

## THE MEANING OF THE SEVENTEENTH AMENDMENT AND A CENTURY OF STATE DEFIANCE

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**ABSTRACT**—Nearly a century ago, the Seventeenth Amendment to the U.S. Constitution worked a substantial change in American government, dictating that the people should elect their senators by popular vote. Despite its significance, there has been little written about what the Amendment means or how it works. This Article provides a comprehensive interpretation of the Seventeenth Amendment based on the text of the Amendment and a variety of other sources: historical and textual antecedents, relevant Supreme Court decisions, the complete debates in Congress, and the social and political factors that led to this new constitutional provision. Among other things, this analysis reveals that the Amendment requires states to fill Senate vacancies by holding elections, whether or not they first fill those vacancies by making temporary appointments. In so doing, the Seventeenth Amendment guarantees that the people’s right to vote for senators is protected in all circumstances.

Using this interpretation as a baseline, this Article reviews state practice with respect to the filling of vacancies under the Seventeenth Amendment. Since the Amendment was adopted in 1913, there have been 244 vacancies in the U.S. Senate. In one-sixth of these cases, the states have directly violated the Seventeenth Amendment’s core requirement that senators be elected by popular vote by failing to hold any election. In addition, in many more cases the states have significantly delayed the required elections. These practices have cost the people 200 years of elected representation since the Constitution was amended to provide for direct election of senators, and there has been little resistance to this pattern of state defiance of the Constitution.

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*Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.*

—Chief Justice Earl Warren, *Reynolds v. Sims*<sup>‡</sup>

#### INTRODUCTION

When Barack Obama resigned from the U.S. Senate to become President of the United States, Rod Blagojevich, then Governor of Illinois, saw an opportunity. “I’ve got this thing and it’s fucking . . . golden,” Blagojevich said, “[a]nd . . . I’m just not giving it up for fucking nothing.”<sup>1</sup> Blagojevich was referring to his power to appoint a replacement to fill President-elect Obama’s vacancy in the Senate. The Seventeenth

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<sup>†</sup> Accessible through the *Northwestern University Law Review’s* website or SSRN. See *The Meaning of the Seventeenth Amendment and a Century of State Defiance: Appendices*, NW. U. L. REV., <http://www.law.northwestern.edu/lawreview/v107/n3/1181/LR107n3CloptonAppendices.pdf>, SOC. SCI. RES. NETWORK, <http://ssrn.com/abstract=2280361>.

<sup>‡</sup> 377 U.S. 533, 562 (1964).

<sup>1</sup> Telephone call between Rod Blagojevich and Doug Scofield, FBI Session 281, at 3–4 (Nov. 5, 2008, 11:06 AM), available at <http://media.apps.chicagotribune.com/blago/5094-session-281-blagojevich-home-nov-5-2008.html#document> (first omission in original).

Amendment to the U.S. Constitution and Illinois election laws gave the state's governor this appointment power. Governors of nearly every state have had the chance to appoint replacement senators to fill vacancies in their states' senatorial delegations, and they have typically done so without attracting much notice. In this case, however, things would go much differently.

Governor Blagojevich thought he might trade the appointment for a position in the Obama Administration, or use it to secure financial backing from supporters or to increase his national political stature. But the Feds suspected that Blagojevich had been practicing pay-to-play politics, and they had been secretly recording his conversations. Just after President-elect Obama resigned his Senate seat, federal authorities arrested Blagojevich and charged him with fraud and corruption.<sup>2</sup> The Illinois legislature removed Blagojevich from office, and after two trials, a jury found the ex-governor guilty of charges that he had tried to sell Obama's vacant Senate seat.<sup>3</sup>

Despite his political unraveling, Blagojevich managed to appoint Roland Burris, a former Illinois attorney general, to serve as Barack Obama's replacement in the Senate. Consistent with the Seventeenth Amendment, Illinois law places the power to appoint temporary replacement senators solely in the hands of the governor.<sup>4</sup> In January 2009, Burris took his seat in the Senate. Critics questioned the legitimacy of his appointment, called for his resignation, and offered alternative mechanisms for selecting a replacement senator,<sup>5</sup> but ultimately state and federal officials decided that Burris would serve as an appointee for the remainder of President Obama's vacancy—until January 2011.<sup>6</sup> It appeared that the

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<sup>2</sup> See Superseding Indictment, *United States v. Blagojevich*, No. 08 CR 888-1 (N.D. Ill. Apr. 2, 2009), ECF No. 37.

<sup>3</sup> While Rod Blagojevich was convicted of all crimes relating to the Senate seat, he was not found guilty on all counts. Docket Entry, *Blagojevich* (June 27, 2011), ECF No. 754; Monica Davey & Emma G. Fitzsimmons, *Ex-Governor Found Guilty of Corruption*, N.Y. TIMES, June 28, 2011, at A1 (late edition).

<sup>4</sup> 10 ILL. COMP. STAT. ANN. 5/25-8 (West 2010).

<sup>5</sup> For example, the Senate Democratic Leadership stated: "We again urge Gov. Blagojevich to not make this appointment. It is unfair to Mr. Burris, it is unfair to the people of Illinois and it will ultimately not stand." Press Release, Senate Democratic Leadership Statement on Gov. Blagojevich's Appointment of Roland Burris to the Vacant U.S. Senate Seat from Illinois (Dec. 30, 2008), available at <http://democrats.senate.gov/2008/12/30/senate-democratic-leadership-statement-on-gov-bлагоjevichs-appointment-of-roland-burris-to-the-vacant-u-s-senate-seat-from-illinois>. An editorial in the *New York Times* remarked, "[Illinois]'s Senate seat cannot be filled fairly by such a discredited blowhard." Editorial, *The Latest from Illinois*, N.Y. TIMES, Dec. 31, 2008, at A26. Even months after Burris took office, local papers called for his resignation, see, e.g., Editorial, *Roland Burris, Resign*, CHI. TRIB., Feb. 18, 2009, § 1, at 26, and the governor called for a new law that would open the way to replace him, see Monica Davey, *Illinois Governor Urges Senator to Quit and Calls for a Law on Special Elections*, N.Y. TIMES, Feb. 21, 2009, at A14.

<sup>6</sup> The state attorney general wrote to the Illinois legislature, "Senator Burris's temporary appointment will conclude in January 2011 following an election in November 2010, the next election

people of Illinois would not have the opportunity to elect a senator to replace the new President.

This political maelstrom masked a history of state practice that is inconsistent with the purposes of the Seventeenth Amendment. Since 1913, that Amendment has required states to hold elections so that the people may select their senators by popular vote. The Seventeenth Amendment's call for direct elections displaced a regime that had existed since the Framing, in which state legislatures picked senators. The Amendment applied this preference for direct elections to the regular election of senators to six-year terms and to the filling of senatorial vacancies. Yet this Article's review of state practice reveals that on many occasions the states have failed to hold elections to fill vacancies, and on many more occasions there has been a significant lag between the creation of the vacancy and the election to fill it.

To better understand these data and to inquire into solutions to these potential lapses, this Article looks to the history of the Seventeenth Amendment. To date, there has been little study of the meaning of this important constitutional provision,<sup>7</sup> and the Supreme Court has passed up

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of representatives in Congress." Letter from Lisa Madigan, Attorney General of Illinois, to John J. Cullerton, President of the Illinois Senate, et al., 2009 Ill. Att'y Gen. Op. 09-001, at 3 (Feb. 25, 2009), 2009 WL 530827 (citing 10 ILL. COMP. STAT. ANN. 5/2A-1.2 (West 2010)); see also Ray Long, *Democrats Vote Down Special Election for Roland Burris Senate Seat*, CHI. TRIB. CLOUT ST. (Mar. 5, 2009, 2:40 PM), [http://newsblogs.chicagotribune.com/clout\\_st/2009/03/democrats-vote-down-special-election-for-roland-burris-senate-seat.html](http://newsblogs.chicagotribune.com/clout_st/2009/03/democrats-vote-down-special-election-for-roland-burris-senate-seat.html) ("Democrats who run the Illinois Senate defeated legislation today that would have allowed for a special election to replace appointed Democratic U.S. Sen. Roland Burris before his term ends in January 2011.").

<sup>7</sup> The legal scholarship on the Seventeenth Amendment is scant. Some scholars have criticized the effect or aims of the Amendment. See, e.g., RALPH A. ROSSUM, *FEDERALISM, THE SUPREME COURT, AND THE SEVENTEENTH AMENDMENT: THE IRONY OF CONSTITUTIONAL DEMOCRACY* (2001); Vikram David Amar, *Indirect Effects of Direct Election: A Structural Examination of the Seventeenth Amendment*, 49 VAND. L. REV. 1347 (1996) [hereinafter Amar, *Indirect Effects*]; Jay S. Bybee, *Ulysses at the Mast: Democracy, Federalism, and the Sirens' Song of the Seventeenth Amendment*, 91 NW. U. L. REV. 500 (1997); Ralph A. Rossum, *The Irony of Constitutional Democracy: Federalism, the Supreme Court, and the Seventeenth Amendment*, 36 SAN DIEGO L. REV. 671 (1999); Todd J. Zywicki, *Beyond the Shell and Husk of History: The History of the Seventeenth Amendment and Its Implications for Current Reform Proposals*, 45 CLEV. ST. L. REV. 165 (1997) [hereinafter Zywicki, *Beyond the Shell and Husk*]; Todd J. Zywicki, *Senators and Special Interests: A Public Choice Analysis of the Seventeenth Amendment*, 73 OR. L. REV. 1007 (1994); James Christian Ure, Comment, *You Scratch My Back and I'll Scratch Yours: Why the Federal Marriage Amendment Should Also Repeal the Seventeenth Amendment*, 49 S. TEX. L. REV. 277 (2007). In addition, Professors Vikram Amar and Sanford Levinson have written dueling articles about Wyoming's unorthodox vacancy-filling law, Vikram David Amar, *Are Statutes Constraining Gubernatorial Power to Make Temporary Appointments to the United States Senate Constitutional Under the Seventeenth Amendment?*, 35 HASTINGS CONST. L.Q. 727 (2008) [hereinafter Amar, *Gubernatorial Power*]; Sanford Levinson, *Political Party and Senatorial Succession: A Response to Vikram Amar on How Best to Interpret the Seventeenth Amendment*, 35 HASTINGS CONST. L.Q. 713 (2008); Professor Laura Little wrote on the process of conducting elections to fill vacancies (discussing whether primaries are and should be required) and touched briefly on the history and structure of the Amendment, Laura E. Little, *An Excursion into the Uncharted Waters of the Seventeenth Amendment*, 64 TEMP. L. REV. 629 (1991); and

opportunities to resolve unanswered questions about its meaning.<sup>8</sup> This Article provides a comprehensive interpretation of the Seventeenth Amendment based on an in-depth evaluation of the text of the provision, its historical and textual antecedents, the history surrounding this fundamental reform, the monumental battle to pass the Amendment in Congress, and relevant court decisions.

The first paragraph of the Seventeenth Amendment presents a straightforward command: senators are to be popularly elected by the people of each state.<sup>9</sup> The Seventeenth Amendment's second paragraph promotes the same democratic reform in situations where Senate seats are left vacant midterm, while at the same time helping preserve the states' equal representation in the Senate through temporary appointments.<sup>10</sup> Unlike the Amendment's first paragraph, the second presents a more challenging interpretive puzzle. This Article attempts to solve that puzzle and explain what states must do to comply with the Seventeenth

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Daniel Shedd wrote a helpful note on the meaning of the Seventeenth Amendment, Daniel T. Shedd, Note, *Money for Senate Seats and Other Seventeenth Amendment Politicking: How to Amend the Constitution to Prevent Political Scandal During the Filling of Senate Vacancies*, 79 GEO. WASH. L. REV. 960 (2011). Finally, a growing political science literature attempts to quantitatively assess the effect of the Amendment on Senate membership and behavior, see *infra* note 124, and at least one legal scholar has joined this group, looking at the treatment of state laws by federal courts before and after the Amendment, see Donald J. Kochan, *State Laws and the Independent Judiciary: An Analysis of the Effects of the Seventeenth Amendment on the Number of Supreme Court Cases Holding State Laws Unconstitutional*, 66 ALB. L. REV. 1023 (2003). None of these accounts provide a comprehensive interpretation of the Amendment or examine in detail whether states have complied with its terms.

<sup>8</sup> The Supreme Court has only addressed in any detail the part of the Seventeenth Amendment's first paragraph that discusses the qualifications of electors. See *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 227 (1986). Otherwise, cases on the Amendment are few and far between. *Gray v. Sanders* found that a county unit system of primary voting violated the one-person-one-vote principle enshrined in the Seventeenth Amendment and other provisions. 372 U.S. 368, 379–81 (1963). In *Newberry v. United States*, the Court decided that the Seventeenth Amendment did not affect Congress's power to regulate elections and held that Congress could not regulate spending for party primaries and caucuses. 256 U.S. 232 (1921). All other decisions referring to the Seventeenth Amendment describe the change it caused, *United States v. Morrison*, 529 U.S. 598, 650–52 (2000) (Souter, J., dissenting); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 554 & n.18 (1985), or mention it tangentially, *U.S. Term Limits, Inc v. Thornton*, 514 U.S. 779, 821 (1995); *id.* at 881–82 (Thomas, J., dissenting); *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 8–11 (1982). The Court has been silent on the Amendment's vacancy-filling provision except for a summary affirmance in *Valenti v. Rockefeller*, 393 U.S. 405 (1969). Most recently, the Supreme Court denied certiorari in *Quinn v. Judge*, 131 S. Ct. 2958 (2011), declining a chance to explain the Amendment's requirements for filling Senate vacancies.

<sup>9</sup> “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, para. 1.

<sup>10</sup> “When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.” *Id.* para. 2.

Amendment when vacancies arise in their Senate delegations. Among other things, the Seventeenth Amendment requires states to hold elections each time a seat becomes vacant. State legislatures may give governors permission to fill vacancies temporarily, but the people ultimately must elect a new senator. In this way, the first two paragraphs of the Seventeenth Amendment work in tandem to guarantee that the people will have the right in all circumstances to elect their representatives in the U.S. Senate.<sup>11</sup>

With this reading of the Seventeenth Amendment in place, this Article turns to a detailed examination of the state practice alluded to above. Since 1913, no state has ever violated the command of Paragraph One; following ratification, the states acted quickly to adopt laws guaranteeing that senators would be popularly elected to six-year terms, and Congress passed new laws providing a day for regular elections.<sup>12</sup> One would expect this sort of routine compliance with a provision of the Constitution that straightforwardly mandates how part of the national government is to be formed, just as one would expect strict adherence to constitutional provisions that prohibit denying the franchise on the basis of race or sex, or to those that set the voting age or outlaw poll taxes.<sup>13</sup> It may be surprising, then, that the states repeatedly and blatantly violate the Constitution when it comes to how they fill vacancies in the Senate.

Since the adoption of the Seventeenth Amendment, there have been 244 vacancies in the U.S. Senate.<sup>14</sup> Data were collected about every vacancy to determine: how each vacancy occurred; whether it was filled by an appointee, an elected replacement, both, or no one at all; the time it took the state to first fill the vacant seat; and the time that the people were left without elected representation during each vacancy. These data show that the states have violated the Seventeenth Amendment's command that vacancies are to be filled by election in almost one-sixth of all vacancies since 1913, and the frequency of defiance has only increased during that time. Further, even when the states hold elections to fill Senate vacancies, they do not always do so in an expeditious manner. In total, the people have lost out on nearly 200 years of elected representation since 1913, during which time Senate seats were left empty or filled by unelected appointees. These data are out of step with the Seventeenth Amendment's focus on popular enfranchisement.

Returning to President Obama's vacant Senate seat, once Illinois concluded that its citizens would not elect a replacement senator, two

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<sup>11</sup> The third and final paragraph of the Amendment reads: "This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution." *Id.* para. 3.

<sup>12</sup> *See, e.g.*, An Act Providing a Temporary Method of Conducting the Nomination and Election of United States Senators, Pub. L. No. 63-111, 38 Stat. 384 (1914) (codified at 2 U.S.C. § 1 (2006)).

<sup>13</sup> U.S. CONST. amends. XV, XIX, XXVI, XXIV.

<sup>14</sup> The data and original research can be found in Appendix A.

voters sued in federal court, alleging a violation of their rights guaranteed by the Seventeenth Amendment.<sup>15</sup> They asked the court to order the Governor to call an election. The people of Illinois ultimately would be deprived of elected representation for two years, and the state held the required election only when a federal court ordered it to do so. In opposing the election, the State of Illinois argued that the Amendment's language is not clear. The analysis provided here rejects this view. Illinois also submitted that it should be allowed to skip the election because other states had done the same. This Article catalogs this constitutional defiance, explains its effect of denying elected representation, and proposes methods to curb these practices. The states adopted the Seventeenth Amendment to ensure that the people have the right to elect all of their representatives in national government. This right should be protected meticulously.

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This Article proceeds in four parts. Part I examines the first paragraph of the Seventeenth Amendment, which provides for regular, direct election of senators. While its terms are rarely the source of controversy, the first paragraph's text and history help provide a comprehensive understanding of the Seventeenth Amendment. Part II turns to the Amendment's second paragraph. That provision directs how vacancies in the Senate should be filled. The second paragraph is a relatively complicated mechanism for choosing replacement senators, and it presents a less detailed legislative history. Still, its meaning is not indeterminate. By closely analyzing the text and historical record, a cohesive interpretation emerges. This interpretation then serves as the standard against which state practice is evaluated in Part III. There, data on every vacancy in the Senate since the adoption of the Seventeenth Amendment are reviewed, revealing that the states frequently ignore the facial terms of the Amendment and violate its spirit with even greater regularity. Part IV concludes with a survey of state law and a proposal for legislation that would promote compliance with the text and purpose of the Seventeenth Amendment.

#### I. PARAGRAPH ONE AND POPULAR ELECTIONS

The first paragraph of the Seventeenth Amendment replaced a distrusted, aristocratic regime with one of popular enfranchisement. Delegates to the Constitutional Convention in Philadelphia considered many mechanisms for selecting U.S. Senators, including direct election, but ultimately they settled on an indirect model, which placed the choice of

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<sup>15</sup> See *Judge v. Quinn*, 612 F.3d 537, 541 (7th Cir. 2010).

senators with the state legislatures.<sup>16</sup> The consensus on legislative selection began to crack soon thereafter. As early as 1826, members of Congress proposed constitutional amendments to provide for the direct election of senators.<sup>17</sup>

Pressure for popular election of senators sprung from many quarters. Some legal scholars and historians have described this effort as a feature of the Progressive movement's drive for democratization.<sup>18</sup> Independent of its connection to any movement, the push for popular elections can be traced to real and perceived problems with the old system. Reformers stressed that the legislative selection of senators consumed state legislative agendas with national issues at the expense of local concerns<sup>19</sup> and had the effect of ceding the right to elect senators to party bosses, caucuses, and political machines.<sup>20</sup> Legislative deadlocks also meant that states were left without full representation in Congress.<sup>21</sup> To outside observers, stories of bribery

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<sup>16</sup> The original Constitution provided: "The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof . . ." U.S. CONST. art. I, § 3; *see also* JAMES MADISON, THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA 69–71 (Gaillard Hunt & James Brown Scott eds., int'l ed. 1920) (considering proposals to select senators by presidential appointment from a slate of legislatively nominated candidates, by the House in a similar fashion, by direct election, or by the state legislatures).

<sup>17</sup> *See, e.g.*, 2 REG. DEB. 1347, 1348–49 (1826) (statement of Rep. Henry R. Storrs). There had been nine such proposals by 1869. *See id.*; 5 REG. DEB. 361, 361–71 (1829) (statement of Rep. John Wright); CONG. GLOBE, 23d Cong., 2d Sess. 240 (1835) (amendment by Rep. Edward Hannegan); CONG. GLOBE, 31st Cong., 1st Sess. 88 (1850) (statement of Sen. Jeremiah Clemens); CONG. GLOBE, 31st Cong., 2d Sess. 627 (1851) (statement of Rep. Andrew Johnson); CONG. GLOBE, 32d Cong., 1st Sess. 284 (1852) (statement of Rep. Daniel Mace); CONG. GLOBE, 32d Cong., 1st Sess. 443 (1852) (statement of Rep. Andrew Johnson); CONG. GLOBE, 33d Cong., 1st Sess. 38 (1853) (statement of Rep. Daniel Mace); CONG. GLOBE, 36th Cong., 2d Sess. 117 (1860) (statement of Sen. Andrew Johnson). President Johnson—a supporter of the direct election of senators—mentioned the issue in his 1868 message to Congress. Andrew Johnson, Fourth Annual Message (Dec. 9, 1868), in 8 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 3870, 3889 (New York, Bureau of Nat'l Literature, Inc. 1897).

<sup>18</sup> *E.g.*, ALAN I. ABRAMOWITZ & JEFFREY A. SEGAL, SENATE ELECTIONS 17–19 (1992); AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 407–12 (2005); ROSSUM, *supra* note 7, at 191; Ruth Bader Ginsburg, *On Amending the Constitution: A Plea for Patience*, 12 U. ARK. LITTLE ROCK L.J. 677, 684 (1990); Gordon E. Sherman, *The Recent Constitutional Amendments*, 23 YALE L.J. 129 (1913); David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1496–99 (2001). This view contrasts with recent criticism of the Seventeenth Amendment that has suggested that the Amendment was part of a push by special interests to increase the power of the federal government. *See, e.g.*, Bybee, *supra* note 7, at 538–39; Zywicki, *Beyond the Shell and Husk*, *supra* note 7.

<sup>19</sup> GEORGE H. HAYNES, THE SENATE OF THE UNITED STATES: ITS HISTORY AND PRACTICE 93–94 (1960) [hereinafter HAYNES, THE SENATE].

<sup>20</sup> *See* GEORGE H. HAYNES, THE ELECTION OF SENATORS 39 (1906) [hereinafter HAYNES, ELECTION OF SENATORS]; Amar, *Gubernatorial Power*, *supra* note 7, at 741–42.

<sup>21</sup> HAYNES, THE SENATE, *supra* note 19, at 86.

and corruption became salient features of the selection process,<sup>22</sup> and it seemed that personal wealth was a prerequisite to joining the Senate.<sup>23</sup> Structurally, interposing the state legislatures between the Senate and the people disfigured the notion of popular representation. Some states were “misrepresent[ed]” in the Senate when a minority party selected the senator because of infighting among larger parties.<sup>24</sup> Similarly, state legislative districts might be gerrymandered to prevent equal representation in the state legislature, meaning that the selected senator would not represent the entire state.<sup>25</sup>

With respect to political action, for decades it was the states themselves that led the charge for democratically elected senators.<sup>26</sup> States amended their constitutions, passed laws, and adopted practices to sidestep legislative selection of senators.<sup>27</sup> They also pressured Congress to adopt a system for direct senatorial election.<sup>28</sup> Political parties also got into the act, campaigning in favor of direct election.<sup>29</sup> Meanwhile, the press continued

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<sup>22</sup> See, e.g., HAYNES, ELECTION OF SENATORS, *supra* note 20, at 51–59. Reformers thought popular elections would distribute the vote and thus dilute the effect of corruption. Amar, *Indirect Effects*, *supra* note 7, at 1353–54.

<sup>23</sup> See HAYNES, ELECTION OF SENATORS, *supra* note 20, at 86–91, 95; see also Sara Brandes Crook & John R. Hibbing, *A Not-So-Distant Mirror: The 17th Amendment and Congressional Change*, 91 AM. POL. SCI. REV. 845, 848 (1997) (describing the effect of wealth).

<sup>24</sup> HAYNES, ELECTION OF SENATORS, *supra* note 20, at 63–65.

<sup>25</sup> See Amar, *Gubernatorial Power*, *supra* note 7, at 746. Notably, this malapportionment of state officials typically underrepresented urban centers and African-American populations, and, regrettably, opponents of reform expressly acknowledged their distrust of these groups. *Id.* at 747–50.

<sup>26</sup> E.g., Bybee, *supra* note 7, at 537 (“Surprisingly, the bodies that stood to lose power if the amendment passed—state legislatures—were quite supportive.”).

<sup>27</sup> Under the state canvas system, of which the Lincoln–Douglas debates are an example, Senate candidates campaigned on behalf of state legislators who, in turn, pledged to support them in legislative elections. C.H. HOEBEKE, *THE ROAD TO MASS DEMOCRACY: ORIGINAL INTENT AND THE SEVENTEENTH AMENDMENT* 87 (1995); William H. Riker, *The Senate and American Federalism*, 49 AM. POL. SCI. REV. 452, 463–64 (1955). State political parties also pressured legislators to vote for particular Senate candidates. See HAYNES, *THE SENATE*, *supra* note 19, at 99. Some states held primaries to fix a slate of Senate candidates to which state legislators were restricted. *Id.*; Rossum, *supra* note 7, at 708 (counting thirty-three states holding such primaries by the time of the Amendment). In some of these states, the legislature was all but required to select the primary winner. See HAYNES, *THE SENATE*, *supra* note 19, at 102–04; see also 1 ROBERT C. BYRD, *THE SENATE, 1789–1989: ADDRESSES ON THE HISTORY OF THE UNITED STATES SENATE* 394–95 (1988); *Direct Election of Senators*, U.S. SENATE, [http://www.senate.gov/artandhistory/history/common/briefing/Direct\\_Election\\_Senators.htm](http://www.senate.gov/artandhistory/history/common/briefing/Direct_Election_Senators.htm) (last visited Apr. 20, 2013) (discussing other state constitutional and statutory schemes).

<sup>28</sup> By 1913, states had sent 175 memorials to Congress pushing direct election, and many states had called for a constitutional convention on the issue. HAYNES, *THE SENATE*, *supra* note 19, at 96–97; Rossum, *supra* note 7, at 708–10.

<sup>29</sup> See Rossum, *supra* note 7, at 708 (noting that 239 party platforms called for direct election); see also HAYNES, ELECTION OF SENATORS, *supra* note 20, at 105–06 (describing the Democratic and Populist Parties’ platforms); HAYNES, *THE SENATE*, *supra* note 19, at 97 (identifying nominee Taft as supporting an amendment in 1908). Political parties were not alone: other social groups joined the chorus, especially in the West. *Id.*

to provoke (and perhaps reflect) the public desire to elect senators; David Graham Phillips's famed series in *Cosmopolitan* magazine, "The Treason of the Senate," is one of many examples.<sup>30</sup>

The reform movement gained steam in Congress after 1870, but the real action began in 1909 with the Sixty-first Congress.<sup>31</sup> By this time, it seemed that direct elections were a foregone conclusion. Indeed, the discussion of direct election in this era became tied up with—if not overshadowed by—the division of authority over national elections between Congress and the states.<sup>32</sup> The Elections Clause of the Constitution granted states the power to regulate elections for national office, subject to the power of Congress to make or alter those election laws.<sup>33</sup> Perhaps seeing an open door to constitutional reform, champions of states' rights sought to use proposals for direct elections as vehicles to transfer to the states the exclusive control over the time, place, and manner of Senate elections.<sup>34</sup> The propriety of such a shift in power became the centerpiece

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<sup>30</sup> Phillips's nine-article series was republished as DAVID GRAHAM PHILLIPS, *THE TREASON OF THE SENATE* (George E. Mowry & Judson A. Grenier eds., 1964); see also 1 BYRD, *supra* note 27, at 396–98 (describing the series's effect); HOEBEKE, *supra* note 27, at 97–99 (discussing other media efforts). In addition to popular media, scholarship focused on reform. The work of George Haynes, in particular, was influential. See 1 BYRD, *supra* note 27, at 404–06.

It is worth noting that the various societal pressures coincided with a change in political landscape, including the addition of seven new western states, which all practiced forms of or advocated for direct election. See HAYNES, *ELECTION OF SENATORS*, *supra* note 20, at 110, 141–43.

<sup>31</sup> The frequency of proposed amendments increased after 1870. See John William Perrin, *Popular Election of United States Senators*, 192 N. AM. REV. 799, 799–804 (1910); see also Rossum, *supra* note 7, at 705 (counting 187 proposals prior to ratification of the Seventeenth Amendment). However, none was reported out of committee until 1888, fifty years after the first attempt. See H.R. REP. NO. 50-1456, at 1 (1888). There was a series of successful House proposals. See 24 CONG. REC. 617–18 (1893); 26 CONG. REC. 7782–83 (1894); 31 CONG. REC. 4824–25 (1898); 33 CONG. REC. 4127–28 (1900); 35 CONG. REC. 1721–22 (1902). But each stalled in the Senate. See 1 BYRD, *supra* note 27, at 398; HAYNES, *THE SENATE*, *supra* note 19, at 106–08. Seven years after rejecting the last of these House proposals, the Senate (first through Senator Bristow) took up the cause in the Sixty-first Congress. See S.J. Res. 50, 61st Cong., 45 CONG. REC. 105 (1909).

<sup>32</sup> Many proposals for implementing popular election were advanced. Some left the decision whether to have such elections in the hands of the states, e.g., 5 REG. DEB. 361, 361–71 (1829) (amendment of Rep. John Wright); 23 CONG. REC. 116, 133 (1892) (proposal of Rep. William Jennings Bryan); others would have required popular election but would have given the states complete authority to regulate those elections, e.g., H.R. REP. NO. 52-368, at 5 (1892) (accompanying H.R. Res. 90, 52d Cong. (1892)). Meanwhile, other proposals made popular election mandatory and shifted oversight to the national government. E.g., 35 CONG. REC. 3922, 3925–236 (1902) (proposal of Sen. Chauncey Depew).

<sup>33</sup> U.S. CONST. art. I, § 4, cl. 1; see, e.g., *Cook v. Gralike*, 531 U.S. 510, 522–23 (2001); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 832–33 (1995); *Buckley v. Valeo*, 424 U.S. 1, 131–32 (1976). A superb account of the Elections Clause debates from the Constitutional Convention is found in Jamal Greene, Note, *Judging Partisan Gerrymanders Under the Elections Clause*, 114 YALE L.J. 1021, 1031–39 (2005).

<sup>34</sup> This proposal first appeared in Senator William Borah's 1911 draft, which included the line: "The times, places, and manner of holding elections for Senators shall be as prescribed in each State by

of the congressional debate over the direct election of senators in the Sixty-first and Sixty-second Congresses.<sup>35</sup>

Direct election had been a powerful cause for decades, and the significance of this democratic reform should not be understated. However, in the legislative history of the Amendment, there was surprisingly little debate over direct elections, apart from the recurring observation that the popular enfranchisement enjoyed wide support.<sup>36</sup> Nor was there much discussion of the effects that direct election might have on federalism in general.<sup>37</sup> And finally, there was extremely little discussion of senatorial vacancies, a central issue in this Article. It was the aforementioned states' rights question that drove the debate on both sides.<sup>38</sup>

In the end, Congress democratized the selection of senators without touching the states' rights issue. The final version of the Seventeenth Amendment, which passed both houses of Congress by early 1912, left intact the division of authority between the federal and state governments as it had been described in the Elections Clause since the Founding. The proposed Amendment was ratified quickly by the states.<sup>39</sup>

The final version of the Amendment promoted democratic reform by reallocating power *within* each state, shifting control from the state

the legislature thereof." S. REP. NO. 61-961, at 1 (1911) (accompanying S.J. Res. 134, 61st Cong. (1911)).

<sup>35</sup> See JOSEPH L. BRISTOW, RESOLUTION FOR THE DIRECT ELECTION OF SENATORS, S. DOC. NO. 62-666, at 8 (1912); 1 BYRD, *supra* note 27, at 400; HAYNES, THE SENATE, *supra* note 19, at 109. For many southern states, "state control over senatorial elections was the price of . . . assent to a popular-election amendment to the Constitution." *Id.* at 110 (citing 46 CONG. REC. 2128-30 (1911) (statement of Sen. LeRoy Percy); 46 CONG. REC. 3536 (1911) (statement of Sen. Augustus Bacon)); *see, e.g.*, 46 CONG. REC. 2426-27 (1911) (statement of Sen. Charles Curtis); 46 CONG. REC. 2645-57 (1911) (statement of Sen. William Borah); 46 CONG. REC. 2756-63 (1911) (statement of Sen. Isidor Rayner); 47 CONG. REC. 1535-45 (1911); 47 CONG. REC. 1912 (1911). Opponents of this proposal saw it as unnecessarily degrading federal power. *See, e.g.*, 46 CONG. REC. 848 (1911) (Sen. George Sutherland); 46 CONG. REC. 1161-69 (1911) (statements of Sens. Norris Brown, Thomas Carter, and George Sutherland); 46 CONG. REC. 1335-39 (1911) (statement of Sen. Chauncey Depew); 46 CONG. REC. 2491-98 (1911) (statements of Sens. Norris Brown and Jonathan Bourne, Jr.); 47 CONG. REC. 1482-95 (1911); *see also* 1 BYRD, *supra* note 27, at 400 & n.39 (citing 46 CONG. REC. 1162, 1166-69 (1911)); HAYNES, THE SENATE, *supra* note 19, at 110. This debate unavoidably gravitated toward race. *See, e.g.*, 47 CONG. REC. 1899 (1911) (statement of Sen. Hoke Smith objecting to the "race rider"); 47 CONG. REC. 1909 (1911) (discussing the role of race); 47 CONG. REC. 1911 (1911) (statement of Sen. James Reed referring to "[d]ark" influences); S. DOC. NO. 62-666, at 8; 1 BYRD, *supra* note 27, at 400; *see also* 46 CONG. REC. 2657 (1911) (statement of Sen. William Borah: "We have used the Negro as a political football about as long as our own sense of decency or the Negro's developing intelligence will permit.").

<sup>36</sup> See S. REP. NO. 61-961 (1911) (accompanying S.J. Res. 134, 61st Cong. (1911)); 46 CONG. REC. 1103-07 (1911); 46 CONG. REC. 2178-81 (1911).

<sup>37</sup> See Rossum, *supra* note 7, at 711-13. For an exception, see 46 CONG. REC. 2243 (1911) (statement of Sen. Elihu Root).

<sup>38</sup> See *supra* note 35.

<sup>39</sup> See 47 CONG. REC. 1925 (1911) (Senate); 48 CONG. REC. 6347-69 (1912) (House); 38 Stat. 2049-50 (1913) (certification of ratification).

legislatures to the people. By declining to accept new language on states' rights, those who framed and voted for the Seventeenth Amendment reaffirmed a divided system that the Framers of the original Constitution had thought best: the state and federal governments would continue to share the stewardship of congressional elections, and the states, in the first instance, would have the job of passing laws regulating elections—a duty that now included passing laws to guarantee that the popular elections required by the new Amendment took place.

After more than a century of legislatively selected senators, the advocates of greater democratization won an important victory for the nation's upper legislative chamber and for the people of the several states. The result was the simple textual command of the first paragraph of the Seventeenth Amendment:

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.<sup>40</sup>

The phrase “elected by the people” reflected the decades-long struggle for the direct election of senators and, in so doing, fundamentally changed American government.

This first paragraph of the Seventeenth Amendment sets out the procedure for electing U.S. Senators in the normal course, but this move to greater democratization and the accompanying attention to the federal–state balance are found in its second paragraph as well. It is to that more complex textual provision that this Article now turns.

## II. PARAGRAPH TWO AND SENATE VACANCIES

Alongside the first paragraph's command that the people elect their senators, the Seventeenth Amendment's second paragraph sets out a procedure for filling vacancies in the Senate:

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.<sup>41</sup>

The procedure applies the Amendment's principal command that people should elect their senators to all vacancies, and it supplements that rule with a mechanism by which the states may retain their equal suffrage in the Senate until an election is held.

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<sup>40</sup> U.S. CONST. amend. XVII, para. 1.

<sup>41</sup> *Id.* para. 2.

The second paragraph of the Seventeenth Amendment requires the organs of state government to work in tandem—every time a vacancy occurs—to promote the dual aims of popularly elected senators and equal suffrage in the Senate: the governor must issue writs of election calling for an election to fill the vacancy, the legislature may provide for the temporary appointment of a replacement senator (but may only do so by empowering the state’s governor to select an appointee), and the legislature retains the power to regulate state elections, including the election to fill the Senate vacancy. This necessarily intricate arrangement is the reason for the relatively complex language quoted above. For present purposes, this complexity means that the second paragraph of the Seventeenth Amendment requires closer attention as a textual matter than the first paragraph. However, the added complexity does not render the vacancy-filling provision ambiguous. This Part will demonstrate the deliberate design of the constitutional mechanism for filling Senate vacancies and show that this text effectuates the same democratic purpose as the Amendment’s first paragraph.

#### A. *Extra-Textual Sources*

Before turning to the text, it is helpful to review the legislative history of the second paragraph and Supreme Court precedents that may shed light on the text’s meaning. While the legislative history provides clues about the second paragraph’s meaning, instances of explicit commentary are few and far between. Of the hundreds of proposals for direct election of senators introduced in Congress, only a small number contained vacancy-filling provisions.<sup>42</sup> While there was variation among proposed vacancy-

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<sup>42</sup> See, e.g., H.R. REP. NO. 50-1456, at 1 (1888) (accompanying H.R. Res. 141, 50th Cong. (1888)) (“[I]f vacancies happen, . . . the executive of the State in which such vacancy occurs may make temporary appointment until a Senator is elected thereto as provided by the laws of such State.”); H.R. REP. NO. 52-368, at 1 (1892) (accompanying H. Res. 90, 52d Cong. (1892)) (“When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election, as the legislature may direct.”); H.R. REP. NO. 53-944, at 1 (1894) (accompanying H. Res. 20, 53d Cong. (1894)) (same as H.R. REP. NO. 52-368, at 1); S. REP. NO. 54-530, at 11 (1896) (accompanying S. Res. 6, 54th Cong. (1896)) (“When vacancies happen in the representation from any State by resignation or otherwise, the executive thereof may make temporary appointments until the next general election in such State for Members of the House of Representatives in Congress, when such vacancies shall be filled by a vote of the people as aforesaid.”); H.R. REP. NO. 54-994, at 1 (1896) (accompanying H.R. Res. 155, 54th Cong. (1896)) (“When vacancies happen, by resignation or otherwise, in the representation of any State in the Senate, the same shall be filled for the unexpired term thereof in the same manner as is provided for the election of Senators in paragraph one: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointments until the next general election, in accordance with the statutes or constitution of such State.”); H.R. REP. NO. 55-125, at 1 (1898) (accompanying H.R. Res. 5, 55th Cong. (1898)) (same as H.R. REP. NO. 54-994, at 1); 35 CONG. REC. 1721–22 (1902) (adopting H.R.J. Res. 41, 57th Cong. (1902), as amended) (“When vacancies happen, by resignation or otherwise, in the representation of any State in the Senate, the same shall be filled for the unexpired term thereof in

filling procedures, the differences did not prompt much debate.<sup>43</sup> But it is significant that all of these proposals called for vacancies to be filled by direct election—everyone in Congress agreed that elections to fill vacancies were necessary.

Two points in the legislative record reflect serious discussion of a proposed vacancy-filling provision. In 1892, the House proposed an amendment that mirrored in nearly all respects the final version of the Seventeenth Amendment.<sup>44</sup> To accompany this proposal, Representative Tucker wrote a committee report that described the vacancy-filling provision in unusual detail.<sup>45</sup> He said the proposed amendment required

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the same manner as is provided for the election of Senators in paragraph 1: *Provided*, That the executive thereof shall make temporary appointment until the next general or special election held, in accordance with the statutes or constitution of such State.”); H.R. REP. NO. 59-3165, at 2 (1906) (accompanying H.R.J. Res. 120, 59th Cong. (1906)) (same as 35 CONG. REC. 1721–22, except that there was no comma before “in accordance with the statutes or constitution of such State”); 47 CONG. REC. 96, 106–07 (1911) (S.J. Res. 1, 62d Cong. (1911), introduced by Sen. Bristow) (same as H.R. REP. NO. 52-368, at 1); 47 CONG. REC. 1205 (1911) (proposed substitute of Sen. Bristow) (same as H.R. REP. NO. 52-368, at 1, except that there was no comma before “as the legislature may direct”).

<sup>43</sup> Proposed vacancy provisions offered different rules for when an election should be held to fill a vacant seat. Some permitted state legislatures to empower executives to appoint replacement senators until the next general election, *e.g.*, H.R. REP. NO. 54-994, at 1 (accompanying H.R. Res. 155); others said appointments should last until a general or special election, *e.g.*, H.R. REP. NO. 57-125, at 6 (1902) (accompanying H.R.J. Res. 41); and still others said the legislature could set the time of the vacancy election, *e.g.*, U.S. CONST. amend. XVII (referring to elections “as the legislature may direct”).

<sup>44</sup> The House’s 1892 proposal differs only in that it included an inconsequential comma before the phrase “as the legislature may direct.” The plaintiffs in *Valenti v. Rockefeller* argued this comma was important. *See* 292 F. Supp. 851, 855 n.7 (W.D.N.Y. 1968), *aff’d*, 393 U.S. 405 (1969) (per curiam). But no member of Congress gave it a second thought—the comma floated in and out of proposals without comment. *Compare* H.R. REP. NO. 52-368, at 5 (accompanying H.R. Res. 90) (recording Representative Tucker’s initial proposal, with the comma), *with* 24 CONG. REC. 617–18 (1893) (reporting the passage of Tucker’s proposal without the comma). Consistent with this view, the *Valenti* court attached no importance to the absence of this comma in the final version of the Seventeenth Amendment. 292 F. Supp. at 855–56.

<sup>45</sup> Tucker wrote:

Where vacancies occur the executive of the State shall direct writs to issue for holding the election by the people to fill the vacancies; or, by law, the legislature may empower the executive to fill the same temporarily until an election can be had.

Under this clause the governor must order an election to fill the vacancy that has occurred. This preserves the principle of election by the people. In some States, however, in which there are annual elections, this would be a hardship, for the vacancy would in most cases not be of long duration, and to add another State election would be imposing an unnecessary expense on the people, so that the proviso was thought to be wise by which the governor may be empowered to fill the vacancy “until the people fill the vacancy, as the legislature may direct.”

Under this provision in a State where there are biennial elections the legislature might direct that if a vacancy occurred within a year [or any other period it might fix] after the election, the vacancy should be filled by an election by the people; but if the vacancy occurred more than a year after the election the vacancy should be filled by executive appointment. This optional feature in the filling of vacancies was as far as your committee deemed it prudent to go in this direction.

H.R. REP. NO. 52-368, at 4–5 (accompanying H.R. Res. 90). Tucker’s third paragraph is addressed in the context of temporary appointments. *See infra* notes 112, 121.

governors to issue writs of election and also permitted the states, in the interest of resource conservation, to provide for gubernatorial appointments. This proposal would have allowed vacancy elections to be held at the same time as regular elections and would have prevented leaving seats empty in the meantime.

The second substantive discussion of how vacancies should be filled came from Senator Bristow, in comments about the provision that would ultimately become the Seventeenth Amendment.<sup>46</sup> The vacancy-filling provision, Bristow said, was just like the mechanism for filling vacancies in the House of Representatives by election, except that state legislatures would be allowed to empower governors to make temporary appointments until an election occurred—modeled on the original Constitution’s provision for temporary senatorial appointments. These textual antecedents and Tucker’s and Bristow’s commentaries will be important to the discussions of the second paragraph’s individual provisions below, but they do not provide a definitive guide to the second paragraph’s meaning.

The Supreme Court has provided virtually no guidance on the meaning of the Amendment’s second paragraph.<sup>47</sup> When the Court has had the opportunity to explain how Senate vacancies should be filled, it has declined to do so. After Senator Robert Kennedy’s assassination, a three-judge district court in New York considered Senate vacancies in *Valenti v. Rockefeller*.<sup>48</sup> It held that a long delay before an election to replace

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<sup>46</sup> Bristow said of his vacancy-filling provision:

The Constitution as it now reads, referring to vacancies in the Senate, says:

And if vacancies happen by resignation, or otherwise, during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.

Instead of that, I provide the following:

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies.

Which is exactly the language used in providing for the filling of vacancies which occur in the House of Representatives, with the exception that the word “of” is used in the first line for the word “from,” which, however, makes no material difference.

Then my substitute provides that—

The legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

That is practically the same provision which now exists in the case of such a vacancy. The governor of the State may appoint a Senator until the legislature elects. My amendment provides that the legislature may empower the governor of the State to appoint a Senator to fill a vacancy until the election occurs, and he is directed by this amendment to “issue writs of election to fill such vacancies.”

That is, I use exactly the same language in directing the governor to call special elections for the election of Senators to fill vacancies that is used in the Constitution in directing him to issue writs of election to fill vacancies in the House of Representatives.

<sup>47</sup> 47 CONG. REC. 1482–83 (1911).

<sup>48</sup> See *supra* note 8.

<sup>48</sup> 292 F. Supp. at 855 n.7. The New York governor appointed Charles E. Goodell on September 10, 1968, to fill the vacancy in the term ending January 3, 1971. See 114 CONG. REC. 26,668 (1968). Under New York law, the vacancy election would not have occurred until November 1970, despite the

Kennedy would not offend the Seventeenth Amendment.<sup>49</sup> The Supreme Court summarily affirmed and in doing so chose not to specify what aspects of the decision it thought correct.<sup>50</sup> The Court has since referred to *Valenti* in dicta,<sup>51</sup> but its guidance on vacancies and the Seventeenth Amendment ends there. Most recently, the Court declined to address the issue when it denied certiorari in the appeal of the Seventh Circuit’s decision requiring an election to fill President Obama’s Senate vacancy.<sup>52</sup>

Though the Court has not addressed Senate vacancies and the legislative history is thin, comments from those who designed the Amendment and their references to earlier aspects of the Constitution offer some guidance. Against that backdrop, and with the social and legislative history described in Part I in mind, the meaning of the Seventeenth Amendment’s second paragraph begins to come into focus.

### B. The Principal Clause

The second paragraph of the Seventeenth Amendment is divided into two parts. The first part is the “principal clause”; the second is the “proviso.” The principal clause invokes the broader mission of the Seventeenth Amendment by requiring an election: “When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies . . . .”<sup>53</sup> A colon follows this statement, marking the start of the proviso, which further defines the apparatus for filling Senate vacancies. The proviso reads, “*Provided*, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.”<sup>54</sup> Analysis of the Amendment will proceed part by part, beginning with the principal clause.

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statewide election scheduled for November 1968. *See Valenti*, 292 F. Supp. at 853 (citing N.Y. ELEC. LAW § 296 (1968)). The plaintiffs sought a vacancy election in 1968. *Id.* at 853–54.

<sup>49</sup> The majority relied on state practices and policy considerations in its ruling, *Valenti*, 292 F. Supp. at 858–62, and was rightly rebuffed by a dissenting judge for doing so, *id.* at 875–89 (Frankel, J., dissenting). Interpretation of the Constitution by reference to the states’ propensity to obey is not always the best practice. *See, e.g.*, *Brown v. Bd. of Educ.*, 347 U.S. 483, 489 (1954) (calling the states’ practice of segregating schools since the Fourteenth Amendment “inconclusive” as far as the meaning of that provision was concerned).

<sup>50</sup> *Valenti v. Rockefeller*, 393 U.S. 405 (1969). The summary affirmance renders *Valenti* “a rather slender reed” on which to base any future decision. *See Anderson v. Celebrezze*, 460 U.S. 780, 784 n.5 (1983).

<sup>51</sup> *See Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 10–11 (1982) (discussing how vacant offices in Puerto Rico are filled).

<sup>52</sup> *Judge v. Quinn*, 612 F.3d 537 (7th Cir. 2010), *cert. denied*, 131 S. Ct. 2958, 2959 (2011).

<sup>53</sup> U.S. CONST. amend. XVII, para. 2.

<sup>54</sup> *Id.*

### 1. *The Trigger*

*When vacancies happen in the representation of any State in the Senate . . .*

The second paragraph starts with a trigger. A vacancy must “happen” before the Seventeenth Amendment’s vacancy-filling mechanism snaps to life,<sup>55</sup> and there is no question the vacancy must precede all other steps outlined by the text.<sup>56</sup> But what causes a vacancy to happen? The answer is self-evident to an extent, but there are complicated circumstances worth consideration.

Since the Seventeenth Amendment was adopted, most vacancies have happened when a senator resigns or dies, which undoubtedly creates a vacancy and triggers the process outlined in the second paragraph.<sup>57</sup> The original Constitution referred to Senate vacancies created “by Resignation, or otherwise,”<sup>58</sup> and some proposed amendments parroted that language.<sup>59</sup> The Seventeenth Amendment, however, did not refer to “resignation” or any other trigger,<sup>60</sup> but there is no evidence that this omission was significant.<sup>61</sup> With respect to resignations, it is most important to observe that Congress decided early on that its members could resign and that a vacancy was created once the resignation was effective.<sup>62</sup>

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<sup>55</sup> The process described in the original Constitution for filling Senate vacancies was triggered “if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State.” U.S. CONST. art. I, § 3, cl. 2. The triggering language of the Seventeenth Amendment mimics the Constitution’s provision governing House vacancies: “[w]hen vacancies happen in the Representation from any State.” *Id.* art. I, § 2, cl. 4.

<sup>56</sup> *See, e.g.*, Case IV: James Lanman, of Connecticut (1825), in CASES OF CONTESTED ELECTIONS IN CONGRESS, FROM THE YEAR 1789 TO 1834, INCLUSIVE 871, 871–76 (M. St. Clair Clarke & David A. Hall eds., Washington, Gales & Seaton 1834) [hereinafter CASES OF CONTESTED ELECTIONS] (“It is not competent for the Executive of a State, in the recess of a Legislature, to appoint a Senator to fill a vacancy which *shall happen*, but has not happened, at the time of the appointment.”); *see also* *Busbee v. Smith*, 549 F. Supp. 494, 525 (D.D.C. 1982) (holding that the normal expiration of a term does not create a “vacancy”).

<sup>57</sup> *See infra* Part III.B.

<sup>58</sup> U.S. CONST. art. I, § 3, cl. 2.

<sup>59</sup> *See, e.g.*, H.R. REP. NO. 50-1456 (1888) (accompanying H.R. Res. 141, 50th Cong. (1888)); S. REP. NO. 54-530, at 11 (1896) (accompanying S. Res. 6, 54th Cong. (1896)); H.R. REP. NO. 54-994, at 1 (1896) (accompanying H.R. Res. 155, 54th Cong. (1896)); H.R. REP. NO. 55-125 (1898) (accompanying H.R. Res. 5, 55th Cong. (1898)); 35 CONG. REC. 1721–22 (1902) (adopting H.R.J. Res. 41, 57th Cong. (1902), as amended); 47 CONG. REC. 218 (1911).

<sup>60</sup> *See, e.g.*, H.R. REP. NO. 52-368, at 1 (1892) (accompanying H.R. Res. 90, 52d Cong. (1892)); H.R. REP. NO. 53-944, at 1 (1894) (accompanying H.R. Res. 20, 53d Cong. (1894)); S. REP. NO. 61-961, at 1 (1911) (accompanying S.J. Res. 134, 61st Cong. (1911)).

<sup>61</sup> Bristow did not even mention the omission when comparing his proposal to the original Constitution. *See supra* note 46.

<sup>62</sup> During the Second Congress, the House Committee on Elections concluded that “[t]he Executive authority of a State may receive the resignation of a member of the House of Representatives, and issue writs for a new election, without waiting to be informed by the House that a vacancy exists in the

That the death of a senator creates a vacancy is similarly established.<sup>63</sup> Recently, however, one state has tested this truism. When Senator Robert Byrd died in 2010, West Virginia officials considered questioning whether a vacancy was created immediately upon the senator's death. If the vacancy did not formally "happen" for a few days, a quirk in West Virginia law meant that an election to fill the vacancy would not be required.<sup>64</sup> This Kafkaesque idea was abandoned, however, and West Virginia made plans to fill the vacancy in the 2012 election.<sup>65</sup> That did not settle the issue. The state's attorney general thought that the state's idea of waiting until 2012 was "awkward and unintended" and decided that the people should have the right to vote much sooner;<sup>66</sup> a deal was struck, and West Virginia's governor was elected to fill the vacancy in November 2010.<sup>67</sup>

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representations of that State." Case III: John F. Mercer, of Maryland (1791), in *CASES OF CONTESTED ELECTIONS*, *supra* note 56, at 44, 44. In response to questions about a member's right to resign, Representative Joshua Seney replied: "it [is] a new and very strange declaration to say that a member had not a right to resign. . . . Suppose a man who has a large family, and is engaged in a very extensive and lucrative business, should be elected contrary to his will, must a man so circumstanced be obliged to resign his business, and to take his seat in the House?" *Id.* at 46. The Committee agreed. *Id.* In 1815, the Senate added that a resignation was effective even if the governor refused to accept it. Case III: Jesse Bledsoe, of Kentucky (1815), in *CASES OF CONTESTED ELECTIONS*, *supra* note 56, at 869, 869–70. For further discussion, see LUTHER STEARNS CUSHING, *LEX PARLIAMENTARIA AMERICANA: ELEMENTS OF THE LAW AND PRACTICE OF LEGISLATIVE ASSEMBLIES IN THE UNITED STATES OF AMERICA* ¶¶ 486–487, at 197–98 (Boston, Little, Brown & Co. 9th ed. 1874). *But see* Josh Chafetz, *Leaving the House: The Constitutional Status of Resignation from the House of Representatives*, 58 *DUKE L.J.* 177 (2008) (suggesting that the House had the power to reject resignations).

<sup>63</sup> See, e.g., CUSHING, *supra* note 62, ¶ 484, at 197 (permitting state executives to take official notice of a senator's death).

<sup>64</sup> West Virginia law provides that an appointed senator may serve the balance of any unexpired term less than two years and six months. W. VA. CODE ANN. § 3-10-3 (LexisNexis 2011). (For an explanation of how this law permits unconstitutional behavior, see *infra* Part III.C.) Senator Byrd died on June 28, 2010, with just days more than two years and six months remaining in his term. It was suggested that the governor might not declare the seat vacant until July 3, 2010, a date within the two-year-and-six-month window when state law would not require an election. See Jonathan Allen, *West Virginia Law Murky on Robert Byrd Succession*, POLITICO (June 29, 2010, 6:38 AM), <http://www.politico.com/news/stories/0610/39092.html>; Stephanie Condon, *Robert Byrd Succession Hinges on Ambiguous West Virginia Laws*, CBSNEWS (June 28, 2010, 12:27 PM), [http://www.cbsnews.com/8301-503544\\_162-20009017-503544.html](http://www.cbsnews.com/8301-503544_162-20009017-503544.html). There is some ambiguity about who may "declare" a seat vacant; certainly the Senate judges its own membership, U.S. CONST. art. I, § 5, cl. 1, but executives have taken official notice of vacancies and acted upon them without waiting for word from Congress, and the rules may depend on whether Congress is in session. See CUSHING, *supra* note 62, ¶¶ 483–487, at 197–98.

<sup>65</sup> See Letter from Darrell V. McGraw, Jr., Att'y Gen. of W. Va., to Governor Joe Manchin III (July 8, 2010), 2010 WL 5139257.

<sup>66</sup> See *id.* at 6 (discussing the governor's proposed special election).

<sup>67</sup> The state attorney general concluded that "the power of the Governor to proclaim a special election carries with it the power to set the date of the election, filing dates for candidates, and all other election procedures; without such ancillary power, the authority to proclaim an election would be meaningless." *Id.*; see also *infra* Part II.B.2. Still, the governor and state legislature worked together to arrange the vacancy election. Phil Kabler, *Special Election Bill Signed, Sealed*, CHARLESTON GAZETTE, July 20, 2010, at 1A.

Apart from death and resignation, the only other vacancies that have happened in the Senate since the adoption of the Seventeenth Amendment have been caused by the Senate refusing or failing to seat a senator.<sup>68</sup> The Senate declined to seat two senators because of charges of fraud and corruption in 1932 campaigns,<sup>69</sup> and it refused to seat either competitor in a bitterly contested 1974 New Hampshire election.<sup>70</sup> The Senate's failure to seat a senator is sometimes unavoidable because the elected senator has died before Congress convenes—Mel Carnahan was elected after dying in a plane crash,<sup>71</sup> and both Keith Thomson and Key Pittman died between their elections and the start of a new term.<sup>72</sup> In addition, the Senate may create a vacancy by using its constitutional authority to expel members,<sup>73</sup> although it has not done so since before the adoption of the Seventeenth Amendment.

Incapacity of a senator is an untested way a vacancy may happen. A federal statute lists incapacity as a reason that a House vacancy might be

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<sup>68</sup> Sources contemporaneous to the Seventeenth Amendment remark that a legislative body (including the Senate) may create a vacancy based upon “a refusal to qualify, expulsion, adjudication of a controverted election or return, disqualification, or acceptance of a disqualifying office.” CUSHING, *supra* note 62, ¶ 485, at 197. At least some of these bases have constitutional roots. U.S. CONST. art. I, § 3, cl. 3 (age, citizenship, and residency requirements for senators); *id.* art. I, § 5, cl. 2 (expulsion); *id.* art. I, § 6 (incompatibility clause).

Though the Senate can create a vacancy in these ways, the states cannot create a senatorial vacancy deliberately. *See id.* art. I, § 5, cl. 1 (“[The Senate] shall be the Judge of the Elections, Returns and Qualifications of its own Members . . .”). In practice, however, the Senate depends on the states not only to hold elections but also to certify results. 2 U.S.C. §§ 1a–1b (2006). A senator will not be seated without credentials from the state, U.S. SENATE COMM. ON RULES & ADMIN., STANDING RULES OF THE SENATE, S. DOC. NO. 112-1, R. II(1), at 2 (2011); FLOYD M. RIDDICK & ALAN S. FRUMIN, RIDDICK'S SENATE PROCEDURE: PRECEDENTS AND PRACTICES 695–710 (rev. ed. 1992), although this requirement occasionally has been waived, *id.* at 707–08. Thus, while states do not cause vacancies to “happen” within the meaning of the Seventeenth Amendment, they usually take the first step toward seating senators. A recent example is the six-month wait to seat Senator-elect Al Franken. Monica Davey & Carl Hulse, *Minnesota Court Rules Democrat Won Senate Seat*, N.Y. TIMES, July 1, 2009, at A1.

<sup>69</sup> App. B, Nos. 57 (Smith) and 190 (Vare). The complete Appendices A and B, reflecting original research on Senate vacancies, are available at *The Meaning of the Seventeenth Amendment and a Century of State Defiance: Appendices*, NW. U. L. REV., <http://www.law.northwestern.edu/lawreview/v107/n3/1181/LR107n3CloptonAppendices.pdf>, and SOC. SCI. RES. NETWORK, <http://ssrn.com/abstract=2280361>.

<sup>70</sup> App. B, No. 141 (Wyman and Durkin). This might be thought of as a “failure to elect.” *See Act for the Apportionment of Representatives to Congress Among the Several States According to the Ninth Census*, ch. 11, § 4, 17 Stat. 28, 29 (1872) (referring to “a failure to elect” that is “upon trial”); *see also* CONG. GLOBE, 42d Cong., 2d Sess., 677 (1872) (remarks of Sen. Allen Thurman) (“[T]here can be no failure to elect except in those States in which a majority of all the votes is necessary to elect a member . . .”).

<sup>71</sup> *See* John W. Fountain, *Doomed Plane Apparently Had Instrument Trouble*, N.Y. TIMES, Oct. 18, 2000, at A21 (describing plane crash).

<sup>72</sup> App. B, Nos. 114 (Carnahan), 130 (Pittman), and 243 (Thomson).

<sup>73</sup> U.S. CONST. art. I, § 5, cl. 2.

created.<sup>74</sup> Assuming incapacity could create a vacancy in the Senate, it is debatable what constitutes incapacity and who may declare a senator incapacitated; neither federal statutes nor congressional rules provide an answer.<sup>75</sup> Historical practice is similarly unhelpful: members have been unable to appear in Congress (sometimes for quite some time) without their seats being treated as vacant.<sup>76</sup> The closest to an example of incapacity creating a vacancy is when Gladys Noon Spellman was in a coma when her House term began in 1981. The House decided her seat was vacant for the new term because she could not appear to take the oath of office.<sup>77</sup> But since the decision came at the start of a term, this case is more like the Senate refusing to seat any senator, which was discussed above. It is an open question whether incapacity in the midst of a term causes a vacancy to happen in Congress.

## 2. *The Writ of Election*

*. . . the executive authority of such State shall issue writs of election to fill such vacancies . . .*

The second half of the principal clause commands the state's governor to issue a writ of election in all cases when a vacancy happens. This command raises two questions: What sort of duty has the Constitution imposed on the executive? And what is the substance and function of the writ she issues?

Taking context into account, the first question is answered easily: the Seventeenth Amendment's requirement that the governor issue a writ of election is a mandatory duty. Whether the word "shall" in legal drafting reflects an affirmative obligation is not a foregone conclusion,<sup>78</sup> but when

<sup>74</sup> 2 U.S.C. § 8(a) (2006). Courts have said this rule applies to the Senate as well. *See* Pub. Citizen, Inc. v. Miller, 813 F. Supp. 821, 829 n.8 (N.D. Ga.), *aff'd*, 992 F.2d 1548 (11th Cir. 1993). The original 1872 version of this law did not mention incapacity, 17 Stat. 28; "incapacity" appeared when the Government Printing Office codified the Revised Statutes, Rev. Stat. § 26 (1878).

<sup>75</sup> *See* JACK MASKELL, CONG. RESEARCH SERV., RS22556, INCAPACITY OF A MEMBER OF THE SENATE 1 (2006).

<sup>76</sup> Senator Glass was absent for four years before he died but kept his Senate seat during that time. Kate Zernike, *For Senate, Quirks of Fate Sometimes Decide Majority*, N.Y. TIMES, Dec. 17, 2006, § 1, at 44; *Elder Statesman*, TIME, Feb. 19, 1945, at 20; *see also* Neil McLaughlin, *Can't Be Forced to Resign: The Congressman Is in a Coma—And Still in Office*, L.A. TIMES, Aug. 10, 1986, at A14 (discussing Rep. John Grotberg). Edward Kennedy spent the last months of his life in Massachusetts while continuing to represent his state in the Senate. Paul Kane, *On the Cusp of Historic Majority, Senate Democrats Miss 'Pillars'*, WASH. POST, June 9, 2009, at A3.

<sup>77</sup> H.R. Res. 80, 97th Cong., 127 CONG. REC. 2916–17 (1981); *see also* MASKELL, *supra* note 75, at 4–5 (discussing Reps. Spellman, Nick Begich, and Hale Boggs). *But see* Powell v. McCormack, 395 U.S. 486 (1969) (holding that the House's power to judge qualifications is limited to requirements listed in the Constitution).

<sup>78</sup> Bryan Garner calls "shall" a "chameleon-hued word," referring to Hohfeld's observation, "In any closely reasoned problem, whether legal or nonlegal, chameleon-hued words are a peril both to clear thought and to lucid expression." BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 145,

“shall” introduces duties in the Constitution it is mandatory in nature.<sup>79</sup> The word appears five times in the Seventeenth Amendment alone, including in the requirement that “[t]he Senate of the United States shall be composed of two Senators from each State.” The House provision that served as the model for the second paragraph’s principal clause provides that executives “shall” issue writs to fill House vacancies,<sup>80</sup> and Congress and the courts have understood this to establish a mandatory duty.<sup>81</sup> The legislative history of the Seventeenth Amendment further supports the view that the state executive has no discretion about whether to issue the writ of election.<sup>82</sup> The framers of the Seventeenth Amendment were concerned about direct elections, and all proposals for filling vacancies in the Senate called for elections. Given this evidence, it is safe to conclude that a writ must issue whenever a seat is left vacant.

Turning to the writ’s substance and function, it is helpful to begin with historical background. Writs of election have been a necessary part of British elections for ages.<sup>83</sup> Traditionally, the monarch called for the

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939–41 (2d ed. 1995) (quoting WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING AND OTHER LEGAL ESSAYS* 35 (Walter Wheeler Cook ed., 1920)). The Court usually treats “shall” as a mandatory command when evaluating statutes, e.g., *Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 661–62 (2007); *Lopez v. Davis*, 531 U.S. 230, 241 (2001); *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998), but not always, e.g., *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 761 (2005).

<sup>79</sup> The original Constitution uses the word 191 times; too many times to reproduce here. A review leaves no doubt that the word conveys unconditional commands in the Constitution: “The judicial Power of the United States, shall be vested in one supreme Court,” U.S. CONST. art. III, § 1, meaning that the core of the judicial power cannot be shared, *Stern v. Marshall*, 131 S. Ct. 2594, 2608–09 (2011). The Supremacy Clause provides that the Constitution, federal law, and treaties “shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby,” U.S. CONST. art. VI, cl. 2, a mandatory command. The amendments to the Constitution use “shall” 115 times—the only amendment that does not use the word is the Tenth. Each time the duty imposed is obligatory.

<sup>80</sup> U.S. CONST. art. I, § 2, cl. 4. Bristow described his proposed amendment as “exactly the language used in providing for the filling of vacancies which occur in the House of Representatives.” 47 CONG. REC. 1482 (1911).

<sup>81</sup> E.g., *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 896 (1995) (Thomas, J., dissenting); *ACLU of Ohio, Inc. v. Taft*, 385 F.3d 641, 649 (6th Cir. 2004); *Jackson v. Ogilvie*, 426 F.2d 1333, 1336 (7th Cir. 1970); *Fox v. Paterson*, 715 F. Supp. 2d 431, 434–36 (W.D.N.Y. 2010); *Valenti v. Rockefeller*, 292 F. Supp. 851, 863 (W.D.N.Y. 1968), *aff’d*, 393 U.S. 405 (1969) (per curiam); see also *Judge v. Quinn*, 612 F.3d 537, 547 (7th Cir. 2010) (reaching this conclusion with respect to the Seventeenth Amendment). *Jackson* invoked an 1804 election dispute in which the House called the issuance of writs an “indispensable duty.” 426 F.2d at 1336.

<sup>82</sup> Bristow said “the legislature *may* empower the governor of the State to appoint a Senator to fill a vacancy” but that the government “*is directed* by this amendment to issue writs of election.” 47 CONG. REC. 1483 (emphasis added) (internal quotation mark omitted).

<sup>83</sup> See H.H. Asquith, *The Ballot in England*, 3 POL. SCI. Q. 654, 665–66 (1888) (discussing the writ and the Ballot Act); Ronald H. Fritze, *The Role of Family and Religion in the Local Politics of Early Elizabethan England: The Case of Hampshire in the 1560s*, 25 HIST. J. 267, 280 (1982) (describing how Protestants used the writ to their electoral advantage); H.G. Richardson & George Sayles, *The King’s Ministers in Parliament, 1272–1377*, 46 ENG. HIST. REV. 529, 541 (1931) (discussing the writ in the thirteenth century).

election of a new Parliament by issuing the writ, affixed with the Great Seal of the Realm.<sup>84</sup> While issuance of the writ is routine in Britain today, it remains essential to the electoral process.<sup>85</sup>

The writ made it across the Atlantic as well. Writs of election were used in the colonies and became the mechanism by which states ensured that a desired election occurred.<sup>86</sup> On the road to the American Revolution, colonists voiced concern that writs of election were being withheld, preventing them from electing representatives;<sup>87</sup> it was a gripe so significant that it appeared in the Declaration of Independence.<sup>88</sup> Even before the Seventeenth Amendment, the writ of election was one of just two writs mentioned in the U.S. Constitution.<sup>89</sup> Writs of election were a common feature of election laws across the country from independence

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<sup>84</sup> See Bruce Ackerman & Neal Katyal, *Our Unconventional Founding*, 62 U. CHI. L. REV. 475, 559 (1995); Seth Barrett Tillman, *Defending the (Not So) Indefensible*, 16 CORNELL J.L. & PUB. POL'Y 363, 377 (2007). Professors Ackerman and Katyal report that King James II, when he fled England in 1688, attempted to stymie government by cancelling writs of election and throwing the Great Seal into the Thames. "A meeting of a parliament cannot be authorized without writs under the great seal," the King said. Ackerman & Katyal, *supra* (internal quotation marks omitted); see also 2 THE CORRESPONDENCE OF HENRY HYDE, EARL OF CLARENDON 226 n.\* (Samuel Weller Singer ed., London, Henry Colburn 1828) (quoting 3 F.A.J. MAZURE, HISTOIRE DE LA RÉVOLUTION DE 1688, EN ANGLETERRE 264 (Paris, Librairie de Charles Gosselin 1825)).

<sup>85</sup> Issuing writs for parliamentary elections became more ministerial over time. By the nineteenth century, Parliament directed the Clerk of the Crown to issue the writs, and the Clerk had to comply or face charges. CUSHING, *supra* note 62, ¶¶ 453–455, at 186–87. Still, an election—including one to fill a parliamentary vacancy—cannot occur without the writ. Representation of the People Act, 1983, c. 2, § 23, sch. 1, pt. 1 (Eng.). Britain is not alone; the writ of election is an ordinary feature of common law systems. See, e.g., Canada Elections Act, R.S.C. 2000, c. L-9, § 57; *Commonwealth of Australia Constitution Act 1900*, ss 12, 32–33; Parliamentary Elections Act (Chapter 218), §§ 24–25 (Sing.).

<sup>86</sup> Evidence of the writ's use is found in colonial histories, see Foster C. Nix, *Andrew Hamilton's Early Years in the American Colonies*, 21 WM. & MARY. Q. 390, 405 (1964); Richard S. Rodney, *Early Relations of Delaware and Pennsylvania*, 54 PA. MAG. HIST. & BIOGRAPHY 209, 221–23 (1930); *The Proceedings and Minutes of the Governor and Council of Georgia, October 4, 1774 Through November 7, 1775 and September 6, 1779 Through September 20, 1780*, 35 GA. HIST. Q. 126, 151 (Lilla M. Hawes ed., 1951), and in accounts of state practices shortly after the Revolution, see, e.g., Amelia Williams, *A Critical Study of the Siege of the Alamo and of the Personnel of Its Defenders*, 36 SW. HIST. Q. 251, 269–71 (1933).

<sup>87</sup> See A General Meeting of the Freeholders of the County of Mecklenburg on the 29th Day of July, 1774, in Archibald Henderson, *An Interesting Colonial Document*, 28 VA. MAG. HIST. & BIOGRAPHY 54, 56 (1920) ("Whereas by the Delay of the Writ of Election for this County, we are prevented from choosing Representatives, in time, in whom we may confide, to express our sentiments, upon the important matters Recommended to the members of the late house of Burgesses by some of the Northern Colonies . . .").

<sup>88</sup> The Declaration said King George III had "dissolved Representative Houses repeatedly, for opposing with manly firmness his invasions on the rights of the people," and alluded to withholding of writs of election: "He has refused for a long time, after such dissolutions, to cause others to be elected; whereby the Legislative powers, incapable of Annihilation, have returned to the People at large for their exercise . . ." THE DECLARATION OF INDEPENDENCE para. 3 (1776) (emphasis added).

<sup>89</sup> Article I, Section 2 requires governors to issue writs to fill House vacancies. The other writ, of course, is the writ of habeas corpus. U.S. CONST. art. I, § 9, cl. 2.

until the Seventeenth Amendment was adopted, and they continue to play a central role in American elections today.<sup>90</sup>

Importantly, the writ of election divides responsibilities within the state. The Elections Clause obliges state legislatures to promulgate regulations for congressional elections, including elections to fill vacancies, and that power and obligation is limited only by Congress's authority to make or alter election regulations. Through the writ of election, the state executive calls the election to fill the vacancy and sets its time, place, and manner, subject to procedural parameters set by state (and sometimes federal) law.<sup>91</sup> For example, a source contemporaneous with the Seventeenth Amendment demonstrates that the executive's power under the House vacancy-filling provision "carries with it the power to fix the times and places of holding such election in cases where such times and places are not fixed by law."<sup>92</sup> Therefore, whatever details are left open by these laws are to be filled by the state executive's writ.

When the drafters of the Seventeenth Amendment directed state executives to issue writs of election to fill vacancies in the Senate, they did not do so in a vacuum. They were implementing in a new context a

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<sup>90</sup> Writs of election appeared in early state constitutions, for example, DEL. CONST. of 1776, art. 5; GA. CONST. of 1777, art. VII; ILL. CONST. of 1818, art. II, § 11; N.C. CONST. of 1776, art. X; VA. CONST. of 1776, ch. 2, § 7; NORTHWEST ORDINANCE of 1787, para. 10, 1 Stat. 51 n.(a), and many state constitutions expressly refer to writs of election today, see ALA. CONST. art. IV, § 46; ARK. CONST. art. 5, § 6; DEL. CONST. art. II, § 6; GA. CONST. art. V, § II, ¶ V; IOWA CONST. art. III, § 12; KY. CONST. § 262; MICH. CONST. art. V, § 13; MISS. CONST. art. 4, § 77; MO. CONST. art. III, § 14; OKLA. CONST. art. V, § 20; OR. CONST. art. V, § 17; PA. CONST. art. II, § 2; S.C. CONST. art. III, § 25; TEX. CONST. art. III, § 13; VA. CONST. art. IV, § 7; WIS. CONST. art. IV, § 14. In addition, state laws on Senate vacancies today refer to the writ, for example, CONN. GEN. STAT. ANN. § 9-211 (West 2009); FLA. STAT. ANN. § 100.161 (West 2008); IND. CODE ANN. § 3-10-8-3 (West 2006); MINN. STAT. ANN. § 204D.28 (West 2009 & Supp. 2013); N.Y. PUB. OFF. LAW § 42(4-a) (McKinney 2008 & Supp. 2013); N.C. GEN. STAT. § 163-12 (2011); N.D. CENT. CODE § 16.1-13-08 (2009); OHIO REV. CODE ANN. § 3521.02 (West 2007); OR. REV. STAT. § 188.120 (2011); 25 PA. CONS. STAT. ANN. § 2776 (West 2007); R.I. GEN. LAWS § 17-4-9 (2003 & Supp. 2012); VA. CODE ANN. § 24.2-207 (2011); WASH. REV. CODE ANN. § 29A.28.030 (West 2005), or to analogous instruments, for example, CAL. ELEC. CODE § 10700 (West 2003); COLO. REV. STAT. § 1-12-201 (2012); MASS. ANN. LAWS ch. 54, § 140 (LexisNexis 2006 & Supp. 2013). It is not always the chief executive who issues writs of election; writs may be issued by legislators, secretaries of state, marshals, local leaders, or others.

<sup>91</sup> There is ample historical evidence that the writ sets the date of an election. See W.F. Craies, *Australasia: Queensland*, 11 J. SOC'Y COMP. LEGIS. 379, 379 (1911) (describing that a member of the Australian Parliament is payable "from the day appointed in the writ [of election] as the day for taking the poll for his election" (alteration in original) (internal quotation mark omitted)); Charles E. Lee & Ruth S. Green, *A Guide to the Commons House Journals of the South Carolina General Assembly, 1692-1721*, 68 S.C. HIST. MAG. 85, 86 (1967) (remarking that the writ sets the dates that sessions of the state assembly convened); Letter from Peter Mayo to David Campbell, Governor of Va. (Apr. 15, 1838), in *A Description of Seargent S. Prentiss in 1838*, 10 J. S. HIST. 476, 477 (Charles S. Sydnor ed., 1944) (discussing a disputed election in Mississippi and remarking that "the struggle terminated in discarding all, and the issuing of a writ of Election, to be held on the 23 & 4th days of this month").

<sup>92</sup> GEO. W. MCCRARY, A TREATISE ON THE AMERICAN LAW OF ELECTIONS 166 (Keokuk, R.B. Ogdon 2d ed. 1880).

mechanism familiar to all common law countries and to all the states, and one with its own constitutional pedigree. This history confirms that when the Seventeenth Amendment says the executive shall issue a writ of election, it means that in every case where a vacancy happens, the executive has a mandatory duty to call an election to fill the vacancy and to supply any details about that election (including the date) that state law has not addressed.

### C. *The Proviso*

Just as the first paragraph of the Seventeenth Amendment calls for popular elections for each new Senate term, the principal clause of the second paragraph automatically provides that elections will fill vacancies whenever they happen. But the Amendment's framers wanted to ensure that the new procedure for selecting senators did not diminish the states' voice in the Senate. In the proviso of the second paragraph, they provided a solution in the form of an appointment power. The proviso was never intended, however, to undermine the primary command of direct election contained in the principal clause; instead, it gave the states a way to maintain their equal suffrage in the Senate until the process described in the rest of the second paragraph could run its course. To ensure that the democratic purpose of the Seventeenth Amendment was not compromised, the proviso divides the appointment power between the state executive and the state legislature.

*1. The Role of a Proviso.*—To understand the meaning of the second paragraph's proviso, it is first necessary to understand how a proviso works. A proviso is either an alternative to the principal clause or a qualification of that clause. If the proviso is an alternative, then the Seventeenth Amendment would provide two distinct ways that a vacancy in the Senate can be filled; one would involve a writ of election and the other would not. However, if the proviso acts as a qualification, then the governor would be required to order an election in every case and the governor may, if so empowered, appoint a temporary replacement until the election takes place.

There is no standard practice in the law when it comes to provisos. Legal dictionaries are in conflict; a popular one says provisos may serve as a "condition, exception, or addition," which provides little guidance.<sup>93</sup> The Supreme Court recently pinpointed the ambiguity: after noting that

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<sup>93</sup> BLACK'S LAW DICTIONARY 1346 (9th ed. 2009). Older dictionaries stake out marginally more helpful positions. One, for example, says that "[a] proviso differs from an exception . . . . An exception *exempts*, absolutely, from the operation of an engagement or an enactment; a proviso defeats their operation, *conditionally*." 2 JOHN BOUVIER, A LAW DICTIONARY ADAPTED TO THE CONSTITUTION AND LAWS OF THE UNITED STATES OF AMERICA 483 (Phila., J.B. Lippincott & Co. 15th ed. 1883). While this is an interesting distinction, this Article is concerned with the separate question whether the proviso enacts an alternative or a qualification.

provisos are generally used “to except something from the enacting clause, or to qualify and restrain its generality,” the Court lamented that a proviso’s “general (and perhaps appropriate) office is not, alas, its exclusive use. Use of a proviso to state a general, independent rule may be lazy drafting, but is hardly a novelty.”<sup>94</sup>

The Constitution itself, which includes provisos in two other sections, sheds some light on the situation. Article II provides that the President “shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.”<sup>95</sup> This proviso is a qualification on the exercise of the treaty power, not an alternative rule. Article V, meanwhile, sets out the process for amending the Constitution, followed by a two-part proviso:

Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.<sup>96</sup>

This proviso (at least the part still in effect) places a significant condition on the amendment power. It is a condition more extreme than anything in the second paragraph of the Seventeenth Amendment; it outlines conditions under which the amendment process may not take place at all. Still, these other constitutional provisos are best read as conditions and not as alternatives. This is evidence that the Seventeenth Amendment follows the same pattern—its proviso further develops the procedure outlined in the principal clause, rather than providing an alternative route for filling vacancies.

The substantive legislative history outlined at the beginning of this Part also supports this reading. Representative Tucker explained his entire vacancy-filling provision, including the proviso, and concluded, “Under this clause the governor must order an election to fill the vacancy that has occurred.”<sup>97</sup> He did not say the governor must do so in some circumstances or in most circumstances—he said the writ must always issue. Tucker’s proviso thus could not have been an alternative. Senator Bristow took a similar approach when he described his vacancy-filling language: “My amendment provides that the legislature may empower the governor of the State to appoint a Senator to fill a vacancy until the election occurs, *and* he is directed by this amendment to ‘issue writs of election to fill such

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<sup>94</sup> Rep. of Iraq v. Beatty, 556 U.S. 848, 858 (2009) (citation omitted) (internal quotation marks omitted).

<sup>95</sup> U.S. CONST. art. II, § 2, cl. 2.

<sup>96</sup> *Id.* art. V.

<sup>97</sup> H.R. REP. NO. 52-368, at 5 (1892) (accompanying H. Res. 90, 52d Cong. (1892)).

vacancies.<sup>98</sup> As far as Bristow was concerned, the required writ worked in parallel with the power to make temporary appointments.

More broadly, the social and legislative history of the Amendment stands as an obstacle to any argument that the proviso negates the governor's obligation to issue a writ of election. The states and the framers of the Seventeenth Amendment sought the direct election of senators, and the inclusion of the writ of election ensures that those elections happen. The conclusion of this Part returns to the relationship between the principal clause and proviso, after first examining the components of the proviso in greater detail.

## 2. *Empowering the State Executive*

*That the legislature of any State may empower the executive thereof. . .*

The Framers of the Constitution preferred that state legislatures select senators, but to avoid “inconvenient chasms in the Senate,” they agreed that state executives should have the power to appoint replacements in limited circumstances and for limited periods.<sup>99</sup> The Seventeenth Amendment departs from the original Constitution by dividing the appointment power between the state executive and the state legislature: the executive may make a temporary appointment, but only if the legislature has empowered her to do so.<sup>100</sup> The legislature, of course, may decline to extend the power.<sup>101</sup> Today, forty-six states empower their governors to make appointments,<sup>102</sup> all but three have been represented by appointed senators since the ratification of the Seventeenth Amendment.<sup>103</sup>

A separate question is whether the legislature's power to empower the governor to make appointments implies a power to require the governor to

<sup>98</sup> 47 CONG. REC. 1483 (1911) (emphasis added).

<sup>99</sup> MADISON, *supra* note 16, at 363 (statement of Edmund Randolph). The unamended Constitution provided, “[I]f Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.” U.S. CONST. art. I, § 3, cl. 2. At the Convention, proposals to eliminate this appointment power were defeated. MADISON, *supra* note 16, at 364.

<sup>100</sup> Although the Seventeenth Amendment says that the *legislature* empowers the state executive to make appointments, this empowerment seems to follow the normal lawmaking process. Where the state constitution provides a veto, for example, the governor may veto a temporary-appointment law. *See* Smiley v. Holm, 285 U.S. 355, 365–69 (1932); *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565, 566 (1916). *But see* Colo. Gen. Assembly v. Salazar, 541 U.S. 1093, 1094 (2004) (Rehnquist, C.J., dissenting from denial of writ of certiorari) (suggesting that the Elections Clause places limits on the “legislative process” adopted by the states).

<sup>101</sup> Article V of the Constitution provides that “no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.” U.S. CONST. art. V. A vacancy may leave a state temporarily without two senators, but this can only happen when the state legislature has not provided for appointments or when the governor has not made an appointment. To the extent these situations deprive states of equal representation, the states have consented.

<sup>102</sup> *Infra* Part IV.A.

<sup>103</sup> *See generally* App. B.

do so. Some proposals for the constitutional amendment made the appointment power mandatory,<sup>104</sup> but the text adopted as the Seventeenth Amendment does not. As Professor Vikram Amar has suggested, “empower” does not mean “require.”<sup>105</sup> Understanding the Amendment this way, state laws *requiring* appointments may conflict with the Constitution.<sup>106</sup> In the end, this potential conflict between legislatures and governors may be academic. There have been very few instances in which states have left seats empty for substantial periods after vacancies were created,<sup>107</sup> which suggests that state legislatures and executives feel the strong incentive to appoint replacement senators so that their states are maximally represented in Congress.

A potentially more contentious question is how much authority the state legislature has to place conditions on the executive’s appointment power. One view is that the legislature’s power is binary: it may either grant the executive the power to appoint or not. The other view says that the legislature may empower the governor to make an appointment and also control that appointment in some way—for example, by requiring the governor to appoint a temporary senator of the same party as the senator who created the vacancy.<sup>108</sup> Professor Amar has offered textual and structural arguments in support of the binary view.<sup>109</sup> He observes that the framers of the Seventeenth Amendment were concerned that poorly

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<sup>104</sup> H.R. REP. NO. 59-3165, at 2 (1906) (accompanying H.R.J. Res. 120, 59th Cong. (1906)) (“*Provided*, That the executive thereof shall make temporary appointment[s] . . .”).

<sup>105</sup> Amar, *Gubernatorial Power*, *supra* note 7, at 735.

<sup>106</sup> At least 14 states appear to require their executives to appoint. COLO. REV. STAT. § 1-12-201 (2012); 10 ILL. COMP. STAT. ANN. 5/25-8 (LexisNexis 2012); KAN. STAT. ANN. § 25-318 (2000); ME. REV. STAT. ANN. tit. 21-A, § 391(1) (2008); MD. CODE ANN., ELEC. LAW § 8-602(a)(1) (LexisNexis 2010); 2009 Mass. Acts 715 (codified at MASS. ANN. LAWS ch. 54, § 140(f) (LexisNexis Supp. 2013)); MICH. COMP. LAWS ANN. § 168.105 (West 2008); MO. ANN. STAT. § 105.040 (West 1997); NEB. REV. STAT. § 32-565(1) (2008); N.M. STAT. ANN. § 1-15-14(A) (2011); N.Y. PUB. OFF. LAW § 42(4-a) (McKinney 2008 & Supp. 2013); N.C. GEN. STAT. § 163-12 (2011); TEX. ELEC. CODE ANN. § 204.002 (West 2010); WASH. REV. CODE ANN. § 29A.28.030 (West 2005).

<sup>107</sup> Only two vacancies have caused gaps in representation longer than six months. App. B, Nos. 3 (Johnston) and 57 (Smith); *see also infra* note 142 and accompanying text. In Johnston’s case, the legislature had not empowered the government to make an appointment. *See* Act No. 410, 1915 Ala. Acts 364, 364–65.

<sup>108</sup> *See* ARIZ. REV. STAT. ANN. § 16-222(C) (2006) (“[A]ppointee shall be of the same political party as the person vacating the office . . .”); *see also* HAW. REV. STAT. ANN. § 17-1 (LexisNexis 2012) (requiring the governor to appoint a senator from a list of three candidates provided by the vacating senator’s political party); UTAH CODE ANN. § 20A-1-502(2)(b) (LexisNexis 2010) (same); WYO. STAT. ANN. § 22-18-111(a)(i) (2011) (same). Other potential restrictions could relate to the timing of the appointment, *e.g.*, LA. REV. STAT. ANN. § 18:1278(A) (2012) (“If the United States Senate is in session when the vacancy occurs, the governor shall appoint a senator to fill the vacancy within ten days after receiving official notice of the vacancy.”); MISS. CODE ANN. § 23-15-855(2) (2007) (“[I]f the United States Senate be in session at the time the vacancy occurs the Governor shall appoint a Senator within ten (10) days after receiving official notice thereof . . .”), which should be distinguished from the timing of the vacancy election.

<sup>109</sup> *See* Amar, *Gubernatorial Power*, *supra* note 7.

apportioned state legislatures did not represent the people; directly elected governors, on the other hand, do represent the people; and so, the argument concludes, the proviso must allow for unfettered appointments if there are appointments at all.<sup>110</sup> Support for this view is also found in the fact that the Constitution alone sets qualifications for membership in Congress.<sup>111</sup> Professor Sanford Levinson proposes a more flexible understanding that would allow state legislatures “to limit the appointment power with reasonable conditions designed to prevent what the legislature can reasonably believe would be an abuse of discretionary power.”<sup>112</sup> The abuse that may result from the exercise of the Seventeenth Amendment’s appointment power is an entirely legitimate concern—one need look no further than the Obama vacancy discussed in the Introduction.

The plain meaning of “may empower” suggests a binary authority, and the legislative history reveals no evidence to support a more nuanced understanding of the relationship between the state legislature and the governor in this respect. Professor Amar’s structural arguments are also persuasive. In addition, it is important to consider that too much legislative control over the appointment power could undermine the people’s right to elected representation that is guaranteed by the Seventeenth Amendment. The second paragraph divides power between legislatures and executives to ensure that the election takes place; if the state legislature could control the identity of an appointee, there is nothing to stop it from defining a long term for its chosen appointee as well. Moreover, the concerns raised by Professor Levinson are best addressed through the ballot box<sup>113</sup> and the legislature’s control over how vacancy elections take place, not through control over who can be appointed. For these reasons, the start of the proviso should be read to permit state legislatures to empower but not compel the state executives to make appointments to the Senate in the event that a vacancy happens; and the legislature’s choice to do so does not include a power to micromanage the appointment.

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<sup>110</sup> *Id.* at 746–47.

<sup>111</sup> The states cannot add qualifications, *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 783 (1995); nor can Congress, *Powell v. McCormack*, 395 U.S. 486 (1969).

<sup>112</sup> Levinson, *supra* note 7, at 720. Representative Tucker’s commentary suggests that he envisioned the legislature could condition the appointment power on the timing of the vacancy. H.R. REP. NO. 52-368, at 5 (1892) (accompanying H.R. Res. 90, 52d Cong. (1892)) (“[I]n a State where there are biennial elections the legislature might direct that if a vacancy occurred within a year [or any other period it might fix] after the election, the vacancy should be filled by an election by the people; but if the vacancy occurred more than a year after the election the vacancy should be filled by executive appointment.” (alteration in original)); *see also supra* note 44 (discussing that Tucker’s proposal differed from the final Amendment by one inconsequential comma).

<sup>113</sup> After Minnesota’s governor resigned to have himself appointed to a Senate vacancy by the new governor, the people voted both players out of office in the next election. *Election 2002 Recalls Minnesota Massacre of 1978*, ASSOCIATED PRESS, Nov. 6, 2002 (available at LexisNexis).

### 3. *The Temporary Appointment*

*. . . to make temporary appointments until the people fill the vacancies by election . . .*

While the state legislatures may not place restrictions on appointments, there is one important restriction in the Seventeenth Amendment's proviso itself: appointments must be temporary. The text says so, and one need not consult dictionaries or historical sources to establish that temporary appointments are not permanent. The plain meaning of this part of the proviso limits the appointee's term of service to the time before the election to fill the vacancy.

To the extent that additional support for this view is needed, Senator Bristow's commentary stresses the limited duration of all appointments. "My amendment," he said, "provides that the legislature may empower the governor of the State to appoint a Senator to fill a vacancy until the election occurs . . ." <sup>114</sup> Bristow said his provision was "practically the same" as the original Constitution's, under which "[t]he governor of the State may appoint a Senator until the legislature elects." <sup>115</sup> This history, along with the plain meaning of the text, supports an interpretation of the Seventeenth Amendment that requires an election to fill the vacancy in every case, whether or not there is a *temporary* appointment.

Before continuing with this phrase-by-phrase analysis, it is helpful to preview here part of the record of state practice that was briefly mentioned in the Introduction and that will be discussed at length in Part III. In particular, one finding of this Article is that states do not always act expeditiously to fill vacancies in the Senate. In sixty-five cases when a vacancy election followed an intermediate appointment, the people waited more than one year for elected representation; in more than twenty cases they waited more than a year and a half; and in four cases they waited more than two years. <sup>116</sup> These data are raised here because Bristow's reliance on the original Constitution suggests one way to think about this pattern of delay.

Under the original Constitution, state legislatures filled Senate vacancies, but if a vacancy happened while the state legislature was not in session, the governor could make a temporary appointment. <sup>117</sup> The

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<sup>114</sup> 47 CONG. REC. 1483 (1911); *see also id.* at 228–29 (statement of Rep. Burton French) (noting in response to a different vacancy-filling provision that "the legislature of any State may empower the executive thereof to make temporary appointments 'until the people fill the vacancy by election.' Words could hardly be plainer . . .").

<sup>115</sup> *Id.* at 1483.

<sup>116</sup> *See infra* Part III.

<sup>117</sup> U.S. CONST. art. I, § 3, cl. 2; *see also* GEORGE S. TAFT, COMPILATION OF SENATE ELECTION CASES FROM 1789 TO 1885, S. DOC. NO. 58-11, at 52–88, 107–42 (1903) (concluding that the governor could not make an appointment if the state legislature had adjourned without electing a new senator);

appointment would expire, however, if the legislature selected a new senator *or* if it finished the subsequent legislative session without making any such selection.<sup>118</sup> Therefore, appointments before the Seventeenth Amendment could not have lasted longer than the time needed for a state legislature to convene and complete a legislative session. The Framers of the original Constitution understood state legislatures to meet annually.<sup>119</sup> For practical purposes, then, the Framers of the original Constitution capped appointments at one year.<sup>120</sup>

Returning to the Seventeenth Amendment, it would be odd for a constitutional amendment that was intended to provide greater democratic representation in regular Senate terms to have the effect of reducing democratic representation following vacancies in the Senate. Given its history and purpose, one might be inclined to construe the Seventeenth Amendment in a way that shortened, or at least did not lengthen, the maximum term for appointments.<sup>121</sup> On this theory, even though the

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4 ANNALS OF CONG. 77–78 (1794) (rejecting an appointment because the legislature was in session); HAYNES, ELECTION OF SENATORS, *supra* note 20, at 59–63 (noting that in the 1890s the Senate refused to seat five members appointed by governors after their legislatures failed to select replacements).

<sup>118</sup> See CONG. GLOBE, 33d Cong., 1st Sess. 2208–11 (1854) (concluding that an appointment expired at the conclusion of the legislative session following the appointment); CUSHING, *supra* note 62, ¶ 494, at 199–200; HAYNES, THE SENATE, *supra* note 19, at 163 & nn.2–3.

<sup>119</sup> In the Convention debate over Senate vacancies, Edmund Randolph expressed concern that “[i]n some States the Legislatures meet but once a year.” MADISON, *supra* note 16, at 363. Many original state constitutions also required annual meetings by the legislature. *E.g.*, DEL. CONST. of 1776, art. XXVII; GA. CONST. of 1777, art. II; MD. CONST. of 1776, art. XXIII; N.J. CONST. of 1776, art. VII; N.Y. CONST. of 1777, art. II; N.C. CONST. of 1776, arts. XV–XVI; PA. CONST. of 1776, ch. II, § 9; VT. CONST. of 1777, ch. II, § VIII.

<sup>120</sup> Relying on a U.S. Senate record, the lower court in *Valenti v. Rockefeller* concluded that 32 of the 179 senatorial appointments that took place according to the terms of the unamended Constitution had lasted longer than a year. 292 F. Supp. 851, 864 & n.20 (W.D.N.Y. 1968) (citing GORDON F. HARRISON & JOHN P. CODER, SENATE MANUAL, S. DOC. NO. 90-1, at 661–725 (1967)), *aff’d*, 393 U.S. 405 (1969) (per curiam). With the aid of modern technology and more accurate sources, this Senate document was cross-referenced with additional materials (including S. DOC. NO. 58-11, at 146–55) to find that twenty-one pre-Amendment appointees served more than a year before the legislature selected a permanent replacement.

In any event, the *Valenti* majority used its finding to sanction a twenty-nine-month vacancy. Yet the historical record establishes that legislative selections were delayed more than a year only twenty-one times—just 11% of cases—and only one appointee served that long in the first fifty years after the Constitution was ratified. Furthermore, while the *Valenti* court was correct that the longest appointed term before the Seventeenth Amendment was nineteen months, it is not insignificant that this vacancy happened during the Civil War, and in particular during a period when the Senator’s home state of Missouri was divided between two competing and dysfunctional legislatures—the state became a member of the Union and the Confederacy at once, and generally was preoccupied with its role in the war and not the timely selection of a replacement senator.

<sup>121</sup> Tucker also envisioned a system where vacancy elections would be held within a year:

In some states . . . in which there are annual elections, this would be a hardship, for the vacancy would in most cases not be of long duration, and to add another State election would be imposing an unnecessary expense on the people, so that the proviso was thought to be wise by which the

Seventeenth Amendment does not include any expressly time-limiting language, “temporary” could be understood to mean that a governor empowered to appoint a replacement senator may select any qualified individual to serve until the election to fill the vacancy takes place, but not for longer than the one year imagined at the Framing.<sup>122</sup>

#### 4. *The State Legislature’s Power to Direct Elections*

... *as the legislature may direct.*

The proviso (and thus the second paragraph of the Seventeenth Amendment) concludes with a return to the theme of state control over congressional elections. The proviso calls for an election to follow an appointment and reminds the reader that this election is a creature of state law.<sup>123</sup> “[A]s the legislature may direct” thus links up to the rule in the Elections Clause that requires states to establish election regulations. The legislative history discussed above shows that a main point of contention was whether *federal* oversight of elections should be removed—there was

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governor may be empowered to fill the vacancy “until the people fill the vacancy by election, as the legislature may direct.”

... [I]n a State where there are biennial elections the legislature might direct that if a vacancy occurred within a year [or any other period it might fix] after the election, the vacancy should be filled by an election by the people; but if the vacancy occurred more than a year after the election the vacancy should be filled by executive appointment . . . .

H.R. REP. NO. 52-368, at 5 (1892) (accompanying H.R. Res. 90, 52d Cong. (1892)) (alteration in original).

<sup>122</sup> There are at least two other potential bases for timing principles. First, around the turn of the twentieth century, when the Seventeenth Amendment was adopted, there was a trend toward state legislatures convening every two years. By 1906, only six state legislatures met each year. See R. Newton Crane, *United States of America—State Legislation*, 8 J. SOC’Y COMP. LEGIS. 274, 274–75 (1907); see also *Valenti*, 292 F. Supp. at 864. So, at the time of the ratification of the Amendment, state practice would have permitted an appointee to serve for two years.

Second, because the original Constitution gave the legislature one opportunity to fill the vacancy, the Seventeenth Amendment could be read to allow an appointment to last through the state’s next election. From that point of view, a state would only violate the Seventeenth Amendment if it allowed a statewide election to pass without electing a replacement senator. One objection to this measure is that it treats cases differently based on the timing of the vacancy. Imagine a state that holds statewide elections only in even-numbered Novembers, i.e., when electing members of the House of Representatives. Under this interpretation of the second paragraph, the state would only be required to hold a vacancy-filling election if a Senate seat were vacant (or filled by an appointee) on one of those election days. In a state like this, if a senator died or left office in October of an even-numbered year, the people of the state would elect her replacement within one month, but if the senator died or left office in December of an even-numbered year, the people would have to wait nearly two years for the right to elect a replacement.

Part III of this Article, which reviews state practice under the Seventeenth Amendment, will address all of these proposed measuring sticks.

<sup>123</sup> For thoroughness, it should be noted that “as the legislature may direct” modifies “election,” the last antecedent. See *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003). It cannot modify the governor’s duty to issue a writ of election. *Judge v. Quinn*, 612 F.3d 537, 549 (7th Cir. 2010) (“The grammatical acrobatics . . . are difficult to imagine.”).

no serious discussion about removing the state legislatures' obligation to promulgate election regulations. The final clause of the proviso is thus coextensive with the Election Clause's directive that the state legislatures should pass laws governing the time, place, and manner of congressional elections. Its appearance at the end of the Seventeenth Amendment simply reminds the reader that the states' obligation to regulate elections extends to the context of vacancy elections as well.

So understood, the final phrase of the proviso fits neatly within the discussion thus far. As discussed above, the proviso places a condition on the principal clause (rather than providing an alternative). The governor is directed by the principal clause to issue a writ of election when a vacancy happens. Nothing about the state legislature's power can interfere with that constitutional duty. Instead, the two branches of government work together: where the legislature establishes a date for the election, the governor issues the writ to make sure that election happens; where the legislature has not set a date, the governor's writ schedules the election, too. This balance of power between legislature and executive as far as the details of the vacancy election are concerned is complemented by a similar balance of authority on the subject of temporary appointments. The legislature decides whether such appointments may occur, and if it approves the appointment power, the governor may appoint a replacement until the election happens. This system should prevent the branches of state government from colluding to appoint a replacement senator for too long. Through this mechanism, the question whether states wish to retain their equal suffrage in the Senate is left to their discretion, but in all instances, vacancies in the Senate must be filled by the people themselves.

### III. STATE PRACTICE AND THE SEVENTEENTH AMENDMENT

The Seventeenth Amendment demonstrates a clear constitutional preference for the democratic selection of senators. This guiding principle applies to regular elections conducted according to the Amendment's first paragraph, and it is central to the vacancy-filling procedure outlined in the second paragraph. This Part turns to state practice under the Seventeenth Amendment. Since 1913, there has been no case when a state has ignored the first paragraph's command to elect senators to six-year terms by popular vote. Efforts to fill vacancies in states' senatorial delegations, however, tell a different story. Having compiled a dataset of all vacancies that have happened since the Seventeenth Amendment was ratified,<sup>124</sup> this

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<sup>124</sup> This Article does not address how the Seventeenth Amendment affects the composition and behavior of the Senate. The political science literature has found that: directly elected senators are more responsive to and reflective of the general electorate, the Senate's composition is less dynastic and aristocratic and reflects faster turnover, the composition of state legislatures became less important in senators' reelection decisions, the Amendment did not make it more likely that progressive reforms would pass, and direct election made senators more responsive to the public but also gave them more

Part shows that state practice repeatedly runs afoul of both the explicit terms and the spirit of the Seventeenth Amendment's second paragraph.

### A. Senate Vacancy Data

To assess state compliance with the Seventeenth Amendment, data were collected on every vacancy in the U.S. Senate since the Amendment was adopted through the November 2012 general election.<sup>125</sup> This effort is produced in two appendices.<sup>126</sup> Using records maintained by Congress,<sup>127</sup>

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discretion to pursue their own agendas (the public monitors them less than state legislatures did). See William Bernhard & Brian R. Sala, *The Remaking of an American Senate: The 17th Amendment and Ideological Responsiveness*, 68 J. POL. 345 (2006); Sara Brandes Crook & John R. Hibbing, *A Not-So-Distant Mirror: The 17th Amendment and Congressional Change*, 91 AM. POL. SCI. REV. 845 (1997); Sean Gailmard & Jeffery A. Jenkins, *Agency Problems, the 17th Amendment, and Representation in the Senate*, 53 AM. J. POL. SCI. 324 (2009); Scott R. Meinke, *Institutional Change and the Electoral Connection in the Senate: Revisiting the Effects of Direct Election*, 61 POL. RES. Q. 445 (2008); Francine Sanders Romero, *The Impact of Direct Election on Reform Votes in the U.S. Senate*, 88 SOC. SCI. Q. 816 (2007). Senate historian George Haynes recognized that studying the Senate before and after the Seventeenth Amendment would be important. In 1914, he published a review of the last class of legislatively elected senators explicitly as a resource for future researchers. George H. Haynes, *The Changing Senate*, 200 N. AM. REV. 222 (1914).

<sup>125</sup> The Seventeenth Amendment was in force as of May 31, 1913, see 38 Stat. 2049–50 (1913), and these data are limited to vacancies occurring after that date. This approach adheres to the Amendment's third paragraph: "This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution." U.S. CONST. amend. XVII (emphasis added); see also *Hearing Before the S. Comm. on Privileges & Elections*, 63d Cong. (1913) (construing the Amendment in light of a seat that became vacant before ratification and was filled after ratification). These data include the seven senators filling Senate vacancies as of the November 2012 general election. These senators present a bit of a moving target. Each is treated as if she will serve until the last day of her current term in the same capacity in which she currently serves: it is assumed that the six who have been elected to fill vacancies (Barrasso, Brown, Coons, Gillibrand, Manchin, and Wicker) will continue as elected replacements, and that Senator Heller, the only appointee serving today, will continue as an appointee. This study does not include any vacancies created after the November 2012 general election.

<sup>126</sup> See Apps. A & B.

<sup>127</sup> Data are drawn from the *Congressional Record* and the following sources: BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, 1774–PRESENT, <http://bioguide.congress.gov> (last visited May 13, 2013); Senate Historical Office, *Senators of the United States, 1789–2012* (2013), <http://www.senate.gov/artandhistory/history/resources/pdf/chronlist.pdf>; *Appointed Senators*, U.S. SENATE, [http://www.senate.gov/artandhistory/history/common/briefing/senators\\_appointed.htm](http://www.senate.gov/artandhistory/history/common/briefing/senators_appointed.htm) (last visited May 13, 2013); *Contested Senate Elections*, U.S. SENATE, [http://www.senate.gov/artandhistory/history/common/contested\\_elections/intro.htm](http://www.senate.gov/artandhistory/history/common/contested_elections/intro.htm) (last visited May 13, 2013); *Senate State Information*, U.S. SENATE, [http://senate.gov/pagelayout/senators/f\\_two\\_sections\\_with\\_teasers/states.htm](http://senate.gov/pagelayout/senators/f_two_sections_with_teasers/states.htm) (last visited May 13, 2013); *Senators who Have Died in Office*, U.S. SENATE, [http://www.senate.gov/pagelayout/history/four\\_column\\_table/SenatorsDiedinOffice.shtml](http://www.senate.gov/pagelayout/history/four_column_table/SenatorsDiedinOffice.shtml) (last visited May 13, 2013). This dataset differs from these congressional publications. For instance, the Senate data exclude so-called technical resignations, where a senator resigns after her successor is elected. See THOMAS H. NEALE, CONG. RESEARCH SERV., R40421, FILLING U.S. SENATE VACANCIES: PERSPECTIVES AND CONTEMPORARY DEVELOPMENTS 7 (2009). For completeness, these resignations are counted as vacancies and included in the dataset.

every vacancy during the relevant timeframe was identified,<sup>128</sup> and then biographical information about all senators who created or served as replacements during the vacancy was cataloged.<sup>129</sup> In addition, calculations were made for the length of time the seat was empty at the start of the vacancy, the time served by appointees and elected replacements, and the total time during the vacancy that the people were without elected representation. Finally, each vacancy was coded to correspond to the type of senator who created the vacancy, how it was created, and the way in which it was filled.<sup>130</sup>

### B. An Overview of Senate Vacancies

There have been 244 vacancies in the U.S. Senate since the adoption of the Seventeenth Amendment. These vacancies have been spread evenly across the states for the most part, and there has been a decline in the rate of vacancies over time. There have been a total of 170 elections to fill Senate vacancies. In the same period, state executives have made 234 appointments to the Senate.<sup>131</sup> In fact, almost one-third of all senators who have taken office since the adoption of the Amendment first arrived in the Senate as appointees.<sup>132</sup>

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<sup>128</sup> Counting vacancies requires some thought. Some cases are easy: a regularly elected senator who dies in office always creates a vacancy. As mentioned above, vacancies before May 31, 1913, are not counted, while the dataset includes those that happen after technical resignations and similar events creating vacancies at the tail end of a Senate term. As explained in Part II, vacancies occur in those instances where the Senate is unable or unwilling to seat a senator—where the would-be senator dies before the term begins, *see* App. B, Nos. 114 (Carnahan), 130 (Pittman), and 243 (Thomson), or where the Senate rejects the senator, *id.* Nos. 57 (Smith), 141 (Wyman and Durkin), and 190 (Vare). Finally, when an appointed senator leaves office early, this is not treated as a new vacancy; if the sitting senator has been replaced in an election to fill the vacancy, however, the elected replacement leaving office does create a new vacancy. This rule reflects the view that the process required by the Seventeenth Amendment is complete once an elected replacement takes office.

<sup>129</sup> This Part refers to “full terms,” “unexpired terms,” and “short terms.” *See generally* ROBERT DOVE, THE TERM OF A SENATOR—WHEN DOES IT BEGIN AND END?, S. DOC. NO. 98-29, at 1 (1984). A full term is the six-year term of a Senate seat. An unexpired term is the balance of a term remaining when a vacancy happens. Finally, where a senator leaves office between the regular November election for the new term and the end of the current term (during the lame-duck session), the unexpired term is referred to as a short term.

<sup>130</sup> A detailed explanation of the coding is found in App. A.

<sup>131</sup> On twelve occasions, a senator who was appointed to fill a vacancy left the Senate before the end of the unexpired term and the state executive selected a second appointee as a replacement. This means there are twelve fewer vacancies filled by appointment than the total number of appointments. In addition, the total number of appointments is not the same as the total number of people appointed. Five people were appointed twice, *see* App. B, Nos. 47 & 53 (Thomas), 129 & 130 (Bunker), 173 & 178 (Metzenbaum), 181 & 182 (McNary), and 209 & 212 (Blakley), which means that a total of 229 different people have been appointed to the Senate under the Seventeenth Amendment.

<sup>132</sup> The Senate Historical Office’s publication, *see* Senators of the United States, *supra* note 127, at 53–89, lists 813 individuals who took office in the Senate for the first time after the passage of the Seventeenth Amendment. Of these 813 senators, 227 or 28% first took their seats as appointees (2 of

These initial observations include so-called technical vacancies—vacancies that happen when a senator leaves office after the regular election for the next term of her seat.<sup>133</sup> There have been forty-four technical vacancies in this period.<sup>134</sup> While the Seventeenth Amendment applies to these cases, all technical vacancies have been excluded from this Part’s consideration of state compliance. As a practical matter, technical vacancies are quite short, occurring with twenty days left in the term on average. Even if a state could hold an election during this short term,<sup>135</sup> the harm of losing a few days of elected representation at the end of a lame-duck session of Congress may not be worth the considerable cost of the vacancy election.<sup>136</sup> And since the vast majority of these technical vacancies are filled by appointing a senator-elect, the people usually end up represented by a person they have just elected.<sup>137</sup> As a result, while

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the 229 people appointed since 1913—Henry Dworshak and Norris Cotton—served as elected senators prior to their appointments).

<sup>133</sup> The vacancy occurs during the “short term.” See *supra* note 129.

<sup>134</sup> Thirty-four of these forty-four occurred because of technical resignations, where the sitting senator resigned and the senator-elect took over just before the start of the term for which she was elected. In part, this was done to give the senator-elect an advantage in seniority in the next Congress. See, e.g., Stephen H. Balch, *Getting that Extra Edge: Seniority & Early Appointments to the United States Senate*, 11 POLITY 138, 138–40 (1978). According to the Senate Historical Office, the Rules Committee stopped granting seniority in these cases beginning in 1980. See *Senators of the United States*, *supra* note 127, at 81 n.8. The remaining nine technical vacancies were resolved as follows: one senator who resigned during a short term was replaced by a person other than the senator-elect, App. B, No. 20 (McAdoo and Storke); three senators resigned during a short term and their seats were never filled, *id.* Nos. 14 (Fulbright), 86 (Brewster), and 165 (Ervin); and six senators died during a short term—two were replaced by the senator-elect, *id.* Nos. 54 (McCormick and Deneen) and 97 (Hart and Riegle), three were replaced by someone other than the senator-elect, *id.* Nos. 129 (Pittman and Bunker), 199 (Smith and Hall), and 230 (Jones and Grammer), and one vacancy was left unfilled because the putative appointee was never seated in the Senate, *id.* No. 56 (McKinley). See also *infra* Part IV.A (discussing state laws in Oklahoma and Connecticut that limit appointments to the short terms).

<sup>135</sup> It would be difficult to do so in some cases. And even if a state could hold such an election, it would be almost impossible to challenge its refusal to do so—the time between early November’s general election and the next January 3 does not give an aggrieved party time to prosecute a lawsuit.

<sup>136</sup> This does not imply that the harm caused by the loss of representation during the lame-duck session of Congress is *de minimis*. *Accord* *Judge v. Quinn*, 612 F.3d 537, 556 (7th Cir. 2010). Elections to fill vacancies should be held on the same day as the regular election for the next term. This is what Illinois did following the Obama vacancy, and it has happened on forty different occasions since 1913—in almost a quarter of all the elections held to fill vacancies. However, when a vacancy occurs after the general election for the next term, the cost-benefit analysis shifts dramatically. An effort to start a whole new election cycle—which would include nominating candidates, a statewide election, and a certification period—right after a general election would present serious difficulties. The Amendment’s framers also recognized the significant obstacles in such circumstances. See, e.g., H.R. REP. NO. 52-368, at 5 (1892) (accompanying H.R. Res. 90, 52d Cong. (1892)) (report of Rep. Tucker) (commenting on the “hardship” and “unnecessary expense” of a special election too close to a general election).

<sup>137</sup> The senator-elect filled thirty-six of forty-four technical vacancies. See *supra* note 134. As discussed above, this early transfer of power was often intentional. Strict enforcement of the

technical vacancies are reported in the appendices, they are excluded in the following analysis of state practice.

This leaves 200 Senate vacancies between the adoption of the Seventeenth Amendment and the present day. To begin with some basic observations, more than 70% of these vacancies were caused by the death of a sitting senator, with nearly all the rest caused by a senator's resignation.<sup>138</sup> In 182 of the 200 cases, the vacancy was first filled by a state executive appointing a replacement, and in 152 of those cases, the appointment was followed by an election to fill the balance of the term. In only 18 cases did the state hold an election to fill a vacancy without first appointing a replacement senator. The result is that the people ultimately filled 170 of these 200 vacancies. The converse, of course, is that there have been 30 instances in which the state executive appointed a permanent replacement to the Senate and the state failed to hold any election to fill the vacancy. Of the 200 vacancies of interest, no state has ever left any of them empty for the balance of the unexpired term.

Vacancies in the Senate have resulted in a total of 568 years' worth of unexpired terms since 1913.<sup>139</sup> To put this figure another way, at any given moment, one could expect 6 of the 100 Senate seats to be vacant or filled by senators appointed or elected to fill a vacancy.<sup>140</sup> Moreover, of the 568 years to which the terms of the second paragraph of the Seventeenth Amendment ought to apply, the people have been without elected representation a total of 193 years, or one-third of the time. The vast majority of this 193-year figure is comprised of the service of senators appointed by state executives.<sup>141</sup>

A final issue is the states' immediate responses to vacancies in their Senate delegations. States tend to fill empty seats with great speed. As explained already, no state has ever left a seat empty for a whole unexpired term. The average time a seat is left empty after a vacancy happens is an incredibly short twenty-five days.<sup>142</sup> In the last fifty years, states have filled

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Seventeenth Amendment during a short term likely would lead to fewer technical resignations, rather than a greater number of elections to fill technical vacancies.

<sup>138</sup> Deaths caused 142 out of 200 vacancies, and resignation caused 55. All three vacancies not caused by death or resignation were created when the Senate refused to seat anyone. *See* App. B, Nos. 57 (Smith), 141 (Wyman and Durkin), and 190 (Vare). Since the passage of the Seventeenth Amendment, no vacancy has been caused by expulsion.

<sup>139</sup> Accounting for all 200 vacancies, the total time between creation of the vacancy and the end of the term is 207,379 days.

<sup>140</sup> On average, 5.79% of seats are tied up in some phase of the process outlined in the Amendment's second paragraph.

<sup>141</sup> Appointees served 178 of the 193 years (accounting for all 200 vacancies, the total time appointees served is 64,716 days). In other words, the appointees served 31% of all unexpired terms. The remainder corresponds to time that seats were empty before a replacement senator was appointed or elected (accounting for all 200 vacancies, the total time seats were left empty is 5086 days).

<sup>142</sup> Seats have been empty for a total of 14 of the 568 years of total unexpired terms, or just 2.5%. Only two seats have been left open more than six months, and the longest any seat was empty is ten

vacancies in just two weeks on average. The speed with which the states act should come as no surprise, given the persistent concern about equal suffrage in the Senate. In this connection, note that the time a seat is left empty corresponds to whether it is first filled by an election or by an executive appointment: when there is an election to fill a vacancy with no intervening appointment, the seat remains empty for four months on average,<sup>143</sup> but when the seat is filled first by an appointment, it is empty only sixteen days. This discrepancy makes sense; while governors can make temporary appointments with the stroke of a pen, a state's electoral processes take more time to operate. That said, there may be other reasons for this discrepancy, a subject to which this Article will return shortly.

### C. *Facial Noncompliance*

States violate the Seventeenth Amendment's explicit terms when they fail to hold elections to fill vacant seats. Such blatant violations are referred to here as "facial noncompliance."<sup>144</sup>

The frequency of facial noncompliance over the past 100 years is striking. In that period, state executives have appointed a permanent replacement to serve the entire unexpired term in 30 of the 200 Senate vacancies.<sup>145</sup> This means that in one-sixth of all vacancies, the states have failed to hold the election required by the Seventeenth Amendment. Vacancies have been filled by permanent appointments nearly twice as often as they have been filled by an election without any intervening appointment.<sup>146</sup> This pattern represents persistent disobedience of a core constitutional voting right.

A permanent appointment necessarily means that the people have been deprived of elected representation in the Senate.<sup>147</sup> Although permanent appointees typically have been appointed quite quickly after a vacancy

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months. *See* App. B, Nos. 3 (Johnston) and 57 (Smith). On the short end, in ten instances, a vacancy was created and filled on the same day, and in twenty-two cases, a vacancy was filled on the day after it was created.

<sup>143</sup> The average time the seat is left empty in these cases is 119 days. The delay before filling the seat does not always last that long. A senator could choose, for example, to wait to resign until a replacement is elected. This happened when Senator Boren announced his plan to resign to become President of the University of Oklahoma in 1994. He said he would wait to leave office until a successor was elected. Although this chain of events may present some formal concerns, it resulted in just two days between Senator Boren's resignation and his elected replacement's start date. *See* App. B, No. 180; *see also infra* note 196.

<sup>144</sup> A state also would fail to comply facially by failing to hold an election for the full term, but this has never happened.

<sup>145</sup> Recall that "technical vacancies" that occur near the end of a term are excluded. *See supra* notes 133–37 and accompanying text.

<sup>146</sup> States filled vacancies with no intervening appointment eighteen times.

<sup>147</sup> As a result of facial noncompliance, the people have been deprived of thirty-six years of elected representation in the Senate (13,041 days for all thirty vacancies).

happened, the average time that a state went without elected representation was more than fourteen months in cases where states disobeyed the Seventeenth Amendment on its face. In sixteen cases, facial noncompliance caused gaps in elected representation of a year or more,<sup>148</sup> and in five instances, the deprivation lasted more than two years.<sup>149</sup>

One of the most extreme examples of facial noncompliance occurred in connection with Senator Robert Kennedy's vacancy, which was the subject of *Valenti v. Rockefeller*.<sup>150</sup> New York never held an election to fill the Kennedy vacancy, and the appointed replacement served the remainder of the term.<sup>151</sup> The people of New York went without elected representation for two years and seven months.<sup>152</sup> In 1964, when Hubert Humphrey resigned from the Senate to become Vice President, Walter Mondale was appointed to his seat and served for the entire term without being elected, leaving Minnesotans without elected representation for over two years.<sup>153</sup> When Senator Mondale later left the Senate to become Vice President, two appointees served for the remainder of the vacancy. The state did not hold an election and the people were again without elected representation for two years.<sup>154</sup> The most extreme deprivation occurred in Maine, where the governor appointed George Mitchell to serve for most of a two-year-and-eight-month vacancy.<sup>155</sup> In a recent case of facial noncompliance, Frank Murkowski resigned as senator from Alaska in 2002 to become that state's governor and appointed his daughter, Lisa Murkowski, to fill his seat.<sup>156</sup>

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<sup>148</sup> See App. B, Nos. 8 (Murkowski), 10 (Miller), 11 (McClellan), 26 (Salazar), 40 (Martinez), 87 (Muskie), 105 (Humphrey), 106 (Mondale), 112 (Truman), 125 (Zorinsky), 131 (Scrugham), 132 (Ensign), 156 (Kennedy), 178 (Saxbe), 193 (Chafee), and 228 (Wallgren).

<sup>149</sup> See *id.* Nos. 8 (Murkowski), 87 (Muskie), 105 (Humphrey), 106 (Mondale), and 156 (Kennedy).

<sup>150</sup> 292 F. Supp. 851 (W.D.N.Y. 1968), *aff'd*, 393 U.S. 405 (1969) (per curiam).

<sup>151</sup> See 116 CONG. REC. 44,576–77 (1971) (Goodell's last day); 117 CONG. REC. 3 (1971) (certificate for replacement dated January 3). This fact seems to have escaped scholars writing about *Valenti*. It is especially strange because the *Valenti* court agreed with the conclusion that permanent appointments violate the Seventeenth Amendment: "We would have difficulty, for example, squaring the word 'temporary' with a statute providing that the Governor's appointee is to serve out the remainder of a term regardless of its length." 292 F. Supp. at 856. But this is exactly what happened.

<sup>152</sup> See App. B, No. 156. The seat was left empty for 96 days, and Goodell served for 845 days.

<sup>153</sup> See *id.* No. 105. Mondale served as an appointee for 734 days.

<sup>154</sup> See *id.* No. 106. The replacements for Mondale served a total of 733 days. One interpretation of the second paragraph requires states to fill vacancies by election at the next statewide election. See *supra* note 122. In the case of the Mondale vacancy (and the Kennedy vacancy, *supra* note 152), not one but two statewide elections passed without the state electing a replacement.

<sup>155</sup> See App. B, No. 87. Senator Mitchell served as an appointee for 959 days.

<sup>156</sup> Unfortunately, family connections and scheming by state governors are common when it comes to vacant seats. In at least eleven cases, the appointed replacement came from the same family as the senator creating the vacancy. See *id.* Nos. 5 (Allen), 8 (Murkowski), 13 (Caraway), 82 (Long), 101 (Humphrey), 114 (Carnahan), 168 (Burdick), 193 (Chafee), 201 (Bushfield), 220 (Gibson), and 222 (Byrd). On two occasions, a state executive appointed his own wife to a vacant seat, *id.* Nos. 4 (Dixie Bibb Graves) and 83 (Elaine Edwards), and once an executive appointed his own daughter, *id.* No. 8 (Murkowski). Perhaps worse, ten times a governor appointed himself to the Senate. *Id.* Nos. 48

She served as a permanent appointee through the end of the term more than two years later.<sup>157</sup>

There is considerable variance in facial noncompliance over time. In the first half century after the Seventeenth Amendment was ratified, there were eleven vacancies filled by permanent appointees. Since 1963, however, there have been nineteen cases. Importantly, there have been roughly half as many vacancies in the Senate during the latter period as there were during the earlier one.<sup>158</sup> Thus, facial noncompliance occurred in 7% of vacancies during the first half century after adoption of the Seventeenth Amendment and in 25% of cases during the second half century. And in the last decade, there have been three times as many examples of facial noncompliance than during the first twenty-five years that the Seventeenth Amendment was in force. In short, facial noncompliance is becoming more common.

#### *D. Election Delays and “Constructive Noncompliance”*

The Seventeenth Amendment does not expressly require the states to hold vacancy-filling elections within any particular time period. The delays in holding elections, therefore, do not represent noncompliance of the Amendment in the same sense as the failures to fill vacancies by election. However, long delays seem to run counter to the Seventeenth Amendment’s preference for democratically elected senators—during these periods the Senate seats are filled by an unelected appointee or (far less frequently) by no one at all. This section begins with a review of state practice with respect to the scheduling of vacancy elections and then turns to some observations about that record in light of various measures that may be applied to Senate vacancies.

Putting aside the thirty cases of facial noncompliance discussed above, the states filled the remaining 170 vacancies in one of two ways: they put a temporary appointee in the Senate and then held an election to select a permanent replacement, or they held an election to fill the vacancy without any intervening appointee.<sup>159</sup> Of these 170 vacancies ultimately filled by election, the people were without elected representation for an average of

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(Gossett), 74 (Chandler), 81 (Ford) (though Ford was appointed after a technical resignation), 106 (Anderson), 120 (Erickson), 131 (Carville), 152 (Mechem), 179 (Edmondson), 200 (Russell), and 243 (Hickey).

<sup>157</sup> See *id.* No. 8. Lisa Murkowski served for 745 days as an appointee before starting a full term in 2005 for which she was elected.

<sup>158</sup> One hundred sixty-four vacancies occurred during the first fifty years after adoption; seventy-nine have occurred since then.

<sup>159</sup> As mentioned above, the states have chosen the appointment-then-election route in 152 cases and the election-only route in 18.

eleven months per vacancy.<sup>160</sup> In the last century, this wait adds up to almost 157 years without elected representation.<sup>161</sup>

One key variable predicting how long the people must wait for an election to fill a Senate vacancy is whether the state appoints a temporary replacement before holding the election. Senate seats are left empty for four months on average when a state fills the vacancy by holding an election without any appointment and for only sixteen days when an appointed senator first fills the seat. This is a significant difference in the amount of time the state goes without representation in the Senate, but time without representation is only half the story. The Seventeenth Amendment's preference for elections means it is important to compare the difference between how long the people are without *elected* representation in each of these circumstances. The wait for an election is four months when the seat is filled by election only (the same figure as above). But in those cases where an appointee first fills the vacancy, the election does not come for *more than a year* after the vacancy is created.<sup>162</sup> The average wait for elected representation is thus three times longer when an election is preceded by an executive appointment.<sup>163</sup> This is a difference that adds up: if all vacancies were filled by an election alone without intervening appointments, the people would have enjoyed an additional 100 years' worth of elected representation.<sup>164</sup>

The disparity is evident in cases of extreme delay as well. All four cases in which the people waited more than two years for an elected replacement involved an interim appointment. One of these egregious delays came in the case of the Obama vacancy, where the people of Illinois waited more than two years for an elected replacement. Perhaps more stunning than two-year-long delays is that the wait for an elected senator lasted more than one year in sixty-five of the vacancies that followed the appointment-then-election model, and lasted more than a year and a half in twenty-two cases. In contrast, of those cases that were filled by election

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<sup>160</sup> In the 170 cases where states held elections, the average time to fill the seat by election was 336 days.

<sup>161</sup> The total time without elected representation in these 170 cases is 57,159 days.

<sup>162</sup> In the 18 instances where a vacancy was first filled by election, the average wait for an election was 119 days. In the 152 cases where the vacancy was filled by an appointment followed by an election, the average wait for an election was 362 days.

<sup>163</sup> Put another way, when vacancies are filled by election without an appointment, an elected senator represents the people for 89% of the unexpired term (the average time filled by an elected senator is 995 days and the average time without elected representation is 119 days); but where an appointee serves in advance of an election, only 68% of the unexpired term is filled by an elected senator (the average time filled by an elected senator is 785 days and the average time without elected representation is 362 days).

<sup>164</sup> If the election had occurred within 119 days (the average wait for an election if there is no appointment) in each of the 152 cases where a vacancy was filled by appointment then election, the people would have lost out on only 18,088 days of representation. Instead, they lost out on 55,010 days total—an additional 36,922 days.

alone, none involved a wait longer than one year; in the vast majority of these cases, the election was held within six months of the vacancy.

These data suggest that while states are quick to fill empty seats in the Senate with appointees, they often let appointees linger in lieu of moving expeditiously to elect permanent replacements. The disparity in the wait for elected representation between cases where appointments happen and those where they do not implies that the second paragraph's appointment power, which is intended to ensure the states' equal suffrage, postpones the popular elections guaranteed by the rest of the Seventeenth Amendment. And the longer an unelected appointee serves, the more entrenched she becomes—and presumably the larger the incumbency advantage she enjoys.

What should be made of this record? A state's failure to hold an election *is* facial noncompliance, but to evaluate state practice with respect to the timing of elections, there would need to be agreement about how long a state may delay an election without offending the Seventeenth Amendment. States cannot hold vacancy elections immediately after vacancies are created;<sup>165</sup> advocating for such a system could result in inordinate costs and significant risks to the electoral process. But giving a state free reign, approaching the full six years of a term (should circumstances permit), seems at odds with the Amendment's purpose.

The history of the Seventeenth Amendment suggests a few ways to think about how long a wait for a vacancy election is too long.<sup>166</sup> Part II suggested that the prehistory of the Seventeenth Amendment provided some support to limiting gubernatorial appointments to one year. There are also historical reasons to think that a two-year measure would be appropriate.<sup>167</sup> Applying the more generous measure, according to which

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<sup>165</sup> See *supra* note 136 and accompanying text.

<sup>166</sup> Another option is drawn from the data. The average time without elected representation is four months when a state holds an election to fill a vacancy without an intervening appointment. (The median is slightly lower than the mean, 111 days.) One could argue that any delay longer than four months runs afoul of the spirit of the Amendment. According to that measure, 82% of all vacancies filled by an election since 1913 have been unreasonably long. See App. B. And many state laws requiring special elections to fill Senate vacancies set those elections within four months. See *infra* note 190. But four months is a strict measure for constitutional compliance, and admittedly there are cases in which the state held an election without an appointment (where the state should be motivated to hold an election quickly), and the delay before the election was more than four months.

<sup>167</sup> See *supra* Part II.C.3. Part II also discussed an interpretation of the second paragraph that only requires states to fill vacancies at the next statewide election. See *supra* note 122. Applying this limit, the thirty cases of facial noncompliance necessarily qualify since facial noncompliance means that the appointee completed the term (having excluded those cases where the seat became vacant after the election for the new term). There are an additional three cases in which an appointee was serving on the November election day in an even-numbered year (i.e., when voters in all states would vote for members of Congress). See App. B, Nos. 29, 104, and 168. This brings the total to thirty-four cases, but there are reasons to believe this analysis understates the total. First, some states hold regular off-year elections. For example, five states currently elect their governors in odd years: Kentucky, Louisiana, Mississippi, New Jersey, and Virginia. Including statewide gubernatorial elections from these states

anything longer than a two-year wait for an election would be unreasonable, the states waited too long to hold an election on just four occasions.<sup>168</sup> Not bad at all given that there have been a total of 170 vacancies filled by election. But this measure countenances an unelected appointee serving a full third of a Senate term.

One year, on the other hand, is enough time to allow the electoral machinery of the states to function in a deliberative fashion, and it has some basis in the original understanding of the Constitution and the legislative history of the Seventeenth Amendment.<sup>169</sup> Some states currently hold statewide general elections every year, suggesting that the burden of holding a vacancy election within this interval would not be prohibitive.<sup>170</sup> Applying this standard, the election was delayed too long in 65 of the 170 vacancies filled by election. One could say, therefore, that in approximately 40% of cases, the states unreasonably delayed elections to fill vacancies and thus violated the democratic spirit of the Seventeenth Amendment.

#### *E. Comments on State Practice*

The second paragraph of the Seventeenth Amendment balances the people's right to popular elections with the states' right to equal suffrage in the Senate. The states have had little trouble making sure the latter goal is served: all 200 vacancies were filled (quickly on average), and in 9 of every 10 cases an executive appointee first filled the vacant seat. In addition, states generally hold the required popular elections—senators have been elected by popular vote every two years since 1913, and in 85% of all Senate vacancies, permanent replacements have been elected by popular vote.

Despite this success, reliance on the Amendment's appointment power has come at the cost of the primary goal of directly electing senators. A permanent appointee serves the entire unexpired term in one-sixth of all Senate vacancies, a facial violation of the Seventeenth Amendment. Furthermore, when states do hold elections, they often appoint a replacement for a substantial period before the election. The states'

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alone, there are three additional cases where a state violated this interpretation of the Amendment. *See id.* Nos. 74, 76, and 141. Moreover, there are countless other statewide votes at times other than in the November of an even-numbered year (constitutional amendments, recalls, initiatives, and other statewide offices), and these irregular elections are not accounted for in this analysis.

<sup>168</sup> *See id.* Nos. 59 (Obama, 743 days), 90 (Lodge, 757 days), 104 (Lundeen, 809 days), and 159 (Bailey, 747 days).

<sup>169</sup> *See supra* Part II.C.3.

<sup>170</sup> *E.g.*, N.J. STAT. ANN. § 19:2-3 (West 1999) (“The general election shall be held on the Tuesday next after the first Monday in November in *each year.*” (emphasis added)); VA. CODE ANN. §§ 24.2-208, -210, -214 (2011) (providing for some statewide elections every year).

ordering of priorities—filling vacancies quickly while sometimes delaying elections—is contrary to the purpose of the Seventeenth Amendment.<sup>171</sup>

A literature too vast to collect here identifies the struggle in different areas of federal constitutional law between the states and the federal government.<sup>172</sup> Historically, the states' systematic violations of the Constitution have prompted strong enforcement measures by the national government and the Supreme Court.<sup>173</sup> Moreover, routine violations of

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<sup>171</sup> Despite these comments, the Seventeenth Amendment's appointment power has not been all bad. There is an argument that the Seventeenth Amendment and its appointment provision played a role in opening the Senate to women. Nine of the first thirteen women to serve in the Senate arrived there as gubernatorial appointees. The first, Rebecca Felton, was appointed by a governor looking to score political points after he opposed the Nineteenth Amendment. That governor never expected Felton to take her Senate seat because the time remaining in the term was too short. He was wrong, however, and Felton was sworn in for twenty-four hours of service. John E. Talmadge, *The Seating of the First Woman in the United States Senate*, 10 GA. REV. 168, 172–73 (1956). There is also evidence that the Seventeenth Amendment helped to acclimate the general population to the idea of women serving in the Senate: the first woman to win a Senate election, Hattie Caraway, had been previously appointed, and two of the first women who won Senate elections did so in elections to fill very short vacancies. See App. B, No. 13. Scholars and historians have shown that the Progressive Movement and the struggle for the Nineteenth Amendment were essential to the women's suffrage movement and the appearance of women in elected office, but it appears that scholars have not examined the role that the Seventeenth Amendment played in this social evolution.

Women were not the only group to benefit from the Amendment. The first Hispanic senator, Octaviano Larrazolo, entered the Senate after winning an election to fill a vacancy, and the second, Dennis Chavez, joined as an appointee. See *id.* Nos. 150–51. The first Asian-American senator from the lower forty-eight states, S.I. Hayakawa, was also an appointee. See *id.* No. 18.

<sup>172</sup> For a starting point, see Frederic M. Bloom, *State Courts Unbound*, 93 CORNELL L. REV. 501 (2008) (surveying state court defiance of Supreme Court precedent), and Caitlin E. Borgmann, *Legislative Arrogance and Constitutional Accountability*, 79 S. CAL. L. REV. 753 (2006) (discussing states chilling certain constitutionally protected conduct by granting private rights of action against that conduct).

<sup>173</sup> Consider, for example, Congress's effort to remedy violations of the Fifteenth Amendment with the Voting Rights Act of 1965 (VRA), discussed in *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966). See also *Katzenbach v. Morgan*, 384 U.S. 641 (1966) (defining Congress's enforcement power under Section 5 of the Fourteenth Amendment). The VRA's preclearance requirement, 42 U.S.C. § 1973b (2006), is a particularly good example of Congress using broad means to deal with a history of constitutional defiance. Another example is the Supreme Court and federal government responses to the states' resistance to *Brown v. Board of Education*, 347 U.S. 483 (1954). See generally CHARLES J. OGLETREE, JR., *ALL DELIBERATE SPEED* (2004); see also *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971) (per curiam) (recognizing that district courts have “broad power” to require compliance with *Brown*); *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (per curiam) (rejecting state nullification of the Court's decision in *Brown* and requiring state officials to obey it).

The Supreme Court has taken steps in a number of other areas to remove the states' ability to infringe upon constitutional rights. *E.g.*, *Brown v. Plata*, 131 S. Ct. 1910 (2011) (ordering California to reduce its prison population to comply with the Eighth Amendment); *North Carolina v. Pearce*, 395 U.S. 711 (1969) (dealing with the problem of vindictive sentencing following successful appeals by imposing prophylactic requirements on state judges); *Mapp v. Ohio*, 367 U.S. 643, 657–58 (1961) (noting that its decision to apply the exclusionary rule to the states would discourage “disobedience to the Federal Constitution”); see also, *e.g.*, Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 2–3 (1975) (discussing and justifying “substantive, procedural, and remedial rules drawing their inspiration and authority from, but not

federal constitutional rights typically result in ample private efforts to enforce compliance.<sup>174</sup> In the context of the Seventeenth Amendment, however, there has been little response. There has been minimal effort from Congress or the courts to remedy violations of the Seventeenth Amendment, and there have been few lawsuits to enforce its terms. This is particularly concerning given the observation that facial noncompliance with the Seventeenth Amendment is on the rise. Indeed, in the spate of vacancies that have happened since the Obama election, the rate of facial noncompliance is even higher than in earlier times.<sup>175</sup>

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required by, various constitutional provisions”). In *Monroe v. Pape*, the Court remarked that Section 1983 provided a federal remedy for civil rights violations because “state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.” 365 U.S. 167, 180 (1961). The Court has also established categorical rules holding the death penalty unconstitutional for certain classes of crimes, *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (child rape); *Coker v. Georgia*, 433 U.S. 584 (1977) (rape), as well as certain classes of people, *Roper v. Simmons*, 543 U.S. 551 (2005) (juveniles); *Atkins v. Virginia*, 536 U.S. 304 (2002) (people of limited mental capacity).

Of course, not all state defiance of the Constitution provokes such an aggressive response. *E.g.*, *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 195–96 (1989) (holding that the Due Process Clause does not place an affirmative obligation on states). Indeed, the doctrine of harmless error acknowledges that some constitutional errors should be tolerated. *See generally* Harry T. Edwards, *To Err Is Human, but Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. REV. 1167 (1995). *But see* *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148–50 (2006) (discussing and cataloging structural errors).

<sup>174</sup> Consider the huge amount of Second Amendment litigation following *District of Columbia v. Heller*, 554 U.S. 570 (2008), *see* *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010); *Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011); *United States v. Skoien*, 614 F.3d 638 (7th Cir. 2010) (en banc), or the high frequency of Eighth Amendment claims by inmates or Takings Clause litigation by property owners.

<sup>175</sup> There have been eight vacancies since the 2008 election. Five states held elections to fill these vacancies; three did not. Illinois held an election, but only in response to a federal court order. Delaware held an election after Senator Biden resigned to become Vice President, and New York did the same to replace Hillary Clinton, who became Secretary of State. The people of Delaware and New York waited nearly two years for elected replacements. *See* App. B, Nos. 34 (Biden vacancy, 669 days) and 157 (Clinton vacancy, 650 days). The two other states to hold elections to fill vacancies were Massachusetts and West Virginia. When Senator Kennedy died in August 2009, Massachusetts law required the governor to schedule an election immediately, MASS. ANN. LAWS ch. 54, § 140(a)–(c) (LexisNexis 2006 & Supp. 2013), and Governor Patrick chose a date in January 2010. At the same time, the Massachusetts legislature passed a law permitting the governor to make a temporary appointment. 2009 Mass. Acts 715 (codified at MASS. ANN. LAWS ch. 54, § 140(f)). The final vacancy in the compliant group occurred when Senator Byrd died, leaving the West Virginia seat vacant. The rollercoaster effort to comply with the Seventeenth Amendment in that case is described above. *See supra* notes 64–67 and accompanying text.

The noncompliant states are Florida, Colorado, and Nevada. Senator Martinez of Florida announced his retirement in August 2009. Though Florida law provided that “the Governor shall issue a writ of election to fill such vacancy at the next general election,” FLA. STAT. ANN. § 100.161 (West 2008), Florida never held an election to fill the vacancy. Instead, an appointee served the remainder of the unexpired term. Colorado similarly appointed a replacement to serve in Senator Salazar’s place when he joined the Obama Administration but never held a vacancy election. Nevada was also represented by an

Before moving on, it is necessary to address one potential qualification of the foregoing analysis. Recall that states wait an average of four months for a new senator when they hold an election without an interim appointment. If a senator is first appointed, the seat is filled almost immediately, though the people wait twelve months on average for elected representation. Critics of the emphasis on elections may ask, therefore, whether it is better to be without *any* representation for four months or without *elected* representation for twelve. This question pits sovereign equality in the Senate against the popular election of senators. But, happily, the states need not choose between these values. As stressed throughout, the Seventeenth Amendment is designed to serve *both* values. The timing of elections is a matter of state law, and there is no reason a state could not choose to empower the governor to make a temporary appointment and require, in all circumstances, an election within a reasonable period.

#### IV. STATE LAW AND CORRECTIVE MEASURES

State law has produced the record of state practice described above, but it also represents an important target for reform. While some members of Congress and commentators have called for revision of the Seventeenth Amendment itself,<sup>176</sup> this is an ill-advised course of action. The Seventeenth Amendment represents a carefully designed mechanism for filling vacancies, which guarantees popular elections as a primary matter and also provides for temporary measures that ensure equal state representation in the Senate. That the states have abused the appointment power and delayed elections is no reason to abandon the well-conceived constitutional design. On the contrary, the problem is best solved by changing state behavior through state law.

It is true that the Elections Clause empowers the federal government to intervene in the regulation of elections, and it may be that federal intervention becomes necessary in this case. But there are reasons to give states the first opportunity to remedy this problem of their own making. For one thing, political will (or lack thereof) supports a state-level response. Whatever coalition of forces would oppose reform proposals in the state legislatures, in Congress these interests would be augmented by those members who oppose increased federal intervention generally or federal

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appointed senator who served the balance of the term as an appointee before being elected to the next Congress.

<sup>176</sup> See, e.g., S.J. Res. 7, 111th Cong. (2009) (proposed constitutional amendment eliminating appointments); *A Constitutional Amendment Concerning Senate Vacancies: Joint Hearing on S.J. Res. 7 & H.R.J. Res. 21 Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary & the Subcomm. on the Constitution, Civil Rights & Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. 25 (2009) (debating these issues); Shedd, *supra* note 7 (proposing a constitutional amendment); REPEAL THE 17TH AMENDMENT, <http://repealthe17thamendment.blogspot.com> (last visited May 15, 2013).

intervention in elections specifically. Furthermore, as described above, one aspect of the Seventeenth Amendment's bargain was the decision to leave the states as the primary regulators of senatorial elections.<sup>177</sup> Although this division of labor is not absolute (or wholly justified), if one were inclined to pick a fight about state control of national elections, it would not be on this issue, which tends to affect states individually and infrequently. Instead, in keeping with the approach that the framers of the Elections Clause and the Seventeenth Amendment imagined, advocates for change in the practice of filling vacancies should permit the states to address this problem in the first instance. Unless and until the states are presented with the problem directly and decline to act, the state-level fix should not be rejected out of hand. While state laws governing vacancy elections are responsible for the lapses in state practice, they also represent the first option for reform.

This Part surveys the landscape of current state laws and the ways in which they affect state practice under the Seventeenth Amendment. Based on these observations, model legislation is proposed that the states could adopt to ensure that they comply with the Constitution whenever vacancies arise in the Senate.

#### A. *The State of State Law*

To understand the problem with state laws and to propose viable solutions, one first should consider the laws of each state that govern elections to fill senatorial vacancies—both as they stand today<sup>178</sup> and as

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<sup>177</sup> See *supra* Part I.

<sup>178</sup> ALA. CODE §§ 36-9-7 to -8 (LexisNexis 2001); ALASKA STAT. §§ 15.40.140–165 (2010); ARIZ. REV. STAT. ANN. § 16-222 (2006 & Supp. 2012); ARK. CODE ANN. § 7-8-102 (2011); CAL. ELEC. CODE §§ 10700, 10701, 10703, 10720 (West 2003 & Supp. 2012); COLO. REV. STAT. § 1-12-201 (2012); CONN. GEN. STAT. ANN. § 9-211 (West 2009); DEL. CODE ANN. tit. 15, § 7321 (2007); FLA. STAT. ANN. § 100.161; GA. CODE ANN. § 21-2-542 (West 2011); HAW. REV. STAT. ANN. § 17-1 (LexisNexis 2012); IDAHO CODE ANN. § 59-910 (2012); 10 ILL. COMP. STAT. ANN. § 5/25-8 (LexisNexis 2012); IND. CODE ANN. §§ 3-13-3-1, -8-3 (West 2006); IOWA CODE ANN. §§ 69.8, .11, .12, .13 (West 2012); KAN. STAT. ANN. § 25-318 (2000); KY. REV. STAT. ANN. § 63.200 (LexisNexis 2004); LA. REV. STAT. ANN. § 18:1278 (2012); ME. REV. STAT. ANN. tit. 21-A, § 391 (2008); MD. CODE ANN., ELEC. LAW §§ 8-401, -602 (LexisNexis 2010); MASS. ANN. LAWS ch. 54, § 140; MICH. COMP. LAWS ANN. § 168.105 (West 2008); MINN. STAT. ANN. §§ 204D.22, .28 (West 2009 & Supp. 2013); MISS. CODE ANN. § 23-15-855 (2007); MO. ANN. STAT. § 105.040 (West 1997); MONT. CODE ANN. § 13-25-202 (2011); NEB. REV. STAT. § 32-565 (2008); NEV. REV. STAT. ANN. § 304.030 (LexisNexis 2008); N.H. REV. STAT. ANN. § 661:5 (LexisNexis 2007); N.J. STAT. ANN. § 19:3-26 (West 1999 & Supp. 2012); N.M. STAT. ANN. § 1-15-14 (2011); N.Y. PUB. OFF. LAW § 42(4-a) (McKinney 2008 & Supp. 2013); N.C. GEN. STAT. § 163-12 (2011); N.D. CENT. CODE § 16.1-13-08 (2009); OHIO REV. CODE ANN. § 3521.02 (West 2007); OKLA. STAT. ANN. tit. 26, § 12-101 (West 1997 & Supp. 2013); OR. REV. STAT. § 188.120 (2011); 25 PA. CONS. STAT. ANN. § 2776 (West 2007); R.I. GEN. LAWS § 17-4-9 (2003 & Supp. 2012); S.C. CODE ANN. § 7-19-20 (1977); S.D. CODIFIED LAWS §§ 12-11-1, -4 to -7 (2004); TENN. CODE ANN. § 2-16-101 (2003); TEX. ELEC. CODE ANN. §§ 201.051, 204.002, .003, .005 (West 2010 & Supp. 2012); UTAH CODE ANN. § 20A-1-502 (LexisNexis 2010); VT. STAT. ANN. tit. 17, §§ 2621–2622 (2002); VA. CODE ANN. § 24.2-207 (2011); WASH. REV. CODE ANN.

they were written just after the Seventeenth Amendment was adopted.<sup>179</sup> The first step is to identify those features of state law that affect state practice.

It should come as no surprise that state legislatures have empowered governors to appoint replacement senators. Today, about forty-four states allow appointments whenever a vacancy happens.<sup>180</sup> Two states—Oklahoma and Connecticut—allow appointments in very limited circumstances.<sup>181</sup> And four reject the appointment power altogether.<sup>182</sup>

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§§ 29A.28.030, .041 (West 2005 & Supp. 2013); W. VA. CODE ANN. § 3-10-3 (LexisNexis 2011); WIS. STAT. ANN. § 8.50 (West 2004 & Supp. 2012); *id.* § 17.18 (West 2003); WYO. STAT. ANN. § 22-18-111 (2011).

<sup>179</sup> Act No. 410, 1915 Ala. Acts 364; ARIZ. REV. STAT. § 12-2870 (1913); Act of Mar. 28, 1917, No. 402, 1917 Ark. Acts 1869; Act of May 20, 1913, ch. 156, 1913 Cal. Stat. 237, 237–38; Act of May 2, 1913, ch. 79, 1913 Colo. Sess. Laws 267; Act of June 6, 1913, ch. 219, 1913 Conn. Acts 1839, 1839–43; DEL. REV. STAT. § 1890 (1915); Act of May 26, 1913, ch. 6471, 1913 Fla. Laws 277, 277–78; Act of Aug. 16, 1913, No. 168, 1913 Ga. Laws 135, 135–36; Act of Mar. 13, 1917, ch. 27, 1917 Idaho Sess. Laws 68, 68–69; Act of 1872—Election of United States Senator, § 1, 1913 Ill. Laws 307, 307–08; Act of Feb. 9, 1915, ch. 4, 1915 Ind. Acts 13, 13–14; Act of Apr. 25, 1917, ch. 401, 1917 Iowa Acts 430; Act of Mar. 2, 1927, ch. 204, 1927 Kan. Sess. Laws 258; Act of Mar. 17, 1914, ch. 25, 1914 Ky. Acts 98, 98–99; Act of July 9, 1914, Act No. 241, 1914 La. Acts 471, 471–72; Act of Mar. 10, 1915, ch. 55, 1915 Me. Laws 35, 35–36; Act of Apr. 16, 1914, ch. 761, 1914 Md. Laws 1337, 1337–39; Act of June 20, 1913, ch. 835, pt. IV, 1913 Mass. Acts 1059, 1059–60; Act of May 7, 1915, No. 156, 1915 Mich. Pub. Acts 261–62; Act of Apr. 25, 1913, ch. 520, 1913 Minn. Laws 756, 756–58; Act of Feb. 3, 1914, ch. 148, 1914 Miss. Laws 192, 192–93; MO. REV. STAT. § 4787 (1919); Act of Mar. 8, 1915, ch. 126, 1915 Mont. Laws 281, 281–82; Act of Apr. 25, 1917, ch. 39, 1917 Neb. Laws 117, 117–18; Act of Mar. 6, 1915, ch. 65, 1915 Nev. Stat. 83, 83–84; Act of Mar. 3, 1915, ch. 29, 1915 N.H. Laws 32; Act of May 5, 1920, ch. 349, § 26, 1920 N.J. Laws 627; Act of Mar. 8, 1915, ch. 27, 1915 N.M. Laws 39; Act of Dec. 17, 1913, ch. 822, 1913 N.Y. Laws 2418, 2418–19; Act of Mar. 11, 1913, ch. 114, 1913 N.C. Sess. Laws 206, 206–07; Act of Feb. 16, 1927, ch. 138, 1927 N.D. Laws 175, 175–76; Act of Feb. 14, 1914, No. 3, 1914 Ohio Laws 8, 8–12; Act of Feb. 24, 1915, ch. 49, 1915 Okla. Sess. Laws 57; Act of Feb. 9, 1915, ch. 48, 1915 Or. Laws 59; Act of July 24, 1913, No. 454, 1913 Pa. Laws 995, 995–96; Act of Apr. 24, 1914, ch. 1048, 1914 R.I. Pub. Laws 65, 65–68; Act of Mar. 4, 1914, ch. 337, 1914 S.C. Acts 592, 592–93; Act of Feb. 15, 1915, ch. 182, 1915 S.D. Sess. Laws 367; Act of Sept. 23, 1913, ch. 8, No. 196, 1913 Tenn. Pub. Acts 396, 396–98; Act of Aug. 22, 1913, ch. 39, 1913 Tex. Gen. Laws 101, 101–11; Act of Mar. 15, 1915, ch. 48, 1915 Utah Laws 54, 54–55; Act of Feb. 4, 1915, No. 7, 1915 Vt. Acts & Resolves 70, 70–72; Act of Mar. 20, 1914, ch. 150, 1914 Va. Acts 252; Act of Mar. 15, 1915, ch. 60, 1915 Wash. Sess. Laws 232; Act of May 3, 1921, ch. 101, 1921 W. Va. Acts 246, 246–47; Act of July 18, 1913, ch. 634, 1913 Wis. Sess. Laws 825, 825–29; Act of Feb. 26, 1913, ch. 91, 1913 Wyo. Sess. Laws 100.

<sup>180</sup> Precision on this issue is complicated by the ambiguity in the law of South Dakota, which likely provides unconstrained appointment power, and Alaska, which likely does not permit appointments. See *State v. Trust of the People*, 113 P.3d 613, 614 n.1 (Alaska 2005). Among the forty-four states, four limit the identity of the appointee: Hawaii, Utah, and Wyoming say that the governor must choose from a list of nominees, HAW. REV. STAT. ANN. § 17-1; UTAH CODE ANN. § 20A-1-502; WYO. STAT. ANN. § 22-18-111, while the Governor of Arizona must select an appointee of the same political party as the senator creating the vacancy, ARIZ. REV. STAT. ANN. § 16-222(C).

<sup>181</sup> Both states only allow appointments during the short term. In addition, Oklahoma law requires the governor to appoint the senator-elect, OKLA. STAT. ANN. tit. 26, § 12-101, and Connecticut requires the governor's appointee to be approved by two-thirds of each house of the state's general assembly, CONN. GEN. STAT. ANN. § 9-211(a)(2).

The data suggest that the appointment power is linked with shortcomings in state practice, and by this logic nearly every state may risk impairing the people's right to elect replacement senators. But banning the appointment power is not the answer. For one thing, temporary appointments avoid lapses in representation in the Senate, and the harm of long lapses is not an insignificant concern.<sup>183</sup> Moreover, the mere possibility of an appointment is not the issue; the problem arises when the appointment power in some way subverts the election required by the Amendment. Where the appointment power is paired with a speedy election, the text and purpose of the Seventeenth Amendment are satisfied.

Unfortunately, a remarkable number of state laws do not pair the appointment power with the required election. Some states permit permanent appointments and thus pose a risk of facial noncompliance. The laws of thirteen states actually require permanent appointments under certain conditions; when these conditions are met, facial noncompliance results.<sup>184</sup> In this category, some state laws deserve particular scrutiny for

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<sup>182</sup> Oregon, Rhode Island, and Wisconsin clearly prohibit appointments, and Alaska, as mentioned, appears to have repealed its law governing appointments, though the issue is not resolved. *See* OR. REV. STAT. § 188.120; R.I. GEN. LAWS § 17-4-9; WIS. STAT. ANN. §§ 8.50, 17.18; *Trust the People*, 113 P.3d at 614 n.1.

<sup>183</sup> In Connecticut and Wisconsin, for example, voters may wait almost six months for an election to fill a vacancy, during which time they are not represented in the Senate. *See* CONN. GEN. STAT. ANN. § 9-211; WIS. STAT. ANN. §§ 8.50, 17.18.

<sup>184</sup> The states that expressly provide for permanent appointments are: California, CAL. ELEC. CODE § 10720 (West 2003) (which seems to permit permanent appointments if a vacancy happens after the election for the next term); Connecticut, CONN. GEN. STAT. ANN. § 9-211 (if a vacancy happens fewer than twenty-two days before the election for the next term); Louisiana, LA. REV. STAT. ANN. § 18:1278 (2012) (if an appointment would last for less than one year); Maryland, MD. CODE ANN., ELEC. LAW, § 8-401 (LexisNexis 2010) (if a vacancy happens fewer than twenty-one days before the candidacy deadline for the second-to-last election in the term, which allows permanent appointments of up to two years and eight months); Mississippi, MISS. CODE ANN. § 23-15-855 (2007) (which seems to permit permanent appointments of up to one year); Nebraska, NEB. REV. STAT. § 32-565 (2008) (if a vacancy happens fewer than sixty days before the election for the next term of the seat); New York, N.Y. PUB. OFF. LAW § 42(4-a) (McKinney 2008 & Supp. 2013) (if a vacancy happens fewer than sixty days before the primary in the second-to-last cycle in the term, which would allow permanent appointments of up to two years and six months); North Dakota, N.D. CENT. CODE § 16.1-13-08 (2009) (if a vacancy happens fewer than ninety days before the second-to-last election in the term, which would allow permanent appointments up to two years and five months); Ohio, OHIO REV. CODE ANN. § 3521.02 (West 2007) (if a vacancy happens fewer than 180 days before the second-to-last election in the term, which would allow permanent appointments of up to 2 years and 8 months); South Carolina, S.C. CODE ANN. § 7-19-20 (1977) (if a vacancy happens fewer than 100 days before the second-to-last election in the term, which would allow permanent appointments of up to 2 years, 5 months, and 10 days); South Dakota, S.D. CODIFIED LAWS §§ 12-11-4 to -7 (2004) (which seems to permit permanent appointments if a vacancy happens after the second-to-last election in the term of the seat, which would allow permanent appointments of up to two years and two months); West Virginia, W. VA. CODE ANN. § 3-10-3 (LexisNexis 2011) (if appointment would last less than two years and six months); Wyoming, WYO. STAT. ANN. § 22-18-111 (2011) (if a vacancy happens after the second-to-last election in the term, which would allow permanent appointments of up to two years and two months). There is some ambiguity in Arkansas law, but its state constitution appears to contemplate permanent appointments.

permitting exceptionally long permanent appointments: Maryland, New York, North Dakota, Ohio, South Carolina, South Dakota, West Virginia, and Wyoming all have statutes that may mandate permanent appointments longer than two years. In addition, more than twenty other states have statutes that create permanent appointments by implication.<sup>185</sup> Taken together, more than two-thirds of states have statutes in force that require or allow governors to appoint permanent replacements and facially defy the Seventeenth Amendment. Moreover, the situation has gotten worse over time: it appears that there are more state laws today that allow for facial noncompliance than there were in 1913.<sup>186</sup>

Also problematic are those state laws that require elections but still permit appointees to serve excessively long terms, which result in long delays before elections to fill vacancies. A commonly used vacancy-filling rule sets the election by referring to the next general election. If a state fills a vacancy at the next general election, even without any additional delay, the people of that state might be left without elected representation for up to two years. The Obama vacancy is an example. Under Illinois law, vacancies are to be filled at the next general election.<sup>187</sup> Obama resigned shortly after the 2008 election, which meant that the law required a vacancy election during the 2010 general election—two years later. And in many states, the outcome may be worse than a two-year wait.<sup>188</sup>

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ARK. CONST. amend. 29, § 4. And Alaska law provides for permanent appointments, but a later enactment probably repealed that provision. *See Trust the People*, 113 P.3d at 614 n.1.

<sup>185</sup> In Alabama, Arizona, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Maine, Michigan, Montana, Nevada, New Hampshire, New Mexico, North Carolina, Pennsylvania, Tennessee, Utah, and Virginia, the law defines the time at which a vacancy-filling election should take place but leaves a gap during which no election will occur. Arkansas, Missouri, New Jersey, and Wisconsin also may fall into this category.

Commonly, these states provide for a vacancy-filling election at the next general election or at the next general election after a specified interval. So if there is no general election following the vacancy (or if the last general election in the term falls within the specified interval in the statute), the appointment will be permanent. For example, Michigan law provides that the appointee “shall hold office from the time of his appointment and qualification until the first day of December following the next general November election which occurs more than 120 days after such vacancy happens.” MICH. COMP. LAWS ANN. § 168.105 (West 2008). So, if a vacancy happened 119 days before the general election in the sixth year of the term, the law would not provide for an election to fill the vacancy, and the people of Michigan could be without elected representation for six months.

<sup>186</sup> South Carolina law is a good example. The current law allows permanent appointees to fill vacancies that occur within 100 days of the second-to-last general election of the term or for up to two-and-one-half years. S.C. CODE ANN. § 7-19-20. After ratification, South Carolina law required a special election to be held within 90 days. Act of Mar. 4, 1914, ch. 337, 1914 S.C. Acts 592, 592–93.

<sup>187</sup> *See* 10 ILL. COMP. STAT. ANN. § 5/25-8 (LexisNexis 2012). Illinois not only defied the Seventeenth Amendment in connection with the Obama vacancy, it nearly violated its own laws by failing to hold any election until the federal courts stepped in.

<sup>188</sup> When a vacancy happens in Maine, for example, state law provides that candidates must participate in the next primary election that is more than sixty days after the vacancy is created, filling the vacancy at the subsequent general election. ME. REV. STAT. ANN. tit. 21-A, § 391 (2008). Maine’s

### B. Model Legislation

The foregoing survey demonstrates that state laws across the United States are not always well suited to the requirements of the Seventeenth Amendment and they are getting worse. Some state statutes, however, do a fairly good job effectuating the Amendment's language and purpose, and these laws can help to construct model legislation for all states. To improve compliance with the Seventeenth Amendment, states should adopt the following model statute for filling Senate vacancies:

#### **An Act for Filling Vacancies in the U.S. Senate**

§ 1. When a vacancy occurs in the office of United States Senator, the governor may make a temporary appointment to fill the vacancy, until the people fill the vacancy by election.

§ 2. When a vacancy occurs in the office of United States Senator, the governor is empowered to issue a writ of election calling an election to fill the vacancy. The writ will specify the day on which the election will occur and a day for a primary election or nominating convention. The election to fill the vacancy will be held not more than four months from the date on which the vacancy occurs, except that if the vacancy occurs within one year of a general election, the election to fill the vacancy may be held on the same day as the general election.

§ 3. An individual who is elected to the office of United States Senator for a regular six-year term will succeed to the office for the remainder of any unexpired term when the office is vacant or is filled by a gubernatorial appointee following certification of the election results.

The Seventeenth Amendment requires an election to fill every vacancy and embodies a strong preference for elected representation, while recognizing that the states should have the option of maintaining their equal representation in the Senate. The proposed legislation serves these goals: it does not permit permanent appointments; it ensures that the length of time between the creation of a vacancy and the election to fill it remains short,<sup>189</sup>

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primaries usually take place on the second Tuesday in June, *id.* § 339, which means a vacancy created in April or May of an election year will not be filled until the November election thirty months later.

An additional concern is the apparent trend toward laws permitting longer delays. Consider Delaware, where the current law fills the vacancy at the next general election, permitting a delay of almost two years. DEL. CODE ANN. tit. 15, § 7321 (2007). The Delaware law adopted after passage of the Seventeenth Amendment, however, provided for a vacancy to be filled at the next general election, unless that would create a lapse of more than one year, in which case the governor was required to call a special election. DEL. REV. STAT. § 1890 (1915). Similarly, current Arizona law fills vacancies at the next general election, ARIZ. REV. STAT. ANN. § 16-222(A) (2006 & Supp. 2012), while after ratification the governor was empowered to call a special election if the gap would be longer than six months, ARIZ. REV. STAT. § 12-2870 (1913).

<sup>189</sup> The proposed legislation uses four months and one year as the maximum times before an election but leaves some discretion with the governor to set the exact date. Some states have taken similar approaches. In Texas and Rhode Island, unless there is a general election in the near future, the

and it allows the state to maintain its equal voice in the Senate through temporary appointments. In addition, the proposed legislation minimizes concern about the cost of or turnout for a vacancy election when there is an upcoming general election; it permits the state in this circumstance to put off the vacancy election for a slightly longer period so the state does not have to hold two elections in close proximity.<sup>190</sup>

The model statute starts from Vermont's law, which provides a decent approach to filling vacancies.<sup>191</sup> The major difference is the third paragraph. When a vacancy happens so close to a general election that the state cannot add the vacancy election to the ballot, or when the vacancy happens after that election, the only option under Vermont law would be to hold another election right away (during the short term).<sup>192</sup> But the costs of holding a quick election immediately after a statewide general election may outweigh the benefits of electing a replacement senator for the last few days of the term. Moreover, in these cases, the governor might be tempted to let the term expire without holding an election.<sup>193</sup> To solve this problem, a few states deem by law that the winner of the regular election is the winner of

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governor must set an election for as early a date as practicable under state law. R.I. GEN. LAWS § 17-4-9 (2003 & Supp. 2012); TEX. ELEC. CODE ANN. §§ 201.051, 204.002, .003, .005 (West 2010 & Supp. 2012). In New Jersey, the governor has the power to pick a date earlier than called for in the law. N.J. STAT. ANN. § 19:3-26 (West 1999 & Supp. 2012).

<sup>190</sup> Exactly where to draw the line between having a quick election and waiting for an already scheduled general election is a matter for the state political process. This statute draws that line at four months. Among the states providing, under some circumstances, a special election for Senate in four months or less are ALASKA STAT. § 15.40.140 (2010) (between sixty and ninety days); CAL. ELEC. CODE § 10703 (West Supp. 2012) (between 112 and 126 days); MISS. CODE ANN. § 23-15-855 (2007) (within ninety days); VT. STAT. ANN. tit. 17, § 2621 (2002) (within three months); and WASH. REV. CODE ANN. § 29A.28.041 (West 2005 & Supp. 2013) (within ninety days).

<sup>191</sup> See VT. STAT. ANN. tit. 17, § 2621 ("If a vacancy occurs in the office of United States senator or United States representative, the governor shall call a special election to fill the vacancy. His proclamation shall specify a day for the special election and a day for a special primary, pursuant to section 2352 of this title. The special election shall be held not more than three months from the date the vacancy occurs, except that if the vacancy occurs within six months of a general election, the special election may be held the same day as the general election."); *id.* § 2622 ("The governor may make an interim appointment to fill a vacancy in the office of United States senator, pending the filling of the vacancy by special election."). Washington takes a similar approach, though its timeline is slightly more complex because it takes filing deadlines into account. WASH. REV. CODE ANN. §§ 29A.28.030, .041. The model statute increases the time limits from the Vermont model, but it would not prevent governors from exercising their discretion to call quicker elections when practicable. See *infra* note 196.

<sup>192</sup> See, e.g., App. B, No. 114 (candidate Carnahan dies after ballots were printed but before the election), and Nos. 129 & 130 (Senator Pittman dies after being reelected but before the new term began).

<sup>193</sup> Although Vermont's law says that the governor *shall* call an election, it would be quite difficult to successfully prosecute a lawsuit requiring her to issue the writ of election during this short time, especially since she would only be in technical violation of the law after the three-month period—by which time the relevant term would be over.

the vacancy election.<sup>194</sup> The accession of a recently elected senator seems like a reasonable substitute for a slapdash election in the waning days of an unexpired term, and it is an improvement over leaving the seat empty during a period (though admittedly short) when business can be done in the Senate.<sup>195</sup> The succession of the regularly elected Senate in the third paragraph of the model legislation responds to these concerns.

By adopting this legislation, states would take a step toward improving compliance with the Seventeenth Amendment.<sup>196</sup> They would provide their constituents with more democratic representation more of the time, and they would not pay large costs or sacrifice their representation in the Senate to do so. The change is simple to implement and easy to administer, and it is by all accounts a change that is within reach.

### CONCLUSION

The reform movement that culminated in the Seventeenth Amendment to the U.S. Constitution rallied against shortcomings in the process of legislative selection of senators. These problems heralded a great redesign of the American republic in the early twentieth century. The reform movement identified popular elections as the remedy, and thus the constitutional amendment promoted that value over all others. This value is embodied in the first paragraph of the Seventeenth Amendment, which calls for each senator to be elected directly every six years. At the same time, the Senate was to retain its character as a body in which states are represented as sovereign equals. The reformers took care to preserve this premise, and thus the second paragraph of the Seventeenth Amendment

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<sup>194</sup> In Minnesota and Massachusetts, if a vacancy happens shortly before the regular election for the next term, the regular-election winner is deemed by law to be the winner of the election to fill the vacancy. MINN. STAT. ANN. § 204D.28, subdiv. 12 (West 2009 & Supp. 2013) (applying if a seat is vacant or filled by an appointee at the time of the election); MASS. ANN. LAWS ch. 54, § 140(d) (LexisNexis 2006 & Supp. 2013) (applying if a seat is vacant at the time of the election). In Iowa, the same applies to vacancies created just before a new election or between the election and the start of the new term. IOWA CODE ANN. § 69.12(2) (West 2012). Oklahoma reaches the same result in a different way: the governor's limited appointment power only applies to senators-elect during the short term. OKLA. STAT. ANN. tit. 26, § 12-101(B) (West 1997 & Supp. 2013).

<sup>195</sup> If the senator who created the vacancy in the short term is also the senator-elect, this model statute requires a special election to fill the seat for the new term. *See* App. B, Nos. 129 & 130 (Pittman).

<sup>196</sup> Even if states do not pass new laws, states and state actors can improve compliance with the Seventeenth Amendment incrementally. One obvious example would be for governors to exercise their discretion, where present, to call earlier elections. *See supra* note 189. Another opportunity presents itself in the case of senators contemplating resignation. In these circumstances, the senator and the governor might agree informally that the senator will resign, only to be reappointed immediately by the governor pending the outcome of the vacancy election. Under the Seventeenth Amendment, the governor may not issue a writ of election until a vacancy happens, so the formal resignation is necessary to start the state's electoral machinery. But at the same time, by reappointing the resigning senator, the people of the state would be represented continuously by winners of Senate elections.

applies the broad goal of popular elections to vacancies in the Senate and also supplies a way that equal suffrage can be maintained. Every vacancy must be filled by election, but the governor of the state, if empowered by the state legislature, may make temporary appointments until the election can be held. To make sure that the second paragraph functioned properly, the framers of the Seventeenth Amendment reaffirmed that regulation of congressional elections should be divided between the states in the first instance and the national government, and they divided control over vacancy elections and temporary appointments between the branches of the state governments.

For nearly 100 years since the Seventeenth Amendment became the law of the land there has been considerable state defiance of its careful design. One of every six Senate vacancies is filled by an appointee who serves the remainder of an unexpired term in facial violation of the Seventeenth Amendment. In an additional third of all Senate vacancies, the states waited more than a year to put an elected replacement in office, and in so doing allowed appointees without direct democratic approval to serve for extended periods in lieu of popularly elected replacements. The people have been denied 200 years' worth of elected representation so far, and the practice of state defiance has grown more common over time. This pattern of state behavior is in direct contradiction to the core reasons that the Seventeenth Amendment became part of the Constitution in the first place.

The overall effect of state defiance is significant, but the individual harms have been more diffuse. A few months' delay before an election here or an appointee who serves the unexpired term there at most provokes attention in isolated cases, but it provides little incentive for the states to comply with the federal Constitution. The Obama vacancy has brought renewed attention to these issues. Federal wire taps, cronyism, and "fucking golden" opportunities became the "Treasons of the Senate" for the twenty-first century. And these new watchwords may provoke a new push for reform.

After 1913, the people were supposed to elect senators in all circumstances. This goal has not been realized. The solution is not to alter the Seventeenth Amendment but to improve state compliance with its terms. The states' duty to direct congressional elections carries with it a responsibility to ensure that any alleged infringement of the right of the people to vote is carefully and meticulously scrutinized. The states must meet their burden and make good on the 100-year-old promise that each senator is "elected by the people."

## APPENDIX A

## FINDINGS

Appendix A presents findings based on data collected on every vacancy in the Senate from the adoption of the Seventeenth Amendment on May 31, 1913, to November 6, 2012. For purposes of analyzing the data, we have coded each vacancy with the following three variables in mind: (1) the manner in which the senator who creates the vacancy was elected to that seat in the first place, (2) the event causing the vacancy, and (3) the method by which the vacancy is filled. For each coding category we have calculated the total number of vacancies, the portion of the vacancy during which the Senate seat is left empty, the portion filled by an appointee or an elected replacement, and the time during the vacancy that the people were without elected representation.<sup>197</sup>

*1. How the Vacating Senator Was Elected.*—A senator who causes a vacancy in the Senate will have been elected to the term in question in one of three ways. The senator may have won the seat in a regular election; he or she could have been elected to the term to fill a prior vacancy during that term; or he or she may never have been seated for the term in which the vacancy is created. The last of these categories consists of people who are elected and then die before taking office, as well as those whom the Senate refuses to seat after they have presented their credentials. We represent the three options as follows:

- A Senator creating the vacancy was elected in a regular election for his or her seat
- B Senator creating the vacancy was elected to the seat in an election to fill an earlier vacancy
- C Senator creating the vacancy was never seated for the term in which the vacancy occurs

*2. How the Vacancy Was Created.*—The second coding category identifies the cause of the vacancy. A sitting senator can be removed from office; the Senate might refuse to qualify any senator for a seat; a sitting senator may die; or resign. It is important in cases of death or resignation to note whether the senator left the Senate before the regular election for the next term of his or her seat or afterwards (in the latter case the senator

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<sup>197</sup> We provide a more detailed explanation of how we calculate periods of time, information on individual vacancies, and further discussion of our dataset in Appendix B. See *The Meaning of the Seventeenth Amendment and a Century of State Defiance: Appendices*, NW. U. L. REV., <http://www.law.northwestern.edu/lawreview/v107/n3/1181/LR107n3CloptonAppendices.pdf>, SOC. SCI. RES. NETWORK, <http://ssrn.com/abstract=2280361>.

creates a “technical vacancy” during a lame-duck session of Congress). We categorize each vacancy in one of the following six categories:

- U Sitting senator removed from office<sup>198</sup>
- V Senate refuses to certify any senator following an election
- W Sitting senator dies before the regular election for the next term
- X Sitting senator resigns before the regular election for the next term
- Y Sitting senator dies after the regular election for the next term
- Z Sitting senator resigns after the regular election for the next term

3. *How the Vacancy Was Filled.*—Perhaps the most important coding category for our study is the manner in which the vacancy is filled. Here we identify seven different categories. The first consists of cases where a person is appointed to fill the remaining days of a term after the regular election for the next term of that seat. In almost all cases, this person is a senator-elect taking his or her seat just before the start of the term for which he or she was elected. The second and third categories cover situations in which the state executive temporarily appoints an interim senator to a vacant seat and then the state holds an election to select a replacement senator to fill the vacancy. The difference between the second and third categories is whether the election to fill the vacancy takes place at the same time as the regular election for the next term of the seat in question or at some other time. The fourth category represents those cases where the state executive appoints a permanent replacement to fill the vacancy and the state never holds an election. As we discuss in our Article, this category of cases represents the most blatant noncompliance with the terms of the Seventeenth Amendment. The fifth and sixth categories consist of cases where the state holds an election to fill the vacancy without any appointee serving before the elected replacement. Like the second and third categories, the difference between the fifth and sixth categories relates to when the election to fill the vacancy is held. Finally, the seventh category covers instances where the state leaves the vacancy in the Senate unfilled through the end of the term. We code these possibilities:

- 1 The state executive appoints a replacement senator to fill the remainder of a term after the regular election for the next term
- 2 The state executive temporarily appoints a replacement senator and then the state holds an election to fill the vacancy at some time other than the regularly scheduled election for the next term of the seat in question

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<sup>198</sup> Since the ratification of the Seventeenth Amendment, the Senate has not removed any senators from office. For a complete list of expulsions and censures in the history of the Senate, see *Expulsion and Censure*, U.S. SENATE, [http://www.senate.gov/artandhistory/history/common/briefing/Expulsion\\_Censure.htm](http://www.senate.gov/artandhistory/history/common/briefing/Expulsion_Censure.htm) (last visited May 15, 2013).

- 3 The state executive temporarily appoints a replacement senator and then the state holds an election to fill the vacancy at the same time as the regularly scheduled election for the next term of the seat in question
- 4 The state executive permanently appoints a senator to fill the vacancy and the state never holds an election
- 5 The state executive does not make an appointment and the state holds an election to fill the vacancy at some time other than the regularly scheduled election for the next term of the seat in question
- 6 The state executive does not make an appointment and the state holds an election to fill the vacancy at the same time as the regularly scheduled election for the next term of the seat in question
- 7 The state leaves the vacancy unfilled through the end of the term

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	Total Vacancies	Total Time Seat Left Empty at Start of Vacancy		Average Time Seat Left Empty at Start of Vacancy	
	#	Days	Y/M/D	Days	Y/M/D
All	244	5272	14 yrs., 5 mos., 12 days	22	22 days
A	228	4906	13 yrs., 5 mos., 11 days	22	22 days
B	10	63	2 mos., 3 days	6	6 days
C	6	303	10 mos., 3 days	51	1 mo., 21 days
U	0	N/A	N/A	N/A	N/A
V	3	303	10 mos., 3 days	101	3 mos., 11 days
W	142	4025	11 yrs., 10 days	28	28 days
X	55	758	2 yrs., 28 days	14	14 days
Y	6	114	3 mos., 24 days	19	19 days
Z	38	72	2 mos., 12 days	2	2 days
1	40	91	3 mos., 1 day	2	2 days
2	113	1789	4 yrs., 10 mos., 29 days	16	16 days
3	39	700	1 yr., 11 mos., 5 days	18	18 days
4	30	448	1 yr., 2 mos., 23 days	15	15 days
5	17	2070	5 yrs., 8 mos., 5 days	122	4 mos., 2 days
6	1	79	2 mos., 19 days	79	2 mos., 19 days
7	4	95	3 mos., 5 days	24	24 days
2+3+4+5+6	200	5086	13 yrs., 11 mos., 11 days	25	25 days
1+2+3+4	222	3028	8 yrs., 3 mos., 18 days	14	14 days
2+3+4	182	2937	8 yrs., 17 days	16	16 days
2+3+5+6	170	4638	12 yrs., 8 mos., 18 days	27	27 days
2+3	152	2489	6 yrs., 9 mos., 29 days	16	16 days
5+6	18	2149	5 yrs., 10 mos., 24 days	119	3 mos., 29 days

	Vacancies Filled by Appt.	Total Time Vacancy Filled By Appointment		Average Time Vacancy Filled by Appointment	
	#	Days	Y/M/D	Days	Y/M/D
All	222	65,431	179 yrs., 3 mos., 6 days	295	9 mos., 25 days
A	207	60,570	165 yrs., 11 mos., 15 days	293	9 mos., 23 days
B	10	2400	6 yrs., 7 mos.	240	8 mos.
C	5	2461	6 yrs., 9 mos., 1 day	492	1 yr., 4 mos., 7 days
U	0	N/A	N/A	N/A	N/A
V	2	396	1 yr., 1 mo., 1 day	198	6 mos., 18 days
W	127	40,159	110 yrs., 9 days	316	10 mos., 16 days
X	53	24,161	66 yrs., 2 mos., 11 days	456	1 yr., 3 mos., 1 day
Y	5	191	6 mos., 11 days	38	1 mo., 8 days
Z	35	524	1 yr., 5 mos., 9 days	15	15 days
1	40	715	1 yr., 11 mos., 20 days	18	18 days
2	113	35,083	96 yrs., 1 mo., 13 days	310	10 mos., 10 days
3	39	17,108	46 yrs., 10 mos., 18 days	439	1 yr., 2 mos., 14 days
4	30	12,525	34 yrs., 3 mos., 25 days	418	1 yr., 1 mo., 23 days
5	0	N/A	N/A	N/A	N/A
6	0	N/A	N/A	N/A	N/A
7	0	N/A	N/A	N/A	N/A
2+3+4+5+6	182	64,716	177 yrs., 3 mos., 21 days	356	11 mos., 26 days
1+2+3+4	222	65,431	179 yrs., 3 mos., 6 days	295	9 mos., 25 days
2+3+4	182	64,716	177 yrs., 3 mos., 21 days	356	11 mos., 26 days
2+3+5+6	152	52,191	142 yrs., 11 mos., 28 days	343	11 mos., 13 days
2+3	152	52,191	142 yrs., 11 mos., 28 days	343	11 mos., 13 days
5+6	0	0	0	0	0

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	Vacancies Filled by Special Election	Total Time Vacancy Filled by Elected Replacement		Average Time Vacancy Filled by Elected Replacement	
	#	Days	Y/M/D	Days	Y/M/D
All	170	137,179	375 yrs., 10 mos., 4 days	807	2 yrs., 2 mos., 17 days
A	161	128,018	350 yrs., 8 mos., 28 days	795	2 yrs., 2 mos., 5 days
B	3	911	2 yrs., 6 mos., 1 day	304	10 mos., 4 days
C	6	8250	22 yrs., 7 mos., 10 days	1375	3 yrs., 9 mos., 10 days
U	0	N/A	N/A	N/A	N/A
V	3	4302	11 yrs., 9 mos., 17 days	1434	3 yrs., 11 mos., 9 days
W	126	104,894	287 yrs., 4 mos., 19 days	832	2 yrs., 3 mos., 12 days
X	41	27,983	76 yrs., 8 mos., 3 days	683	1 yr., 10 mos., 18 days
Y	0	N/A	N/A	N/A	N/A
Z	0	N/A	N/A	N/A	N/A
1	0	N/A	N/A	N/A	N/A
2	113	116,555	319 yrs., 4 mos.	1031	2 yrs., 10 mos., 1 day
3	39	2709	7 yrs., 5 mos., 4 days	69	2 mos., 9 days
4	0	N/A	N/A	N/A	N/A
5	17	17,797	48 yrs., 9 mos., 7 days	1047	2 yrs., 10 mos., 17 days
6	1	118	3 mos., 28 days	118	3 mos., 28 days
7	0	N/A	N/A	N/A	N/A
2+3+4+5+6	170	137,179	375 yrs., 10 mos., 4 days	807	2 yrs., 2 mos., 17 days
1+2+3+4	152	119,264	326 yrs., 9 mos., 4 days	785	2 yrs., 1 mo., 25 days
2+3+4	152	119,264	326 yrs., 9 mos., 4 days	785	2 yrs., 1 mo., 25 days
2+3+5+6	170	137,179	375 yrs., 10 mos., 4 days	807	2 yrs., 2 mos., 17 days
2+3	152	119,264	326 yrs., 9 mos., 4 days	785	2 yrs., 1 mo., 25 days
5+6	18	17,915	49 yrs., 1 mo.	995	2 yrs., 8 mos., 25 days

	Vacancies with Period of No Elected Representation	Total Time During Vacancy Without Elected Representation		Average Time During Vacancy Without Elected Representation	
	#	Days	Y/M/D	Days	Y/M/D
All	244	71,101	194 yrs., 9 mos., 21 days	291	9 mos., 21 days
A	228	65,870	180 yrs., 5 mos., 20 days	289	9 mos., 19 days
B	10	2466	6 yrs., 9 mos., 6 days	247	8 mos., 7 days
C	6	2765	7 yrs., 7 mos.	461	1 yr., 3 mos., 6 days
U	0	N/A	N/A	N/A	N/A
V	3	700	1 yr., 11 mos., 5 days	233	7 mos., 23 days
W	142	44,516	121 yrs., 11 mos., 16 days	313	10 mos., 13 days
X	55	24,984	68 yrs., 5 mos., 14 days	454	1 yr., 2 mos., 29 days
Y	6	305	10 mos., 5 days	51	1 mo., 21 days
Z	38	596	1 yr., 7 mos., 21 days	16	16 days
1	40	806	2 yrs., 2 mos., 21 days	20	20 days
2	113	37,106	101 yrs., 8 mos., 1 day	328	10 mos., 28 days
3	39	17,904	49 yrs., 19 days	459	1 yr., 3 mos., 4 days
4	30	13,041	35 yrs., 8 mos., 21 days	435	1 yr., 2 mos., 10 days
5	17	2070	5 yrs., 8 mos., 5 days	122	4 mos., 2 days
6	1	79	2 mos., 19 days	79	2 mos., 19 days
7	4	95	3 mos., 5 days	24	24 days
2+3+4+5+6	200	70,200	192 yrs., 4 mos.	351	11 mos., 21 days
1+2+3+4	222	68,857	188 yrs., 7 mos., 27 days	310	10 mos., 10 days
2+3+4	182	68,051	186 yrs., 5 mos., 11 days	374	1 yr., 9 days
2+3+5+6	170	57,159	156 yrs., 7 mos., 9 days	336	11 mos., 6 days
2+3	152	55,010	150 yrs., 8 mos., 20 days	362	11 mos., 28 days
5+6	18	2149	5 yrs., 10 mos., 24 days	119	3 mos., 29 days

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TOTAL VACANCIES PER CODING CATEGORY

AU1	0	AW1	0	AY1	5	BU1	0	BW1	0	BY1	0	CU1	0	CW1	0	CY1	0
AU2	0	AW2	79	AY2	0	BU2	0	BW2	1	BY2	0	CU2	0	CW2	3	CY2	0
AU3	0	AW3	27	AY3	0	BU3	0	BW3	1	BY3	0	CU3	0	CW3	0	CY3	0
AU4	0	AW4	15	AY4	0	BU4	0	BW4	1	BY4	0	CU4	0	CW4	0	CY4	0
AU5	0	AW5	14	AY5	0	BU5	0	BW5	0	BY5	0	CU5	0	CW5	0	CY5	0
AU6	0	AW6	1	AY6	0	BU6	0	BW6	0	BY6	0	CU6	0	CW6	0	CY6	0
AU7	0	AW7	0	AY7	1	BU7	0	BW7	0	BY7	0	CU7	0	CW7	0	CY7	0
AV1	0	AX1	0	AZ1	30	BV1	0	BX1	0	BZ1	5	CV1	0	CX1	0	CZ1	0
AV2	0	AX2	28	AZ2	0	BV2	0	BX2	0	BZ2	0	CV2	2	CX2	0	CZ2	0
AV3	0	AX3	10	AZ3	0	BV3	0	BX3	1	BZ3	0	CV3	0	CX3	0	CZ3	0
AV4	0	AX4	13	AZ4	0	BV4	0	BX4	1	BZ4	0	CV4	0	CX4	0	CZ4	0
AV5	0	AX5	2	AZ5	0	BV5	0	BX5	0	BZ5	0	CV5	1	CX5	0	CZ5	0
AV6	0	AX6	0	AZ6	0	BV6	0	BX6	0	BZ6	0	CV6	0	CX6	0	CZ6	0
AV7	0	AX7	0	AZ7	3	BV7	0	BX7	0	BZ7	0	CV7	0	CX7	0	CZ7	0