Book review

Wendy J. Schiller and Charles Stewart III, *Electing the Senate: Senate Elections before the 17th Amendment* (Princeton: Princeton University Press, 2014).

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For most of American history U.S. Senators were not elected by the people. The Constitution originally left this function to state legislators. Indirect election was only ended by the 17th Amendment in 1913 after decades of efforts by reformers. While indirectly elected upper houses still exist in other democracies like France and Germany, the history of indirect election of U.S. senators is obscure for most Americans. Yet the topic has generated a large literature, and has even become a focus of political debate, with conservatives from the legal academy to the Tea Party seeing in the 17th Amendment a turning point in which the defense of the states the Founders constructed was laid waste by centralizing progressives, producing the big government these commentators deplore.

The effects of the 17th Amendment have also been explored by several political scientists who seem motivated more by empirical and analytical interests than normative ones. In this literature scholars typically compare the periods before and after the 17th Amendment.[1] They have found various differences, including a greater correspondence between voter preference and senators' voting patterns after 1913, as well as improved Democratic party fortunes and a tendency by senators to vote in a less partisan manner as their term came close to expiry in

1 Ronald F. King and Susan Ellis, "Partisan Advantage and Constitutional Change: The Case of the 17th Amendment," *Studies in American Political Development* 10, (1996), 69–102. Sara Brandes Crook and John R. Hibbing, "A Not-so-Distant Mirror: The 17th Amendment and Constitutional Change," *American Political Science Review* 91, no. 4 (1997), 345–57. Daniel Wirls, "Regionalism, Rotten Boroughs, Race and Realignment: The Seventeenth Amendment and the Politics of Representation," *Studies in American Political Development* 13, (1999), 1–30. William Bernhard and Brian R. Sala, "The Remaking of an American Senate: The 17th Amendment and Ideological Responsiveness," *Journal of Politics* 68, no. 2 (2006), 345–57. Sean Gailmard and Jeffery Jenkins, "Agency Problems, The 17th Amendment and Representation in the Senate," *American Journal of Political Science* 55, no. 2 (2009), 324–42.

the period after direct election was instituted. They also find some differences in career patterns with more experienced politicians typically elected to the Senate after direct elections began.

These studies are now joined by a volume motivated by empirical, analytical and normative concerns. *Electing the Senate* is the product of an extended collaboration between two distinguished students of Congress and American political development. Using archival evidence, sophisticated statistical analysis and capsule case studies, the authors have crafted the most extensive and informative exploration of U.S. Senate elections before the 17th Amendment to date. It is unlikely that their painstaking efforts will be equaled in the foreseeable future.

Political scientists pursuing US-focused historical investigations who venture outside the well-maintained preserves of the *Congressional Record* and election returns quickly learn the truth in the saying that "the past is another country." The data limitations with which such scholars contend more closely resemble those faced by students of developing countries than the situation of Americanists focused on contemporary politics. For this study seemingly basic facts such as the party affiliation of state legislators and the names of the U.S. senate candidates for whom they voted (other than the eventual victors) had to be collected with difficulty. The deliberations of the legislative party caucuses, in which the real decision was generally made, were still harder to obtain and could only be partially reconstructed. These difficulties help explain why we have not a book like this until now.

The authors focus chiefly on the final third of the period in which indirect elections were in place because prior to the enactment of a federal statute regulating these contests in 1866, states were not required to hold recorded votes on the election of U.S. Senators. After that point Congress prescribed that both houses of state legislatures should hold recorded votes. If a candidate did not receive a majority in both chambers the state legislators would meet in joint assembly until an absolute majority emerged in favor of one choice. The important action mostly took place within party caucuses. Meeting in public or in private, casting one ballot or voting repeatedly, these caucuses chose nominees. The prevailing norm dictated that having participated in the caucus vote meant that legislators were bound to support their party's choice. In most cases the formal legislative vote was anti-climactic, much as the votes of the Electoral College are today. Even if a joint ballot proved necessary because the same party did not control both chambers of the legislature, the parties' strengths in the joint assembly still typically meant the result was preordained.

However, on occasion things got more interesting. The presence of minor party legislators – more numerous in that era than today- meant that sometimes neither Democrats nor Republicans could determine the outcome unilaterally.

Occasionally the party caucus process broke down with the losing factions unwilling to accept defeat like good team players. Even then, the authors report that legislators typically split their votes among candidates from their party, rather than supporting anyone from the other camp. Schiller and Stewart find that it was rare for the minority party to coalesce with a dissident faction of the majority to elect a Senator. After days or weeks these conflicts were usually resolved, sometimes via the selection of a compromise "dark horse" candidate. On occasion, however, deadlock emerged, and states went without their full representation in the Senate for an extended period. Governors sometimes named interim appointees, but starting in the 1890s, the Senate refused to seat them, prolonging vacancies. At one point, Delaware had no U.S. Senators for 2 years. These deadlocks and resulting vacancies were one of the main problems, along with corruption, that reformers cited in their long-running campaign to end indirect election.

Schiller and Stewart acknowledge and build on many earlier investigations. In three important cases however, they take on existing studies. One view common at the time and still represented in scholarship holds that the system of indirect election produced a Republican bias, due to the malapportionment of state legislatures. Until the 1960s, state legislatures tended to over-represent rural areas. Schiller and Stewart allow that in some states such as New York, this arrangement worked in the GOP's favor. They also argue via simulations that had the 17th Amendment not been adopted, a pro-Republican bias would have emerged in ensuing decades as cities grew and malapportionment increased. Yet the authors contend that before 1913 this bias was not great overall and did not consistently favor one party.

Another dispute concerns the extent to which voters had a meaningful role in the period of indirect election. Decades ago William Riker discussed the celebrated 1858 Lincoln-Douglas Debates. These remarkable events occurred because both parties had chosen their senate nominees via party convention. This meant that Illinoisans knew that a vote for a Democratic legislator was a vote for Stephen Douglas, while a Republican ballot was a choice of Abraham Lincoln. In other cases Riker suggests that a more informal "canvassing" process gave voters a meaningful role in choosing their senators, well before the 17th Amendment. Incumbent senators were understood to be seeking re-election when they made speeches for their party, and sometimes the other party's likely candidate was also known in advance. Riker's claim is still cited by some law professors who favor repeal of the 17th Amendment.

However, Schiller and Stewart show convincingly that the Lincoln-Douglas contest was anomalous. The 19th century party conventions that nominated candidates for governor and other statewide offices almost never chose Senate candidates. If an incumbent was understood to be seeking reelection there was still

no guarantee that even a legislature controlled by his party would grant it to him. It was not until the final years before the adoption of the 17th Amendment when a majority of states created primaries or advisory general election votes on U.S. Senators (the "Oregon Plan") that voters had meaningful input as to the choice of individual senators. The system of indirect election amounted to voters writing blank checks to the party of their choice.

Finally, the authors take aim at the contentions of critics of the 17th Amendment who hold that it undermined federalism by destroying the defense of the prerogatives of state government the Founders put in place when they designed the Senate. This argument, developed by legal scholars in the 1990s,[2] is a staple of Tea Party arguments today. In refuting it Schiller and Stewart make two important points.

First, it is unclear that this role was intended by "the Founders" as a whole. If some delegates described the Senate as the guardian of states, others saw in it a bulwark of the propertied class. Some defended both purposes. More importantly, the authors note that the Constitution did *not* make Senators ambassadors from state governments. Ambassadors – and delegates to the Continental Congress- could be recalled. Senators had lengthy terms. Under the Articles of Confederation and in the Constitutional Convention itself each state had one vote, even if it sent multiple representatives. By contrast, each senator is the master of his own vote.

Moreover, whatever the Founders may have intended, Schiller and Stewart show that the indirectly elected Senate was hardly a collection of ambassadors from state legislatures. In the early decades of American history (largely outside the scope of this book) state legislatures did periodically vote "instructions" to Senators, and prevailing norms led some senators to comply, but this custom waned by the mid 19th century.

A recurring theme in this book is the central role played by parties. Roll-call studies of the period show that voting patterns in the Senate were highly partisan. So was the balloting in state legislatures that chose the senators. Then, as now, when a state had senators from different parties, the two voted quite differently.

2 Todd J. Zywicki, "Senators and Special Interests: A Public Choice Analysis of the Seventeenth Amendment," *Oregon Law Review* 73, (1994), 1007–55, Todd J. Zywicki, "Beyond the Shell and Husk of History: The History of the Seventeenth Amendment and Its Implications for Current Reform Proposals." Vol. 45 *Cleveland State Law Review* 165, (1997), 204–12. Jay Bybee, "Ulysses at the Mast: Democracy, Federalism and the Siren's Song of the Seventeenth Amendment," *Northwestern University Law Review* 91, no. 2 (1997), 500–72. Ralph A. Rossum, *Federalism, the Supreme Court, and the Seventeenth Amendment: The Irony of Constitutional Democracy* (Lanham, Maryland: Lexington Books, 2001).

The massive turnover in state legislatures during this period meant that the partisan majority that elected a Senator might disappear years before his term ended. Senators knew that few of the co-partisans who had elected them would be around in 6 years' time. Senators' hopes for re-election rested chiefly on two factors: the strength of their party in the state legislature and their ability to stay in the good graces of patronage-seeking party organizations and business interests. Legislators came and went, but these powers remained. Schiller and Stewart's devastating critique of the law professors' contentions should not have been necessary, but the currency of these arguments suggests that it is. The authors do a service in informing the public debate by refuting these specious claims.

Schiller and Stewart's research is impressive and their arguments clear and well-defended. Yet while recognizing the extensive efforts required to produce the important findings the authors offer, I find two sins of omission: an insufficient focus on candidates' activities and a comparative neglect of interest groups' role.

The authors could have discussed candidate activity in greater depth. They do offer informative capsule studies of senators' careers, illustrating the varying political styles that were viable in that era. (Gilded Age aficionados will be glad to learn that Roscoe Conkling and Boies Penrose make appearances.) The authors report, "aspirants to the Senate often engaged in comically demure machinations in seeking the office – for instance making speeches statewide without calling the activity campaigning." (p. 111)

Of course this behavior was consistent with prevailing norms in an era when overt political ambition was stigmatized. Strong candidates feigned reluctance and were "drafted." Until FDR no major party presidential nominee – even those whose nomination was not in doubt – gave a convention acceptance speech. Doing so would have suggested they had sought the nomination. Into the early 20th century, presidents seeking re-election and many non-incumbent nominees also stayed quiet. Historian John Reynolds found that these norms also prevailed in gubernatorial elections.[3] The authors' brief observation suggests that this was true of Senate contests as well.

Yet in that era candidates were active behind the scenes communicating with influential people via meetings, letters and intermediaries. They took stands on issues and – as the authors note- made speeches that were not ostensibly about their own ambitions. Surely the same was true for Senate aspirants. The authors could have said more about whom Senate candidates courted, how widely reported these activities were and the extent to which they allowed at least political elites to make informed choices.

3 John F. Reymolds, *The Demise of the American Convention System, 1880–1911* (New York: Cambridge University Press, 2006).

More discussion of the role of interest groups and social movements would also have been helpful. The authors do discuss the role of money and business interests. Then as now, rich Senate candidates could "self-finance," with the difference being that funds now spent on advertising were then devoted to party war chests or simply bribing legislators. The role of deep-pocketed business interests was similar, but more extensive. The authors' suggestion that after patronage-seeking party bosses, business interests and the wealthy were the most important influences on legislators is plausible.

Yet even if the heavenly chorus of Gilded Age pluralism spoke with an upper-class accent, business was not alone. Many movements from farmers' associations, to labor unions, prohibitionists, suffragettes and veterans emerged in this period. Such groups get little attention from the authors. Yet these lobbies did seek to influence Senate elections. Sociologist Elisabeth Clemens found that in Washington State the Grange sent legislative candidates questionnaires that included questions about whom they might support in a U.S. Senate election.[4] This tactic had clear limitations since Senate candidates often only emerged after the general election. Moreover, it is unclear how much leverage lobbies had over legislators who were mostly one-termers. Groups present in the legislature via minor parties may have had an easier time affecting outcomes.

There are two ways to look at the role of non-business lobbies in this process. Some might have played a real role, despite the handicap indirect election was for groups whose strength was in numbers rather than dollars. The authors briefly mention the Grand Army of the Republic veterans group, and note that The Grange, a farmers' association, was influential in the Kentucky legislature. Yet they do not assess such groups' activities in any depth, a choice that may be read as a dismissal of their importance before 1913.

Yet even if one sees these groups' role as marginal, they still should be part of the story of the 17th Amendment as both cause and effect. It was no accident that populists, unions, prohibitionists and women suffrage advocates all favored direct election. Groups whose influence was based on the votes they could sway were empowered by letting electorates rather than legislators choose senators.

These groups then are a part of the story of how the Amendment mattered. Schiller and Stewart show that indirectly elected senators were staunch partisans rather than defenders of state prerogatives. Thus the argument that the federal government grew because senators ceased to represent some notional state interest is specious. States' rights is a pretext in politics and a snare and delusion for analysts.

4 Elisabeth S. Clemens, *The People's Lobby: Organizational Innovation and the Rise of Interest Group Politics in the United States* (Chicago: University of Chicago Press, 1997).

The 17th Amendment was more a symptom than a cause of progressivism, yet conservative opposition to direct election then and now is understandable. Direct election gave lobbies based on people power – and not just deep pockets – a greater role in senate elections. As a result, the Amendment probably did contribute to the success of progressive and New Deal reforms conservatives opposed, not because senators ceased to represent state governments, but rather because the influence of party organizations, corporations and the wealthy was finally balanced to some degree by lobbies that spoke for ordinary people.

Identifying topics that merit more extensive discussion in no way diminishes the manifold contributions of this volume. Students of Congress, parties and American political development are all indebted to Schiller and Stewart for this valuable study. It will be consulted by scholars for many years to come.

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