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The Meaning of the Seventeenth Amendment and a Century of State Defiance

Steven E Art
Zachary D Clopton, University of Chicago

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

Steven E. Art & Zachary D. Clopton

“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

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 for the first time a comprehensive interpretation of the Seventeenth Amendment based on a detailed textual analysis 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, we demonstrate 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.

* The authors’ appear alphabetically to reflect their equal contribution. Zachary Clopton is a Lecturer in Law at the University of Chicago and an Assistant United States Attorney in the Northern District of Illinois. He received a JD from Harvard Law School, an MPhil from Cambridge, and a BA from Yale. Steven Art is a civil rights attorney at the law firm Loevy & Loevy. He received a JD from Northwestern University School of Law and an AB from the University of Chicago. The authors wish to thank Judge Diane P. Wood, to whom they both served as law clerks when the inspiration for this article arose, as well as Albert Alschuler, Stephen B. Burbank, Steven Calabresi, Katherine Kinzler, Jim Pfander, and Julia Rickert for their helpful comments and suggestions. We also thank the participants in the Loyola Constitutional Law Colloquium, to whom a draft of this article was presented. The views expressed here are personal and do not represent any position taken by the Department of Justice or the U.S. Courts.

1 377 U.S. 533, 562 (1964).
We also identify a pronounced pattern of state defiance of the Seventeenth Amendment. To measure state compliance with this constitutional provision, we gathered and examined data on each of the 244 vacancies that has occurred in the Senate since the Amendment’s adoption. 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; and in many more than that they have unnecessarily (and, we argue, unconstitutionally) delayed holding the required elections. These practices have cost the people 200 years worth of elected representation since the Constitution was amended to provide for direct election of Senators. There are few areas in which states so routinely disregard the federal Constitution without any action to stop them.

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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, “and I’m not just giving it up for fucking nothing.” Blagojevich was referring to his power to appoint a replacement to fill President-elect Obama’s vacancy in the Senate. The Seventeenth 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. The U.S. Attorney declared that the governor had been on a “political corruption crime spree” and had done things that “would make Lincoln roll over in his grave.” The Illinois legislature removed Blagojevich from office, and after two trials, a federal jury found the ex-governor guilty of charges that he had tried to sell Obama’s vacant Senate seat.

Despite his political unraveling, Blagojevich managed to appoint Roland Burris, a former Attorney General of Illinois, to serve as Barack Obama’s replacement in the Senate. Consistent with the Seventeenth Amendment, Illinois law places the power to appoint replacement Senators solely in the hands of the governor. In January 2009, Burris took his seat in

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4 While Rod Blagojevich was convicted of all crimes relating to the Senate seat, he was not found guilty on all counts. United States v. Blagojevich, No. 08 CR 888-1 (N.D. Ill. June 27, 2011), Dkt. 754; Monica Davey, Jury Finds Blagojevich Guilty of Corruption, N.Y. TIMES, June 28, 2011, at A1.
the Senate. Critics questioned the legitimacy of his appointment, called for his resignation, and offered alternative mechanisms for selecting a replacement Senator, 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. It appeared that the people of Illinois would not have the opportunity to elect a Senator to replace the new President.

The political maelstrom masked a fundamental constitutional problem: the states’ persistent failure to follow the requirements 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. To date, there has been little study of the meaning of this important constitutional provision, and the Supreme Court has passed up


7 The legal scholarship on the Seventeenth Amendment is scant. Some scholars have criticized the effect or aims of the Amendment. RALPH A. ROSSUM, FEDERALISM, THE SUPREME COURT, AND THE SEVENTEENTH AMENDMENT: THE IRONY OF CONSTITUTIONAL DEMOCRACY (2001); 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); Ralph A. Rossum, The Irony of Constitutional Democracy, 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); Vikram David Amar,
opportunities to resolve unanswered questions about its meaning. This Article provides a comprehensive interpretation of the Seventeenth Amendment and a Century of State Defiance.

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 (1996); Todd J. Zywicki, Senators and Special Interests: A Public Choice Analysis of the Seventeenth Amendment, 73 OR. L. REV. 1007 (1994). 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 to Best 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 TEMPLE L. REV. 629 (1991); and 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 121, 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, 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 provides a comprehensive interpretation of the Amendment or examines in detail whether states have complied with its terms.

8 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 Connecticut, 479 U.S. 208 (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 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 Metropolitan Transit Authority, 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, No. 10-821, 2011 WL 2175218 (U.S. June 6, 2011), declining a chance to explain the Amendment’s requirements for filling Senate vacancies.
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.\(^9\) The Congresses that debated the proposed amendment were consumed not only with the propriety of changing the method of selecting Senators but also with the question whether the Amendment should alter the balance of power between the states and the federal government when it came to control over the election of national officials. Indeed, the former question was arguably less controversial than the latter. In the end, Congress left the federal-state balance untouched and adopted a version of the Seventeenth Amendment addressed exclusively to the popular election of Senators.

But to guarantee the popular election of Senators, the Seventeenth Amendment had to do more than call for regular, direct elections in its first paragraph. A second paragraph promoted the same democratic reform in situations where Senate seats were left vacant mid-term. And this second paragraph had an additional goal: to help preserve the states’ equal representation in the Senate by allowing them to fill empty seats quickly with appointed replacements.\(^{10}\) Unlike the Amendment’s first paragraph, the second presents a challenging interpretive puzzle. We attempt to solve that puzzle and explain what states must do to comply with the Seventeenth Amendment when vacancies arise in their Senate delegations. Among other things, we conclude that 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. So construed, the first two paragraphs of the Seventeenth Amendment work in tandem to guarantee that the people

\(^{9}\) “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.

\(^{10}\) “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.” U.S. CONST. amend XVII para 2.
will have the right in all circumstances to elect their representatives in the U.S. Senate.\footnote{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.” U.S. CONST. amend. XVII para 3. The limited implications of this statement are discussed infra, at note 122.}

With our reading of the Seventeenth Amendment in place, we then turn to a detailed examination of state compliance with this constitutional provision. 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,\footnote{See infra note 170(collecting state laws).} and Congress passed new laws providing a day for regular elections.\footnote{38 Stat. 384 (June 4, 1914) (codified at 2 U.S.C. § 1).} 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.\footnote{U.S. CONST. amends. XV, XIX, XXVI, XXIV.} 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.\footnote{Our data and original research can be found at http://www.seventeenth-amendment.com.} We analyzed 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. We find 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, when the states hold elections to fill Senate vacancies, they unreasonably (and unconstitutionally, in our view) delay those elections in more than one-third of cases, undermining the Seventeenth Amendment’s democratic purpose. In total, the people have lost out on nearly 200 years worth of elected representation since 1913, during which time Senate seats were left empty or filled by unelected appointees. This represents a level of noncompliance that we view as unacceptable given the Amendment’s focus on enfranchisement. Indeed, we submit that there are few comparable areas in
which states routinely disregard the federal Constitution and nothing is done to stop them.

That brings us back to President Obama’s vacant Senate seat. Once Illinois concluded that its citizens would not elect a replacement Senator, two voters sued in federal court, alleging a violation of their rights guaranteed by the Seventeenth Amendment.\(^{16}\) 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. We hope to demonstrate that there is only one way to read the Seventeenth Amendment. Illinois also submitted that it should be allowed to skip the election because other states had done the same. We catalog this constitutional defiance, explain its effect of denying elected representation, and propose methods to curb this unconstitutional practice. 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.

* * * *

The 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, we briefly review the first paragraph’s text and history in order to provide a comprehensive understanding of the Seventeenth Amendment. In Part II, we turn 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 we evaluate state practice in Part III. There, we review data on every vacancy in the Senate since the adoption of the Seventeenth Amendment, and we describe how the states frequently ignore the facial terms of the Amendment and violate its spirit with even greater regularity. We conclude in Part IV with a survey of state law and a proposal

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16 The lawsuit came to our attention when we served as law clerks for the U.S. Court of Appeals for the Seventh Circuit, which heard an appeal of the case described in 2009 and 2010.
for legislation that will ensure compliance with 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 Senators with the state legislatures. Yet 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.

17 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 MADISON, DEBATES, June 7, 1787 (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).


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. 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 and had the effect of ceding the right to elect Senators to party bosses, caucuses, and political machines. Legislative deadlocks also meant that states were left without full representation in Congress. To outside observers, stories of bribery and corruption became salient features of the selection process and it seemed that personal wealth was a prerequisite to joining the Senate. Structurally, interposing the state legislatures between the Senate and the people disfigured the notion of popular representation. Some states were “misrepresented” in the Senate when a minority party selected the Senator because of infighting among larger parties. Similarly, state legislative districts might be gerrymandered to prevent equal

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19 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; David A. Strauss, The Irrelevancy of Constitutional Amendments, 114 HARV. L. REV. 1457, 1496-99 (2000); Ruth Bader Ginsburg, On Amending the Constitution: A Plea for Patience, 12 U. ARK. L.J. 677, 684 (1989); Gordon E. Sherman, The Recent Constitutional Amendments, 23 YALE L. J. 129 (1913). This view contrasts with recent criticism of the Seventeenth Amendment, which 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.

20 HAYNES, THE SENATE, supra note 17, at 93-94.

21 HAYNES, ELECTION OF SENATORS, supra note 17, at 39; Amar, Gubernatorial Power, supra note 7, at 741.

22 HAYNES, THE SENATE, supra note 17, at 86.

23 HAYNES, ELECTION OF SENATORS, supra note 17, 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.

24 HAYNES, ELECTION OF SENATORS, supra note 17, at 86-91, 95; see also Sara Brandes Cook & John R. Hibbing, A Not-so-Distant Mirror: The 17th Amendment and Congressional Change, 91 AM. POL. SCI. REV. 845, 848 (Dec. 1997) (describing the effect of wealth).

25 HAYNES, ELECTION OF SENATORS, supra note 17, at 63-65.
representation in the state legislature, meaning that the selected Senator would not represent the entire state.\textsuperscript{26}

With respect to political action, for decades it was the states themselves that led the charge for democratically elected Senators.\textsuperscript{27} States amended their constitutions, passed laws, and adopted practices to sidestep legislative selection of Senators.\textsuperscript{28} They also pressured Congress to adopt a system for direct senatorial election.\textsuperscript{29} Political parties also got into the act, campaigning in favor of direct election.\textsuperscript{30} Meanwhile, the press continued to provoke (and perhaps reflect) the public desire to elect Senators—David Graham Phillips’s famed series in \textit{Cosmopolitan} magazine, “The Treason of the Senate,” is one of many examples.\textsuperscript{31}

\textsuperscript{26} Amar, \textit{Gubernatorial Power}, supra note 7, at 741. 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. \textit{Id.}

\textsuperscript{27} \textit{E.g.}, Bybee, \textit{supra} note 7, at 537 (“Surprisingly, the bodies that stood to lose power if the amendment passed—state legislatures—were quite supportive.”).

\textsuperscript{28} 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. HOEBEKE, \textit{THE ROAD TO MASS DEMOCRACY} 87 (1960); William H. Riker, \textit{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. HAYNES, \textit{THE SENATE}, supra note __, at 99. Some states held primaries to fix a slate of Senate candidates to which state legislators were restricted. \textit{Id.} at 99; Rossum, \textit{supra} note 7, at 708 (counting 33 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. HAYNES, \textit{THE SENATE}, \textit{supra} note 17, at 102-04; 1 BYRD, \textit{supra} note 17, at 394-95. \textit{See also} U.S. Senate, \textit{Direct Election of Senators}, http://www.senate.gov/artandhistory/history/common/briefing/Direct_Election_Senators.htm (discussing other state constitutional and statutory schemes).

\textsuperscript{29} By 1913, states had sent 175 memorials to Congress pushing direct election and many states had called for a constitutional conviction on the issue. HAYNES, \textit{THE SENATE}, \textit{supra} note 17, at 97; Rossum, \textit{supra} note 7, at 708-10.

\textsuperscript{30} Rossum, \textit{supra} note 7, at 708 (noting that 239 party platforms called for direct election); HAYNES, \textit{ELECTION OF SENATORS}, \textit{supra} note 17, at 105 (describing the Democratic and Populist Party’s platforms); HAYNES, \textit{THE SENATE}, \textit{supra} note 17, at 97 (identifying nominee Taft as supporting the amendment in 1908). Political parties were not alone: other social groups joined the chorus, especially in the West. \textit{Id.}

\textsuperscript{31} Phillips’s nine-article series was republished as DAVID GRAHAM PHILLIPS, \textit{THE TREASON OF THE SENATE} (George E. Mowry & Judson A. Grenier eds., 1964); \textit{see also} 1 BYRD, \textit{supra} note 17, at 396-98 (describing the series’ effect); HOEBEKE, \textit{supra} note 28, at 97-99 (discussing other media efforts). In addition to popular media, scholarship focused on reform. The work of George Haynes, to which we refer extensively, was influential. \textit{See} 1 BYRD, \textit{supra} note 17, at 404-06.
The reform movement gained steam in Congress after 1870, but the real action began in 1909 with the Sixty-first Congress. 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.

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. Perhaps seeing an open door to constitutional reform, champions of states’ rights sought to include in the direct-election proposal language to transfer to the states the exclusive control over the time, place, and manner of Senate elections.

It is worth noting that the various societal pressures coincided with a change in political landscape, including the addition of a seven new western states, which all practiced forms of or advocated for direct election. See Haynes, Election of Senators, supra note 17, at 110, 141-43.

While the frequency of proposed amendments increased after 1870, see John William Perrin, Popular Election of United States Senators, 193 N. Am. Rev. No. 661, 779-804 (Dec. 1910); see also Rossum, supra note 7, at 705 (counting 200 proposals prior to ratification of the Seventeenth Amendment), none was reported out of committee until 1888, 50 years after the first attempt. H. Rep. No. 50-1456, at 1 (1888); see also Haynes, Election of Senators, supra note 17, at 96. A series of successful House proposals, see 24 Cong. Rec. 617-18 (Jan. 16, 1893); 26 Cong. Rec. 7783 (July 21, 1894); 31 Cong. Rec. 4824-25 (May 11, 1898); 33 Cong. Rec. 4128 (Apr. 13, 1900); 35 Cong. Rec. 1722 (Feb. 13, 1902), stalled in the Senate, see 1 Byrd, supra note 17, at 398; Haynes, The Senate, supra note 17, at 106. 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 (Dec. 13, 1909), printed in 45 Cong. Rec. 105 (Dec. 13, 1909).

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., 23 Cong. Rec. 116, 133 (Jan. 5, 1892) (proposal of Representative Williams Jennings Bryan); 5 Cong. Deb. 361, 361-71 (Feb. 19, 1829) (amendment of Representative John Wright); others would have required popular election but would have given the states complete authority to regulate those elections, e.g., H. Rep. No. 52-368, at 5 (1892) (accompanying H. Res. 90 (1892)). Meanwhile, other proposals made popular election mandatory and shifted oversight to the national government, e.g., 25 Cong. Rec. 3922, 3925-36 (Apr. 10, 1902) (proposal of Senator Depew).


This proposal first appeared in Senator 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 the legislature thereof.” S. Rep. 61-961 (1911) (accompanying S. J. Res. 134).
The propriety of such a shift in power became the centerpiece of the congressional debate over the direct election of Senators in the Sixty-first and Sixty-second Congresses.36

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.37 Nor was there much discussion of the effects that direct election might have on federalism in general.38 And finally, there was extremely little discussion of senatorial vacancies, a central issue in this Article. It was the states’-rights question that drove the debate on both sides.39

In the end, Congress democratized the selection of senators without touching the states’-rights issue. The final version of the Seventeenth

36 See Bristow, Resolution for the Direct Election of Senators, S. DOC. NO. 62-666, at 8, printed in 48 CONG. REC. 6476 (May 15, 1912) (hereinafter “Bristow, Resolution”); HAYNES, THE SENATE, supra note 17, at 109; 1 BYRD, supra note 17, at 400. For many southern states, “state control over senatorial elections was the price of . . . assent to a popular-election amendment to the Constitution.” HAYNES, THE SENATE, supra note 17, at 110 (citing Percy, 46 CONG. REC. at 2128-30; Bacon, 46 CONG. REC. at 3536). See, e.g., 46 CONG. REC. 2426-2427 (statement of Senator Curtis); 46 CONG. REC. 2645-57 (statement of Senator Borah); 46 CONG. REC. 2755-63 (statement of Senator Rayner); 47 CONG. REC. 1533-45 (May 24, 1911); 47 CONG. REC. 1912 (June 12, 1911). Opponents of this proposal saw it as unnecessarily degrading federal power. See, e.g., 46 CONG. REC. 848 (Jan. 13, 1911) (Sen. Sutherland); 46 CONG. REC. 1161-69 (Jan. 20, 1911) (statements of Senators Brown, Carter, and Sutherland); 46 CONG. REC. 1335-39 (Jan. 24, 1911) (statement of Senator Depew); 46 CONG. REC. 2491-98 (Feb. 14, 1911) (statements of Senators Brown and Bourne); 47 CONG. REC. 1482-95 (May 23, 1911); see also 1 BYRD, supra note 17, at 400 (citing CONG. REC. 61st Cong., 3d Sess. 1162, 1166-69); HAYNES, THE SENATE, supra note 17, at 110. This debate unavoidably gravitated toward race. See, e.g., 47 CONG. REC. 1899 (June 12, 1911) (Senator Smith objects to the “race rider”); 47 CONG. REC. 1911 (June 12, 1911) (Senator Reed referring to “[d]ark” influences); 47 CONG. REC. 1909 (June 12, 1911) (discussing the role of race); Bristow, Resolution, supra note 36; 1 BYRD, supra note 17, at 400; see also 46 CONG. REC. 2657 (Feb. 16, 1911) (Sen. 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.”).

37 See S. REP. 61-961 (1911) (accompanying S. J. RES. 134); 46 CONG. REC. 1103-07 (Jan. 19, 1911); 46 CONG. REC. 2178-81 (Feb. 9, 1911).

38 See Rossum, supra note 7, at 711-13. For an exception, see 46 CONG. REC. 2243 (Feb. 10, 1911) (Senator Root).

39 [Dear Editors: We have limited our discussion of legislative history in the interest of brevity. An earlier draft of this Article contains a much more detailed account of Congress’s deliberation. If you are interested in that version, we would be happy to provide it.]
Amendment, which passed both houses of Congress in 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.\footnote{40} The final version of the Amendment promoted democratic reform by reallocating power \textit{within} each state, shifting control from the state 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:

\begin{quote}
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.\footnote{41}
\end{quote}

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 we now turn.

\footnote{40} 47 CONG. REC. 1925 (June 12, 1911) (Senate); 48 CONG. REC. 6347-69 (May 13, 1912) (House); 38 Stat. 2049-50 (1913) (certification of ratification).

\footnote{41} U.S. CONST. amend. XVII para. 1.
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.

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.

The second paragraph of the Seventeenth Amendment requires the organs of state government—every time a vacancy occurs—to work in tandem 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 our 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. Our analysis demonstrates the deliberate design of the constitutional mechanism for filling Senate vacancies and shows that the text leaves little room for competing interpretations.

A. Extra-textual Sources

Before turning to the text, we review briefly the legislative history of the second paragraph and Supreme Court precedents that shed light on its 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.\textsuperscript{42} While there was variation among proposed vacancy-filling procedures, the differences did not prompt much debate.\textsuperscript{43} 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.

We have discovered two points in the legislative record that reflect serious discussion of a proposed vacancy-filling provision. In 1892, the

\textsuperscript{42} See, \textit{e.g.}, H. REP. No. 50-1456, at 1 (1888) (accompanying H. RES. 141 (1888)) (“[I]f vacancies happen . . . the executive of the State in which such vacancy occurs may make a temporary appointment until a Senator is elected thereto as provided by the laws of such State.”); S. REP. No. 54-530 at 11 (1896) (accompanying S. RES. 6 (1896)) (“When vacancies 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 direct vote of the people as aforesaid.”); 90. H. REP. No. 52-368, at 1 (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. REP. No. 53-944, at 1 (1894) (same as 90. H. REP. No. 52-368, at 1 (1892)); H. REP. No. 54-994 at 1 (1896) (accompanying H. RES. 155) (“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: \textit{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 of constitution of such State.”); H. REP. No. 55-125 at 1 (1898) (accompanying H. RES. 5) (same as H. REP. No. 54-994 at 1 (1896)); H. REP. No. 57-125, at 6 (1902) (accompanying H. RES. 41 (1902)) (“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: \textit{Provided}, That the executive thereof shall make temporary appointments until the next general or special election held, in accordance with the statutes or constitution of such State.”); H. REP. No. 59-3165, at 2 (1906) (accompanying H. J. RES. 120 (1906)) (same as 23 CONG. REC. 1721-22 (Feb. 13, 1902) (adopting H. RES. 41), except that there was no comma before “in accordance with the statutes or constitution of such State.”); 47 CONG. REC. 96, 106-07 (Apr. 6, 1911) (S. J. RES. 1 introduced by Senator Bristow) (same as 90. H. REP. No. 52-368, at 1 (1892)); 47 CONG. REC. 1205 (May 15, 1911) (proposed substitute of Senator Bristow) (same as 90. H. REP. No. 52-368, at 1 (1892), except that there was no comma before “as the legislature may direct”).

\textsuperscript{43} 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, \textit{e.g.}, H. REP. No. 54-994 at 1 (1896) (accompanying H. RES. 155); others said appointments should last until a general or special election, \textit{e.g.}, H. REP. No. 57-125, at 6 (1902); and still others said the legislature could set the time of the vacancy election, \textit{e.g.}, U.S. CONST. amend. XVII (referring to elections “as the legislature may direct”).
House proposed an amendment that mirrored in nearly all respects the final version of the Seventeenth Amendment.\textsuperscript{44} Representative Tucker wrote a Committee Report to accompany this proposal, which described the vacancy-filling provision in unusual detail.\textsuperscript{45} He said the proposed amendment required 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.\textsuperscript{46}

\textsuperscript{44} 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 \textit{Valenti v. Rockefeller} argued this comma was important. See 292 F. Supp. 851, 855-56 n.7 (W.D.N.Y. 1968). But no member of Congress gave it a second thought—the comma floated in and out of proposals without comment. \textit{Compare} H. Rep. No. 52-368, at 5 (1892) (accompanying H. Res. 90 (1892)) (recording Tucker’s initial proposal, with the comma), with 25 Cong. Rec. 617-18 (Jan.16, 1893) (reporting the passage of Representative Tucker’s proposal without the comma). Consistent with this view, the \textit{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.

\textsuperscript{45} 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.

\textsuperscript{46} Bristow said of his vacancy-filling provision:

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

\hspace{1cm} And if vacancies happen by resignation, or otherwise, during the recess of the legislature of any State, the executive thereof may make
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 as we discuss 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 not provided much guidance either. 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*. It held that a long delay before an

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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 Senator 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.

47 CONG. REC. 1482-83 (May 23, 1911).

47 See *supra* note8.

election to replace Kennedy would not offend the Seventeenth Amendment. The Supreme Court summarily affirmed and in doing so chose not to specify what aspects of the decision it thought correct. The Court has since referred to Valenti in dicta, 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.

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 leave us with 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. We call the first part the “principal clause”; and the second 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.” 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.

49 The majority relied on state practice and policy considerations in its ruling, and was rightly rebuffed by a dissenting judge for doing so. Valenti, 292 F. Supp. at 875-89 (Frankel, J., dissenting). As always, interpretation of the Constitution by reference to the states’ propensity to obey is a bad practice. E.g., Brown v. Board of Education, 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).


52 Judge v. Quinn, 612 F.3d 537 (7th Cir. 2010), cert. denied, Quinn v. Judge, 2011 WL 2175218 (No. 10-821) (U.S. June 6, 2011).

53 U.S CONST. amend. XVII para. 2.
by election as the legislature may direct."\(^{54}\) We address each of these clauses part by part, beginning with the principal clause.

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,\(^{55}\) and there is no question the vacancy must precede all other steps outlined by the text.\(^{56}\) 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.\(^{57}\) The original Constitution referred to Senate vacancies created “by Resignation, or otherwise,”\(^{58}\) and some proposed amendments parroted that language.\(^{59}\) The Seventeenth Amendment, however, did not refer to “resignation” or any other trigger,\(^{60}\) but there is no evidence that this omission was

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\(^{54}\) Id.
\(^{55}\) 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. The triggering language of the Seventeenth Amendment mimics the Constitution’s provision governing House vacancies: “When vacancies happen in the Representation from any State.” Id. art. I, § 2.
\(^{56}\) See, e.g., Case IV (Senate.), James Lawman, of Connecticut, _reprinted in M. ST. CLAIR CLARKE & DAVID A. HALL, CASES OF CONTESTED ELECTIONS_ 871-76 (1834) (“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”); Busbee v. Smith, 549 F. Supp. 494 (D.D.C. 1982) (holding that the normal expiration of a term does not create a “vacancy”).
\(^{57}\) See infra Part III.B.
\(^{58}\) U.S. CONST. art. I, § 3, cl. 2.
\(^{59}\) H. REP. No. 50-1456 (1888) (accompanying H. RES. 141 (1888)); S. REP. No. 54-530 (1896) (accompanying S. RES. 6 (1896)); H. REP. No. 54-994 (1896) (accompanying H. RES. 155); H. REP. No. 55-125 (1898) (accompanying H. RES. 5); H. REP. No. 57-125 (1902) (accompanying H. RES. 41 (1902)); 47 CONG. REC. 218 (Apr. 13, 1911).
\(^{60}\) See, e.g., H. REP. No. 52-368 (1892); H. REP. No. 53-944 (1894); S. REP. 61-961 (1911) (accompanying S. J. RES. 134).
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significant. 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.

That the death of a Senator creates a vacancy is similarly established. 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. This Kafkaesque idea was abandoned, however, and West

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

62 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 representations of that States.” Case III, John F. Mercer, of Maryland, in M. ST. CLAIR CLARKE & DAVID A. HALL, CASES OF CONTESTED ELECTIONS 44-46 (1834). In response to questions about a member’s right to resign, Representative 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. The Committee agreed. Id. In 1815, the Senate added that a resignation was effective even if the governor refused to accept it. Case III (Senate), Jesse Bledsoe, of Kentucky, in M. ST. CLAIR CLARKE & DAVID A. HALL, CASES OF CONTESTED ELECTIONS 869-70 (1834). 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 197-98, ¶¶ 486-87 (1874).

63 See, e.g., CUSHING, supra note 62 at 197, ¶ 484 (permitting state executives to take official notice a Senator’s death) (citing Cong. Globe, XVII. 339).

64 West Virginia law provides that an appointed Senator may serve the balance of any unexpired term less than two years and six months. West Va. Code § 3-10-3. (We explain how this law permits unconstitutional behavior below. Infra Part III.C.1.) Senator Byrd died on June 28, 2010, with just days more than two years and six months remaining in his term. People suggested 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; Stephanie Condon, Robert Byrd Succession Hinges on Ambiguous West Virginia Laws, POLITICAL HOTSHEET (CBS News) (June 28, 2010). There is some ambiguity about who may “declare” a seat vacant; certainly the Senate judges its own membership, U.S. CONST. art. I, § 5, but executives often take official notice of vacancies and act upon them without waiting for word from Congress, and the rules may depend on whether Congress is in session, see CUSHING, supra note 62 at 197-98 §§ 483-87.
Virginia made plans to fill the vacancy in the 2012 election. 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; a deal was struck, and West Virginia’s governor was elected to fill the vacancy in November 2010.

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. The Senate declined to seat two Senators because of charges of fraud and corruption in 1932 campaigns, and it refused to seat either competitor in a special election bill signed, sealed; Gov. Manchin to announce his plans today, CHARLESTON GAZETTE 1A (July 20, 2010).

Though the Senate can create a vacancy in these ways, the states cannot create a senatorial vacancy deliberately. See U.S. CONST. art. I, § 5 cl. 1 (“[The Senate] shall be the Judge of 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. A Senator will not be seated without credentials from the state, Rules of the Senate II; FLOYD M. RIDDICK & ALAN S. FRUMIN, RIDDICK’S SENATE PROCEDURE: PRECEDENTS AND PRACTICE 695-710, 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-week wait to seat Senator-elect Franken. Monica Davey & Carl Hulse, Minnesota Court Rules Democrat Won Senate Seat, N.Y. TIMES, A1 (July 1, 2009).

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, at 197 ¶ 485. At least some of these bases have constitutional roots. U.S. CONST. art. I, § 3 cl. 3 (age, citizenship, and residency requirements for Senators); U.S. CONST. art. I, § 5, cl. 2 (expulsion); U.S. CONST. art. I, § 6 (incompatibility clause).


66 See McGraw Letter, supra note 65 (discussing the governor’s proposed special election).

67 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.

68 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, at 197 ¶ 485. At least some of these bases have constitutional roots. U.S. CONST. art. I, § 3 cl. 3 (age, citizenship, and residency requirements for Senators); U.S. CONST. art. I, § 5, cl. 2 (expulsion); U.S. CONST. art. I, § 6 (incompatibility clause). 

69 App’x B, Nos. 57 (Smith) and 190 (Vare). Our complete appendices, reflecting original research on Senate vacancies, are available online at http://www.seventeenth-
bitterly contested 1974 New Hampshire election. 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; and both Keith Thomson and Key Pittman died between their elections and the start of a new term. In addition, the Senate may create a vacancy by using its constitutional authority to expel members, although it has no 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 created. Still, it is debatable what constitutes incapacity and who may declare a Senator incapacitated—neither federal statutes nor congressional rules provide an answer. 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. 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. But since the decision came at the start of a term, this case

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amendment.com. The reader should refer to that website for all references to Appendices A & B.

70 App’x B, No. 141 (Wyman and Durkin). This might be thought of as a “failure to elect” see 17 Stat. 28 (Feb. 2, 1872) (referring to “failure to elect upon trial”). See also CONG. GLOBE, 42d Cong., 2d Sess., 677 (1872) (remarks of Sen. 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.”).

71 App’x B, Nos. 114 (Carnahan), 130 (Pittman), and 243 (Thomson).

72 U.S. CONST. art. I, § 5.

73 2 U.S.C. § 8(a). Courts have said this rule applies to the Senate as well. Public Citizen, Inc. v. Miller, 992 F.2d 1548, n.8 (11th Cir. 1993). The original version of this law did not mention incapacity, 17 Stat. 28 (Feb. 2, 1872); “incapacity” appeared when the Government Printing Office codified the Revised Statutes, R.S. § 26 (1878).

74 See Jack Maskell, Incapacity of a Member of the Senate, Cong. Research Service, Doc. No. RS22556, at 1 (Dec. 15, 2006).

75 Senator Glass was absent for four years before he died but kept his Senate seat. Kate Zernike, Political Memo; For Senate, Quirks of Fate Sometimes Decide Majority, N.Y. TIMES, Dec. 17, 2006; Elder Statesman, TIME, Feb. 19, 1945. 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 Representative 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.

76 H.RES. 80, 97th Cong., 127 CONG. REC. 2916-17 (Feb. 24, 1981); see also Maskell, supra note 74 (discussing Spellman, Begich and Boggs). But see Powell v.
is more like the Senate refusing to seat any Senator, which we 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

\[ \ldots \text{the executive authority of such State shall issue writs of election to fill such vacancies.} \ldots \]

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. We must answer two questions about this command: 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, \(^77\) but when “shall” introduces duties in the Constitution it is mandatory in nature.\(^78\) 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

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McCormack, 395 U.S. 486 (1969) (holding that the House’s power to judge qualifications is limited to requirements listed in the Constitution).


\(^78\) The original Constitution uses the word 191 times; too many 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 para 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.
model for the second paragraph’s principal clause provides that executives “shall” issue writs to fill House vacancies, and Congress and the courts have understood this to establish a mandatory duty. 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. 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.

That brings us 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. Traditionally, the monarch called for the election of a new Parliament by issuing the writ, affixed with the Great Seal.

79 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. 1482-83 (May 23, 1911).

80 United States Term Limits v. Thornton, 514 U.S. 779, 896 (1995) (Thomas, J., dissenting); ACLU of Ohio, Inc. v. Taft, 385 F.3d 641 (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. at 863. See also Judge v. Quinn, 612 at 547 (reaching this conclusion with respect to the Seventeenth Amendment). Jackson v. Ogilvie, supra, invoked an 1804 election dispute, in which the House called the issuance of writs an “indispensable duty.” 426 F.2d at 1336.

81 Bristow said “the legislature may empower the governor of the States 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. 1482-83 (May 23, 1911).

of the Realm. While issuance of the writ is routine in Britain today, it remains essential to the electoral process.

The writ made it across the Atlantic as well. Writs of election were used in the colonies and became the mechanism by which states ensure that a desired election occurs. On the road to the American Revolution, colonists voiced concern that writs of election were being withheld, preventing them from electing representatives; it was a gripe so significant that it appeared in the Declaration of Independence. Even before the

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83 See Bruce Ackerman & Neal Katyal, Our Unconventional Founding, 62 U. CHI. L. REV. 475, 559 (1995); Seth Barrett Tillman, Colloquy: Reply 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, at 559; see also 2 THE CORRESPONDENCE OF HENRY HYDE, EARLY OF CLARENDON 226 n.* (Samuel Weller Singer ed., 1828) (quoting 3 F. A. J. MAZURE, HISTOIRE DE LA REVOLUTION DE 1688, EN ANGLETERRE 264-65 (1825)).

84 Issuing writs for parliamentary elections became more ministerial over time. By the 19th 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 at 186-87 §§ 453-55 (1874). Still, an election—including one to fill a parliamentary vacancy—cannot occur without the writ. Representation of the People Act, 1983, c2, § 23 & sched. 1, pt. 1, § 1. Britain is not alone; the writ of election it is an ordinary feature of common-law systems. See, e.g., Canada Elections Act, Part V, § 57; Commonwealth of Australia Constitution Act, Part II, § 12; Part III, §§ 32-33; Parliamentary Elections Act (Chapter 218), Part III, §§ 24-25 (Singapore).

85 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 W. & M. Q. 390, 405 (1964); Richard S. Rodney, et al., Early Relations of Delaware and Pennsylvania, 54 PENN. MAG. HIST. & BIOGRAPHY 209, 221-223 (1930); Lilla M. Hawes, The Proceedings and Minutes of the Governor and Council of Georgia, October 4, 1744 through November 7, 1775 and September 6, 1779 through September 20, 1780, 35 GA. HIST. Q. 126, 151 (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).

86 See Minutes of a General Meeting of the Freeholders of the County of Mecklenburg on the 29th Day of July, 1774, in 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 . . . .”).

87 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:
Seventeenth Amendment, the writ of election was one of just two writs mentioned in the U.S. Constitution. Writs of election were a common feature of election laws across the country from independence until the Seventeenth Amendment was adopted, and they continue to play a central role in American elections today.

Importantly, the writ of election divides responsibilities within the state. We have already mentioned that 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. Whatever details left open by these laws are to be filled by the state executive’s writ.

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 . . . .

Declaration of Independence (1776) (emphasis added).

88 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.

89 Writs of election appear in early state constitutions, e.g., VA CONST. of 1776; ILL. CONST. of 1818, art. II, § 11; DEL. CONST. of 1776, art. 5; GA. CONST. of 1777, art. VII; N.C. CONST. of 1776, art. X; THE NORTHWEST ORDINANCE para. 10, July 13, 1787, and at least 20 state constitutions expressly refer to writs of election today. ALA. CONST. art. IV, § 46; ARK. CONST. art. 5, § 6; CAL. CONST. art. IV, § 2; DEL. CONST., art II, § 6; GA. CONST. art. V, § II, para. V; IOWA CONST. art. III § 12; KY. CONST. § 152; MICH. CONST. art. V, § 13; MISS. CONST. art. 4, § 77; MO. CONST. art. III, § 14; N.D. CONST. art. IV, § 11; OKLA. CONST. art. V, § 20; ORE. CONST. art. V, § 17; PA. CONST. art. II, § 2; S.C. CONST. art. III, § 25; TENN. CONST. art. II, § 15; TEX. CONST. art. III, § 13; VA. CONST. art. IV, § 7; WASH. CONST. art. II, § 15; WIS. CONST. art. IV, § 14. In addition, state laws on Senate vacancies today refer to the writ, e.g., CONNECT. GEN. STAT. § 9-211; FLA. STAT. § 100.161; IND. CODE § 3-10-8-3; MICH. STAT. § 204D.28; N.Y. PUB. OFF. LAW § 42(4-a); N.C. GEN. STAT. § 163-12; N.D. CENT. CODE § 16.1-13-08; OHIO REV. CODE ANN. § 3521.02; OR. REV. STAT. § 188.120; 25 PA. CONS. STAT. § 2776; R.I. GEN. LAWS § 17-4-9; VA. CODE ANN. § 24.2-207; WASH. REV. CODE § 29A.28.030, or to analogous instruments, e.g. MASS. GEN. LAWS ch. 54, § 140; CAL. ELEC. CODE § 10700; COLO. REV. STAT. § 1-12-201. 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.

90 There is ample historical evidence that the writ sets the date of an election. See Herman Cohen, et al., Australasia, 11 J. SOC. COMP. LEGIS. 373, 379 (1911) (describing that members of the Australian Parliament are payable “from the day appointed in the writ of election as the day for taking the poll for his election”); Charles S. Sydnor, A Description of Seargent S. Prentiss in 1838, 10 J. OF S. HIST. 475, 477 (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”);
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 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 requirement of an election 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 temporarily 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

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). 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.” GEORGE W. McCRARY, A TREATISE ON THE AMERICAN LAW OF ELECTIONS 166 (2d ed. 1880).
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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 we can conclude that the governor must order an election in every case and that she 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. The Supreme Court recently pinpointed the ambiguity: after noting that 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 it is hardly a novelty.”

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.” 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.

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

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91 BLACK’S LAW DICTIONARY (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.” JOHN BOUVIER, A LAW DICTIONARY 483 (15th ed. 1883). While this is an interesting distinction, we are concerned with the separate question whether the proviso enacts an alternative or a qualification.


93 U.S. CONST. art. II, § 2.

94 Id., art. V.
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 we 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.”95 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, saying, “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.’”96 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 stand 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. We return at the conclusion of this Part to the relationship between the principal clause and proviso, after we have examined the components of the proviso in greater detail.

2. The Authority of the State Legislature to Empower the State Executive

\textit{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

\footnote{95 H. Rep. No. 368, 52d. Cong., 1st Sess. 5 (1892).}

\footnote{96 47 Cong. Rec. 1482-83 (May 23, 1911) (emphasis added).}
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in limited circumstances and for limited periods. 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. The legislature, of course, may decline to extend the power. Today, 46 states empower their governors to make appointments, all but three have been represented by appointed Senators since the ratification of the Seventeenth Amendment.

A separate question is whether the legislature’s power to empower the governor to make appointments implies a power to require the governor to do so. Some proposals for the constitutional amendment made the appointment power mandatory, but the text adopted as the Seventeenth Amendment did not. As Professor Vikram Amar has suggested, “empower” does not mean “require.” Understanding the Amendment this way, state laws requiring appointments may conflict with the Constitution.

97 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. At the Convention, proposals to eliminate this appointment power were defeated. MADISON, DEBATES, August 9, 1787.

98 Although the Seventeenth Amendment says that the legislature empowers the state executive to make appointments, we understand this empowerment to follow normal law-making 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 (1916). But see Colorado General Assembly v. Salazar, 541 U.S. 1093 (2004) (Rehnquist, C.J., dissenting from denial of writ of certiorari).

99 Article V of the Constitution provides that “no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.” 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.

100 Infra Part IV.A.

101 Infra Part III.


103 Amar, Gubernatorial Power, supra note 7, at 735.

104 At least 14 states appear to require their executives to appoint. COLO. REV. STAT. § 1-12-201; § 10 ILCS 5/25-8; KAN. STAT. ANN. § 25-318; ME. REV. STAT. ANN. tit. 21, § 391(1); MD. CODE ANN., ELEC. LAW, § 8-602(a)(1); MASS. GEN. LAWS ch. 54, § 140(f); MICH. COMP. LAWS § 168.105; MO. REV. STAT. § 105.040; NEB. REV. STAT. § 32-565(1); N.M. STAT. § 1-15-14(A); N.Y. PUB. OFF. LAW § 42(4-a); N.C. GEN. STAT. § 163-12; TEX. ELEC. CODE ANN. § 204.002; WASH. REV. CODE § 29A.28.030.
end, this potential conflict between legislatures and governors may be academic. Our research reveals very few instances where states have left seats empty for a substantial period after a vacancy was created, 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. Professor Amar has offered textual and structural arguments in support of the binary view. Amar observes that the framers of the Seventeenth Amendment were concerned that poorly apportioned state legislatures did not represent the people; directly elected governors on the other hand, do represent the people; and so, the argument concludes, we should understand the proviso to allow for unfettered appointments if there are appointments at all. Support for this view is also found in the fact that the Constitution alone sets qualifications for membership in Congress. Professor Sanford Levinson proposes a more flexible understanding, which would allow state legislatures “to limit the appointment power with reasonable conditions designed to prevent what the

105 Only two vacancies have caused gaps in representation longer than six months. App’x B, Nos. 3 (Johnston) & 57 (Smith). See also infra note 139 and accompanying text. In Johnston’s case, the legislature had not empowered the government to make an appointment. See 1915 Ala. Laws 364-65 (No. 410).

106 See Ariz. Rev. Stat. § 16-222(C) (“[A]ppointee shall be of the same political party as the person vacating the office.”); see also Haw. Rev. Stat.§ 17-1 (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) (same); Wyo. Stat. Ann. § 22-18-111(a)(i) (same). Other potential restrictions could relate to the timing of the appointment, e.g., La. Rev. Stat. Ann. § 18:1278(A) (“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) (same), which should be distinguished from the timing of the vacancy election.

107 Amar, Gubernatorial Power, supra note 7.

108 Id. at 746-47.

legislature can reasonably believe would be an abuse of power.\textsuperscript{110} 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 Obama vacancy discussed in the introduction.

In our view, Professor Amar’s position is correct. The plain meaning of “may empower” suggests a binary authority, and our review of 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. Amar’s structural arguments are persuasive, and we would add that we think 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\textsuperscript{111} and the legislature’s control over how vacancy elections take place, not through control over who can be appointed. For these reasons, we interpret the start of the proviso to mean that state legislatures may 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.

3. The Temporary Appointment

\ldots to make temporary appointments until the people fill the vacancies by election \ldots

While the state legislatures may not place restrictions on appointments, there is one important restriction in the Seventeenth Amendment.

\textsuperscript{110} Levinson, \textit{supra} note, 7 at 713. Representative Tucker’s commentary suggests that he envisioned the legislature could condition the appointment power on the timing of the vacancy. \textsc{H. Rep.} No. 368, 52d Cong., 1st Sess. 5 (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.”).

\textsuperscript{111} 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. \textit{Election 2002 Recalls Minnesota Massacre of 1978}, \textsc{Associated Press} (Nov. 6, 2002).
Amendment’s proviso itself: appointments must be temporary. The text says so, and we 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.”\footnote{47 CONG. REC. 1482-83 (May 23, 1911). \textit{See also} 47 CONG. REC. 228-29 (Apr. 13, 1911) (statement in response to a different vacancy-filling provision that “with respect to the filling of vacancies, 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.”).} 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.”\footnote{47 CONG. REC. 1482-83 (May 23, 1911).}

Bristow’s analogy to the original Constitution raises another limit on the executive appointment power: any appointment under the Seventeenth Amendment should not last longer than those that were authorized by the original Constitution. It would be quite strange if a constitutional amendment that provided for greater democratic representation in regular Senate terms had the effect of reducing democratic representation following vacancies in the Senate. The unamended Constitution gave the governor temporary appointment power if a Senate vacancy happened while the state legislature was not in session;\footnote{U.S. CONST. art. I, § 3; \textit{see also} COMPILATION OF SENATE ELECTION CASES FROM 1789 TO 1885, reprinted as SEN. DOC. NO. 58-11 (1903) at 52-88, 107-42 (concluding that the governor could not make an appointment if the state legislature had adjourned without electing a new Senator); 4 ANNALS OF CONG. 78-79 (1794) (rejecting appointment because legislature was in session); HAYNES, ELECTION OF SENATORS 59-63, \textit{supra} note 17 (noting that in the 1890s the Senate refused to seat five members appointed by governors after their legislatures failed to select replacements).} that appointment would expire, however, if the legislature selected a new Senator or if it finished its legislative session without making any such selection.\footnote{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, \textit{supra} note 62, at 199-200, ¶ 494; HAYNES, \textit{SENATE, supra} note 17, at 163 & nn.2-3.} 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.

\footnote{112 47 CONG. REC. 1482-83 (May 23, 1911). \textit{See also} 47 CONG. REC. 228-29 (Apr. 13, 1911) (statement in response to a different vacancy-filling provision that “with respect to the filling of vacancies, 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.”).}
Framers understood state legislatures to meet annually.\textsuperscript{116} For practical purposes, then, appointments under the original Constitution were capped at one year.\textsuperscript{117}

In our view, the Seventeenth Amendment should be construed in a way that shortens, or at least does not lengthen, the maximum term for appointments.\textsuperscript{118} We read “temporary” 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 one year.\textsuperscript{119}

\textsuperscript{116} In the Convention debate over Senate vacancies, Edmund Randolph expressed concern that “[i]n some States the Legislatures meet but once a year.” \textit{Madison, Debates}, August 9, 1787. Many original state Constitutions also required annual meetings by the legislature. \textit{E.g.}, Del.\textit{ Const.} of 1776, art. 27; Ga.\textit{ Const.} of 1777, art. II; Md.\textit{ Const.} of 1776, XXIII; N.J.\textit{ Const.} of 1776, VII; N.Y.\textit{ Const.} of 1777, II; N.C.\textit{ Const.} of 1776, XV-XVI; Pa.\textit{ Const.} of 1776, § 9; \textit{Va. Const.} of 1777, ch. II, § VIII.

\textsuperscript{117} Relying on a U.S. Senate record, the lower court in \textit{Valenti} 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. at 864 (citing Senate Manual, S. Doc. No. 1, 90th Cong., 1st Sess. 661-725 (1967)). With the aid of modern technology and more accurate sources, we cross-referenced that Senate document with additional materials (including \textit{Congressional Directory}, \textit{Compilation of Senate Election Cases from 1789 to 1885}, \textit{reprinted as Sen. Doc. No. 58-11} (1903), at 146-55) to find that 21 pre-Amendment appointees served more than a year before the legislature selected a permanent replacement. In any event, the \textit{Valenti} majority used its finding to sanction a 29-month vacancy. We cannot see how this is a reasonable conclusion. By our count, legislative selections were delayed more than a year only 21 times—just 11%—and only one appointee served that long in the first 50 years after the Constitution was ratified. These data are strong support for the one-year limit we have identified. While the \textit{Valenti} court was correct that the longest appointed term before the Seventeenth Amendment was 19 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.

\textsuperscript{118} Tucker 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 governor may be empowered to fill the vacancy ‘until the people fill the vacancy, 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. Rep. No. 368, 52d. Cong., 1st Sess. 5 (1892).

\textsuperscript{119} There are at least two potential counterproposals. First, around the turn of the 20th century, when the Seventeenth Amendment was adopted, there was a trend toward
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 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.\textsuperscript{120} “As the legislature may direct” thus links up to the rule in the Elections Clause that requires states to establish election regulations. The legislative history we discussed above shows that a main point of contention was whether \textit{federal} oversight of elections should be removed—there was no serious discussion about removing the states’ 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 our discussion thus far. We have discussed how the proviso places a condition on the principal clause (rather than providing an alternative). The governor

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\textsuperscript{120} For thoroughness, we should point out that “as the legislature may direct” modifies “election,” the last antecedent. \textit{See} Barnhart v. Thomas, 540 U.S. 20, 26 (2003). It cannot modify the governor’s duty to issue a writ of election. \textit{Judge} v. \textit{Quinn}, 612 F.3d at 549 (“The grammatical acrobatics . . . are difficult to imagine.”).
is directed by the principal clause to issue a writ 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. According to our interpretation, this system should prevent the branches of state government from colluding to appoint a replacement Senator for more than a year. 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 DEFIANCE OF THE SEVENTEENTH AMENDMENT

Our unified interpretation of 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. In this Part we turn to state compliance with 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. We have compiled a dataset of all vacancies that have happened since the Seventeenth Amendment was ratified, and we present our findings here.\footnote{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/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 discretion to pursue their own agendas (the public monitors them less than state legislatures did). See Sean Gailmard & Jeffery A. Jenkins, \textit{Agency Problems, the 17th Amendment, and Representation in the Senate}, 53 \textit{Am. J. Pol. Sci.} 423 (Apr. 2009); Scott R. Meinke, \textit{Institutional Change and the Electoral Connection in the Senate: Revisiting the Effects of}}
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Our data show that states repeatedly violate both the explicit terms and the spirit of the Seventeenth Amendment when they fill vacancies in the Senate.

A. Senate Vacancy Data

To assess state compliance with the Seventeenth Amendment, we evaluated data on every vacancy in the U.S. Senate since the Amendment was adopted. Our effort is produced in two appendices. Using records maintained by Congress, we identified every vacancy during the relevant


The Seventeenth Amendment was in force as of May 31, 1913, see 38 Stat. 2049-50, and we limit our data 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 Sen. Comm. on Privileges and Elections, 63d Cong., 1st Sess. (Aug. 27, 1913). We include data on all seven Senators currently filling Senate vacancies. These Senators present a bit of a moving target. We treat each as if she will serve until the last day of her current term in the same capacity in which she currently serves: we assume 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.


and then cataloged biographical information about all Senators who created or served as replacements during the vacancy. In addition, we calculated for each vacancy 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, we coded each vacancy to correspond to the type of Senator who created the vacancy, how it was created, and the way in which it was filled.

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 we observe 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

http://www.senate.gov/artandhistory/history/common/contested_elections/intro.htm (last visited Feb. 15, 2012). Our 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 Neale, supra note 17at 7. For completeness, we count these resignations as vacancies and include them in our dataset.

Counting vacancies requires some thought. Some cases are easy: a regularly elected Senator who dies in office always creates a vacancy. We mentioned above that we do not count vacancies before May 31, 1913, and that we do count those that happen after technical resignations and similar events creating vacancies at the tail end of a Senate term. As we explained in Part II, we also count as vacancies 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’x B, Nos. 114 (Carnahan); 130 (Pitman); and 243 (Thomson), or where the Senate rejects the Senator, id. Nos. 190 (Vare); 57 (Smith); 141 (Wyden and Durkin). Finally, when an appointed Senator leaves office early, we do not count it 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 our view that the process required by the Seventeenth Amendment is complete once an elected replacement takes office.

In this Part we refer to “full terms,” “unexpired terms,” and “short terms.” See generally The Term of A Senator – When Does It Begin and End?, SENATE DOC. NO. 98-29, 98th Cong., 2d sess., at 1 (May 22, 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), we refer to the unexpired term as a short term.

A detailed explanation of our coding is found in App’x A.
to the Senate.\textsuperscript{128} 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.\textsuperscript{129}

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.\textsuperscript{130} There have been 43 technical vacancies in our period of study.\textsuperscript{131} While the Seventeenth Amendment applies to these cases, we exclude all technical vacancies from our consideration of state compliance. As a practical matter, technical vacancies are quite short, occurring with 18 days left in the term on average. Even if a state could hold an election during this short term,\textsuperscript{132} the harm of losing a few days of

\textsuperscript{128} On 12 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 12 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’x B, Nos. 173 & 178 (Metzenbaum), 209 & 212 (Blakley), 47 & 53 (Thomas), 129 & 130 (Bunker), and 181 & 182 (McNary), which means that a total of 229 different people have been appointed to the Senate under the Seventeenth Amendment.

\textsuperscript{129} The Senate Historical Office’s publication, Senators of the United States, supra note 124 at 51-84, lists 813 individuals who took office in the Senate for the first time after the passage of the Seventeenth Amendment. Of these 813 Senators, we find that 227 or 28% first took their seats as appointees (two of the 229 people appointed since 1913—Henry Dworshak and Norris Cotton—served as elected Senators prior to their appointments).

\textsuperscript{130} The vacancy occurs during the “short term.” See supra note 126.

\textsuperscript{131} Thirty-four of these 43 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, 138-140 (1978). According to the Senate Historical Office, the Rules Committee stopped granting seniority in these cases beginning in 1980. SENATORS OF THE UNITED STATES, supra note 124 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’x B, No. 20 (McAdoo/Storke); three Senators resigned during a short term and their seats were never filled, id. Nos. 14 (Fulbright), 86 (Brewster), and 165 (Ervin); and five Senators died during a short term—two were replaced by the Senator-elect, id. Nos. 54 (McCormick/Deneen) and 97 (Hart/Riegle), two were replaced by someone other than the Senator-elect, id. Nos. 129 (Pittman/Bunker), and 199 (Smith/Hall), 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).

\textsuperscript{132} It would be difficult to do so in some cases. And even if we thought a state could hold such an election, it would be impossible to challenge its refusal to do so—the
elected representation at the end of a lame-duck session of Congress may not be worth the considerable cost of the vacancy election.133 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.134 In this study, we want to assess state compliance with the Seventeenth Amendment in the mine run of cases. If we included technical vacancies as examples of a state failing to hold the election required by the Seventeenth Amendment, we would unfairly inflate the rate of state defiance. As a result, we report technical vacancies in our appendices, but we exclude them in the foregoing analysis of state compliance.

This leaves 201 Senate vacancies between the adoption of the Seventeenth Amendment and the present day. We begin with basic figures. Over 70% of these vacancies were caused by the death of a sitting Senator, with nearly all the rest caused by a Senator’s resignation.135 In 183 of the 201 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 201 vacancies. The converse, of course, is that there have been 31 instances in which the state executive appointed a permanent replacement to the Senate and the time between early November’s general election and the next January 3 does not give an aggrieved party time to prosecute a lawsuit.

133 We stress that we do not believe 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). We support holding elections to fill vacancies on the same day as the regular election for the next term. This is what Illinois did following the Obama vacancy, and our study shows that it has happened on 40 different occasions since 1913—in almost a quarter of all the elections held to fill vacancies. We recognize, however, that where 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. REP. No. 368, 52d. Cong., 1st Sess. 5 (1892) (Rep. Tucker) (commenting on the “hardship” and “unnecessary expense” of a special election too close to a general election).

134 The Senator-elect filled 36 of 43 technical vacancies. See supra note 131. As we mentioned, this early transfer of power was often intentional. We anticipate that strict enforcement of the Seventeenth Amendment during a short term would lead to fewer technical resignations, rather than a greater number of elections to fill technical vacancies.

135 Deaths caused 143 out of 201 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’x B, Nos. 190 (Vare); 57 (Smith); 141 (Wyden and Durkin). Since the passage of the Seventeenth Amendment, no vacancy has been caused by expulsion.
state failed to hold any election to fill the vacancy. Of the 201 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.\textsuperscript{136} To put this figure another way, at any given moment, one could expect six of the 100 Senate seats to be vacant or filled by Senators appointed or elected to fill a vacancy.\textsuperscript{137} Moreover, our research shows that of these 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.\textsuperscript{138}

Finally, we should touch briefly on the states’ immediate responses to vacancies in their Senate delegations. States tend to fill empty seats with great speed. We explained already that no state has ever left a seat empty for a whole unexpired term, but that record is all the more impressive when one considers that the average time a seat is left empty after a vacancy happens is an incredibly short 25 days.\textsuperscript{139} In the last 50 years, moreover, states have filled 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, we 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 4 months on average;\textsuperscript{140} but when the seat is filled first by an appointment, it is empty

\textsuperscript{136} Accounting for all 201 vacancies, the total time between creation of the vacancy and end of the term is 207,483 days.

\textsuperscript{137} On average, 5.79\% of seats are tied up in some phase of the process outlined in the Amendment’s second paragraph.

\textsuperscript{138} Appointees served 178 of the 193 years (accounting for all 201 vacancies, the total time appointees served is 64,817 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 201 vacancies, the total time seats were left empty is 5,089 days).

\textsuperscript{139} 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 10 months. \textit{See} App’x B, Nos. 3 (Johnston) and 57 (Smith). On the short end, in 10 instances a vacancy was created and filled on the same day, and in 22 cases a vacancy was filled on the day after it was created.

\textsuperscript{140} 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.
only 16 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, and we will return to that subject shortly.

C. Constitutional Defiance

There are two ways in which a state might fail to comply with the Seventeenth Amendment. First, it can disobey the Amendment’s explicit terms by failing to hold an election to fill a vacant seat. We call such blatant violations “facial noncompliance.” Second, we have identified a pattern of states using the vacancy-filling apparatus to unreasonably postpone vacancy elections. While state practices falling into this category arguably adhere to the Seventeenth Amendment’s plain language, they defy the spirit of the Amendment, and so we call this behavior “constructive noncompliance.”

1. Facial Noncompliance

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 31 of the 201 Senate vacancies. 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 twice as often as they have been filled by an election without any intervening appointment. This is 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. Although permanent appointees typically are appointed quite quickly after a vacancy

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141 A state would also fail to comply facially by failing to hold an election for the full term, but this has never happened.
142 Recall that we exclude “technical vacancies” that occur near the end of a term. See supra notes 130-134 and accompanying text.
143 States filled vacancies with no intervening appointment 18 times.
144 As a result of facial noncompliance, the people have been deprived of 36 years worth of elected representation in the Senate (13,145 days for all 31 vacancies).
happened, the average time that a state went without elected representation was almost 14 months in cases where states disobeyed the Seventeenth Amendment on its face. In 16 cases, facial noncompliance caused gaps in elected representation of a year or more; and in five instances, the deprivation lasted more than two years.

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*. Though New York’s governor issued a writ of election to choose a replacement Senator, the state never held an election, and the appointed replacement served the remainder of the term. The people of New York went without elected representation for two years and seven months. 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. 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. 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. 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. She served

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145 See 116 CONG. REC. 44576-77 (Jan. 2, 1971) (Goodell’s last day); 117 CONG. REC. 3 (Jan. 21, 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 our 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.

146 See App’x B, No. 156. The seat was left empty for 96 days and Goodell served for 845 days.

147 See App’x B, No. 105. Mondale served as an appointee for 734 days.

148 See App’x B, No. 106. The replacements for Mondale served a total of 733 days.

149 See App’x B, No. 87. Senator Mitchell served as an appointee for 959 days.

150 Unfortunately, family connections and scheming by state governors are common when it comes to vacant seats. In at least 11 cases, the appointed replacement came from the same family as the Senator creating the vacancy. See App’x B, 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). Perhaps worse, 10 times a governor appointed himself to the
as a permanent appointee through the end of the term more than two years later.\textsuperscript{151}

There is considerable variance in facial noncompliance over time. In the first half-century after the Seventeenth Amendment was ratified, there were 12 vacancies filled by permanent appointees. Since 1963, however, there have been 19 cases. Importantly, there have been roughly half as many vacancies in the Senate during the latter period as there were during the earlier one.\textsuperscript{152} 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 twice as many examples of facial noncompliance than during the first 25 years that the Seventeenth Amendment was in force. In short, facial noncompliance is becoming more common.

2. Constructive Noncompliance

Constructive noncompliance occurs when a state unreasonably postpones the election of a replacement Senator and in so doing acts contrary to the spirit of the Seventeenth Amendment. Constructive noncompliance differs from facial noncompliance because in the former circumstance the state has complied with the literal terms of the Amendment by holding an election to fill the vacant Senate seat. In the 31 cases of facial noncompliance just discussed, the states did not hold vacancy elections at all. 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.\textsuperscript{153} Both avenues provide the election required by the Seventeenth Amendment. But facial compliance is not enough. The Seventeenth Amendment reflects a strong preference for elected representation. State behavior that unreasonably postpones vacancy

\textsuperscript{151} See App’x B, No. 8. Lisa Murkowski served for 745 days as an appointee before starting a full term in 2005 for which she was elected.

\textsuperscript{152} One hundred sixty-five vacancies occurred during the first 50 years after adoption; 79 have occurred since then.

\textsuperscript{153} As we mentioned, the states have chosen the appointment-then-election route in 152 cases and the election-only route in 18.
elections undermines this central tenet and results in constructive noncompliance with the Seventeenth Amendment.

a. General Observations about Constructive Noncompliance

Before measuring constructive noncompliance, which requires us to consider how long a delay before an election is too long (and thus unreasonable), we discuss some general findings. Of the 170 vacancies ultimately filled by election, the people were without elected representation for an average of 11 months per vacancy.\(^{154}\) In the last century, this wait adds up to almost 157 years without elected representation.\(^{155}\)

Our research identifies a key variable affecting how long the people must wait for an election to fill a Senate vacancy: whether the state appoints a temporary replacement before holding the election. We have already observed that a seat is left empty for 4 months on average when a state fills its vacancy by holding an election without any appointment and for only 16 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 4 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.\(^{156}\) The average wait for elected representation is thus three times longer when an election is preceded by an executive appointment.\(^{157}\) This is a difference that adds up. Suppose all vacancies were filled by an election alone without intervening appointments; our research suggests that in this universe the

\(^{154}\) In the 170 cases where states held elections, the average time to fill the seat by election was 336 days.

\(^{155}\) The total time without elected representation in these 170 cases is 57,159 days.

\(^{156}\) 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.

\(^{157}\) 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).
people would have enjoyed an additional 100 years worth of elected representation.\textsuperscript{158}

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 65 of the vacancies that followed the appointment-then-election model. In contrast, of those cases that were filled by election alone, none involved a wait longer than one year; in the vast majority of this set of cases, the election was held within six months of the vacancy.

b. Measuring Constructive Noncompliance

These data suggest that while states are quick to fill empty seats in the Senate with appointees, they would rather let the appointee linger than move expeditiously to elect a permanent replacement. 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.

To precisely measure the extent of this constructive noncompliance, however, we must address a definitional issue not present for facial noncompliance. A state’s failure to hold an election is facial noncompliance, but to count instances of constructive noncompliance requires agreement about how long a state may delay an election without offending the Seventeenth Amendment. We recognized above that states cannot hold vacancy elections immediately after vacancies are created. Advocating for such a system could result in inordinate costs and significant risks to the electoral process. But as we implied in our interpretation of the Amendment’s appointment power, the states may not choose any election day, no matter how long the wait. Our review of vacancy data and the

\textsuperscript{158} 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 is 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.
history of the Seventeenth Amendment suggest a few ways to think about how long a wait for a vacancy election is too long.

One 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, so 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.\textsuperscript{159} But this measure has problems. Four months is a quick turnaround. Indeed, in many cases in which the state held an election without an appointment (where the state should be motivated to hold an election quickly), the delay before the election was more than four months. We also cannot assume that past practice establishes a fair constitutional rule: there may be good reasons for states to move faster or slower than in the past. We think it best to select a more stable measuring stick.

The other options look to the history of the Seventeenth Amendment. In Part II, we noted that the best reading of the Amendment’s second paragraph limited gubernatorial appointments to one year. In addition, we provided reasons that a two-year limit could be appropriate.\textsuperscript{160} Either standard can be used to measure constructive noncompliance. Applying the more generous limit, according to which 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. Not bad at all given that we are talking about a total of 170 vacancies filled by election. As we suggested earlier, however, we think the two-year limit may be too lenient. Anyone who takes the Seventeenth Amendment’s goal of popular elections seriously would consider a full third of a Senate term without elected representation an anathema. And above we provided evidence that the Amendment’s framers agreed with this conclusion.

That leaves our preferred one-year measure. In our view, this is the best measure of constructive noncompliance. It is enough time to allow the electoral machinery of the states to function in a deliberative fashion; and it is a fixed figure based on our historical experience and the original understanding of the Constitution. Indeed, some states currently hold general, statewide elections every year, suggesting that the burden of

\textsuperscript{159} The wait for an election has been longer than 119 days in 133 of 152 cases where there is an appointment and then an election; the wait has been longer than 119 days in 6 of the 18 cases where an election was held without any intervening appointment, for a total of 139 of 170.

\textsuperscript{160} See supra Part II.C.3.
holding a vacancy election within this interval would not be prohibitive. Applying this standard, we find that in 65 of the 170 vacancies filled by election, the election was delayed too long. In approximately 40% of cases, therefore, the states unreasonably delayed elections to fill vacancies and thus violated the democratic spirit of the Seventeenth Amendment.

D. Lessons from 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 201 vacancies were filled (quickly on average), and in nine 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. Constructive noncompliance is also rampant. When states do hold elections, they often appoint a replacement for a substantial period before the election. Including both facial and constructive noncompliance, we find that the states have failed to live up to the promise of the Seventeenth Amendment in half of all Senate vacancies. The states’ ordering of priorities—filling vacancies quickly without worrying about elections—is contrary to the purpose of the Seventeenth Amendment.

161 E.g., N.J. STAT. ANN. § 19:2-3 (“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 (providing some statewide elections every year).

162 Elections have been delayed more than one year in 65 vacancies and the states have refused to hold elections in 31 more, or 48% of the 201 total vacancies.

163 We do not mean to suggest that the Seventeenth Amendment’s appointment power has 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 13 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 24 hours of service. United States Senate, First Woman Senator, http://www.senate.gov/artandhistory/history/minute/First_Woman_Senator_Appointed.htm
There are few constitutional provisions as routinely disregarded today as the second paragraph of the Seventeenth Amendment. A literature too vast to collect here identifies the struggle in different areas of federal constitutional law between the states and the federal government. Historically, the states’ systematic violations of the Constitution have prompted strong enforcement measures by the national government and the Supreme Court. Moreover, routine violations of federal constitutional rights typically result in ample private efforts to enforce compliance.

(last visited Aug. 15, 2011). 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. 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 to our knowledge no scholar has yet examined the role that the Seventeenth Amendment played in this social evolution.

We should also note that 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. The first Asian American Senator from the lower 48 states, S.I. Hayakawa, was also an appointee.

164 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); 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).

165 Consider, for example, Congress’s effort to remedy violations of the Fifteenth Amendment with the Voting Rights Act of 1965, discussed in State of 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, 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 response to the states’ resistance to Brown v. Board of Education. See generally CHARLES J. OGLETREE, JR., ALL DELIBERATE SPEED (2004). See also Cooper v. Aaron, 358 U.S. 1, 18 (1958) (per curiam); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971). The Supreme Court has taken steps in a number of other areas to remove the states’ ability to infringe upon constitutional rights. E.g., 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”); Brown v. Plata, 131 S.Ct. 1910 (2011) (ordering the state of 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). See also, e.g., Henry P. Monaghan, The Supreme Court, 1974 Term – Foreword: Constitutional Common Law, 89 Harv. L. Rev. 1 (1975) (discussing and justifying “substantive, procedural, and remedial rules drawing their inspiration and authority from, but not
In the context of the Seventeenth Amendment, however, we see a high frequency of violations of the people’s right to vote without any response. There has been very little 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 our 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. This historical and continuing constitutional defiance demands a solution.


166 Consider the huge amount of Second Amendment litigation following *Heller v. District of Columbia*, see *McDonald v. Chicago*, 130 S.Ct. 3020 (2010); *Skoien v. United States*, 614 F.3d 638 (7th Cir. 2010) (*en banc*); *Ezell v. City of Chicago*, 2011 WL 2623511 (7th Cir. July 6, 2011), or the high frequency of Eighth Amendment claims by inmates or Takings Clause litigation by property owners.

167 There have been eight vacancies since the 2008 election. Five states held elections to fill these vacancies; three did not. We have already described how Illinois was forced to hold an election by 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. As we said, by any measure the Obama vacancy resulted in constructive noncompliance, but we also note that the people of Delaware and New York waited nearly two years for elected replacements. See App’x B, Nos. 34 (Biden vacancy, 669 days); 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. Gen. Laws 54 § 140(a)-(c), 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. *Id.* § 140(f). The final vacancy in the compliant group occurred when Senator Byrd died, leaving the West Virginia seat vacant.
Before moving to solutions, we address one potential qualification of our 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 12 months on average for elected representation. Critics of our emphasis on elections may ask, therefore, whether it is better to be without any representation for four months or without elected representation for 12. 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 we have stressed throughout, the Seventeenth Amendment is designed to serve both values, and our interpretation reflects that fact. 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, that an election happen within one year.

IV. STATE LAW AND CORRECTIVE MEASURES

The centrality of state law suggests a solution to the record of state defiance we have described. While some members of Congress and commentators have responded with calls for revision of the Seventeenth Amendment itself, we think this an ill-advised course of action. Our interpretation of the Seventeenth Amendment has revealed 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

We described earlier the rollercoaster effort to comply with the Seventeenth Amendment in that case. 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. § 100.161, 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. Finally, Nevada is currently represented by an appointed Senator, and all indications suggest there will be no election to fill the vacancy.

168 See, e.g., S.J. Res. 7, 111th Cong. (2009) (proposed constitutional amendment eliminating appointments); A Constitutional Amendment Concerning Senate Vacancies: Hearing on S.J. Res. 7 & H.J. Res. 21 Before the Subcomm. on the Const. of the S. Comm. on the Judiciary & the Subcomm. on the Const., 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 Seventeenth Amendment (weblog), available at http://repealthe17thamendment.blogspot.com.
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.

In this Part, we explain how this could happen. State laws governing vacancy elections are the primary cause of facial and constructive noncompliance, but they also represent the best hope for reform. To that end, we survey the landscape of current state laws and the ways in which they contribute to defiance of the Seventeenth Amendment. Based on our observations, we propose model legislation 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, we reviewed the laws of each state that govern elections to fill senatorial vacancies—both as they stand today169 and as they were written just after the Seventeenth Amendment was adopted.170 The first step is to


identify those features of state law that contribute to constitutional noncompliance.

It should come as no surprise that state legislatures have empowered governors to appoint replacement Senators. Today, about 44 states allow appointments whenever a vacancy happens.\footnote{Miss. Laws 192-93 (ch. 148); Mo. Rev. Stat. § 4787 (1919); 1915 Mont. Laws 281-82 (ch. 126); 1917 Neb. Laws 117-18 (ch. 39); 1915 Nev. Stat. 83-84 (ch. 65); 1915 N.H. Laws 32 (ch. 29); 1920 N.J. Laws 627; 1915 N.M. Laws 39 (ch. 27); 1913 N.Y. Laws 2418-19 (ch. 822); 1913 N.C. Sess. Laws 206 (ch. 114); 1927 N.D. Laws 175-76 (ch. 138); 1914 Ohio Laws 8-12 (no. 3); 1915 Ok. Sess. Laws 69-70; 1915 Or. Laws 59 (ch. 48); 1913 Pa. Laws 995-96 (no. 454); 1914 Pub. Laws 65-68 (ch. 1048); 1914 S.C. Acts 592-93 (ch. 337); 1915 S.D. Sess. Laws 367 (ch. 182); 1913 Tenn. Pub. Acts 396-98 (ch. 8); 1913 Tex. Gen Laws 101-11 (ch. 39); 1915 Utah Laws 54-55 (ch. 48); 1915 Va. Acts 252 (ch. 150); 1915 Wash. Sess. Laws 232 (ch. 60); 1921 W. Va. Acts 246-47 (ch. 101); 1913 Wis. Sess. Laws 825-29 (ch. 634); 1913 Wyo. Sess. Laws 100 (ch. 91).} Two states—Oklahoma and Connecticut—allow appointments in very limited circumstances.\footnote{Miss. Laws 192-93 (ch. 148); Mo. Rev. Stat. § 4787 (1919); 1915 Mont. Laws 281-82 (ch. 126); 1917 Neb. Laws 117-18 (ch. 39); 1915 Nev. Stat. 83-84 (ch. 65); 1915 N.H. Laws 32 (ch. 29); 1920 N.J. Laws 627; 1915 N.M. Laws 39 (ch. 27); 1913 N.Y. Laws 2418-19 (ch. 822); 1913 N.C. Sess. Laws 206 (ch. 114); 1927 N.D. Laws 175-76 (ch. 138); 1914 Ohio Laws 8-12 (no. 3); 1915 Ok. Sess. Laws 69-70; 1915 Or. Laws 59 (ch. 48); 1913 Pa. Laws 995-96 (no. 454); 1914 Pub. Laws 65-68 (ch. 1048); 1914 S.C. Acts 592-93 (ch. 337); 1915 S.D. Sess. Laws 367 (ch. 182); 1913 Tenn. Pub. Acts 396-98 (ch. 8); 1913 Tex. Gen Laws 101-11 (ch. 39); 1915 Utah Laws 54-55 (ch. 48); 1915 Va. Acts 252 (ch. 150); 1915 Wash. Sess. Laws 232 (ch. 60); 1921 W. Va. Acts 246-47 (ch. 101); 1913 Wis. Sess. Laws 825-29 (ch. 634); 1913 Wyo. Sess. Laws 100 (ch. 91).} And four reject the appointment power altogether.\footnote{Miss. Laws 192-93 (ch. 148); Mo. Rev. Stat. § 4787 (1919); 1915 Mont. Laws 281-82 (ch. 126); 1917 Neb. Laws 117-18 (ch. 39); 1915 Nev. Stat. 83-84 (ch. 65); 1915 N.H. Laws 32 (ch. 29); 1920 N.J. Laws 627; 1915 N.M. Laws 39 (ch. 27); 1913 N.Y. Laws 2418-19 (ch. 822); 1913 N.C. Sess. Laws 206 (ch. 114); 1927 N.D. Laws 175-76 (ch. 138); 1914 Ohio Laws 8-12 (no. 3); 1915 Ok. Sess. Laws 69-70; 1915 Or. Laws 59 (ch. 48); 1913 Pa. Laws 995-96 (no. 454); 1914 Pub. Laws 65-68 (ch. 1048); 1914 S.C. Acts 592-93 (ch. 337); 1915 S.D. Sess. Laws 367 (ch. 182); 1913 Tenn. Pub. Acts 396-98 (ch. 8); 1913 Tex. Gen Laws 101-11 (ch. 39); 1915 Utah Laws 54-55 (ch. 48); 1915 Va. Acts 252 (ch. 150); 1915 Wash. Sess. Laws 232 (ch. 60); 1921 W. Va. Acts 246-47 (ch. 101); 1913 Wis. Sess. Laws 825-29 (ch. 634); 1913 Wyo. Sess. Laws 100 (ch. 91).}

Our data suggest that the appointment power may contribute to state noncompliance, 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.\footnote{Miss. Laws 192-93 (ch. 148); Mo. Rev. Stat. § 4787 (1919); 1915 Mont. Laws 281-82 (ch. 126); 1917 Neb. Laws 117-18 (ch. 39); 1915 Nev. Stat. 83-84 (ch. 65); 1915 N.H. Laws 32 (ch. 29); 1920 N.J. Laws 627; 1915 N.M. Laws 39 (ch. 27); 1913 N.Y. Laws 2418-19 (ch. 822); 1913 N.C. Sess. Laws 206 (ch. 114); 1927 N.D. Laws 175-76 (ch. 138); 1914 Ohio Laws 8-12 (no. 3); 1915 Ok. Sess. Laws 69-70; 1915 Or. Laws 59 (ch. 48); 1913 Pa. Laws 995-96 (no. 454); 1914 Pub. Laws 65-68 (ch. 1048); 1914 S.C. Acts 592-93 (ch. 337); 1915 S.D. Sess. Laws 367 (ch. 182); 1913 Tenn. Pub. Acts 396-98 (ch. 8); 1913 Tex. Gen Laws 101-11 (ch. 39); 1915 Utah Laws 54-55 (ch. 48); 1915 Va. Acts 252 (ch. 150); 1915 Wash. Sess. Laws 232 (ch. 60); 1921 W. Va. Acts 246-47 (ch. 101); 1913 Wis. Sess. Laws 825-29 (ch. 634); 1913 Wyo. Sess. Laws 100 (ch. 91).} Moreover, the mere possibility of an appointment does not create a constitutional problem; the harm happens when the appointment power in some way subverts the election required by the
Amendment. Where the appointment power is paired with a speedy election, there is no constitutional trouble at all.

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 13 states actually require permanent appointments under certain conditions; when these conditions are met, facial noncompliance results.\(^{175}\) In this category, we note with particular disapproval state laws that permit 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, we have identified more than 20 other states whose statutes create permanent appointments by implication.\(^{176}\) Taken together,

\(^{175}\) The states that expressly provide for permanent appointments are: California (seems to permit permanent appointments if vacancy happens after the election for the next term); Connecticut (if vacancy happens fewer than 22 days before the election for the next term); Louisiana (if appointment would last for less than one year); Maryland (if vacancy happens fewer than 21 days before candidacy deadline for the second-to-last election in the term, which allows permanent appointments up to two years and eight months); Mississippi (seems to permit permanent appointments of up to one year); Nebraska (if vacancy happens fewer than 60 days before the election for the next term of the seat); New York (if vacancy happens fewer than 60 days before the primary in the second-to-last cycle in the term, which would allow permanent appointments up to 2 years and 6 months); North Dakota (if vacancy happens fewer than 90 days before the second-to-last election in the term, which would allow permanent appointments up to 2 years and 5 months); Ohio (if vacancy happens fewer than 180 days before the second-to-last election in the term, which would allow permanent appointments up to 2 years and 8 months); South Carolina (if vacancy happens fewer than 100 days before the second-to-last election in the term, which would allow permanent appointments up to 2 years, 5 months, and 10 days); South Dakota (seems to permit permanent appointments if vacancy happens after the second-to-last election in the term of the seat, which would allow permanent appointments up to 2 years and 2 months); West Virginia (if appointment would last less than 2 years and 6 months); Wyoming (if vacancy happens after the second-to-last election in the term, which would allow permanent appointments up to 2 years and 2 months). There is some ambiguity in Arkansas law, but its state Constitution appears to contemplate permanent appointments. Ark. Const. amend. XXIX § 4. And Alaska law provides for permanent appointments, but a later enactment probably repealed that provision.

\(^{176}\) 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
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: our review of state laws passed after the Seventeenth Amendment reveals that there are more laws today that allow for facial noncompliance than there were in 1913.\footnote{\textsuperscript{177}}

Also problematic are those state laws that require elections but still permit appointees to serve excessively long terms. These long appointments mean long delays before elections to fill vacancies, which result in constructive noncompliance. We have identified many state laws that fit this category. 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.\footnote{\textsuperscript{178}} 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.\footnote{\textsuperscript{179}} Disappointingly, just as more state laws permit permanent appointments today than they did in 1913, we see a

\footnote{\textsuperscript{177}} 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. 1914 S.C. Acts 592-93 (ch. 337).

\footnote{\textsuperscript{178}} See 10 ILCS § 5/25-8. 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.

\footnote{\textsuperscript{179}} When a vacancy happens in Maine, for example, state law provides that candidates must participate in the next primary election that is more than 60 days after the vacancy is created, filling the vacancy at the subsequent general election. Me. Rev. Stat. Ann. Tit. 21-A, § 391. Maine’s primaries usually take place on the second Tuesday in June, \textit{id.} § 339, which means a vacancy created in April or May of an election year will not be filed until the November election 30 months later.
similar increase in the number of states that allow for constructive noncompliance.\footnote{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. 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. 1915 Del. Code § 1890. Similarly, current Arizona law fills vacancies at the next general election, Ariz. Rev. Stat. § 16-222, 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).}

\section*{B. Model Legislation}

The foregoing survey represents a bleak state of play when it comes to the state laws governing vacancies in the Senate. For the most part, laws across the United States are not 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 us to construct model legislation for all states. We propose here a statute that states could adopt to improve compliance with the Seventeenth Amendment:

\textbf{An Act for Filling Vacancies in the U.S. Senate}

\section*{§ 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.

\section*{§ 2.} When a vacancy occurs in the office of United States Senator, the governor must 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 three months from the date on which the vacancy occurs, except that if the vacancy occurs within six months of a general election, the election to fill the vacancy will be held on the same day as the general election.

\section*{§ 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.
recognizing that the states should have the option of maintaining their equal representation in the Senate. Our 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;\(^\text{181}\) and it guarantees that the state maintains its equal voice in the Senate through temporary appointments. In addition, the proposed legislation alleviates any concern about the state wasting money or effort putting on a vacancy election where 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.

Our model statute starts from Vermont’s law, which we think provides a better approach than any other.\(^\text{182}\) What is different 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.\(^\text{183}\) 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. We also worry that, in these cases, the governor might be tempted to let the term expire without holding an election.\(^\text{184}\) To solve this

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\(^{181}\) Our proposed legislation uses three and six months 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 governor must set an election for as early a date as practicable under state law. R.I. Gen. Laws § 17-4-9; Tex. Elec. Code Ann. §§ 201.0151 & 204.002, .003, .005. In New Jersey, the governor has the power to pick a date earlier than called for in the law. N.J. Stat. § 19:3-26.

\(^{182}\) 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.”) & 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 §§ 29A.28.030, .041.

\(^{183}\) See, e.g., App’x B, Nos. 129 & 130 (Senator Pittman dies after being reelected but before the new term began); 114 (candidate Carnahan dies after ballots were printed but before the election).

\(^{184}\) 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
problem, a few states deem by law that the winner of the regular election is the winner of the vacancy election. The accession of a recently elected Senator seems like a reasonable substitute for a slap-dash 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. The succession of the regularly elected Senate in third paragraph of our legislation responds to these concerns.

By adopting our legislation, states would take a step toward stopping the problem of repeated defiance of the Seventeenth Amendment. In so doing, 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 we expect that it would have positive rather than negative political ramifications for state legislators. It is by all accounts a change that is within reach.

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185 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. § 204D.28, Subd. 12 (applying if the seat is vacant or filled by an appointee at the time of the election), Mass. Gen. Laws ch. 54, § 140(d) (applying if 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, § 69.12(2). 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. tit. 26, § 12-101(B).

186 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’x B, Nos. 129 & 130 (Pittman).

187 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 181. 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.
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 20th 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 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 branches of state government.

For nearly 100 years since the Seventeenth Amendment became the law of the land there has been considerable state defiance of its careful design. Our study of Senate vacancies reveals that 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, we have found that the states unreasonably delay elections, and in so doing allow appointees who have no 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-month 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 new “Treasons of the Senate” for the 21st century. And these new watchwords have provoked 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 halt state defiance of its terms. The states’ duty to direct congressional elections carries with it a responsibility to ensure that any alleged infringement of the right of people to vote is carefully and meticulously scrutinized. We call on the states to meet their burden and make good on the 100-year-old promise that each Senator is “elected by the people.”