than serving as "political safeguards of federalism," interaction between state and national political parties can serve to reduce the benefits of federalism.¹³ To achieve the ends of the pro-federalism ends of Seventeenth Amendment, we need to come up with methods for making state policies more visible to state voters when they enter the voting booth. Changes to election laws, rather than structural constitutional change, are more likely to improve the degree to which state elections turn on the performance and policy positions of state officials and candidates.

As voluminous as it is, both scholarly and public debates about federalism today too rarely focus on how well state democracy actually works. The history of the Seventeenth Amendment shows that this was not always the case. While today's scholars, jurists and reformers have focused largely on the powers of states and their independence from federal encroachment (and in particular on the Supreme Court's resolution of these questions), state democracy has suffered, failing to produce policy outcomes that are representative of popular

¹² See Christopher S. Elmendorf and David Schleicher, *Informing Consent: Voter Ignorance, Political Parties and Election Law*, 2013 ILL. L. REV. _ (forthcoming 2013) (analyzing mismatch); David Schleicher, *What if Europe Held an Election and No One Cared?*, 52 HARV. INT'L L.J. 109 (2011) (discussing mismatch problem in European Parliament elections); David Schleicher, *Why Is There No Partisan Competition in City Council Elections? The Role of Election Law*, 23 J. L. & POL. 419 (2007) (arguing that there are mismatch problems in city council elections).

¹³ The two central figures in developing the theory (or rather theories) of the "political safeguards of federalism" are Herbert Wechsler and Larry Kramer. See Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 546, 558-59 (1954) (arguing that structural of the federal government in protects federalism); Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1508 (1994) (arguing that state-based political parties and the ability of states to interact with federal administrators protects federalism); Larry Kramer, *Putting the Politics Back in the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 269 (2000) (same).

preferences. A leading recent study showed that, at the state level, “roughly half the time, opinion majorities lose—even large supermajorities prevail less than 60% of the time. In other words, state governments are not more effective in translating opinion majorities into public policy than a simple coin flip.”¹⁴ These failings of state democracy raise important questions about existing theories of federalism. Both our understanding of these theories, and any potential areas for reform, would be well served by looking beyond the arguments at One First Street and into the local electoral fights that choose the people who run state governments in Albany, Richmond, Columbus and Sacramento. This paper is an effort to do just that.

The rest of the article is organized as follows. Section II analyzes the history of state legislative appointment of Senators from the Founding period to the Seventeenth Amendment. Section III argues that the change in the centralization and ideological content of national political parties can help explain why there was little state-government-based opposition to the Seventeenth Amendment. Section IV argues that the history of the Seventeenth Amendment has important implications for the literature on the "political safeguards of federalism" and on the study of federalism generally.

I. Appointing v. Electing Senators From the Founding Period to the Seventeenth Amendment

This section will explore the history of arguments over methods of appointment for Senators from the founding period through passage of the Seventeenth Amendment. As it will show, there are major holes in the existing literature on what caused changes in support for direct election.

¹⁴ See Jeffrey R. Lax & Justin H. Phillips, *The Democratic Deficit in the States*, 56 AM. J. POL. SCI. 148, 149 (2012).

a. **The Founders and Senatorial Appointment: “The Citizens of the States would be represented both individually and collectively.”**

In order to understand what was missing from the debates over the Seventeenth Amendment, and why this has struck historians as particularly strange, it is necessary to discuss the understanding of why state legislatures were given the power to appoint U.S. Senators in the original constitution. There were multiple, overlapping reasons for providing state legislatures with this power, each of which will turn out to be important to the story of why the Seventeenth Amendment passed.

In Federalist 62, James Madison stated clearly two reasons for giving state legislatures the power to appoint Senators:

“Among the various modes which might have been devised for constituting this branch of the government, that which recommended by the double advantage of favoring a select appointment, and of giving to the State governments such an agency in the formation of the federal government as must secure the authority of the former, and may form a convenient link between the two systems.”¹⁵

State legislatures were thus given the power to appoint Senators for two reasons – to ensure “select” representation and to protect the interests of states. The former can be seen in many aspects of the design of the Senate, particularly its six-year terms.¹⁶ Certainly, the Founders gave state legislatures the power to choose Senators in part to remove the decision from democratic consideration and to put the decision in elite hands.

However, it is a mistake to look at state legislative selection only as a means of insulating government from popular opinion. After all, the Constitutional Convention considered and rejected other possible ways of selecting the Senate that were equally removed from the popular

¹⁵ THE FEDERALIST NO. 62, *supra* note 7, at 365 (James Madison).

¹⁶ See Zywicki, *Beyond the Shell*, *supra* note 3, at 180.

vote, including having the House select the membership of the Senate.¹⁷ The other side of the "double advantage" was also central to the decision. George Mason defended state legislative selection on the ground that states needed the "power of self-defense" against the federal government.¹⁸ The Senate was clearly seen as the protector of state interests.

But Senators were not intended to serve as ambassadors of state governments either. The Convention rejected proposals that would have given states governments control over Senators, like the power to recall Senators or to punish them for ignoring instructions from state legislatures.¹⁹ Senators from the same state were allowed to disagree, which is inconsistent with the idea that they served as agents of state governments. Further, the Constitution did not allow state governments as sovereign entities to decide how they would select Senators; the power to appoint was explicitly delegated to the state legislatures, who were seen as the bodies with the greatest democratic pedigree.

State legislative selection of Senators was not just a method of protecting states as entities. It was also a way to increase the *types* of representation afforded by the Federal government to the people.²⁰ William Pierce, a delegate from Georgia, made this point clearly at the Convention, when he said that the division of bicameral legislature into a national and federal bodies meant that "the Citizens of the States would be represented both individually and

¹⁷ Ralph A. Rossum, *The Irony of Constitutional Democracy: Federalism, the Supreme Court, and the Seventeenth Amendment*, 36 SAN DIEGO L. REV. 671, 674 (1999) (noting that the Convention considered and rejected having the House select the Senate).

¹⁸ *As quoted in* GEORGE H. HAYNES, AMERICAN PUBLIC PROBLEMS: THE ELECTION OF SENATORS 13 (Ralph C. Ringwalt, ed., 1906).

¹⁹ See Kramer, *Understanding Federalism*, *supra* note 13, at 1508 (1994).

²⁰ This understanding of the decision to have state legislatures select Senators clears up one seeming contradiction in the Framers' beliefs about the Senate. As Larry Kramer has noted, "The Senate was designed to serve contradictory ends. On the one hand, it was supposed to protect states by giving state legislatures an effective veto over federal policy. On the other hand, it was also supposed to serve as a republican analogue to the aristocratic House of Lords by taking the longer, more "national" view of policy." *See id.* However, if one considers the Senate as providing a different form of representation, one in which through deliberation they came to the best interests of the nation as a compact between states, this seeming contradiction dissolves. That is, to the extent this understanding was common, there is no reason to think that representing state interests in a national legislature and having a long-sighted view of the national interest beyond day-to-day politics are in conflict.

collectively.”²¹ This would also provide a protection against faction. Bicameralism based on different sources of electoral accountability would protect against dominance by one faction.²²

In Federalist 39, Madison emphasized the idea that both houses had democratic purchase, but of different sorts. He noted that the “House of Representatives . . . is elected immediately by the great body of the people. The Senate . . . derives its appointment indirectly from the people.”²³ Thus, both have democratic pedigree, if of a different sort. Then, he continued:

“The House of Representatives will derive its powers from the people of America; and the people will be represented in the same proportion, and on the same principle, as they are in the legislature of a particular State. So far the government is NATIONAL, not FEDERAL. The Senate, on the other hand, will derive its powers from the States, as political and coequal societies; and these will be represented on the principle of equality in the Senate, as they now are in the existing Congress. So far the government is FEDERAL, not NATIONAL. . . . From this aspect of the government it appears to be of a mixed character, presenting at least as many FEDERAL as NATIONAL features.”²⁴

When combined with his one-paragraph earlier statement noting the democratic nature of both bodies, the meaning of Madison’s argument becomes clear. Giving elected state legislatures the power to appoint Senators, and voters the power to select members of the House directly, meant that the two houses of the legislature would provide two different types of democratic representation to citizens, individual (i.e. as national citizens) in the House and collective (as citizens of a State) in the Senate.

In an important article, Terry Smith challenged the argument that state legislatures were intentionally given the power to select Senators in order to give states control over the Senate.²⁵ Instead, Smith argues, it was the result of the intersection of two other forces – the Great Compromise, which gave small states equal representation in the Senate, and the desire for

²¹ See Zywicki, *Beyond the Shell and Husk*, *supra* note 3, at 177 (quoting Pierce from Georgia).

²² *Id.* at 175-79.

²³ THE FEDERALIST NO. 39 (James Madison), *supra* note 7, at 286 (emphasis added).

²⁴ *Id.*

²⁵ Terry Smith, *Rediscovering the Sovereignty of the People: the Case for Senate Districts*, 75 N.C.L. REV. 1, 21-34 (1996).

bicameralism. In fact, there was widespread disgust with the idea that states as entities would be given representation rather than citizens, including from Madison and Alexander Hamilton.²⁶ The design features of the Senate, from the ability of Senators from the same state to vote differently to the absence of the power of states to recall Senators, were inconsistent with the idea of Senate that represented states. Instead of being an intentional choice, state legislative selection passed and then justified *post hoc*.

During the battles over ratification, the inconsistencies in the justification for state legislative election were laid bare, Smith argues. The Federalists had to face claims by Anti-Federalists that the Constitution was inconsistent with the sovereignty of the states because sovereignty, by the understanding at the time, was indivisible. James Wilson, leading the campaign for the Constitution on this point, instead argued that sovereignty “resides in the people,” allowing for it to be represented in different forms at different levels of government. Acceptance of this argument, Smith claims, nullified any argument that the Senate was an expression of state sovereignty. “The legislative appointment of federal Senators was not a mechanism for representing state legislatures in the Senate, for these entities did not in reality possess sovereign powers--only the people did.”²⁷

Smith successfully undermines the notion of that the Senate was designed merely as means of protecting state sovereignty. But, as the arguments made by Madison and Wilson during ratification suggest, one key proffered justification for allocating this power to state legislatures was providing representation to the people of each state in their capacity as state residents. There were no national political parties when the Constitution was written, and the

²⁶ *Id.* at 27.

²⁷ *Id.* at 33.

idea of such parties was anathema to the Founders.²⁸ Instead, each state had its own political culture, local leaders, press and social organizations. Thus, politics internal to each state could be, and were, quite different from politics at the national level. State legislatures represented a state's political culture. Allocating to state legislatures the power to appoint meant that there would be a two types of representation for citizens. As argued during the ratification process, the difference in the electoral basis for representation in the House and the Senate would provide a sovereign people with two means of representation.

As with any such decision, many forces surely played a role in the decision to allocate power to state legislature to choose Senators. However, three stories come out of the history that will inform the question of what happened during debates over the Seventeenth Amendment. First, state legislative appointment was designed to ensure elite and not purely popular representation. Second, the Framers took seriously the benefits of using the Senate to provide representation for states in the federal government. Third, the decisions to give the power to state legislatures instead of the state as a whole, the lack of a power of recall and the ability of Senators from the same state to vote differently meant that Senators were not seen as ambassadors of state governments. Instead, Senators were meant to provide a type of democratic representation to citizens, representation in their capacity as citizens of states, rather than just as citizens of the nation.

b. Why Did The Seventeenth Amendment Pass?

If the Senate was originally designed in part to protect state governments against federal encroachment and in part provide an alternative means of representation for voters, it is a riddle why was it abandoned overwhelmingly in 1913 without any real debate over the extent to which it would affect the role of states in the federal government. Traditional accounts of the history of

²⁸ See Kramer, *Putting the Politics Back*, *supra* note 13, at 269.

the Seventeenth Amendment provide a number of explanations for its success, but none of directly address the two most difficult questions about its passage: why direct election was so overwhelming popular in the state legislatures it disempowered and why federalism was not a major part of the debate at the state or national level.

Before discussing the history of the Seventeenth Amendment, it is important to see how the Senate functioned during the Eighteenth and Nineteenth centuries. There is some dispute about the extent to which the Senate ever truly functioned in the way the Framers intended. William Riker and Larry Kramer have argued that the original set-up of the Senate strongly limited the degree to which Senators served as representatives of states as institutions.²⁹ Once appointed, Senators were largely independent of state legislatures because of their six-year terms and because state legislatures did not have the power of recall. Further, although state legislatures did have the power to “instruct” Senators on specific votes but this power was limited by their limited power to punish wayward Senators and it was phased out after its abuse during the Jackson Administration.³⁰ According to Riker, the result was that “Senate did not ... have quite the anticipated effect. Except for a few occasions when sectionalism has been organized by state governments, the Senate has not been a peripheralizing institution.”³¹

Todd Zywicki, on the other hand, while acknowledging the limitations created by the lack of the power of recall and the atrophying of the instruction power, argues that, “[n]onetheless, instruction and the remaining enforcement mechanisms such as refusal to reelect and forced resignations provided state legislatures with some measure of control over Senators.

²⁹ Kramer, *Understanding Federalism*, *supra* note 13, at 1506-10; William H. Riker, *The Senate and American Federalism*, 49 AM. POL. SCI. REV. 452, 455-63 (1955).

³⁰ Kramer, *Putting the Politics Back*, *supra* note 13, at 224 n.33 (2000); Kramer, *Understanding Federalism*, *supra* note 13, at 1508-09.

³¹ Riker, *supra* note 29, at 455.

... [S]tatistical and anecdotal evidence suggests that the Senate played an active role in preserving the sovereignty and independent sphere of action of state governments.”³²

Regardless of the emphasis one puts on this evidence, it is clear that the Senate was not as robust an institution in protecting state interests as some Framers intended. But it is also clear that it was not a purely national institution either. The question remains, though, why the original Senate was changed.

The timing of the national movement towards direct election is usually dated to the 1870s, when the first real efforts to amend to the Constitution were introduced in Congress.³³ Others point to the rise of the "public canvass," in which candidates starting in the 1830s for Senate would stump for state legislators, making state legislative elections into partial referenda on the candidates.³⁴ The most famous example of the public canvas was the nationally-followed Illinois Senate race of 1858, in which the state legislative election served as a proxy for the titanic battle between Abraham Lincoln and Stephen Douglas, with Democratic state legislative candidates pledging their support to Douglas and Republicans to Lincoln in advance of the election.³⁵ After the Civil War, President Andrew Johnson said that he thought the arguments in favor of direct election of Senators were so overwhelming that they barely needed explaining.³⁶

Regardless of when the beginning of the movement for direct elections is placed, it is clear that it picked up rapidly during the mid-1870s. Constitutional amendments to institute direct elections for Senators began to be filed annually by members of Congress. Many states began adopting primary elections for Senator, in which partisans could choose directly their

³² Zywicki, *Beyond the Shell*, *supra* note 3, at 173-74

³³ See HAYNES, *supra* note 18, at 103 (noting that although amendments to change the form of Senatorial appointment had been proposed in the 1820s and 30s, the first real efforts to amend the constitution to require direct election occurred in the 1870s); Zywicki, *Beyond the Shell*, *supra* note 3, at 174 (same).

³⁴ See Riker, *supra* note 29, at 464

³⁵ See Riker, *supra* note 29, at 464-65.

³⁶ See Rossum, *supra* note 17, at 536; HAYNES, *supra* note 18, at 102.

candidate of choice.³⁷ This, of course, did not create direct elections – whichever party won the state legislature would still have the power to choose candidates. However, the public profile of Senate candidates meant that their popularity (or lack thereof) became increasingly important in state legislative elections.³⁸

Around the turn of the century, state legislatures began actively pushing for direct elections. A number of state legislatures started calling for direct elections, and even for a Constitutional convention to allow for direct elections. Between 1890 and 1905, 31 of the 45 state legislatures had passed resolutions either calling for Congress to propose or pass an amendment providing for direct elections, to hold a conference with other states to work on such an amendment, or to have a Constitutional Convention such that direct elections could be included in a newly drawn Constitution.³⁹ They were aided by a popular press that seized on the issue: William Randolph Hearst hired muckraking journalist David Graham Phillips to write an sensationalist expose “The Treason of the Senate” in *Cosmopolitan*, attacking the appointed Senate as a club of corrupt millionaires.⁴⁰

States also started implementing direct elections themselves through a clever mechanism that became known as the “Oregon System.”⁴¹ Under the Oregon system, state legislative candidates were required to state on the ballot whether they would abide by the results of a formally non-binding direct election for U.S. Senator. Almost all legislative candidates did so, fearing popular wrath if they did not, and followed the results once elected. By 1908, 28 of the

³⁷ Kris W. Kobach, *Note, Rethinking Article V: Term Limits and the Seventeenth And Nineteenth Amendments*, 103 YALE L.J. 1971, 1977 (1994) (describing the rise of Senate party primaries and noting that, where one party was dominant, like the solid Democratic South, these functioned like direct elections)

³⁸ See Riker, *supra* note 29, at 466.

³⁹ See HAYNES, *supra* note 18, at 108-09

⁴⁰ Much later, the articles were republished in book form. DAVID GRAHAM PHILLIPS, *THE TREASON OF THE SENATE* (George E. Mowry & Judson A. Grenier eds., 1964). See also Donald R. Matthews, *Review*, 30 PUB. OPIN. Q. 326, 326-27 (1966). Phillips’s attack was so prominent that President Theodore Roosevelt devoted a major address to rebutting it. *Id.*

⁴¹ Kobach, *Note, Rethinking Article V, supra* note 37, at 178 (describing the Oregon System)

45 states used the Oregon system or some other form of direct elections, some adopted through the initiative process and others through legislative action.⁴²

In the House of Representatives, direct election of Senators was nearly as popular. Amendments to the Constitution providing for direct election passed the House in each session between 1893 and 1912.⁴³ Hardliners in the Senate managed to fend off each of these efforts, and were aided in their efforts when Amendment became linked with a highly controversial effort by Southern Senators to change the Elections Clause of Article I to remove Congress's ability to pass voting rights legislation.⁴⁴ But in 1912, supporters of the Amendment were able to sever the Amendment from the change to the Elections Clause, and the drumbeat of popular support ensured its passage. The fear of a Constitutional Convention, which could have resulted in more dramatic changes to the Constitution, the defeat of many Senators opposed to direct election, and the overwhelming nature of popular opinion in favor of direct election led the Senate to send the Amendment to the states in 1912.⁴⁵ It took less than eleven months for three quarters of the states to ratify the Amendment and it went into law in 1913.

One particularly notable part of the debate, in Congress and in popular opinion, over the Seventeenth Amendment was the absence of any debate about the costs weakening state control over the Senate might have for federalism. Ralph Rossum wrote:

The popular press, the party platforms, the state memorials, the House and Senate debates, and the state legislative debates during ratification focused almost exclusively on

⁴² *Id.* at 178-79.

⁴³ See Sara Brandes Cook & John R. Hibbing, *A Not-So-Distant Mirror: The 17th Amendment and Congressional Change*, 91 AM. POL. SCI. REV. 845 (1997); Rossum, *supra* note 17, at 705-06 n. 186.

⁴⁴ The original draft of what would become the Seventeenth Amendment included a change to Article I, Section 4, the Elections Clause that would have given states, and not the federal government, sole control over setting the time, place and manner of Senate elections. See Smith, *supra* note 25, at 41-50. Southern Democrats, who were worried that the federal government might interfere with the exclusion of African-Americans from voting, defended this proposed change on federalism grounds. But the Senate passed the so-called Bristow Amendment, which removed the part of the Seventeenth Amendment that would have changed the Elections Clause, before it was sent to the states.

⁴⁵ Zywicki, *Beyond the Shell*, *supra* note 3, at 176

expanding democracy, eliminating political corruption, defeating elitism, and freeing the states from what they had come to regard as an onerous and difficult responsibility. Almost no one (not even among the opposition) paused to weigh the consequences of the Amendment on federalism.⁴⁶

There were a few exceptions to this.⁴⁷ Notably, Senators Elihu Root and George Hoar gave several impassioned speeches about the effect of the Seventeenth Amendment on the Constitutional system of federalism, quoting extensively from the Federalist Papers and the Constitutional Convention.⁴⁸ However, proponents of the Amendment did not justify their support on the grounds of national unity or centralization, but instead focused on other issues. Root and Hoar's federalism-based defense did little and the Senate passed the Amendment.

This history leaves many questions: Where did the near-universal support for direct election of senators come from? Why was there no real opposition inside the state legislatures that the Amendment disempowered? Why was the issue of federalism not a major part of the debate over the Seventeenth Amendment?

There are a number of reasons scholars usually give for the passage of the Seventeenth Amendment, most notably the rise of Progressive movement and problems relating to the specifics of state legislative selection, including unfilled Senatorial seats and corruption in the selection of Senators. A close look at them shows they each have force as well as some internal problems, but cannot explain the popularity of the amendment in state legislatures or the absence of counter-arguments based on the negative effects on federalism the amendment might generate.

The traditional story is that the rise of the Progressives and Populist movement caused the passage of the Seventeenth Amendment. Much of the popular argument for the Amendment sounded in Progressive rhetoric: opposition to corrupt state legislatures bought by seedy business

⁴⁶ Rossum, *supra* note 17, at 711-12

⁴⁷ That is, exceptions in addition to the argument over the proposed change in the Elections Clause, which was debated largely on federalism grounds.

⁴⁸ See Bybee, *supra* note 3, at 544.

trusts and powerful party machines, dislike for corrupt "elite" representation and extensive faith in the ability of the people to govern when impediments to their rule were removed.⁴⁹ To the extent the Seventeenth Amendment is accompanied by a conventional wisdom, it is this.⁵⁰

But revisionist scholars like Zywicki and now-Judge Jay Bybee have persuasively shown that this story is, at very least, overly simplified.⁵¹ While the Progressives and Populists were indeed prominent at the time of the Seventeenth Amendment and were substantial proponents of direct elections, the claim that the Seventeenth Amendment can be explained solely by their support is problematic. After all, despite other major successes in the electoral field (e.g. women's suffrage, state constitutional amendments providing for initiatives, non-partisan elections and council-manager systems at the local level) the Seventeenth Amendment was the Progressives' only success in reforming the structure of the federal government.⁵² Other proposals for structural change at the federal level, like abolishing the Electoral College, made little or no headway.⁵³ Even at the state level, where Progressives were successful in passing major reforms of elections, they were largely unable to rally mass support for changes to the form of legislatures. For instance, numerous Progressive proposals for unicameral legislatures in

⁴⁹ For a contemporary summary of the arguments in favor of direct election, see HAYNES, *supra* note 18, at 153-210. Noting that the conventional wisdom on the Seventeenth Amendment is to credit the Progressive movement, see Zywicki, *Beyond the Shell*, *supra* note 3, at 185-86.

⁵⁰ See Zachary D. Clompton and Steven E. Art, *The Meaning of the Seventeenth Amendment and a Century of State Defiance*, 107 N.W.L. REV. __, 10, n. 19 (forthcoming 2013), available at http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID2117441_code1543427.pdf?abstractid=1915673&mirid=1.

⁵¹ See Zywicki, *Beyond the Shell*, *supra* note 3, at 184-95; Bybee, *Ulysses At the Mast*, *supra* note 3, at 538-45.

⁵² Thomas E. Baker, *Towards a "More Perfect Union": Some Thoughts on Amending the Constitution*, 10 WIDENER J. PUB. L. 1, 8 (2000) (noting the support of the Progressives for the Nineteenth Amendment, which provided for female suffrage); Zywicki, *Beyond the Shell*, *supra* note 3, at 194 (noting Progressive support for recall and referenda at the state level); Schleicher, *City Council Elections*, *supra* note 12, at 465-67 (describing Progressive support for non-partisan elections and council manager systems).

⁵³ See Zywicki, *Beyond the Shell*, *supra* note 3, at 194-95.

the states were defeated.⁵⁴ If nothing else, one needs a story why this part of the Progressive's agenda was more successful than others.

Moreover, merely pointing to the broader success of the Progressive movement does not explain the breadth of the support for the Seventeenth Amendment. Urban political machines, usual opponents of “goo-goo” Progressives, also supported direct election.⁵⁵ Direct election also attracted support from big business interests, which either had an oppositional or ambivalent relationship with the Progressive movement.⁵⁶

Most importantly, a story built around the rise of the Progressive movement cannot explain the absence of a state-based opposition. This was, after all, the era of Jim Crow and states, particularly southern ones, resisted other intrusions on the scope of their power or their rights to self-determination.⁵⁷ (Most Southern legislatures had passed resolutions calling on Congress to pass a constitutional amendment providing for direct elections well before it did so.⁵⁸) Voters operate through state legislatures and groups that were successful at the state level were in a position to support or reject direct elections. We need a story that can explain why voters, interest groups and politicians who were winning decided to give away the power to

⁵⁴ See John Dinan, *Framing a “People’s Government”*: *State Constitution-Making in the Progressive Era*, 30 RUTGERS L. J. 933, 962 (1999) (“As a result, although the various alternatives to the traditional bicameral arrangement attracted a fair amount of support in several of the state conventions, and came within a single vote of being approved by the Nebraska Convention, none of these proposals was ultimately adopted, at least during the Progressive era. It was not until 1935 that Nebraska became the first and only state to enact a unicameral system, through an initiative procedure.”)

⁵⁵ See RICHARD HOFSTATDER, *THE AGE OF REFORM* 254 (1955) (“If big business was the ultimate enemy of the Progressive, his proximate enemy was the political machine.”); John D. Buenker, *The Urban Political Machine and the Seventeenth Amendment*, 56(2) J. AM. HIST. 305 (1969) (describing urban political machine support for the Seventeenth Amendment).

⁵⁶ See HOFSTATDER, *supra* note 55, at 254 (noting opposition between big business and the Progressive movement); Smith, *supra* note 25, at 66 n.328 (describing business support for the Seventeenth Amendment); Zywicki, *Beyond the Shell*, *supra* note 3, at 185 (arguing Progressive movement was not oppositional to business interests).

⁵⁷ See, e.g. James A. Gardner, *State Constitutional Rights as Resistance to National Power: Toward a Functional Theory of State Constitutions*, 91 GEO. L.J. 1003 (2003) (“Trust in state governments enjoyed a resurgence during the late Nineteenth Century, particularly after public opinion turned against the northern occupation of the South and the Union programs of Reconstruction.”); FORREST McDONALD, *STATES’ RIGHTS AND THE UNION: IMPERIUM IN IMPERIO, 1776-1876* 208-23 (2000) (“[During this period] attempts to encroach upon the powers reserved to the states were struck down by the Supreme Court and were disapproved by the vast majority of Americans.”)

⁵⁸ See HAYNES, *supra* note 18, at 108.

appoint Senators. Clearly, although the Progressive movement did push the Seventeenth Amendment and was a strong political force in the early Twentieth Century, its rise alone cannot explain the overwhelming popular and political support for the direct election of Senators.

Explanations rooted in the specifics of the practice of the state legislatures face similar problems. Two common arguments during the debates over direct election were that state legislatures were corrupt in their selection of Senators and that deadlocks in state legislatures resulted in unfilled Senatorial seats.⁵⁹ The reason deadlocks could persist was an 1866 federal law required the votes of a majority, and not merely a plurality, of state legislators to elect a Senator. Although these arguments were certainly a large part of the campaign by proponents of direct election, as an explanation of why the campaign was so successful they do not explain the full story of how the Seventeenth Amendment passed. While there was certainly some corruption in selecting Senators, politics is never free of the stench of the improper, and there needs to be an explanation for why, of all sources of corruption, this one was targeted for elimination by constitutional amendment.⁶⁰ Also, the key alleged sources of that corruption – interest groups powerful at the state level, political machines – were frequently supporters of direct election. If they 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. Deadlock as an explanation is particularly odd, because there were not that many seats left unfilled,⁶¹ and were the result of change in federal law that could easily be changed back without amending the Constitution.

⁵⁹ See Bybee, *supra* note 3, at 539-43.

⁶⁰ Also, there are substantial questions about how much actual corruption there was. *Id.* at 539 (“Between 1857 and 1900, the Senate investigated ten cases of alleged bribery or corruption, although in only three cases was a Senate committee able to conclude that the charges had merit.”)

⁶¹ *Id.* at 542 (“Between 1891 and 1905, eight state legislatures failed to elect senators and were without full representation from periods of ten months to four years.”)

Zywicki has advanced his own claims about the reasons for the passage of the Seventeenth Amendment using the tools of public choice.⁶² He argues that the Amendment passed due to lobbying by national special interest groups, ranging from business trusts to unions. The groups supported the Amendment for several reasons, he claims: it reduced the cost of lobbying for favorable legislation because lobbyists would only have to engage with one body and not fifty; it would increase the length of Senatorial tenures permitting long term relationships with Senators; it would reduce monitoring of Senators because state legislatures were better at making sure Senators did not do the bidding of special interests than the voting public. National interest groups thus had an interest in direct elections because it made Senate easier to lobby.⁶³

These claims provide interesting arguments for why certain interest groups might have supported the Amendment when it was proposed in Congress. But there are reasons to be skeptical that Zywicki's public choice story for the passage of the Seventeenth Amendment can explain much of what is really perplexing about the history of the Amendment.

First, it is hard to understand why any one interest group would expend substantial resources on a structural constitutional issue. Even if the Seventeenth Amendment benefited all national interest groups, each interest should have faced a collective action problem counseling against spending resources in favor of this type of constitutional change that would benefit all

⁶² He makes these claims over the course of two articles – Zywicki, *Beyond the Shell*, *supra* note 3, and Todd J. Zywicki, *Senators and Special Interests*, *supra* note 3.

⁶³ Zywicki also argues that Western states, who had already implemented direct elections, had an interest in passing the Seventeenth Amendment because Eastern states had long-serving Senators and introducing popular elections might remove these Senators, opening up committee and leadership positions for Western senators. While this may have played a role, support for direct election was national. Support in Eastern states like Pennsylvania, Maine and New Jersey was strong enough for their state legislatures to call for a Constitutional Convention in order to pass an amendment in favor of direct election of Senators. There were also calls for a convention in Midwestern states like Illinois, Minnesota, Ohio and Wisconsin, and southern states like North Carolina, Arkansas, Tennessee, Missouri, Kentucky and Texas. See Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-seventh Amendment*, 103 YALE L.J. 677, 764-789 (1993). All eastern states with the exception of Rhode Island, which never voted, ratified the Seventeenth Amendment. One western state – Utah – voted not to ratify. All of the rest of the non-ratifying states were in the South or were border states. See Rossum, *supra* note 17, at 711 n.213.

national interests equally.⁶⁴ More pressingly, even if Zywicki is correct about the incentives of national businesses and political interests, the increased nationalization of politics would surely create losers as well as winners. Those who were harmed by the Seventeenth Amendment in Zywicki's story – e.g. state-based businesses, rural interests – should have been *relatively* more powerful inside state legislatures. Their influence with state legislatures is exactly what would have made them lose out as a result of the passage of the Seventeenth Amendment. If Zywicki's story were right, the last holdouts against the Seventeenth Amendment should have been resistant state legislatures. But the opposite is the case. State legislatures *led* the fight for direct election. There is nothing in the historical record that reveals national interest groups becoming newly and heavily involved in state legislative debates over the subject.

Thus, the biggest problem with the revisionist take on the Seventeenth Amendment is one that it shares with the Progressive history it challenges. Although an interesting addition to the explanations for why certain groups supported direct elections, it cannot explain what is really interesting or confusing about the history of the Seventeenth Amendment: the *absence of opposition* among the state legislators, state-based interest groups, and successful state political groups that it disempowered.

Although success in politics is often either over- or under-determined, and has a degree of randomness to it, existing explanations just do not seem up to the task of explaining why the movement for direct elections succeeded.

⁶⁴ See Zywicki, *Senators and Special Interests*, *supra* note 3, at 1054 (acknowledging that there is no evidence of lobbying by particular interest groups).

II. **Why Was There No State-Based Opposition to the Seventeenth Amendment: National Political Parties and State Democracy**

Extant explanations of the passage of the Seventeenth Amendment have one common feature – they look at who supported the Amendment and why. However, this is only half of the story. The more interesting part of the story is why there was not opposition to the direct election of Senators among state officials who were losing power. This section will argue the lack of opposition can be explained in part by changes in the political party system.

a. **A Brief History of Political Parties From The Civil War to the Seventeenth Amendment**

It is necessary to go through a (too) quick history of American political parties in order to recount for this tale. By the mid-1830s until the run-up to the Civil War, and then again after the War, American politics had the rough outlines of a two-party system.⁶⁵ Voting was intensely partisan, but largely non-ideological, with loyalty to state and local parties taking the lead based on ethnic and cultural ties.⁶⁶ State parties dominated newspapers, campaigning and the distribution of ballots.⁶⁷

After the Civil War, however, the number of votes for independents dropped dramatically, except for one last gasp in the early 1870s. Further, parties – both the two major parties and a few minor parties, especially the emerging Populists – became more national. Pradeep Chhibber and Ken Kollman created a figure, “party aggregation,” to measure the

⁶⁵ RICHARD MCCORMICK, *THE PARTY PERIOD AND PUBLIC POLICY: AMERICAN POLITICS FROM THE AGE OF JACKSON TO THE PROGRESSIVE ERA* 162-181 (1986); William Shade, *Political Pluralism and Party Development: The Creation of a Modern Party System, 1815-1852*, in *THE EVOLUTION OF AMERICAN PARTY SYSTEMS* 103-104 (Paul Kleppner, et al. eds, 1965).

⁶⁶ See PRADEEP CHHIBBER & KEN KOLLMAN, *THE FORMATION OF NATIONAL PARTY SYSTEMS: FEDERALISM AND PARTY COMPETITION IN CANADA, GREAT BRITAIN, INDIA, AND THE UNITED STATES* 209-10 (2004); See PAUL KLEPPNER, *WHO VOTED? THE DYNAMICS OF ELECTORAL TURNOUT, 1870-1980* 47-48 (1982) (“Above all, politics was *party* politics.”)

⁶⁷ See CHHIBBER & KOLLMAN, *supra* note 66, at 210-11; McCormick, *supra* note 65, at 164-66, 172-73, 179, 201

difference between the number of parties competitive nationally and the average number of parties competitive in each district.⁶⁸ (In a fully aggregated system, every party that was competitive in any congressional election would also be competitive in all other congressional races – there would be no state or district specific parties or candidates). It thus measures how national a party system is. Outside of two elections with small spikes in the early 1890s and in 1912 (after the passage of the Seventeenth Amendment in Congress), parties became highly aggregated after 1870.⁶⁹ Further, a high percentage of the vote in congressional elections – roughly equal to today -- was won by national parties (i.e. the four parties getting the most votes nationally) in each election except for 1894 during the period between the 1870s and 1912.⁷⁰

The key turning point, they note, occurred in the 1870s. For most of the nineteenth century, the national parties were in many ways coalitions. Rather than having one name and organizational structure, the national parties were composed of groups from each state that didn't run candidates against one another but were formally separate.⁷¹ After the 1870s, the parties unified and “stamped out the proliferation of labels and both coalesced under singular labels.”⁷² Party was also increasingly the key determinant of legislative behavior – party line voting increased substantially between 1876 and 1894.⁷³

Why the parties began to nationalize is a difficult question. Chhibber and Kollman, based on comparative research in the United States, India, Canada and Britain, argue that parties

⁶⁸ The run the same test against the number of competitive parties at the state level and the data shows an identical narrowing. CHHIBBER & KOLLMAN, *supra* note 66, at 169

⁶⁹ “Finally, party aggregation in the United States has been relatively successful since the 1870s. It blips upward several times during the 1890s and the 1910s, but is quite low otherwise.” *Id.* at 173, 166-69.

⁷⁰ *Id.* at 170.

⁷¹ *Id.* at 208-216.

⁷² *Id.* at 215.

⁷³ Paul Kleppner, *Partisanship and Ethnoreligious Conflict: The Third Electoral System, 1853-1892*, in THE EVOLUTION OF AMERICAN PARTY SYSTEMS, *supra* note 65, at 139.

nationalize following the centralization of political power.⁷⁴ That is, as power moves from states or provinces to the federal government, party structure follows. “As policy-making authority migrates towards higher levels of government, voters will be more inclined to choose candidates who adopt party labels at broader levels of aggregations.”⁷⁵ However, after a great deal of centralizing during the Civil War, the period in question here – roughly the 1870s to 1913 – centralizing and decentralizing forces were both in play. Chhibber and Kollman note this as an “ambiguous” period.⁷⁶ However, the parties continued the trend towards national aggregation throughout the period.

Although it is difficult to explain why parties aggregated as much as they did from the 1870s to 1912, it is easy to see a temporal connection between this aggregation and the movement for the direct election of Senators. Despite furious battles about state rights in other policy areas, this is when the campaign for the Seventeenth Amendment took off. Through the late 1870s and 1880s, groups agitated for direct election, proposing constitutional amendments, pushing for party primaries and for direct election substitutes on the state level.⁷⁷ However, as the movement built, a major political event happened: The Realignment of 1896.

Although party organizations began to nationalize during this period, state branches of parties retained differentiated local flavors through the 1870s and 1880s.⁷⁸ Voter turnout during this period was extremely high – the highest in American history -- and strong ethno-cultural-religious links between groups and parties made politics fierce, competitive and stable, with voters consistently supporting the same party election to election.⁷⁹ “[L]ate nineteenth century

⁷⁴ See CHHIBBER & KOLLMAN, *supra* note 66, at 21.

⁷⁵ *Id.* at 21.

⁷⁶ *Id.* at 156-60.

⁷⁷ See notes 37-45 *supra* and accompanying text.

⁷⁸ Kleppner, *Partisanship and Ethnoreligious Conflict*, *supra* note 66, at 140.

⁷⁹ *Id.* at 124.

parties [were] strongholds of localist resistance to political centralization.”⁸⁰ National parties were unable to provide support for (or against) cross-sectional and cross-societal national policy programs because their bases of political support were rooted in state and ethno-religious specific conflicts. That is, the national parties were not ideologically defined. Democrats from New York shared little in common with Democrats from Ohio or South Carolina. Thus, despite becoming national in organizational scope, the parties were still coalitions of distinct state-based institutions.

This changed in the 1890s. Political scientists have debated endlessly how to define the term “realignment” and whether the major change in the American political system happened in 1894 as a result of the Panic of 1893 or in 1896 as a result of the Presidential campaign between Republican William McKinley and Democrat William Jennings Bryan.⁸¹ Regardless, at some point in the mid-1890s, American politics changed dramatically. Republicans gained an advantage they would hold until 1912.⁸² Importantly, party support became heavily regional. The Republicans dominated the populous Northeast and industrial Midwest and most of the West Coast, while Democrats controlled the South and competed strongly in the interior West.⁸³ Third parties nearly died out as effective national forces. The Senate had 12 third-party members in

⁸⁰ *Id.* at 140.

⁸¹ William Schneider has described the timing and existence of realignments as “The Eternal Question.” William Schneider, *Realignment: The Eternal Question*, 15(3) PS 449 (1982). All discussion of realigning elections begins with V.O. Key’s work. See V.O. Key, *A Theory of Critical Elections* 17 J. POL. 1, 18 (1955). For a debate over the date of the beginning of the realignment of 1896, compare Walter Dean Burnham, *CRITICAL ELECTIONS AND THE MAINSPRING OF AMERICAN POLITICS* 38 (1970) with JAMES SUNDQUIST, *DYNAMICS OF THE PARTY SYSTEM: ALIGNMENT AND REALIGNMENT OF POLITICAL PARTIES IN THE UNITED STATES* 156 (1983).

⁸² Walter Dean Burnham, *The System of 1896* in KLEPPNER ET AL., *supra* note 65, at 171-83.

⁸³ Joel Budgor et al., *The 1896 Elections and Congressional Modernization: An Appraisal of the Evidence*, 5(1) Soc. Sci. Hist. 53 (1981); Burnham, *The System of 1896*, *supra* note 82, at 171-75.

the late 1890s but did not have a single one after 1903. Few third-party members were elected in the House either.⁸⁴

After 1896, Congress became highly professionalized, with each party having a strong whip organization to line up votes and control over committee assignment, resulting in a high degree of cohesiveness in party voting, at least until the very end of this period.⁸⁵ This was driven by ideology: the parties became far more programmatically coherent. “The 1896 realignment...was the result of cross-cutting issues that polarized the parties.”⁸⁶ Debate inside parties was also largely national and regional, not state-specific, with each party’s Progressive movement challenging party regulars across the country.⁸⁷ After 1896, the parties gained more clear ideological content.

At the same time, politics became less popular and more elite driven. This is easiest to see in the difference between McKinley victoriously campaigning from his back-porch, a model of the new style of parties, against William Jennings Bryan’s old-time religion mass rallies. The parties’ responses to the depression of 1893 – free silver for the Bryanite Democrats, tariffs and support for industry for Republicans – led not only to massive regionalization, but also to reorganization of politics in the states.⁸⁸ The ethno-cultural-religious links between groups and parties in the pre-1896 era fell away.⁸⁹ Turnout, which reached its apex right before the

⁸⁴ *Party Division in the Senate, 1789 to Today*, U.S. Senate (available at http://www.senate.gov/pagelayout/history/one_item_and_teasers/partydiv.htm, last visited February 8, 2013); CHHIBBER & KOLLMAN, *supra* note 66, at 166.

⁸⁵ See David Brady, Richard Brody and David Epstein, *Heterogeneous Parties and Political Organization: The U. S. Senate, 1880-1920*, 14 LEG. STUD. Q. 205, 206 (1989)

⁸⁶ David Brady and Joseph Stewart, *Congressional Party Realignment and Transformations of Public Policy*, 26 AM. J. POL. SCI. 333, 352 (1982)

⁸⁷ Howard L. Reiter, *The Bases of Progressivism Within the Major Parties: Evidence From the National Conventions*, 22(1) SOC. SCI. HIST. 83, 86 (1998)

⁸⁸ See KLEPPNER, *WHO VOTED?*, *supra* note 66, at 73-82 (1982).

⁸⁹ *Id.* at 55 (“The realignment of 1894-96 altered the political conditions that had driven late-nineteenth-century electoral participation. It reduced partisan competition in most areas of the country. In the nation’s urban-industrial Metropole, it displaced the earlier congruence between social cleavages and party oppositions. The coalition agreements created by the “System of 1896” eroded the older linkages among group subcultures, partisan

realignment, collapsed as a result of the decline in competitiveness in many states and the breakdown of the ethno-cultural links between groups and parties.⁹⁰ Reforms like the introduction of primary elections and the secret “Australian” ballot reduced the import of state party organizations.⁹¹ The political parties of the turn of the century were substantially less programmatic and centralized than today's parties, but they were far more programmatic and centralized than they had been prior to 1896.

b. Why the Nationalization of Political Parties Mattered: Voter Behavior and Political Parties

It is a striking fact that the nationalization of political parties lines up almost exactly with the movement for direct elections. As the parties took a national organizational form in the 1870s, the movement for direct election took off. As the parties began to centralize their operations and develop ideological programs, the states began their push for direct elections. The question is whether there is any reason to think this is a causal relationship. This section will argue that there are strong theoretical reasons to think the centralization and newly-found ideological character of national parties depressed opposition to direct elections in state legislatures. This section will show that stronger national parties should, all else equal, mean that national politics plays a bigger role in state elections, leaving state officials with less control over their political destinies and more likely to support changes that separated state and national politics.

identification, and turn out rates, without replacing them with any news bases for social-group reinforcement...The result was a participating electorate that was considerable shrunken in size from its late-nineteenth-century level, and one that more nearly approximated our own in its internal patterns of stratification by age cohorts and economic status.”)

⁹⁰ *Id.* at 33,

⁹¹ *Id.* at 58-59.

Parties play a particular role in the life of a democracy. Voters have little information about individual candidates and little reason to learn such information.⁹² Given voters' frequent lack of information about candidates and issues, they need help if they are going to make elections a useful mechanism for ensuring representation and accountability. The key bit of help we give voters is political party labels.

Party labels help voters in a number of ways.⁹³ To the extent party labels accurately describe the ideological commitments of candidates running under their banner, voters only have to learn the meaning of the party label rather than the positions and histories of the numerous individual candidates on the ballot.⁹⁴ To the extent candidates currently in office represent one party or another, voters do not need to rely on things politicians say, but rather can look retrospectively at how government has performed and attribute that to the current party in office. If parties are ideologically consistent over time, voters can use these observations about how parties have performed to develop "running tallies" (in Morris Fiorina's famous turn of phrase), allowing them to tally up things they noticed and liked about each party and use those observations when voting. These running tallies allow them to vote roughly as if they were informed even if they do not know too much about what's happening today.⁹⁵ Further, the party label appears on the ballot, unlikely say interest group endorsements, meaning that it is easy (or easier) to link observations about the world to the actual voting decision. And because aggregate

⁹² See Elmendorf and Schleicher, *supra* note 12, at 8-11 (discussing work by Anthony Downs and Joseph Schumpeter on why there is no instrumental reason to become informed about politics and summarizing research on actual voter knowledge); MICHAEL X. DELLI CARPINI & SCOTT KEETER, WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS 75-93 (1996) (summarizing data on voter knowledge). To be fair, our information about voters' political knowledge is based on survey data that does not cover the period in question here, but there's little reason to believe voters in the 1880s were particularly more informed.

⁹³ The following paragraphs is a very short version of the lengthy literature review in Elmendorf and Schleicher, *supra* note 12, at 11-20 (summarizing research).

⁹⁴ See, e.g., ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY 112-115 (1960) (showing how party labels can allow voting even under low information);

⁹⁵ MORRIS P. FIORINA, RETROSPECTIVE VOTING IN AMERICAN NATIONAL ELECTIONS 89, 89-106 (1981).

performance is likely better than individual ones (either for Condorcet Jury Theorem reasons or because errors cancel), the overall electorate can behave rationally and responsively on what political scientists call a "marcopartisan" level even if many or most voters are ignorant of basic political facts.⁹⁶

This affects the behavior of individuals in office. If the parties are competitive, then parties have incentives to attempt to cater to median voter preference.⁹⁷ And if they are long-lived, party coalitions have incentives to perform well in order not to sully their reputation.⁹⁸ Well-functioning parties, thus, enable even a largely uninformed electorate to use elections for their intended purpose: producing responsive and accountable government.

One need not overstate this case. Many voters have relationships with political parties that are more social or affective than ideological. Membership in a party can be a trait handed down from parents to children or across social groups, preceding preferences about governance and serving as a "perceptual screen" for thinking about politics.⁹⁹ Even policy-minded voters are frequently myopic, have trouble assigning functional responsibility to office holders and frequently take into account facts about the world, from shark attacks to college football results, that are outside of the control of office holders.¹⁰⁰ But virtually everyone who studies elections

⁹⁶ See ROBERT S. ERIKSON, MICHAEL B. MACKUEN & JAMES A. STIMSON, *THE MACRO POLITY* (2002)

⁹⁷ See Downs, *supra* note 94, at 105-112

⁹⁸ See JOHN H. ALDRICH, *WHY PARTIES? THE ORIGIN AND TRANSFORMATION OF PARTY POLITICS IN AMERICA* 49-50 (1995)

⁹⁹ This theory was famously developed in ANGUS CAMPBELL, PHILLIP E. CONVERSE, WARREN E. MILLER & DONALD STOKES, *THE AMERICAN VOTER* 120-41 (1960)

¹⁰⁰ See Elmendorf and Schleicher, *supra* note 12, at 18-20; Christopher H. Achen & Larry M. Bartels, *It Feels Like We're Thinking: The Rationalizing Voter and Electoral Democracy* (working paper, 2006), <http://www.princeton.edu/~bartels/papers> (explaining biased perceptions); Larry M. Bartels & Christopher Achen, *Blind Retrospection: Electoral Responses to Drought, Flu, and Shark Attacks* (working paper, 2009), http://www.allacademic.com/meta/p65097_index.html (discussing how irrelevant facts influence elections); Andrew J. Healy, Neil Malhotra & Cecilia H. Mo, *Personal Emotions and Political Decision Making: Implications for Voter Competence* (Stanford Graduate School of Business Research Paper 2034, 2009), https://gsbapps.stanford.edu/researchpapers/detail1.asp?Document_ID=3269 (discussing the influence of sporting results on elections).

agrees that party labels are important tools -- and almost certainly the most important tools -- voters have to make elections work.

However, the value of the party label is better thought of as a variable than a constant. Party labels are less and more descriptive of candidates' beliefs at different times.¹⁰¹ Further, party labels that are accurate at one level can be barely descriptive at other levels. Finding out that a candidate for the House of Representatives is a Democrat or Republican in today's heavily polarized Congress will tell you almost everything you need to know about their future voting record.¹⁰² However, finding out whether a candidate for city council in most big cities is a Democrat or Republican will tell you very little.¹⁰³ The reason for this is that, in most big cities, the parties do not take coherent stands on local issues.¹⁰⁴ However, the lack of information most voters have about individual city councilmen means that voters rely on party labels heavily even when they are only weakly descriptive of candidate issue stances. Democrats dominate national elections in big cities and this domination of national elections is translated directly into dominating local legislatures, even though preferences on national and local issues are only weakly correlated.

European political scientists have given a name to this type of election -- "second-order elections."¹⁰⁵ When an election at one level of government turns on voter preferences on performance and policies at another level, it is second order. The classic example of this is European Parliament elections. These elections choose officials who make European Union policy, but their results turn entirely on the popularity of Prime Ministers in each European

¹⁰¹ Elmendorf and Schleicher, *supra* note 12, at 22-24

¹⁰² *Id.* at 5, 21.

¹⁰³ See Cheryl Boudreau, Christopher S. Elmendorf, & Scott A. MacKenzie, *Lost in Space?: How Endorsements Affect Spatial Voting in Low-Information Elections* (Paper presented at the 2012 Conference of the Midwest Political Science Association) (on file with author).

¹⁰⁴ Schleicher, *City Council Elections*, *supra* note 12, at 440-47;

¹⁰⁵ Karl H. Reif & Hermann Schmitt, *Nine Second-Order National Elections: A Conceptual Framework for the Analysis of European Election Results*, 8 EURO. J. POL. RES. 3 (1980).

country.¹⁰⁶ As I have argued elsewhere (and will discuss below in Section IV), second order elections can be a result of "mismatch" or the use on local or supranational ballots of party labels defined at the national level.¹⁰⁷

We see this phenomenon in elections for offices like European Parliament or City Council, where there is no formal link between the activities of officials at each level. But formal ties between levels of government -- like giving state legislatures the power to appoint Senators -- should *increase* the likelihood that elections at the lower level of government will be second-order. If you know a vote for one party or another's candidate for state legislature will have a desired effect on national politics, but do not know its effect on state politics, basing your vote entirely on national issues is perfectly rational.

The changes in political parties that started in the late 1870s and took off after 1896 affected the meaning and utility of party labels. The party labels increasingly described national political coalitions and differences in ideology about what the national government should do.¹⁰⁸ As the party labels became more accurate in describing how Senators would vote on national issues, it increasingly became more reasonable for voters to use this label to determine their voting patterns in state legislative elections if they wanted to achieve national level policy changes or to hold national coalitions accountable for their performance. That is, better party labels made it increasingly possible for state voters to use state legislative elections to influence national politics. The change in the meaning of party labels, thus, is directly related to the degree

¹⁰⁶ See *id.*; SIMON HIX, WHAT'S WRONG WITH THE EUROPEAN UNION AND HOW TO FIX IT 80-84 (2008) (discussing European Parliament elections as second-order elections); Schleicher, *What If Europe*, *supra* note 12, at 119-30 (same).

¹⁰⁷ Elmendorf and Schleicher, *supra* note 12, at 35-45; Schleicher, *What If Europe*, *supra* note 12, at 119-30; Schleicher, *City Council Elections*, *supra* note 12, at 453-57

¹⁰⁸ See notes 83-91 and accompanying text

to which preferences about national issues -- the tariff, the Spanish-American War, antitrust -- determined voting patterns in state legislative elections.¹⁰⁹

Changes in the form of party labels likely even affected voters who cared more about state issues than national ones. It is a relatively safe assumption that turn of the last century voters were without much information about individual candidates for state legislature and that party labels provided them with their most (and probably only) useful tool for figuring out how to vote in state legislative elections on ideological grounds. Unless state parties are able to create state-specific brands in voters' minds that were different from the national party, even state-motivated voters will use their national level preferences in state elections if that's the information contained by the party labels.¹¹⁰ The reason is that there is likely some correlation between national and state political preferences. In the absence of other information, it makes sense to rely on even weak heuristics.¹¹¹ As party labels increasingly described national political commitments rather than state-based ethno-religious coalitions, the degree to which national issues determined the votes of even-state-minded voters likely increased, as these voters relied on party labels in the absence of any other way of determining their vote in state elections.

A theory that changing party definition had a causal effect on the degree to which state legislative voting tracked state issues and assessments of the performance of state officials rather than national ones is not the only one consistent with the facts. Another possibility is changes in party structure were epiphenomenal and the real changes -- that caused both changes in party and

¹⁰⁹ This is perhaps better seen as a discussion of the utility of party labels on accountability rather than representation. After all, the issues determined by states and the federal government overlap (both make policy with respect to health care, civil rights, and so forth) and, more importantly, are determined by the parties in government (except to the extent which the Constitution allocates power away from the federal government or the states). As parties described national coalitions more accurately before the Seventeenth Amendment, it became more reasonable for voters to use state legislative elections to hold the party in power at the national level accountable through state legislative elections.

¹¹⁰ See Elmendorf and Schleicher, *supra* note 12, at 39-47.

¹¹¹ Schleicher, *City Council Elections*, *supra* note 12, at 449.

changes in state legislative voting patterns -- was the increased nationalization of government and/or the nationalization of the economy. One could argue that, as the government and economy became more national, there was greater incentive among legislators to form ideologically coherent parties *and* state voters had greater reason to use state legislative elections to determine Senate races rather than state policy. This can't be ruled out, certainly, although it is worth noting that throughout the period there was also a strong push for decentralization and leaving power in the hands of states (remember, this period begins with the end of Radical Reconstruction and includes the height of Jim Crow).

Most likely, the party structure both reflected the increasing nationalization of preferences and served as an independent force in making state elections turn on national issues because of its role in providing information to voters. But for our purposes here, whether the nationalization of the parties is a result of the nationalization of preferences or a cause is not particularly important. What is important is that the change -- whatever happened -- seems to have made state issues relatively less important in state legislative elections.

The change in the form of political parties provides a coherent causal story that can explain the key question about the history of the Seventeenth Amendment, namely why it was popular among the state legislatures that it disempowered. The nationalization of the meaning of party labels meant that state legislative elections were influenced to a greater degree by trends in preference for national parties. As state legislative elections turned more on the performance of national officials, the ability of state legislators to control their own fate likely fell.

State legislators might have reasonably felt that they wanted more agency over their own fates and thought that having separate elections for Senator and state legislator would have the effect of allowing voters to segment national politics from their minds when voting in state

elections. But perhaps more importantly, state-based interests -- from state parties to local businesses -- may have wanted to be able to influence election results at the state level without worrying that their efforts would be foiled by changes in far-off Washington (or beyond, if elections turned on foreign affairs). Groups that would otherwise been assured of victory, due to popular support or financial muscle, could face unexpected losses in elections if they turned on national events. Those powerful in each state thus had an incentive to fight against linkages between state and national politics. And state legislators, responsive to those powerful at the state level, likely were responsive to this desire among state interest groups to divorce state and national politics as a constitutional manner.

On top of this, the change in party structure weakened the affirmative case for state legislative appointment. Recall that in the Founding period, one of the justifications for giving state legislatures the power to appoint Senators was to give the political cultures of each of the state's direct representation in Congress.¹¹² This type of collective representation was seen as a complement to the "individual" representation provided in the House of Representatives. But once voting at the Senate level became mostly based on the national coalition to which the Senator belonged, or even the branch of the party to which the senator belonged, senators were acting less and less as representatives of the state or its political culture. Instead, they became more like ordinary legislators, organized into coalitions based on national and regional issues.

This can explain why there was discussion of how the Seventeenth Amendment would harm the functioning of American federalism. The reason few made this argument may have been that few believed that Senators still represented state governments or their unique political cultures. As the parties nationalized and centralized, the logic of having state legislatures appoint Senators withered.

¹¹² See notes 19-28 and accompanying text

Finally, this story can help explain why efforts to pass a Constitutional amendment to reform the Electoral College failed while the Seventeenth Amendment was successful.¹¹³ Although state legislatures have the power to determine how electors are selected under the original constitution and the Supreme Court's decision in *McPherson v. Blacker*,¹¹⁴ nothing requires them to select electors themselves. Thus, states are able to pass laws that bind electors to the results of general elections.¹¹⁵ Compare this with the Oregon Plan. That system had no formal power to bind state legislatures, nor could it, as the Constitution specifically placed the power to appoint Senators in the hands of legislatures. Thus, although they are similar in many respects, there was no way short of a constitutional amendment to remove Senatorial politics from state legislative politics, while laws setting up a system of effectively direct elections for electoral college votes did not require Constitutional amendment.

This is just a theoretical treatment of why there might have been a causal relationship between the rise of national parties and the decline in opposition to direct elections in state

¹¹³ There is a limit to the degree to which the story here can capture the full range of reasons for the passage of the Seventeenth Amendment. The argument here is that the reason voters wanted a constitutional amendment to state voters (as opposed to simply adopting the Oregon Plan) was that they wanted to limit state legislative discretion in their own state in order to reduce the influence of national politics on state elections. But surely part of the reason to use the constitutional amendment process was also to influence how other states chose their Senators. And this story does not explain that.

¹¹⁴ 146 U.S.1 (1892) (upholding a state legislative plan to establish districted popular votes for the electoral college). Notably, in states where the state legislature chose the electors directly, state legislative elections quickly became second-order, with interest in the vote for President dominating any state-specific concerns. For instance, the most crucial state in Presidential election of 1800, fought between John Adams and Thomas Jefferson, was New York, where the state legislature chose the electors. EDWARD J. LARSON, *A MAGNIFICENT CASTASTROPHE: THE TUMULTUOUS ELECTION OF 1800, AMERICA'S FIRST PRESIDENTIAL CAMPAIGN* 87-106 (2007). When New York City voted for state legislature (which would determine control over the overall state legislature), both the Federalists and Republicans campaigned heavily. This state legislative election was treated as a national referendum: "The local press focused squarely on national issues, not state ones. The looming showdown between Jefferson and Adams subverted the local race to national ends and relegated the Assembly candidates to the role of willing surrogates for the presidential aspirants." *Id.* at 93. Interestingly, Alexander Hamilton, who led the Federalist campaign in New York, was engaged in a secret game to push the incumbent Adams aside as the Federalist candidate for President by promoting "individuals loyal to him for the New York legislature rather than secur[ing] the strongest Federalist candidates, some of whom might favor Adams." *Id.* at 95-96. Thus, not only did national politics dominate state elections for voters that knew the state legislature would choose the President, but national politics even dominated the method of choosing candidates.

¹¹⁵ See *Ray v. Blair*, 343 U.S. 214 (1952) (holding that faithless elector laws are constitutional).

legislatures. Doing much more than this is difficult as the argument is attempting to provide an explanation for an absence -- namely, why did we not see opposition to the Seventeenth Amendment among state legislatures. But, as we will see in the next section, there is evidence in debates over the Seventeenth Amendment that suggests such a relationship.

c. Debates Over The Seventeenth Amendment: "[N]ational interests, the party interests, are so overwhelming"

The long public debate over the Seventeenth Amendment, both in Congress and in the popular press, focused on two contentions made by supporters of direct election: that state legislatures were corrupt and easily bought by powerful business interests and that the institution of state legislative appointment was elitist and anti-democratic. There was also lots of debate about the effect of choosing Senators on the state legislative calendar, with many officials arguing that deadlocks and debate over Senatorial appointments left state legislatures with little time to do the business of state government.

Scholars investigating this argument, however, have dismissed deadlocks and state legislative delay as causes for the passage of Seventeenth Amendment.¹¹⁶ William Riker, perhaps the leading modern scholar on the subject, noted that Progressives at the turn of the last century considered direct election to be a move in favor of federalism, but dismissed this argument as faintly ridiculous. "It was ... frequently asserted that the direct election of senators would peripheralize federalism, strengthening state legislatures by forcing them to concentrate on state business. It is difficult to understand how even the progressive propagandists imagined that depriving legislatures of their only control over national affairs would strengthen houses that were already decadent for want of a significant agenda."¹¹⁷

¹¹⁶ See, e.g., Riker, *supra* note 29; Zywicki, *Beyond the Shell and Husk*, *supra* note 3, at 195-200.

¹¹⁷ See Riker, *supra* note 29, at 468

What Riker failed to notice was that the effect of Senatorial appointment was not only on state legislative time, but on state legislative elections. Although most debate over the Seventeenth Amendment discussions of the value of elite representation and claims that it would enhance democracy, there was, in fact, substantial discussion of the effect of Senatorial appointment on state legislative elections. Supporters thought holding direct elections for U.S. Senators would strengthen state democracy, not only because doing so would reduce the time state legislatures devoted to Senatorial appointment, but because it would allow voters in state legislative elections to focus on state issues, rather than national ones.

The evidence for this comes in two forms: popular histories of the Seventeenth Amendment and evidence from debates on the floor of Congress. Unfortunately, I have not been able to find much surviving information about the debates in state legislatures, but this evidence - - much of which references such debates -- is at least strongly suggestive that, at the time, state legislatures were concerned with the degree to which state elections turned on state issues during an era with national political parties.

Debates in Congress:

The most important evidence that the effect of Senatorial appointment on state legislative elections was a key concern comes from the debates in Congress over the Seventeenth Amendment. Supporters of the Seventeenth Amendment argued repeatedly that national party politics and national issues intruded on state legislative elections because state legislators had the power to appoint Senators. Direct election of Senators was necessary in order to make state democracy function. Further, national party centralization had already ensured that Senators were national political figures, and not representatives of states, such that the affirmative case for legislative appointment was unavailing.

Senator John Hipple Mitchell of Oregon ran the Republican Party machine in the state for many years, and thus was closely tied to opinion in the state legislature.¹¹⁸ (His name should ring a bell for civil procedure fans, as he played a central role in *Pennoyer v. Neff*.¹¹⁹) He was also one of the leading advocates of direct election, leading the floor fight in the Senate.¹²⁰ Both on the floor of the Senate and in accompanying editorial writing, he made clear that the influence of national politics on state elections was a major reason for his support.

Writing in the popular journal *The Forum*, Mitchell argued:

Another vital objection to the choosing of Senators by the legislatures...is found in the fact that in the selection of candidates for the legislatures whose business it is to choose a Senator, every consideration is lost sight of except as to how the candidates, if elected, will vote on the question of senatorship. This becomes the vital issue in all such campaigns, while the question as to the candidate's qualifications or fitness for the business of general legislation, or as to the views he entertains upon the great subjects of material interest to the State -- taxation, assessments, schools, internal improvements, revenue, corporations, appropriations, salaries and fees of officers, trusts, municipal affairs, civil and criminal code, apportionment and other like important subjects -- is wholly ignored, and thus not unfrequently, the most vital interests of the State are made to suffer from the very fact that the question of the selection of a Senator is a districting and disturbing element, not only in the legislature itself, but in the primary and other elections involving the selection of members of the legislature."¹²¹

Mitchell -- one of the leaders in the floor debate in the Senate in favor of the Seventeenth Amendment -- put as one of his central arguments in favor of direct elections that it would improve state democracy. He repeated parts of this passage in the floor debate.¹²² Thus, prior to the establishment of the Oregon system of quasi-direct elections, the leader of the Oregon Republican Party grounded his argument for direct election in part on the costs appointment of Senators had on accountability in the state legislature.

¹¹⁸ See Richard Clucas, *The Oregon Constitution and the Quest for Party Reform*, 87 OR. L. REV. 1061, 1070 (2009)

¹¹⁹ Mitchell was an, er, colorful character, as Wendy Purdue's wonderful history of *Pennoyer v. Neff* makes clear. Wendy Collins Purdue, *Sin, Scandal, and Substantive Due Process: Personal Jurisdiction and Pennoyer Reconsidered*, 62 WASH. L. REV. 479, 482-95 (1987).

¹²⁰ HAYNES, *supra* note 18, at 103.

¹²¹ Sen. John H. Mitchell, *Election of Senators by a Popular Vote*, *The Forum*, June 6, 1896 at 394, available at <http://www.unz.org/Pub/Forum-1896jun-00385>.

¹²² Statement of Senator John H. Mitchell, 28 Cong. Rec. 6152 (1896)

Mitchell was not the only Senator to raise this argument. John McCauley Palmer of Illinois argued that having state legislatures appoint Senators was worse and less democratic than having the Electoral College choose the President. The reason was that the Electoral College had no other task, while state legislatures had to govern states. Giving state legislatures the power to appoint Senators meant that the only thing that mattered in state legislative elections was voter preferences about national parties.

"It is simply a question of whether the legislature, which is charged with the duty of conserving the interests of the State, shall also be required to separate themselves from those great duties and continue the exercise of the power of choosing Senators. That the duties interfere with each other nobody can doubt, because if there were no political influences -- I mean if the legislatures of the States were disconnected entirely from the election of Senators -- they would be the representatives of the real and present interests of the people of the States. Now, whatever may be the wants or the necessities of the people of the States with respect to local legislation, the legislators are elected with reference to the vote they will cast for Senator, and thus these duties are made to conflict, and *the national interests, the party interests*, are so overwhelming in comparison with those of the people of the States, of the local interests, that a Democratic legislature, or a Republican legislature, or a Populist legislature, instead of consulting the interests for which they are elected assume at once the sphere and field of political action, and if they elect a Senator who is satisfactory to the party in power all their shortcomings in regard to the interests of the people of their States are forgiving, unless indeed they should be guilty of some crime which would subject them to indictment. It is a mixture of authority and a confusion of duties from which the legislatures of the States ought to be relieved." (Emphasis mine)¹²³

Palmer was clear that voter preferences about national parties dominated state legislative elections and that this was why he supported direct election. Thus, another leading voice in the Senate on the subject thought that the combination of national parties and Senatorial appointment led voters to ignore state issues when voting for state legislators.

In debates in the House, Henry Tucker III of Virginia -- later dean of the Law Schools at Washington and Lee and George Washington Universities and President of the American Bar

¹²³ Statement of Senator John Palmer, 28 Cong. Rec. 6160-61 (1896)

Association -- made similar claims.¹²⁴ In 1892, he argued that “the power given to the Legislature of the State to legislate on local matters for the interests of the people should not be interfered with or diverted by electoral functions in federal matters forced upon it under the Constitution.”¹²⁵ He then went on to explain exactly why Senatorial appointment interfered with state democracy.

[A] state may be greatly interested in a matter of local opinion. The political parties of the State may be divided on the subject, and yet the people of the State ... may be in favor of such a law. But as there is a United States Senator to be elected in the Legislature, which is to be chosen at the same time that the local option bill is sought to be passed, the men that are in favor of the bill split their votes between the Democratic, the Republican and possibly the third party people. Why? In order to elect a United States Senator, when the matter they regard as of vital importance at their door is suffered to go down because of the injection of the Federal matter into the election of local State officers. ... I would divorce as far as possible the Federal power from the State, and I would take away the power which is given under the present system which may defeat the local demands of the people because of the electoral functions in federal matters conferred upon the State legislatures by this provision of the Constitution for the betterment of neither and to the injury of both.¹²⁶

Notice Tucker’s argument relies heavily on the idea that party organizations – the Democratic, Republican or “third party people” -- do not divide on state issues but rather on national ones. Rep. John Small, Democrat from North Carolina, followed theme, arguing that changes in the party system were central to understanding Senatorial appointment.

"Another question which now plays a very prominent part in the choice of United States Senators was not thought of when the Constitution was adopted. The present party system of the United States was not known, and no prophet had arisen who could fortell what the future party organization would be. All who favored the election of Senators by the legislature did so in order to remove those elections from all partisanship and to keep them absolutely free from the influence of the Federal Government. When the matter was debated in the early days of our country's history the objection was always made that to have the election of Senators placed in the hands of the people would be to invite corruption and Federal influence...."¹²⁷

¹²⁴ Rucker, Henry St. George, *Biographical Directory of the United States Congress*, available at <http://bioguide.congress.gov/scripts/biodisplay.pl?index=T000399>

¹²⁵ Statement of Rep. Henry Tucker, 23 Cong. Rec. 6065 (1892)

¹²⁶ *Id.*

¹²⁷ Statement of Rep. John Small, 33 Cong Rec. Appx. 316, 317 (1900)

Small then claimed that Senators were chosen because of the influence of the federal government -- and particularly the President -- and they were more responsive to federal party influence than state interests. This was contrary, he claimed, to the intended division of powers in the Constitution.

Another fact of common notoriety which can be proved is that the election of Senators is not now ever free from Federal influences when the legislature of the State which elects the Senator is controlled by the same party which controls the Federal administration...The question of what they are elected for goes to the very fundamental principle of the existence of the Senate. If they are elected by Federal influences, they can not serve the State as the Constitution intended they should. Experience has shown that the present method brings about elections by means of Federal influences. ... The United States Senate is not controlled by the States, but when the party whip is cracked with orders from the Executive Mansion, the Senators obey and fall into line.¹²⁸

Small was clear that changes in the party system had weakened the Founders' desire for the Senate to provide an alternative form of democratic representation from the House and the Presidency.

These are only characteristic of the debates of the period. These comments suggest that member of Congress thought that changes in the party system were linked both to a) increasing the cost of Senatorial appointment by making state legislative elections turn on national issues; b) reducing the benefits of Senatorial appointment because appointed Senators had become more responsive to national level alliances than state-specific concerns. As we will see in the next section, scholars at the time thought that the effect of direct elections on state legislatures was central to the case for the Seventeenth Amendment.

¹²⁸ *Id.*

Scholarship, The Press, and the Case for Direct Election

Political scientist George Henry Haynes published in 1906 a detailed history of Senatorial appointment, including a summary of all arguments for and against direct election. It is the most comprehensive existing work on the movement in favor of direct election.¹²⁹

Haynes lists a large number of arguments in favor of direct election. The usual suspects are lined up, ranging from its effect on increasing democracy, to improving the quality of the Senate by limiting the chances of those there only because their "proficiency in the arts of the ward politician."¹³⁰ He discusses corruption, the likely effect on the wealthy becoming Senators and many other issues.

But Haynes also devotes a whole chapter to how "popular election of Senators would be of advantage to the state and local governments."¹³¹ Haynes summarizes several arguments, but the first and central one is that, although state governments have a great deal of power, "the spell which the national party casts upon the average voter is so strong that he rarely recognizes that, under all ordinary circumstances, it is the near-at-hand state government that his life, liberty and pursuit of happiness are far more essentially affected."¹³² The reason this is true, Haynes argues, is clear. "That ...state politics has been entirely submerged by national politics is due, probably, more than anything else, to the linking together of the two in the election of Senators."¹³³

Haynes acknowledged that, even if direct election were enacted, it was likely that candidates for the legislature would still run under national party banners, but they would "go before the people to be judged upon their merits as State legislators, not as counters in the game

¹²⁹ No less than Sen. Robert Byrd noted that it is "an invaluable resource that is yet to be equaled." ROBERT BYRD, *THE SENATE 1789-1989: ADDRESSES ON THE HISTORY OF THE UNITED STATES SENATE. VOL. I.* 405 (1988).

¹³⁰ Haynes, *supra* note 18, at 153-210, 171. This argument was a little odd, as if direct elections would reduce the power of candidates who were good politicians.

¹³¹ *Id.* at 180.

¹³² *Id.* at 180-81

¹³³ *Id.* at 181

of federal lawmaking or office-winning."¹³⁴ Under the appointment system, voters face "a most embarrassing dilemma" of having to decide whether to use their beliefs about state politics or national party politics when voting.¹³⁵ Haynes goes on to detail how voter desire to influence national politics allowed political machines to staff the state legislatures with party hacks, as they knew voters would vote based on the Senate election rather than on the men running for state legislature. Further, Senatorial appointment stood in the way of states agreeing to redistrict their legislatures to allow for more representative politics in the state legislatures. It also encouraged national politicians to influence state politics, noting that the telegrams from national party leaders to state officials considering Senators took "on a dictatorial tone."¹³⁶

That this was a theme in debates over the Seventeenth Amendment is seconded by the Herman Ames, who surveyed arguments in favor of direct election as part of an award-winning history of Constitutional amendments written in 1897.¹³⁷ He noted that proponents thought that direct elect was more democratic, less likely to lead to corruption or excessive corporate influence, would result in more deserving men and would end deadlocks. He also noted that "the advocates of popular elections claim that the evils of the present method, which tend to the introduction of national affairs into State politics and lead to the election of members of the State legislatures on national instead of local issues, would be diminished."¹³⁸

These reviews of the literature cite numerous examples of this theme showing up in the scholarship and popular press of the time, and it takes no great feat to find many others.¹³⁹ While

¹³⁴ *Id.* at 184

¹³⁵ *Id.* at 185

¹³⁶ *Id.* at 199

¹³⁷ HERMAN V. AMES, *THE PROPOSED AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES DURING THE FIRST CENTURY OF ITS HISTORY* iv, 63 (1897)

¹³⁸ *Id.* at 63.

¹³⁹ Here are some of my favorites. Edwin Maxey, *Some Questions of Larger Politics* 72 (1905) (arguing that "members of the legislature are chosen, too frequently not with a view to their fitness to serve their State in the capacity of legislators, but because they favor this or the other candidate for United States Senate."); Charles James

it was only one argument among many, it is clear that the influence national elections had on state elections was one of the planks of the argument for direct election. And the argument was aided by the clarity of the national party positions.

The relationship between national party platforms and the need for direct election is perhaps made clearest in a remarkable editorial in the Chicago Tribune in 1894. It actually rebuked candidates for State Senator for running on state issues!

"Do these Democratic State Senators think the voters can be called off from the national issues involved in the direct election of Representatives and the indirect election of a Senator to consider only local questions. That they will drop the Wilson bill and devote their attention to the establishment of a Police Board in Chicago? That they will lose their interest in the currency -- in the silver question and the taxation of State bank notes -- and become wrapped up in the question whether the Chicago park boards shall be elective or appointed... The people are not such fools. They are not such children that they can be induced to consider the abolition of the Town Assessor system at a time when they doubtful whether the Democratic tariff policy will leave them anything which is worth assessing.¹⁴⁰

Put together, we can see that people during the debates over direct election were quite worried about the influence national issues had on state legislative elections. Further, we can see that they linked this to the fact that the parties were national in scope and ideological in form. The political science literature shows that this was newly the case around the time the movement for direct election took off, and that the parties became more national and more clearly ideological as pressure mounted to change the Constitution to allow for direct election. While this is not proof that the changes in party form had a clear causal effect on support for the Seventeenth Amendment, it is highly suggestive of this.

Fox, *Popular Election of U.S. Senators*, 27 *The Arena* 455, 460 (1905) ("the question as to how a person will vote for senators has become an important but illegitimate factor in his qualification for the state legislature"); *New York Nation*, March 20, 1902 ("This election of senators by the state legislatures has insured the subordination of state to federal politics; maintained party divisions that were natural in the national field in a field (municipal as well as state) where they were uncalled for and mischievous; made the 'final end' of a legislature not the proper affairs of the State, but the election of state senators in the interest of national party supremacy; constrained the conscience of men to vote for unworthy candidates for the legislature lest the party at Washington should be imperiled, and in a word, prepared the way for the absolute domination of the machine as we see it today....")

¹⁴⁰ *The Want to Dodge National Issues*, *CHIC. TRIB.*, May 14, 1894.

The next section will analyze what this relationship can tell us about modern arguments over the Seventeenth Amendment and federalism more generally.

III. The Seventeenth Amendment and Theories of Federalism

This section will discuss the implication of the fight the Seventeenth Amendment how we think about federalism, both in scholarship and judicial opinions. The first subsection will show the existing literature on "political safeguards of federalism" misses a great deal of the history of American political parties. The second will broaden the discussion, arguing that not only does the political safeguards of federalism literature miss certain things, in important ways it has the relationship between political parties and federalism backwards – connections between state and national parties can make state elections turn on national issues, raising problems and questions for virtually all normative theories of federalism. The final section will broaden the argument further, showing that despite the Seventeenth Amendment, the results of state elections are still heavily influenced by national politics, reducing the degree to which state majorities are able or do use state elections to implement state policies. The failure of the Seventeenth Amendment in separating state politics from national politics was rooted in its formalism. The move to direct elections changed the formal links between state legislatures and Congress, but not the more powerful informal links caused by a common party system.

a. The Seventeenth Amendment and the Problems of Political Safeguards of Federalism

Legal scholars have long debated whether and how courts should police the lines of authority provided in the Constitution. Herbert Weschler, in one of the more famous essays in American legal scholarship, laid out the strong form of the argument that courts should largely

stay out of this dispute.¹⁴¹ Weschler argued that, instead of relying on courts to police the lines of federal and state authority, the Framers created "political safeguards of federalism" or structural and cultural limits on federal encroachment on state powers. Structures like the Electoral College, the fact that representatives in the House are allocated by state and not purely by population, and the very fact of the U.S. Senate with its equal representation for each state serve to protect the interests of states.¹⁴² This obviates the need for courts to police federal authority. The Supreme Court in *Garcia v. San Antonio Metropolitan Transit Authority* relied on Wechsler and others as reason to avoid a heavy-handed review of Congressional authority.¹⁴³

Larry Kramer, in two well-known pieces, rejected Wechsler's characterization of the efficacy of the structural protections for states, but argued that there were other political safeguards for federalism.¹⁴⁴ Federalism, Kramer argued, is the constitutional protection of the "regulatory authority of state and local institutions to legislate policy choices."¹⁴⁵ The Constitution's structural provisions may protect interests that reside in states, but they do not protect the authority of state governments to legislate against federal encroachment. For instance, the Electoral College may give ethanol producers in Iowa more influence than they would have in a system of purely popular elections for President

However, Kramer claimed that there were in fact strong political safeguards for states because politics was organized at the state level. The Framers understood the real protections for states were not in "Wechsler's tidy, bloodless constitutional structures," but rather were provided

¹⁴¹ Wechsler, *Political Safeguards of Federalism*, *supra* note 13, at 558-59.

¹⁴² He notably did not talk about much about the Seventeenth Amendment. See Kramer, *Understanding Federalism*, *supra* note 13, at 1503 (noting oddity of Weschler's decision not to discuss the Seventeenth Amendment extensively).

¹⁴³ 469 U.S. 528, 550-51 & n.11 (1985). The Court also relied on JESSE CHOPPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 175-84 (1980), who made similar claims.

¹⁴⁴ Kramer, *Putting the Politics Back In*, *supra* note 13, at 221-27; Kramer, *Understanding Federalism*, *supra* note 13, at 1503-15. Kramer also critiqued Weschler's reliance on "cultural foundations," as these were more likely the result of other protections for states, rather than being an independent source of protection for states. *Id.*

¹⁴⁵ Kramer, *Putting the Politics Back In*, *supra* note 13, at 253.

by "real politics, popular politics: the messy, ticklish stuff that was (and is) the essence of republicanism."¹⁴⁶ State leaders would drum up opposition to federal encroachment on their authority, and could count on popular support due to the greater connection with the people and greater regulatory ambit.¹⁴⁷ The political safeguards of federalism lay in the political power of state leaders to rally popular support.

The modern version of this was state-based political parties. Compared with European political parties, American parties have been less "programmatic" or ideologically coherent and committed to achieving an ideological agenda, and less "centralized" or run by a top-down national organization.¹⁴⁸ Instead, Kramer argued America's parties were largely run by state and local politicians and activists. The power of state politicians over political parties gave them control over federal elections, which in turn protected states as institutions, as federal government overreaching could be punished through use of the party apparatus in elections.

In the 1990s, when Kramer wrote his two classic pieces, the weakening of the party system that occurred in the 1970s was already giving way to our currently heavily polarized party system.¹⁴⁹ Kramer suggested that, while the parties may be growing more centralized and programmatic, state parties retained substantial influence. Further, a new form of protection had emerged: the states' role in the administration of federal programs.¹⁵⁰ Because the federal government relied on state governments to administer its policies, states had all sorts of protections against excessive federal intrusions.

¹⁴⁶ *Id.* at 258.

¹⁴⁷ *Id.* at 258-66.

¹⁴⁸ Kramer, *Putting the Politics Back In*, *supra* note 13, at 278-87; Kramer, *Understanding Federalism*, *supra* note 13, at 1520-42.

¹⁴⁹ Kramer, *Putting the Politics Back In*, *supra* note 13, at 280-83; ALAN I. AMBRAMOWITZ, THE DISAPPEARING CENTER: ENGAGE CITIZENS, POLARIZATION & AMERICAN DEMOCRACY (2010) (cataloging and attempting to explain the increasing polarization of political parties and elites over the last 30 years); NOLAN MCCARTY, KEITH T. POOLE AND HOWARD ROSENTHAL, POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES (2008) (highlighting history of polarization in Congress).

¹⁵⁰ Kramer, *Putting the Politics Back In*, *supra* note 13, at 283-87

While the power of states as part of the administrative process has been substantially fleshed out in recent times by scholars like Heather Gerken, Rick Hills and Robert Schapiro and shown to have real teeth, the state parties as political safeguards story has not fared as well.¹⁵¹ The reason is that the trend that began before Kramer's article has become even more significant: today's political parties have become substantially more programmatic and centralized. Congress is more polarized than ever, with the party affiliation defining almost all variation in Congressional voting.¹⁵² Organizational control has flowed to national groups like Presidential campaigns and organizations like the congressional campaign committees. Each party's candidates for office have become more similar to one another ideologically, no matter what type of district they run in, since the 1970s.¹⁵³ Presidential candidates are similarly growing more ideologically distinct.¹⁵⁴ There is little evidence that state parties exert any meaningful control over members of Congress; Members are responsive to national and not local trends and control.

Kramer acknowledged that "parties change constantly " but also claimed that their decentralization and non-programmatic nature have been relatively constant.¹⁵⁵ From this, he

¹⁵¹ For only a small taste of the work on the relationship between states and federal administrative agencies, see ROBERT A. SCHAPIRO, *POLYPHONIC FEDERALISM: TOWARDS THE PROTECTION OF FUNDAMENTAL RIGHTS* 90 (2009) (noting that state participation in federal regulatory regimes "provides a prime example of the operation of cooperative federalism"); Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 *YALE L.J.* 1256, 1275-80 (2009) (discussing how uncooperative behavior by states implanting federal laws resulted in policy changes); Roderick M. Hills, Jr., *The Eleventh Amendment as Curb on Bureaucratic Power*, 53 *STAN. L. REV.* 1225, 1227 (2001) (discussing the influence of state regulators in federal administrative regimes).

¹⁵² AMBRAMOWITZ, *supra* note 149, at 140-44 (describing changes in polarization in Congress); MCCARTY, POOLE AND ROSENTHAL, *supra* note 149, at 3; Jacob Jensen, Ethan Kaplan, Suresh Naidu, Laurence Wilse-Samson, *The Dynamics of Political Language* (draft paper 2012) available at <http://www.brookings.edu/~media/Projects/BPEA/Fall%202012/2012%20fall%20jensen.pdf> (analyzing language used in Congressional debates to find that polarization increasing for 30 years although lower than during New Deal period and earlier).

¹⁵³ Stephen Ansolabehere & James M. Snyder, *Candidate Positioning in U.S. House Elections*, 45 *AM. J. POL. SCI.* 136, 136 (2001).

¹⁵⁴ See David Andersen, Richard R. Lau & David P. Redlawsk, *An Exploration of Correct Voting in Recent U.S. Presidential Elections*, 52 *AM. J. POL. SCI.* 395, 396-8 (2008) (noting that Presidential candidates have become more ideologically distinct leading to voters become better at voting "correctly" or in line with their ideological preferences)

¹⁵⁵ Kramer, *Understanding Federalism*, *supra* note 13, at 1523

argues that state parties have, at least until the most modern period, have constantly provided political safeguards for federalism.

The story of the 17th Amendment shows that the parties were changing a great deal even before the last few decades. The increased ideological definition and organizational centralization of the two major parties in the period after 1896 made national politics a bigger part of state elections, reducing the degree to which state politicians mattered to election results. The move towards programmatic and centralized parties in the early part of the 20th Century was not as dramatic as we would see in the early part of the 21st Century. But it represented a decrease in the strength of the non-formal political safeguards of federalism. As the non-formal safeguards weakened, support for a formal political safeguard of federalisms, the power of state legislatures to appoint Senators, also withered.

Kramer's arguments about the political safeguards of federalism have been criticized by modern judicial federalists for failing to acknowledge that informal safeguards are contingent on the existence of a particular political order, rather than absolute like the Constitution's guarantees.¹⁵⁶ The history of the Seventeenth Amendment provides an example of how shifts in the political order can affect state power in the federal legislature. Thus, while the history of the Seventeenth Amendment provides an important caveat to Kramer's arguments about judicial enforcement of federalism, it also provides substantial support for his analytical claim that we should look to how political parties functions in order to understand how federalism works.

¹⁵⁶ See, e.g., Lynn A. Baker and Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 115-16 (2001). One might question, however, whether the "parchment barriers" provided by Constitutional protection and judicial review for federalism is similarly reliant on the formation and existence of a political order that supports them, as Daryl Levinson's work suggests is true of Constitutional protections in general. See Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 659 (2011) (arguing the enforceability of a constitution turns on its ability to shape political coalitions to support enforcement).

But perhaps the most important thing the history of the Seventeenth Amendment can tell us about Kramer's story is less about safeguards and more about the very basic question of what those safeguards protect. Kramer writes: "federalism is meant to preserve the regulatory authority of state and local institutions to legislate policy choices."¹⁵⁷ The next section will show that this elides an important distinction between state regulatory authority and popular authority at the state level.

b. The Seventeenth Amendment and the Problems of Flowchart Federalism

Scholars have rather endlessly debated whether we should move in the direction of protecting state power more or less through the courts, or differently through the political system. Most of these discussions, as the quote from Kramer above suggests, have largely either clearly stated or tacitly assumed that increasing and protecting state regulatory authority -- that is the power of state entities to make policy decisions -- is what federalism protects from federal encroachment.¹⁵⁸ We might call this understanding "flowchart federalism," as it assumes that the benefits of federalism are generated by the formal list of powers reserved to states under the Constitution.

However, when one looks at the equally endless and unbelievably varied normative justifications for federalism, we see something subtly different. Most normative justifications for federalism rely on an assumption that state majorities will be able to use elections to promote

¹⁵⁷ Kramer, *Putting the Politics Back In*, *supra* note 13, at 253.

¹⁵⁸ There are some exceptions. Most notable is the work of John McGinnis and Ilya Somin. John O. McGinnis and Ilya Somin, *Federalism vs. States' Rights: A Defense of Judicial Review in a Federal System*, 99 N.W. U. L. REV. 89, 89-92 (2004). Taking off from the well-known section from *New York v. United States*, 505 U.S. 144, 181-182 (1992) that argued that sometimes federalism had to be protected from state officials who would rather cede responsibility to the federal government, McGinnis and Somin lay out a full-throated argument that state autonomy and federalism are substantially different. While Somin and McGinnis do not focus on the formal bounds of connection between state governments and the federal government, like state legislative appointment of Senators, the argument here and the argument there are very much in line.

their preferences about policies. That is, the benefits that run from having a federal system are dependent, in part, on state democracy functioning.¹⁵⁹

It may seem safe to assume that the power of state officials to enact policies and the power of majorities inside state to choose policies are the same thing. After all, officials of state government are elected by majority vote. However, what the history of the Seventeenth Amendment shows us is that, under certain conditions, there are powers states can hold that *reduce* the capacity of state voters -- real and not hypothesized voters, full of warts and empty of some important relevant political knowledge -- to affect policy decisions at the state level. As Ernie Young has shown convincingly, courts frequently toggle between “sovereignty” conceptions of federalism (roughly speaking the “dignity” and immunity to suit or challenge of states) and “autonomy” notions (the actual regulatory capacity of states), but the normative arguments for federalism almost all rest on “autonomy” arguments.¹⁶⁰ Thus, increasing state power in some instances actually can reduce the benefits of federalism.

This is broadly true across most normative theories of federalism.¹⁶¹ For instance, the benefits of federalism that flow from the smaller size of states as polities, and the theorized improved responsiveness of state policy to majority preference, will not appear if state-based voters are making their decisions on national issues. Giving states control over national political

¹⁵⁹ One potential objection must be noted. Malcolm Feely and Edward Rubin distinguish federalism as a theory from local democracy largely on the grounds that “federalism reserves particular issues to subnational governmental units, regardless of the political process that exists within these units.” MALCOLM M. FEELY AND EDWARD RUBIN, *FEDERALISM: POLITICAL IDENTITY & TRAGIC COMPROMISE* 31 (2008). I do not disagree with this statement, at least in theory, as it is not hard to imagine federal systems with major non-democratic elements (for instance, with provinces run by unelected tribal chieftans). But the main benefit of federalism for Rubin and Feely’s protection of distinct political identities. In systems where state-based political identities are expressed democratically (as in the American system, where states must provide republican government), the case for federalism *does* rely on the quality of local democracy, as will be argued below, and the benefits of federalism are eroded by giving states powers that limit the ability of locals to choose local policies.

¹⁶⁰ Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 *Tex. L. Rev.* 1, 53-64 (2004)

¹⁶¹ For a nice summary and categorization of theories of federalism, see Erin Ryan, *The Once and Future Challenges of American Federalism: The Tug of War Within*, in *THE WAYS OF FEDERALISM IN WESTERN COUNTRIES AND THE HORIZONS OF TERRITORIAL AUTONOMY IN SPAIN* (Alberto López Basaguren and Leire Escajedo San-Epifanio, eds., 2013)

results can make state elections more second-order and hence less responsive to state opinion on state issues. Sorting, or Tieboutian, theories of benefits of federalism rely on states providing lots of different choices to mobile citizens.¹⁶² If the Constitution forces national decisions on state legislatures, we may see a reduction in the differences in state policy, as they take, for instance, either Democratic or Republican form and will not provide a wide range of choices. The legislatures running “laboratories of democracy” will experiment less if they get little electoral credit for successful innovations. If state legislative elections turn largely on a race for a Senator, there is little reason for state legislators to bother with innovative, costly to devise, and risky new ideas.¹⁶³ Theorists that argue federalism can help solve the conflicts that arise from the existence of geographically-specific cultural differences in big countries, like Ed Rubin and Malcolm Feely, need state politics to express local identity, which can be frustrated if the constitutional organization leads to state voters making national decisions when choosing state legislatures.¹⁶⁴ The benefits of inter-jurisdictional synergy through “cooperative” or “uncooperative” federalism rely on the existence of inter-jurisdictional differences.¹⁶⁵ And so on.¹⁶⁶

¹⁶² See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956) (arguing that diffusing power to many local governments will produce an optimal provision of local public services under some conditions).

¹⁶³ The term laboratory of democracy derives from *New State Ice Co. v. Liebmann*, 275 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”) Cf. See Susan Rose-Ackerman, *Risk Taking and Reelection: Does Federalism Promote Innovation?*, 9 J. Legal Stud. 593, 594 (1980) (arguing that limited electoral incentives for state officials results in suboptimal amount of state policy innovation).

¹⁶⁴ FEELY AND RUBIN, *supra* note 159, at 15-38.

¹⁶⁵ SCHAPIRO, *supra* note 151, at 45 (providing argument for benefits of federalism that flow from “cooperative” or “symphonic” inter-jurisdictional synergy); Bulman-Pozen & K. Gerken, *supra* note 151, at 1256 (providing argument that federalism promotes benefits from “uncooperative federalism” or inter-jurisdictional conflict).

¹⁶⁶ An exception might be drawn for checks and balances theories of federalism, or arguments that the reason to give states power is that it limits the ability of national majorities to push their policies absent widespread agreement. Even if state elections are merely another sphere in which national politics expresses itself, the existence of many states each with some degree of autonomy means that it will be more difficult for a national majority to achieve its objectives. Even if this is the case, the effect of giving states powers that renders their elections second-order state elections has a somewhat ambiguous effect on checks and balances. If a President is elected with coattails, then he

This has a number of implications. First and foremost, advocates of repealing the 17th Amendment, from scholars like Zywicki and John Yoo to politicians like Rick Perry, do so on the grounds that would be good for federalism.¹⁶⁷ They are wrong. Although as we will see in a moment, state elections *still* turn heavily on national issues, repealing the 17th amendment would make state elections turn on national issues to an even greater degree.¹⁶⁸ This would reduce the quality of state democracy and thus reduce the quality of American federalism.

and the national government will have greater power if state elections follow national ones. State officials elected because of the President, and who will be reelected only if the President is popular, will have incentives to push the President's agenda in areas where Congress cannot legislate (due to Constitutional constraints or due to a sheer lack of time and resources). However, where the President's party is rejected in off-term state elections, as is often the case, his power will diminish and there will be greater checks on federal power. Thus, giving states control over national level entities like the Senate, which encourages state elections to be second-order, will alternatively increase and decrease the strength of checks and balances in the system. Having state elections turn on state issues will mean a more steady check on the power of national officials. As we are particularly worried about the existence of checks following landslide elections (when other checks are not available), the effect of second-order elections on checks and balances is likely negative, even if there are times when second-order elections increases checks on the Presidency.

¹⁶⁷ See Zywicki, *Beyond the Shell and Husk*, *supra* note 3, at 166; John Yoo, *Repeal the Seventeenth Amendment*, The Corner, NATIONAL REVIEW ONLINE, October 22, 2010, <http://www.nationalreview.com/corner/250726/repeal-17th-amendment-john-yoo>; RICK PERRY, FED UP! OUR FIGHT TO SAVE WASHINGTON 42-44 (2011).

¹⁶⁸ It should be noted that this requires a simplifying assumption that voter preferences are either separable (i.e. their voting preference at the state level is not conditional on who is in charge at the national level) or non-separable in a way that does not create a “doctrinal paradox.” See Robert D. Cooter and Michael D. Gilbert, *A Theory of Direct Democracy and the Single Subject Rule*, 110 Colum. L. Rev. 687 (2010). To the extent preferences are separable, state democracy would be made worse off by repealing the Seventeenth Amendment, as voters could not use state elections to hold state officials accountable without it affecting their preferences in federal elections. If state voters care more about federal policy or the party system is organized in ways to make choosing on federal elections easier, then state democracy will suffer. However, if preferences at the state and national level are non-separable, however, there are certain preference orders that would result in voters being either better served or no worse served by linkages between the two types of elections. It is not hard to imagine such preferences. For instance, before a voter supports a high tax party at the state level, she may want to ensure a low tax party is in charge at the national level or vice versa. If preferences take this form, choosing state and federal officials separately can lead to a bad outcome for some voters (in the example above, high or low tax parties in charge at both levels). This is an application of the “doctrinal paradox” identified by Lewis Kornhauser and Larry Sager. See Lewis A. Kornhauser and Lawrence G. Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 Cal. L. Rev. 1, 10-13 (1993); Lewis A. Kornhauser & Lawrence G. Sager, *Unpacking the Court*, 96 Yale L.J. 82 (1986). But the assumption here is a modest one. First, non-separability of preferences only harms the normative conclusion that the Seventeenth Amendment was bad for state democracy if preferences in the electorate take a form where they are prone for cycling results and parties behave in a specific way, following the platforms they announce even if things change at another level of government. Given that much voter assessment is retrospective based on holding incumbent officials responsible for results rather than promises, state officials have strong incentives to produce good results for voters, which requires taking into account what is happening at other levels of government. Further, state legislative elections in the pre-1913 world did not determine more than a little about the make-up of federal power; state legislatures each only chose two Senators (and one at a time), and had no direct effect the House or the President. Thus, even fully informed voters with non-separable preferences should have in most instances voted *as if* their preferences were separable as the practical effect of the linkage was small. Finally, it is unlikely that voters

Second, other institutional rules that link federal representation to state legislative elections are also likely bad for achieving the goals of federalism. Franita Tolson has argued that partisan gerrymandering is a "safeguard of federalism."¹⁶⁹ She argues that states are able to use their power over Congressional districting to protect their interests. Like arguments made by supporters of repeal of the Seventeenth Amendment, Tolson's claim ignores the harm linking levels of government can do to state politics. Because states have the power to gerrymander, federal officials, organizations and interest groups all become heavily involved in state elections prior to redistricting, flooding state elections with outside money, all in the name of affecting Congress.¹⁷⁰ Gerrymandering, like state legislative appointment of Senators, turns state legislative elections into proxy fights for control of Congress, reducing the accountability of state officials for state policy. The power to gerrymander, thus, reduces the quality of state democracy and hence the benefits of federalism.

Even more commonly, the federal government shares responsibility in some policy areas with state governments. Rather than implementing its own policy, the federal government engages in "cooperative federalism," and in doing so achieves certain benefits -- allowing greater local tailoring of policies, mixing the differing competencies of state and federal governments, and gaining legitimacy and efficacy from the involvement of state actors.¹⁷¹ This also allows for "uncooperative federalism" where state officials use their involvement in policy areas to dissent,

could develop enough information about candidates, parties and policy interactions between the state and federal level to operationalize a set of non-separable preferences (even though the mere fact that voters behave naively and not strategically does not eliminate the possibility that they were in fact made worse off by breaking the link between the Senate and state legislature). As a result, the assumption that the doctrinal paradox does not seriously imperil this normative claim seems solid, but it is an assumption. Thanks to Michael Gilbert for forcing me to think about this.

¹⁶⁹ Franita Tolson, *Partisan Gerrymandering as a Safeguard of Federalism*, 2010 UTAH L. REV. 859 (2010).

¹⁷⁰ As Michael Kang notes, "the most aggressive offensive gerrymanders during the recent cycle of congressional redistricting occurred after energetic intervention by federal-level party leaders." Michael S. Kang, *Electoral Redistricting and the Supreme Court: The Bright Side of Partisan Gerrymandering*, 14 CORNELL J. L. & PUB. POL'Y 443, 465 (2005)

¹⁷¹ See Schapiro, *supra* note __, at 45.

creating new nodes for political disagreement and better public debate as a result.¹⁷² But sharing responsibility across types of government has a cost in terms of its effect on accountability. Research has shown that voters have some ability, although not a great deal, to assign responsibility to different levels of government.¹⁷³ Where voters can do so, they can use elections at each level to hold officials accountable for real world effects. Where policy responsibility is mixed, however, it is harder for voters to use elections at either level to hold officials accountable. As John McGinnis and Ilya Somin have shown, this harms the efficacy of federalism across a number of dimensions.¹⁷⁴

This discussion further problematizes Kramer's theory of the political safeguards of federalism.¹⁷⁵ Kramer argues that interaction between state parties and national politics protects the values of federalism by protecting state authority. Interaction between national and state parties, however, can result in weakening the ability of state voters to control state policy. Thus, the very safeguards Kramer finds for the formal authority of states can actually serve to reduce the functional benefits of federalism.¹⁷⁶

¹⁷² Bulman-Pozen and Gerken, *supra* note 151, at 1259.

¹⁷³ See Elmendorf and Schleicher, *supra* note 12, at 131-33.

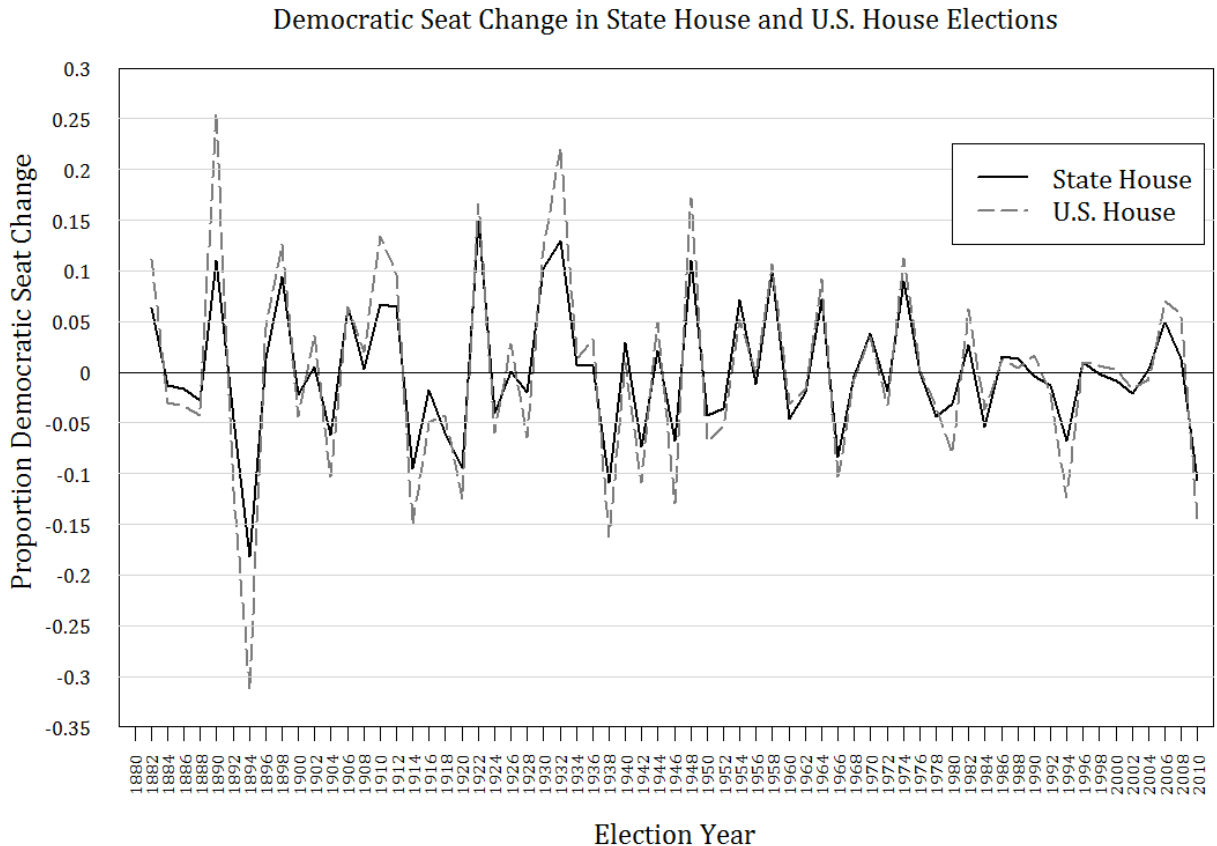
¹⁷⁴ McGinnis and Somin, *supra* note 158, at 109-112.

¹⁷⁵ James Gardner wrestles with some similar questions about Kramer's work in a recent draft. James A. Gardner, *The Myth of State Autonomy: Federalism, Political Parties and the National Colonization of State Politics* 58-59 (2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2191150. However, Gardner does not do much to explain the mechanisms through which national politics influences state politics, except to note that parties are involved.

¹⁷⁶ It may, however, serve to improve the democratic process at the federal level. In a recent paper, Jessica Bulman-Pozen argues that second-order elections at the state level may be good for national level politics, as the minority party at the national level will have through its control of state governments avenues through which it can provide actually examples of how alternatives to the majority party's approach will work, and opportunities to frustrate the majority party's agenda through "uncooperative federalism." Jessica Bulman-Pozen, *Partisan Federalism*, Harv. L. Rev. (forthcoming 2013, on file with author). Voters using state elections to comment on national politics are thus, Bulman-Pozen argues, providing a democratic good – making federal politics work better by having a more efficacious check on majority party power. Bulman-Pozen's work is challenging and fascinating, but the costs of whatever improvement the existence of second-order elections at the state level provides to national level discourse are quite high. As argued above, second-order state election reduce or eliminate accountability for state level officials, reduce the variation in state policy and thus harm the benefits from sorting and choice of law, and harm the degree to which state policies follow state voter preferences, at least to the extent that states are doing things other than merely rearguing national issues. Although states and the federal government do deal with some issues in

c. Can State Democracy Work?

The story of the Seventeenth Amendment sketched out here has an ironic ending. If a goal of the Amendment was to reduce the influence voter preferences about national politics had on state elections, it largely failed. Look at this chart¹⁷⁷:



When Democrats or Republicans are popular and do well in national elections, they usually win elections at the state legislative level as well. Despite the passage of the Seventeenth Amendment, state legislative elections still largely turn on federal issues.

common, the most important national-level issues – e.g. war and peace, monetary policy, deficit spending – have no state policy analogues (states are generally barred from any of these issue areas by the federal constitution, federal laws or state constitutions). Thus it is hard to see this benefit to federal democratic discourse as much more than a small offset to the costs to society of having second-order state elections.

¹⁷⁷ This chart was prepared by Steven Rogers and it and the underlying data is available upon request.

If the Seventeenth Amendment was intended in part to separate state politics from national politics, why didn't it succeed in doing so? Perhaps the reason is the existing bonds between state and national government, like the power to gerrymander. But I doubt this has more than a small effect. More likely, it is the informational connection between national politics and state politics voters see on the ballot. The Seventeenth Amendment focused on the structural constitutional connection between state governments and the national government created by state legislative appointment of Senators. But what makes state legislative elections substantially second order are the laws and politics that create a unified party system.

As I have argued, both individually and with Chris Elmendorf, the source of second-order elections is frequently "mismatch" in the party system. Parties are (today more than ever) defined by the national political commitments of their candidates and members.¹⁷⁸ Voters see the endorsement of these national coalitions on the ballot. Because voters know little about individual candidates, it is rational to use these heuristics about national politics in state and local elections if there is any correlation at all between national preferences and local ones. The result is what we see in the chart above -- voters use their preferences about the President and Congress to determine their vote for state legislature or city council. At the local level, this is particularly dramatic, with the correlations between national and local getting extremely high.¹⁷⁹ In state legislative elections, there is *some* evidence that *some* voters care *somewhat* about the actual performance of the state legislature and this influence is bigger if voters actually know which party is in the majority. But as Steven Rogers has shown, the largest influence by far on state legislative elections is the approval rate of the President.¹⁸⁰ And accountability suffers as a

¹⁷⁸ Elmendorf & Schleicher, *supra* note 12, at 32-49.

¹⁷⁹ Schleicher, *City Council Elections*, *supra* note 12, at 420, 458-59.

¹⁸⁰ See Steven Rogers, *Accountability in a Federal System: How Parties Perform in Office and State Legislative Elections* (2012), available at <http://www.princeton.edu/%7Erogerssm/Statements/Rogers-JobMarketPaper-Web.pdf>

result. Representation does as well. State legislation is not particularly responsive to the opinions of state residents. This results in state governments that are not particularly representative of popular opinion. In the leading recent paper in the field, Jeffrey Lax and Justin Phillips find that opinion majorities on specific issues are no more likely to have their preferences chosen by state government than if policies were chosen at random.¹⁸¹ State legislative elections do not produce particularly accountable or representative government, and this is directly caused by the fact that state elections turn on national, rather than state-specific, issues and performance.

These facts contradict a basic application of Anthony Downs's well-known median-voter theorem. He suggests that a party that is out of power -- say Massachusetts Republicans or Wyoming Democrats -- should adopt policy positions that appeal to 50.01% of the voting public and therefore become competitive.¹⁸² The pressure of this should produce policy results geared towards majority support. So why don't state parties that lose virtually all state legislative elections, like Massachusetts Republicans or Wyoming Democrats, do so and reap electoral rewards? There are three basic reasons: laws that inhibit rebranding, voter difficulty in differentiating parties at different levels of government, and an imbalance of voters who form their party preference on non-ideological grounds.

First, laws limit the development of differentiated local and state parties. In order to operate like a party in a median voter model, the minority party must be able to adopt a clear platform on issues relevant to the office that appeal to the median voter. Election laws make this difficult. State laws limit the ability of voters to belong to different parties at different levels of

¹⁸¹ Lax & Phillips, *supra* note_, at 149.

¹⁸² See ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY 114-49 (1957).

government or to switch easily back and forth.¹⁸³ Laws frequently also require primary elections and as result, a local minority party will face difficulties field a consistent and competitive slate of candidates, as the party's primary electorate and candidate base is likely to be comprised entirely of voters on a distant fringe of the municipality's ideological spectrum. Further, where the issues that are decided by the state or local government are orthogonal to or weakly correlated with the main dimension of national politics, there is no reason to believe that a primary electorate and candidate base determined by national preferences will be able to agree on local or state policies that would appeal to the jurisdiction's median voter.¹⁸⁴ The base of, say, the Republican Party of New York City is unlikely to be able to field a set of ideologically coherent and competitive candidates across offices, as it is likely too far to the right for the average New York resident on issues that correlate with national politics and too unorganized on issues that do not. As a result, the party cannot build a locally competitive brand and voters use their national preferences in local elections.

At the local level, there is substantial evidence that the major parties do not behave like median-voter parties. Instead, party is only weakly correlated with local issue preference.¹⁸⁵ At the state level, some parties have made efforts at rebranding themselves on state issues.¹⁸⁶ But even where state-issue rebranding occurs, it frequently does not seem to matter. For instance, based on survey data of legislators and voters, Massachusetts Republican legislators have issue

¹⁸³ See Schleicher, *City Council Elections*, *supra* note 12, at 448-60. Also parties earn automatic ballot access for down-ballot races—including races for city offices—through a strong showing in the gubernatorial race. *Id.* at 450, 450 n. 108. This makes it difficult for third-party entrants, as they have to pass an established party in order to become one of the top two vote getters.

¹⁸⁴ See Elmendorf and Schleicher, *supra* note 12, at 32-50.

¹⁸⁵ This is despite the fact that voters frequently have relatively clearly organized preferences on local issues. See Cheryl Boudreau, Christopher S. Elmendorf, & Scott A. MacKenzie, *Lost in Space?: How Endorsements Affect Spatial Voting in Low-Information Elections* (Paper presented at the 2012 Conference of the Midwest Political Science Association) (on file with author) (finding that San Francisco voters have preferences on local issues that fall into two camps but that these preferences do not translate into voting patterns); Schleicher, *City Council Elections*, *supra* note 12, at 439-43 (arguing that local parties have little coherent ideology); Elmendorf and Schleicher, *supra* note 12, at 37-38 (same).

¹⁸⁶ Elmendorf and Schleicher, *supra* note 12, at 40-41.

stances that are very close to those of the median Massachusetts voter.¹⁸⁷ And yet they lose badly every election.¹⁸⁸

The second and third stories attempt to explain this.¹⁸⁹ Voters may not know state legislative party issue stances and may have substantial difficulty figuring them out. In order to vote retrospectively, voters have to know which party is in power and what policies they decide. Voters at the state level often fail at both of these tasks. Figuring out who is responsible for different policies between federal, state and local officials is frequently quite difficult for voters. Further, state voters frequently do not know which party is in power in the state, making retrospective voting on state issues difficult.¹⁹⁰ Where one party has dominated politics for a long time, this becomes particularly difficult. Voters have no basis for assessing a long-term minority party's promises and may simply not believe them when they say they will behave like the state median.¹⁹¹

Finally, differences among voters may explain this. Since the 1950s, we have known that some voters' relationships to political parties are not primarily ideological or based on retrospective assessments of party performance.¹⁹² Rather, they have affective relationships with parties. These voters are members of parties first and their membership defines their ideology, if it exists. Party membership is an affiliation like a religion, not an expression of the sum of issue preferences. At the national level, this may not matter much. As long as there are a roughly equal number of non-responsive Democrats and Republicans, their voting patterns should wash

¹⁸⁷ See Boris Shor, *All Together Now: Putting Congress, State Legislatures and Individuals in a Common Ideological Space to Assess Representation at the Macro and Micro Levels* (working paper, Jan. 20, 2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1697352.

¹⁸⁸ Elmendorf and Schleicher, *supra* note 12, at 43

¹⁸⁹ *See id.* at 44-46.

¹⁹⁰ *See* Rogers, *supra* note 180, at 4.

¹⁹¹ *See* Elmendorf and Schleicher, *supra* note 12, at 48.

¹⁹² *Id.* at 4, 44.

out.¹⁹³ But at the local level, if the rates of voters among Democrats and Republicans that are non-responsive to issues are equal, a big difference in national party membership can make local competition difficult. If a state is 60-40 Republican, and half of all voters are purely affective, in order a majority of the vote, a Democrat would need to win 60% of all voters who care about issues and performance.

Likely all of these forces work together to ensure that voting for state legislature is more responsive to national politics than it is to anything state legislatures actually do. Notably, campaigns for high-profile office like Governor or Mayor can buck this trend, as candidates for these offices can sometimes develop their own brand in voters' eyes.¹⁹⁴ And in fact we see competition in Gubernatorial and Mayoral races, even when we see no competition in the state legislatures and city councils in the same jurisdiction. But down-ballot races are defined by these dynamics.

Having state legislatures appoint Senators likely made this worse, as it gave voters -- even those conscious of the differences between state and national responsibility and state and national party stances -- another reason to use their national preferences in state elections. Even if a voter is fully informed, she may just care more about the identity of a Senator than the policies of the state government. But even without state legislative appointment of Senators, preferences about national politics, the President and Congress play the lead role in determining the results of state legislative elections. As a result, state legislative elections do not do much to make state legislators accountable for their actions or responsive to the preferences of state voters on state issues. State democracy just does not work that well.

¹⁹³ *Id.* at 36.

¹⁹⁴ *Id.* at 59-60.

The failure of the Seventeenth Amendment to make state democracy work substantially better suggests that reformers were trying to change the wrong thing. We see the phenomenon of second-order elections under a whole variety of different institutional structures, from U.S. States to European Parliament elections. When reformers try to change this dynamic, as frequently happens, reformers usually focus on formal ties between the levels of government, or the powers allocated to each. The European Union, for instance, has repeatedly increased the power of the European Parliament in the faint hope that at some point it will become powerful enough that voters pay attention to what it does.¹⁹⁵ Faced with a problem of how elections work, the proposed solutions are constitutional in form.

A better strategy would be to focus on election laws. Reformers should recognize that elections are not pure representations of voter choice, but rather are structured by laws to achieve certain purposes.¹⁹⁶ If reformers want state elections to serve the purpose of making state officials accountable for their performance, we need to design election laws to achieve that end. One can imagine all sorts of changes, ranging from the quotidian -- like labeling which party runs the state legislature on the ballot -- to the major, like barring national parties from contesting state elections, allowing state specific parties to rise up and contest these elections.¹⁹⁷ But the focus should be on developing election rules that shape party competition to produce outcomes that fit the goal of the election in the first place. We hold state legislative elections, presumably, in order to get feedback from state voters on state governmental performance. Our election law rules do not ensure that these elections serve this purpose.

¹⁹⁵ See Schleicher, *What If Europe*, *supra* note 12, at 110-115.

¹⁹⁶ Paul Edelman illustrates this point nicely by showing that the voting for Best Picture in the Oscars is unexplainable were the only goal to represent voters' preferences, but that the voting system exists to achieve other ends (in this case, ratings for the Oscar's broadcast.) Paul H. Edelman, *The institutional dimension of election design*, PUBLIC CHOICE (forthcoming 2013).

¹⁹⁷ See Elmendorf and Schleicher, *supra* note 12, at 50-72 (imagining all sorts of changes).

Rather than changing the constitutional structure, we need to look at how we regulate state elections. By doing this, we might be able to fulfill the Seventeenth Amendment's promise and make state democracy work.