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The 100th Anniversary of the 17th Amendment: A Promise Unfulfilled?

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EXECUTIVE SUMMARY



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May 31st, 2013 marks the 100th anniversary of the adoption of the 17th Amendment, which ushered in direct elections of U.S. senators. The Framers established indirect elections - by state legislators - as a means of shielding the U.S. Senate from public influence and as such, allowed it to act as a counterweight to the directly elected House of Representatives. The impetus for changing the Constitution lay in the perceived corruption and inefficiency that marked indirect elections, and the 17th Amendment was part of the larger Progressive movement that called for more open, accessible, and responsive government. At the same time, states instituted direct primaries for federal and state offices, which presumably gave more power to the voters and less power to party elites. This paper is based on a larger project which investigates the dynamics of Senate elections in the indirect system using an original data set of roll call votes for U.S. senator taken in all state legislatures from 1871-1913. We find that while U.S. Senate elections in the indirect age were more conflicted than previously believed, there are strong parallels to today's Senate in terms of the types of candidates that run for Senate, the role of money in elections, the role of partisan elections, and the nature of Senate ideological and legislative behavior. More broadly, we suggest that the 17th Amendment has failed to deliver on its promise, and has produced a Senate that is even less responsive to voters than it was under the indirect election system.

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In postal reform legislation there is another standstill, Senator Stewart having with the threat of a speech, smothered the Loud measure of the saving of \$13,000,000 annually. In interstate commerce legislation there is the same condition. The anti-scalping bill can be moved neither forward nor back. Finally, this purblind, paralyzed branch of government cannot summon resolution enough to get up a talk over a treaty, despite its notorious liking for treaties and talks. The senate can by a deadlock bring no harm to the country that it has not already brought in its immediate past.¹

That observation, printed in the *New York Press* in 1897, could just as easily describe the modern U.S. Senate in 2013, the year that marks the 100th birthday of the 17th Amendment, which ushered in direct elections of U.S. senators. The 17th Amendment was ratified on April 8, 1913 and adopted on May 31st of that same year. Before the 17th Amendment was adopted, state legislatures elected United States senators. The power to elect U.S. senators elevated the importance of state legislatures because they were pivotal in determining the composition of the U.S. Senate, which in turn was a key player in formulating federal policy.

The 17th Amendment ostensibly changed the focus of Senate elections from state legislatures to the individual voter. To date, political scientists have focused on whether there were changes in the Senate in the years immediately after the direct election system was instituted. In terms of partisan control, the Senate shifted towards the Democrats after many years of Republican supremacy. Senators stayed a bit longer in office, and they shifted their roll call voting patterns to appear more moderate to the general electorate in their states, rather than appeal solely to the state legislators in their

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own party.² However, traditional career building activities such as bill sponsorship and committee work did not change very much; U.S. senators used these tools to build constituent support in the indirect and direct election periods. With respect to changes in internal Senate rules and the use of the filibuster, there is no evidence of a direct correlation between the switch to direct elections and the adoption of the cloture rule in the Senate in 1917, but there has been an increase in filibuster activity in the post 17th Amendment period.³

Opponents of the 17th Amendment, including candidates for office like Tea Party favorite Ken Buck who ran for Senate in Colorado in 2010, incumbents Senator Mike Lee (R-UT) and Senator Rand Paul (R-KY), legal scholars, and historians, argue that this change in the election of U.S. senators has expanded federal power at the expense of the states. They reason that by giving the power to select U.S. senators back to state legislatures, senators would be more accountable to states as entities, and thereby more

sensitive to federal encroachment onto state sovereignty, as well as mandates (funded and unfunded) to carry out federal policy.⁴ For example, if U.S. senators were still elected in state legislatures, the Affordable Care Act might not have passed the Senate, given that 26 states, which had 52 U.S. senators representing them, went on record in opposition to the law and went to court to block its implementation.

One does not have to believe that we will actually repeal the 17th Amendment to want a deeper understanding of the effects of constitutional change on the American democracy. By opening up the electoral process, proponents of the 17th Amendment hoped to free senators from the ties that bound them to wealthy interests in their state, and nationally, and be able to respond to the needs of their constituents. Consequently, there are dangers to judging the effects of the 17th Amendment without a clear understanding of how elections actually were conducted before popular election. In this paper, we provide a brief snapshot at what constituted Senate representation in the period of indirect elections as compared to the direct election period. Has the Senate lived up to the promise sparked by this constitutional change?

From 1789 to 1866, states were inconsistent in their timing and methods of electing senators. This resulted in numerous election controversies, which periodically spilled over onto the floor of the U.S. Senate itself. In response, the U.S. Congress, in 1866, passed “An Act to regulate the Times and Manner for holding Elections for Senators in Congress” (14 Stat 243), that set up a standardized procedure in state legislatures to elect U.S. senators.⁵ First, each chamber was to meet separately at noon on the second Tuesday after the state legislature had organized, to vote separately for senator. On the following day at noon, the two chambers would meet in joint assembly to count the votes. If a majority of members of each chamber favored the same candidate, he would be declared elected. If no candidate secured a majority of the joint assembly, House and Senate members were required to meet together and ballot at least once a day until a senator was chosen or their legislative session adjourned *sine die*.

We have compiled a unique historical dataset that is designed to address the significant questions surrounding indirect elections as a democratic mechanism, as well as fill in major gaps in our knowledge of American politics during this period of time. For the period 1871-1913, we collected original ballot data from individual state legislative journals, so we have as complete a record of voting for senators during this period as possible. We collected all the roll call votes for U.S. senators in each state legislature for 752 elections which sums to 577,042 votes. We also amassed rosters for each state legislature over time, producing information on the approximately 106,000 state legislators who served during those years. In the indirect election period, we found that there was tremendous turnover among legislators; more than two-thirds of legislators held office for only one term, which was typically two years.⁶ These de facto term limits

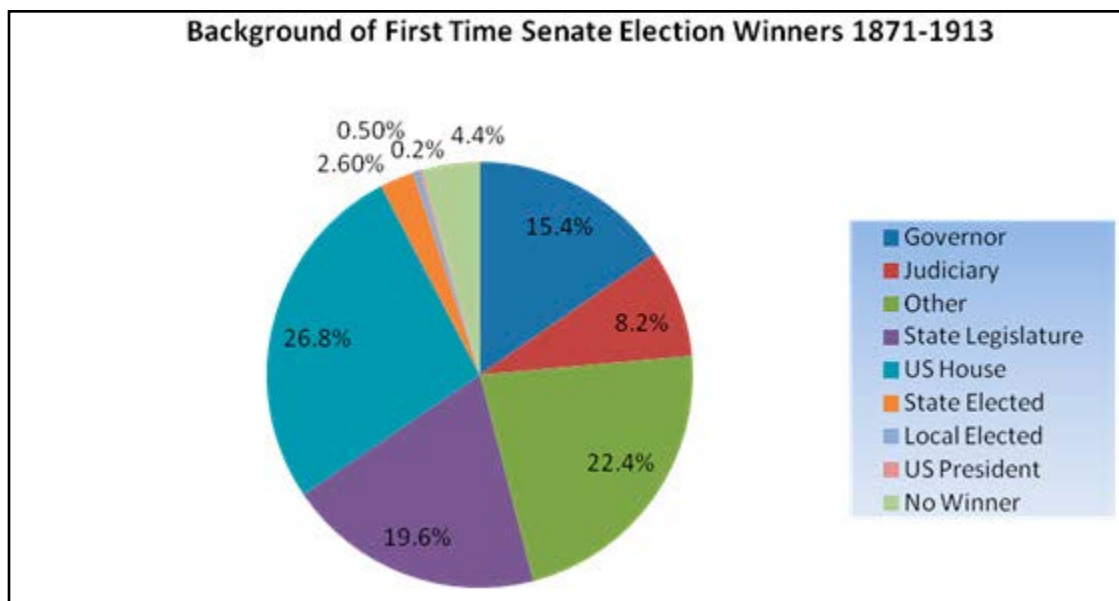
made it more difficult to hold U.S. senators accountable for past campaign pledges because when a senator sought reelection, most of the state legislators who voted in his previous election were gone. In one way, the direct election system solves this problem because without redistricting, the vast majority of voters in one Senate election are still available to judge the U.S. senator in his or her next election.

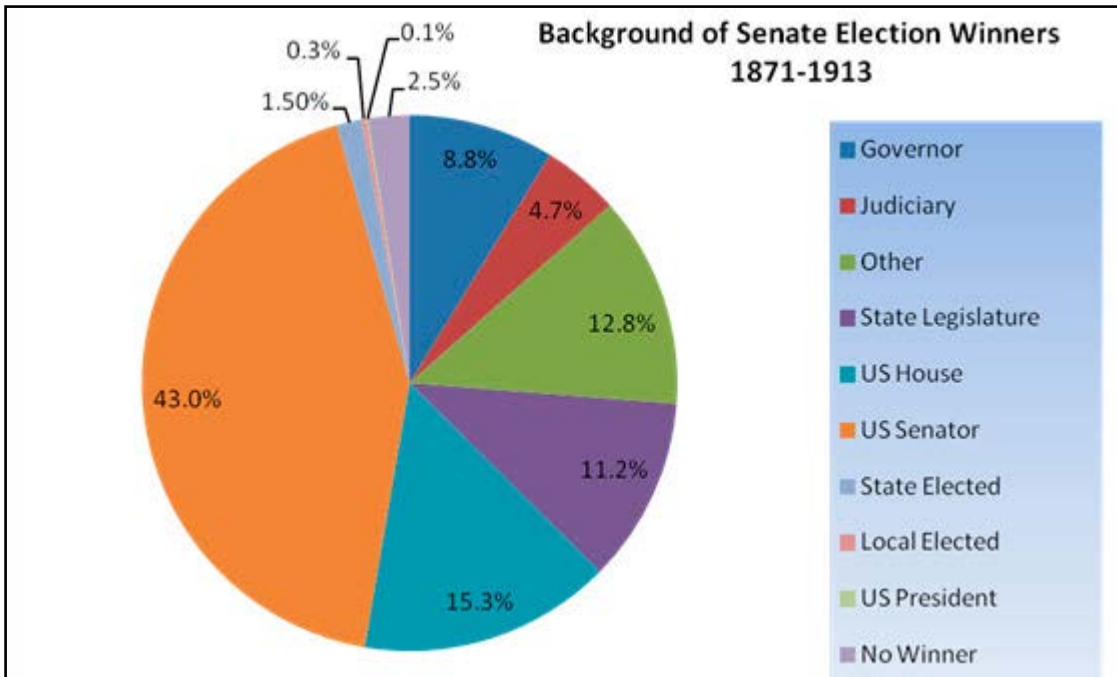
In the section that follows, we break down four components of Senate elections for comparison under the two types of electoral systems: pool of candidates, role of money, role of party and polarization, and legislative patterns of Senate behavior.

Who Ran for U.S. Senate?

The people who ran for U.S. Senate during this time period had political and business experience similar to modern day Senate hopefuls. Figure 1 shows the distribution of immediate prior experience of candidates before being elected to the Senate for the first time. Approximately 65% of first time winners of indirect Senate elections during this time held elected office immediately prior to their election, either as governor, U.S. House member, or a member of their state house or state senate; many of these candidates held multiple levels of elected office before running for U.S. Senate. If we consider all the elections in our dataset, including those with incumbents seeking reelection, more than 80% of elections were won by men with prior experience in elective office. In the modern Senate, using the 110th Congress as an example, nearly 88% of incumbent U.S. senators held prior elective office.

FIGURE 1. EXPERIENCE OF SENATORS ELECTED UNDER INDIRECT ELECTIONS SYSTEM





Source: Data on election outcomes collected by the authors; data on winner's background compiled by authors from Biographical Directory of the United States Congress 1774-present. Accessed online at http://www.senate.gov/pagelayout/history/h_multi_sections_and_teasers/Biographical_Directory.htm.

As in the modern era of the Senate, incumbents typically sought reelection. Under indirect elections, in the years 1871-1913, 61% percent of elections (461) involved incumbents seeking reelection, and 39% were open seat (291); 70% of incumbents (323) were reelected. Under direct elections in 2012, 70% of elections involved incumbents (23), and 30% (10) were open seat; 91% percent of Senate incumbents were reelected. In sum, under indirect elections, the pool of candidates from which state legislatures chose U.S. senators was deep with experienced politicians who wanted to stay in office. Today, we have a similar pool of candidates who make it to the Senate, and they are nearly always reelected. In what way then can we say that the 17th Amendment opened up the process of Senate elections or reduced incumbency advantage?

The Role of Money in Senate Elections

Much as we see in today's Senate elections, ambitious political actors who sought federal office spent considerable time, energy, and money trying to become the party's favored candidate, and go on to win and the general election. And if they were opposed by regular party organization members, they might sometimes try to go around them and directly influence state legislators. Take the example of Francis Newlands, who provides a stark illustration of the extent to which personal ambition and wealth combined to propel individuals into the United States Senate during this period of time. Newlands had

inherited great wealth as a result of his marriage to the daughter of a wealthy California banker named William Sharon. He first won election to the House of Representatives in 1892 thanks to a shrewd campaign manager and the effective use of money:

Despite all of Newlands's expansive ideas, his friend Fulton [Nevada political operative] believed only money would give him the Republican congressional nomination in Nevada. In a letter to Sharon, Fulton wrote that...“You must make your points [about irrigation and silver] in the minds of men and appeal to the other considerations that have controlled elections heretofore.” Fulton saw Newlands's interest in silver politically appropriate...Clearly Newlands needed more than issues to win. But how could cash be effectively used in Nevada campaigns governed by the new Australian ballot law? As Fulton said, the distribution of good cheer in the form of drinks always helped candidates in Nevada. Buying influence with key newspaper editors also was an effective use of money, in addition to liberal contributions to the campaigns of other party members running on the same party ticket. All of it amounted to a traditional use of “the sack” in the election process.⁷

However, Newlands soon fell out of favor with the Republicans and in 1900, switched parties to run as a Democrat. He remained so, and was elected to the U.S. Senate in 1903, after serving effectively as a U.S. House member who sponsored and passed the Newlands Act, which allowed the sales of public land in the west and directed the proceeds to be used to construct major irrigation routes across states, all managed by the federal government.⁸ By his estimation, a single House election cost him \$50,000 [\$1.25 million in 2012 dollars] and a Senate election cost him \$55,000 [\$1.45 million in 2012 dollars].⁹ But he got off relatively cheaply. There are other notable cases of Senate candidates spending a combined \$305,000 [\$8.47 million in 2012 dollars] in a battle for the Oregon Senate seat in 1897. The most stunning example of the use of money to win a Senate seat occurred in Montana in 1899 when two wealthy mine owners, William Clark and W.G. Conrad, went head to head to win the election. Between the two of them, it was reported that over \$1 million was spent [\$27.8 million in 2012 dollars]; this is nearly \$5.9 million *more* than was spent in 2012 by the two major Senate candidates in the Montana Senate election.¹⁰

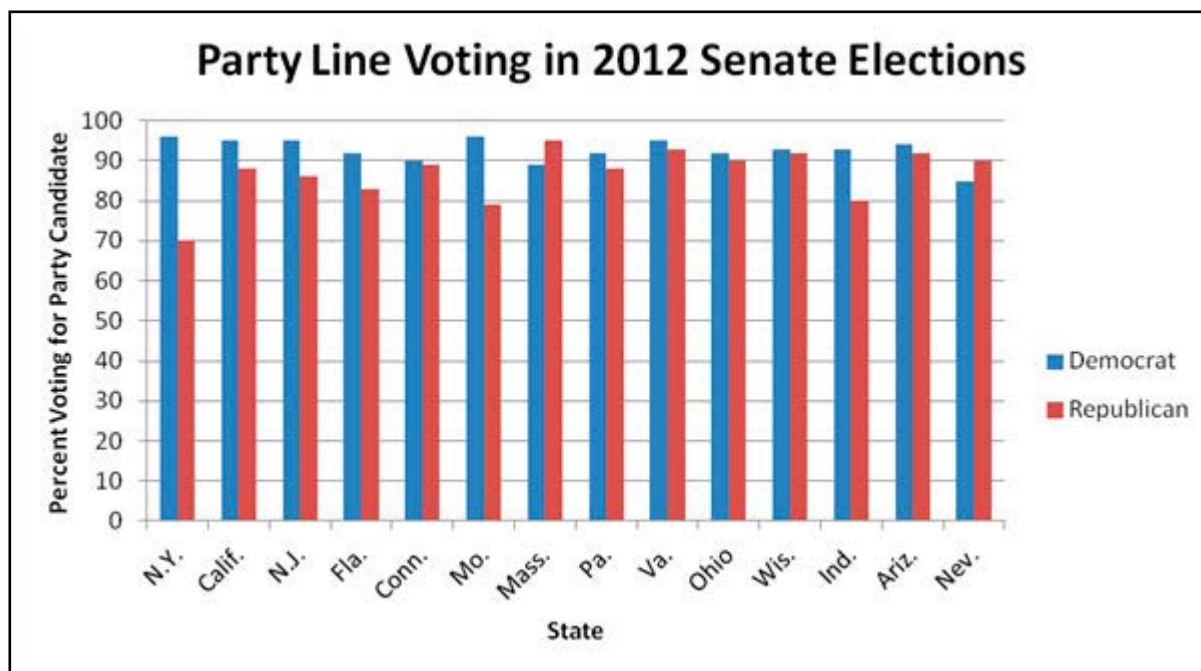
This use of large sums of cash to fund campaigns for state legislators, advertise in media outlets (or purchase them outright), and bribe state legislators once balloting began, was typical in indirect Senate elections. Because state legislatures could elect U.S. senators in advance of the start of the next Senate term, and held special elections to fill unexpected vacancies, Senate elections occurred in every year of this time period.¹¹ If we just take the estimated average value of the three elections described above, we arrive at \$12.64 million [in 2012 dollars] spent per election, and if we multiply that by

an average of 17 elections per year held for seats held from 1871-1913, we get a total of \$214.88 million per year spent on Senate elections. For comparison, the total amount of money raised and spent in the 2012 Senate election cycle was \$1.168 billion according to the Campaign Finance Institute.¹² Despite the blatant use of money to win indirect Senate elections, 100 years after the 17th Amendment was enacted, the modern Senate elections process is swamped with campaign money in ways that far outpace elections under the indirect elections system.

The Role of Party and Polarization in the Senate

For our data, finding the party identification of state legislators has met with mixed success. In terms of partisan identification, we have complete partisan identification for 28% of the elections (208) and partial partisan identification for 54% of the elections (409). Unfortunately, we have not been able to obtain partisan identification for the remaining 18% (135) of elections. Where we do have party information, we see that state legislators voted overwhelmingly for a candidate in their party. More broadly, in 98% of the elections held from 1871-1913, the winner was from the party that controlled the majority in the state legislature. In comparison, 2012 exit polls in 14 states revealed that 93% of Democrats voted party line and 87% of Republicans voted party line (see Figure 2). In very important ways, the role of partisanship in vote choice for U.S. senator has remained consistently strong across time.

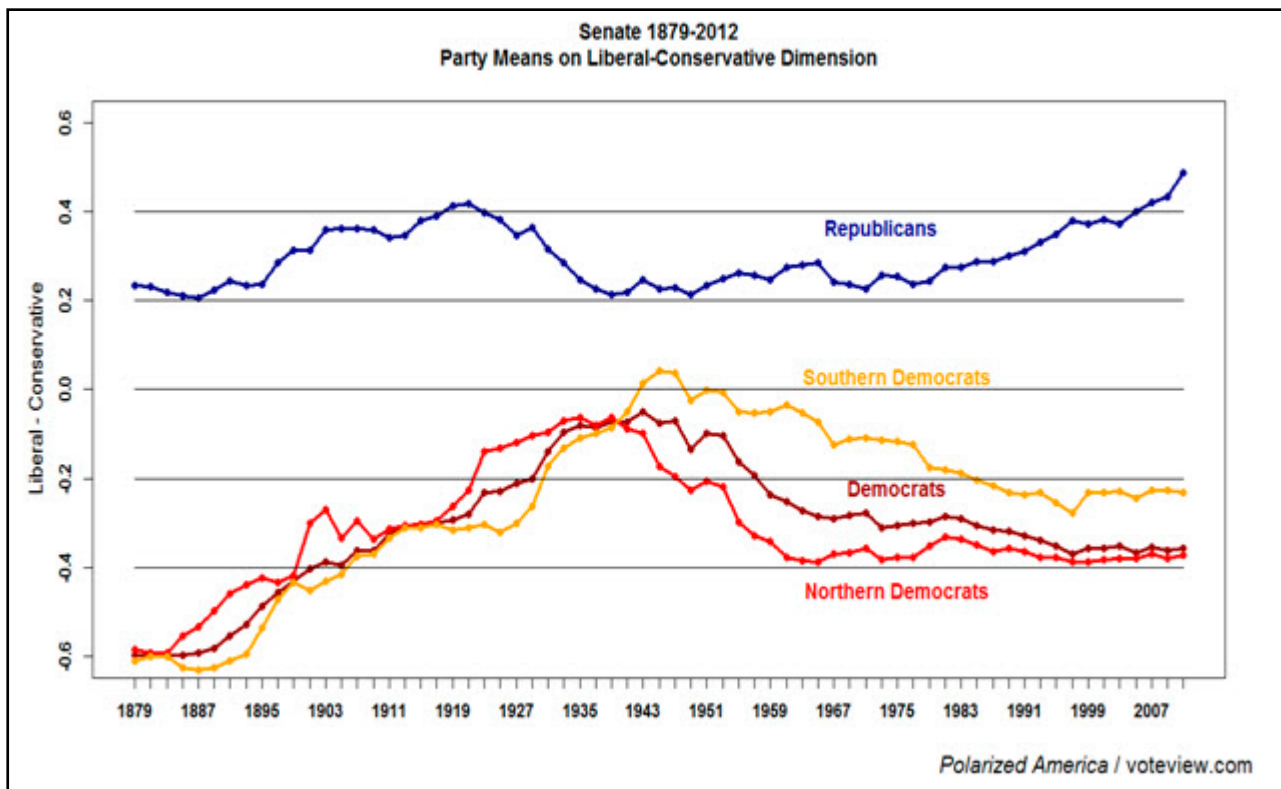
FIGURE 2. PARTY LINE VOTING IN 2012 SENATE ELECTIONS



Source: *New York Times* Senate Exit Polls 2012 <http://elections.nytimes.com/2012/results/senate/exit-polls>

In the Senate, polarization - that is the gap between the average member of the Democratic Party and the average member of the Republican Party in ideological positioning on roll call voting - was high under indirect elections, then decreased after the adoption of the 17th Amendment, but increased again starting in the late 1970's and is now as large as it was under the indirect elections system (see Figure 3 for data from 1879-2012). In the indirect era, the polarization could be attributed directly to election via state legislature since the parties each had a strong interest in maintaining party line voting and winning the Senate seat. Senators were consequently beholden to the parties in their states and in the Senate and they voted party line. Today, scholars debate the source of polarization in Congress generally, attributing it in part to the intensity of the primary system and in part to genuine divides among voters. Either way, there is evidence that the advent of direct elections may have temporarily reduced the electoral incentives for partisanship among U.S. senators but no longer has that effect.

FIGURE 3. PARTY MEANS ON LIBERAL-CONSERVATIVE DIMENSION FOR U.S. SENATE 1879-2012



Source: Keith Poole "The Polarization of the Congressional Parties: Updated 18 January 2013" http://voteview.com/political_polarization.asp

Legislative Behavior in the U.S. Senate

In terms of legislative behavior other than roll voting, including bill sponsorship and committee assignments, the long term impact of 17th Amendment is minimal. We compare senators who represented 10 states, Kentucky, Pennsylvania, Delaware, Washington, Nevada, North Carolina, Louisiana, Maryland, Wisconsin, and North Dakota, during the indirect and direct elections periods. On average, U.S. senators from these states who served before the 17th Amendment introduced 76 bills, and sat on 6 committees; U.S. senators from these same states who served in the modern era (1993 onward) introduced an average of 35 bills and sat on 4 committees. On the face of it, senators who served prior to the 17th Amendment appear to be more responsive to their constituents on these measures than their modern counterparts. But to some extent, these differences can be explained by changes in the legislative arena in the Senate, notably the reduction of the number of committees over the course of the 20th century, as well as the disproportionate number of individual pension and relief bills that were a common source of legislation between 1871 and 1913. Still, one would expect that under a direct election system, U.S. senators would make greater use of their legislative tools to serve their constituents. Yet we do not observe that they are any more responsive than their counterparts who served under indirect elections.

In this work, we have taken the opportunity on the 100th anniversary of the 17th Amendment to draw attention to the promises held out by reformers when advocating for changes in the U.S. Constitution. The issues and dysfunction associated with the modern Senate go well beyond the mode of election for its occupants; even giving the voters the direct power to elect their U.S. senators has not appreciably increased its responsiveness or efficiency. The 17th Amendment was supposed to reduce the influence of wealthy elites, reduce the role of money in determining Senate election outcomes, and give incumbent senators the incentive to represent their constituents responsively. That it has failed to achieve such admirable goals makes it imperative that policymakers and scholars look deeper into the inherent flaws in the construction of the U.S. Senate, and that voters be wary of promises that go unmet.

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Endnotes

1. Staff, *New York Press* (noted as a Republican paper) in *Public Opinion*, Vol. XXIII, No. 27, December 30, 1897 pp. 839-840.
2. See Haynes 1938; Stewart 1992a, 1992b; King and Ellis 1996; Brandes Crook and Hibbing 1997; Wirls 1999; Schiller 2006; Bernhard and Sala 2006; and Gailmard and Jenkins 2009.
3. See Wawro and Schickler (2006:195-209)
4. For an expanded analysis of the Tea Party Movement, see Theda Skocpol and Vanessa Williamson, 2011. *The Tea Party and the Remaking of Republican Conservatism*. New York: Oxford University Press.
5. See Haynes 1906, chapter 2, for the background on why the law was adopted. The law may be found at U.S. Statutes at Large, vol. 14, pp. 243-44.
6. In the early part of our time period, state house and state senate terms were two years, but over time and across states, state senate terms were extended to four years.
7. William D. Rowley. 1996. *Reclaiming the Arid West: The Career of Frances G. Newlands*. Bloomington, IN: Indiana University Press. Pp. 68-69.
8. Ibid. pp. 98-104.
9. See Robert Sahr, "Consumer Price Index (CPI) Conversion Factors 1774 to 2012 to Convert to Dollars of 2012," using .040 for 1892, .036 for 1897, .036 for 1899, and .038 for 1903.
<http://oregonstate.edu/cla/polisci/sites/default/files/faculty-research/sahr/inflation-conversion/pdf/cv2012.pdf>
10. The actual figure for Montana 2012 is \$22.9 million. Staff. "Total Raised and Spent. 2012 Race: Montana Senate." <http://www.opensecrets.org/races/summary.php?cycle=2012&id=MTS1>
11. In the data set of 752 elections, 1 election was held in 1869, and 7 elections were held in 1870 to fill seat terms beginning in 1871 so the average number of elections is calculated across 44 years.
12. Campaign Finance Institute http://www.cfinst.org/data/2012_Senate_Independent.aspx

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