

Are Statutes Constraining Gubernatorial Power to Make Temporary Appointments to the United States Senate Constitutional Under the Seventeenth Amendment?

by VIKRAM DAVID AMAR*

After Republican Senator Craig Thomas died last June while undergoing leukemia treatment, Wyoming's Democratic Governor Dave Freudenthal filled the vacancy by appointing Republican State Senator John Barrasso.¹ Barrasso will serve in the U.S. Senate until the beginning of 2009. A special election in November 2008 will decide who will finish Thomas's term through 2013.²

Analysts were not surprised that Senator Thomas's death generated no short-term effects on the partisan balance of the closely divided Senate. They noted that although Governor Freudenthal is a Democrat, Wyoming state law provided that when picking a temporary replacement to serve until the special election of 2008, the Governor was required to choose from among three candidates put up by the leadership of the State Republican Party—the party represented by the fallen incumbent.

This description of Wyoming law is accurate: Wyoming Elections Code section 22-18-111(a)(i) indeed directs that, in the event of a Senate vacancy among the Wyoming Senate contingent, the central party committee of the party represented by the prior incumbent is to submit three names of qualified persons to the Governor, who “shall” then choose one of the three to serve in the Senate until a popular election is held.³

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1. Michael Falcone, *Wyoming: Senator Named to Fill Vacancy*, N.Y. TIMES, June 23, 2007, at A9.

2. *Id.*

3. The text of the Wyoming statute provides:

It is dubious, however, that Wyoming's law—and that of a few other states whose statutes resemble Wyoming's⁴—is valid under the U.S. Constitution. It is at least very questionable whether a legislature can force a governor to pick one of the three persons served up by state party leaders. It is similarly questionable whether a state can require a governor to fill a Senate vacancy with someone of the same party as the prior incumbent. (Arizona's statute purports to do this, and raises a substantial constitutional controversy that could have major implications should Republican Senator John McCain become President and be replaced by a Democratic governor.) This Article pursues these and related questions. The Article proceeds as follows: Part I provides detailed textual arguments against Wyoming's law and similar schemes. Part II analyzes the relevant (and somewhat sparse) United States Supreme Court authority bearing on these issues. Part III buttresses Part I's textual argument by drawing on the history and

If a vacancy occurs in the office of United States senator or in any state office other than the office of justice of the supreme court and the office of district court judge, the governor shall immediately notify in writing the chairman of the state central committee of the political party which the last incumbent represented at the time of his election under W.S. 22-6-120(a)(vii), or at the time of his appointment if not elected to office. The chairman shall call a meeting of the state central committee to be held not later than fifteen (15) days after he receives notice of the vacancy. At the meeting the state central committee shall select and transmit to the governor the names of three (3) persons qualified to fill the vacancy. Within five (5) days after receiving these three (3) names, the governor shall fill the vacancy by temporary appointment of one (1) of the three (3) to hold the office. If the incumbent who has vacated office did not represent a political party at the time of his election, or at the time of his appointment if not elected to office, the governor shall notify in writing the chairman of all state central committees of parties registered with the secretary of state. The state central committees shall submit to the governor, within fifteen (15) days after notice of the vacancy, the name of one (1) person qualified to fill the vacancy. The governor shall also cause to be published in a newspaper of general circulation in the state notice of the vacancy in office. Qualified persons who do not belong to a party may, within fifteen (15) days after publication of the vacancy in office, submit a petition signed by one hundred (100) registered voters, seeking consideration for appointment to the office. Within five (5) days after receiving the names of qualified persons, the governor shall fill the vacancy by temporary appointment to the office, from the names submitted or from those petitioning for appointment.

WYO. STAT. ANN. § 22-18-111(a)(1) (2007).

4. See HAW. REV. STAT. § 17-1 (2007) (providing scheme similar to Wyoming which allows the Governor to fill U.S. Senator vacancies with a temporary appointment from a list of three prospective appointees submitted by the same political party as the prior incumbent); UTAH CODE ANN. § 20A-1-502 (2007) (directing that the Governor "shall" appoint someone from "one of three persons nominated by the state central committee of the same political party as the prior officeholder."); see also ARIZ. REV. STAT. ANN. § 16-222 (2007) (requiring the Governor to fill U.S. Senator vacancy with appointee from the same political party as the person vacating the office). For a discussion of whether a statute like Arizona's is unconstitutional, see *infra* Part IV.

structure of the Seventeenth Amendment. Of particular importance, Part III points out that only governors—not state legislatures and certainly not state political parties—are elected by the people of each state collectively in precisely the way U.S. Senators are. Part IV then explains why schemes like Arizona’s should likely be treated similarly to Wyoming’s. Part V concludes by reminding that the Senate itself has important, and perhaps ultimate, responsibility to interpret and preserve the meaning of the Constitution, including the provisions relating to Senate elections and vacancies.

I. Textual Arguments From the Seventeenth Amendment

A. Section 2 of the Seventeenth Amendment Textually Forbids State Legislatures From Unduly Constraining Governors’ Exercise of Temporary Senate Appointment Powers

The key provision to consider is Section 2 of the Seventeenth Amendment. The Seventeenth Amendment was an alteration of the Constitution, added in 1913, to guarantee direct popular election (as distinguished from state legislative selection) of U.S. Senators. Section 2 says:

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.⁵

There is a very forceful textual argument that the Seventeenth Amendment prevents the Wyoming legislature from dictating the Governor’s specific personnel choices in making a temporary Senate appointment: The Amendment’s language differentiates between a state “legislature” and a state “executive” authority, and does not authorize a state legislature to make or constrain any temporary appointments itself, but rather *only* to “empower the [state] executive [] to make [the] appointments. . . .”⁶

In other words, the Amendment, by its terms, creates potential appointment power only in governors; it does not authorize legislatures to participate in such appointment decisions, beyond

5. U.S. CONST. amend. XVII, § 2.

6. *Id.*

simply determining whether governors should be allowed to make temporary appointments or not.

This textual argument that the legislature has no authority to limit the governor's substantive choices to specific persons or kinds of persons is reinforced by the last five words of Section 2 of the Seventeenth Amendment: "as the legislature may direct."⁷ This clause refers to, and confirms, the legislature's discretion as to the timing and procedures of any special popular election to be held to fill a vacancy. By contrast, the provisions concerning gubernatorial temporary appointment *lack* any similar language suggesting legislative discretion with respect to the process, let alone the substance, of such a gubernatorial appointment—which strongly suggests that the legislature does not have broad prescriptive powers here. If the drafters and ratifiers of the Amendment had expected the state legislature to have a significant role in the governor's execution of his appointment power with respect to temporary Senate appointments, the Amendment could very easily have included some phrase like "as the legislature has directed" or "subject to the legislature's requirements" right after or before the clause referring to the governor's statutorily created power to make appointments.

Perhaps an analogy will reinforce this kind of "intratextual" argument.⁸ In *Marbury v. Madison*,⁹ Chief Justice Marshall confronted the question whether, given the language of Article III, Congress enjoys power to increase the original jurisdiction of the Supreme Court beyond the categories mentioned in the Constitution itself. As Akhil Amar has observed, "[l]eading scholars have not been kind to Marshall's exposition [in which Marshall concluded Congress lacked such power], calling it 'far from obvious,' 'clearly overstated,' and 'surely wrong.'"¹⁰

Akhil goes on to argue, though, that a more careful "intratextual comparison" of Article III than Marshall performed "would have enabled him to rebut his modern scholarly critics"¹¹ and confirm the strength of his Article III reading:

7. *Id.*

8. See generally Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999) (suggesting a holistic interpretive approach to the Constitution).

9. *Marbury v. Madison*, 5 U.S. 137, 146-49 (1803).

10. Amar, *supra* note 8, at 764.

11. *Id.*

The Appellate Jurisdiction Clause explicitly authorizes Congress to subtract from the Supreme Court's appellate docket; but the Original Jurisdiction Clause contains no comparable language authorizing Congress to add to the Court's original jurisdiction docket. Just as the Appellate Jurisdiction Clause confers jurisdiction "with such exceptions as Congress shall make," so the Original Jurisdiction Clause should have conferred jurisdiction "with such augmentations (and exceptions) as Congress shall make" had it been designed as a minimum (or a default rule) rather than a maximum. The fact that the Original Jurisdiction Clause does not contain augmentation wording symmetric to the exception wording of the Appellate Jurisdiction Clause elegantly buttresses Marshall's conclusion that Congress has no power to add to the Court's original docket. The point here is not a standard textual point about the Original Jurisdiction Clause, but a [Joseph] Story-like intratextual point that emphasizes the variation in language between this clause and the next one.¹²

In his thought-provoking Response essay, Professor Levinson questions my use of intratextualism in the Seventeenth Amendment by suggesting that "[o]ne might . . . argue . . . that the final clause [of Section 2 of the Seventeenth Amendment]—'as the legislature may direct'—applies to the 'empowerment' clause as well as the 'special elections' one."¹³ Yet, as prominent legal commentator and treatise writer Jabez Sutherland explained, around the time versions of what would become the Seventeenth Amendment were drafted, the general rule of statutory interpretation during the nineteenth century was that "[r]elative and qualifying words and phrases, grammatically and legally, where no contrary intention appears, refer solely to the last antecedent. A proviso is construed to apply to the provision or clause immediately precedent."¹⁴ Under this rule of interpretation, commonly referred to as the "doctrine of the last antecedent,"¹⁵ the "as the legislature may direct" language of the Seventeenth Amendment is presumed to apply only to the "until the people fill the vacancies by election" provision directly preceding it. While this

12. *Id.* at 764-65.

13 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. at 713.

14 JABEZ G. SUTHERLAND, SUTHERLAND ON STATUTORY CONSTRUCTION, Section 267 at 349-51 (1891).

15 For a helpful discussion of this doctrine, see Vasam Kesavan and Michael Stokes Paulsen, *Is West Virginia Unconstitutional?*, 90 CAL. L. REV. 291, 352-356 (2002).

presumption may be rebutted, Professor Levinson provides no reason, grammatical¹⁶ or historical, to reject its straightforward and natural application here. Legal technicalities aside, Levinson's suggested reading is simply not persuasive as a matter of ordinary meaning and interpretive common sense.

A textual comparison with the Appointments and Recess Appointments Clauses of Article II might also be useful in interpreting Section 2 of the Seventeenth Amendment. The Appointments and Recess Appointments Clauses of Article II provide, in relevant part:

[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have the Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.¹⁷

No one would think that when the President is making a recess appointment, or when a "Court of Law" is empowered by Congress to make an appointment, that Congress may designate a short list of specific persons from whom the appointment must be made or otherwise constrain the particular personnel choices of the appointing officer. This is in large part because the "Advice and Consent" language (or something like it) that appears earlier is conspicuously

16 Professor Levinson is keenly aware of this interpretive presumption. Elsewhere, he has observed that "[e]vidence that a qualifying phrase is supposed to apply to all antecedents instead of only to the immediately preceding one may be found in the fact that it is separated from the antecedent by a comma." Jordan Steiker, Sanford Levinson and Jack Balkin, *Taking Text and Structure Really Seriously: Constitutional Interpretation and the Crisis of Presidential Eligibility*, 74 TEX. L. REV. 237, 245 n.46 (1995). In the present case, as Professor Levinson seems almost to concede, see Levinson, *supra* note 13, at 721, rules of grammar and punctuation support my reading.

17. U.S. CONST. art. II, § 2, cl. 2-3.

lacking with respect to recess appointments and Court of Law appointments.¹⁸

B. Section 2 of the Seventeenth Amendment is Unlike Other Constitutional References to State “Legislatures” in That Section 2 Textually Contrasts the Legislature with the Executive, Marking Out the Roles of Each Body

Do the terms “legislature” and “executive authority” in the Seventeenth Amendment have to be read so strictly? Might the Seventeenth Amendment simply delegate to “states” more generally the power to make temporary Senate appointments until a special election is held? Does the federal Constitution really contain a textual preference for one elected state institution over another? After all, there are other instances in which the federal Constitution refers to state “legislatures” that courts have not read to exclude participation of other branches of state government.¹⁹ Shouldn’t these allocations of intra-state power be left simply to state separation of powers principles?

It is true that there are other places in the Constitution that make mention of “legislatures” of the states (e.g., Article I, Sections 3 and 4; Article II, Section 2; Article IV, Sections 3 and 4; and Article V).²⁰ And, as discussed more fully below,²¹ the Supreme Court has read some, though not all, of these references to “legislatures” to permit

18. Cf. *Edmond v. United States*, 520 U.S. 651, 659-60 (1997) (confirming that the Appointments Clause prevents congressional encroachment upon the executive and judicial branches).

19. See *infra* notes 40-41, and accompanying text. See also Vikram David Amar, *The People Made Me Do It: Can the People of the States Instruct and Coerce Their State Legislatures in the Article V Constitutional Amendment Process?*, 41 WM. & MARY L. REV. 1037 (2000); Richard L. Hasen, *When “Legislature” May Mean More than “Legislature”: Initiated Electoral College Reform and the Ghost of Bush v. Gore*, 35 HASTINGS CONST. L.Q., 599.

20. U.S. CONST. art. I, § 3, cl. 1 (“The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof. . . .”) (altered by the Seventeenth Amendment); U.S. CONST. art. I, § 4, cl. 1 (“The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof.”); U.S. CONST. art. II, § 1, cl. 2 (“Each state shall appoint, in such manner as the Legislature thereof may direct. . . .”); U.S. CONST. art. IV, § 3, cl. 1 (“[N]o new states shall be formed or erected within the jurisdiction of any state . . . without the consent of the legislatures of the states concerned.”); U.S. CONST. art. IV, § 4 (providing that the federal government shall protect each state against domestic violence “on Application of the Legislature, or of the Executive (when the Legislature cannot be convened)”); U.S. CONST. art. V (requiring ratification of amendments “by the legislatures of three fourths of the several states.”).

21. See *supra* Part II.

involvement by other branches of state government, or by the people themselves. To the extent that other uses of the constitutional term “legislature of the states” can, as a textual matter, sometimes be read generously to confer broad powers on states to structure their own internal divisions of power as they see fit, such generosity seems textually foreclosed in Section 2 of the Seventeenth Amendment. The crucial point here is that Section 2 does not simply mention state “legislatures” in a way that might be interpreted as casual; its terms on their face textually differentiate within a single sentence between “legislature” and “executive,” granting the former the explicit power to empower and the latter the explicit power to appoint.

Indeed, if we were to line up all of the Constitution’s references to state “legislatures” along a spectrum of state institutional specificity, Section 2 of the Seventeenth Amendment’s use of the terms “legislature” and “executive” presents perhaps the clearest textual demarcation of particular federal powers conferred on specific state institutions,²² whereas Article II—at issue in *Bush v. Gore*,²³ and discussed in Professor Hasen’s symposium contribution and my commentary on it²⁴—presents the murkiest allocation, because the grammatical subject of Article II’s key sentence is the “state” itself.²⁵

C. The Power of State Legislatures to Decline to Authorize Temporary Senate Appointments Altogether Does Not Subsume the Power to Limit the Exercise of Appointment Authority

Of course, the Seventeenth Amendment’s text *does* permit state legislatures to simply not authorize gubernatorial temporary Senate appointments altogether: the term “may” rather than “shall” is used to describe the legislative authority to create appointment power.²⁶

22. Another candidate might be Article IV’s so-called “Guarantee Clause,” which provides in relevant part that the federal government shall protect each state against domestic violence “on Application of the Legislature, or of the Executive (when the Legislature cannot be convened).” U.S. CONST. art. IV, § 4. It would be hard to argue, given this text, that a state governor enjoys the unilateral power to apply for federal help when the state legislature is in, or could be in, session.

23. *Bush v. Gore*, 531 U.S. 98 (2000).

24. See Hasen, *supra* note 19; Vikram David Amar, *Direct Democracy and Article II: Additional Thoughts on Initiatives and Presidential Elections*, 35 HASTINGS CONST. L.Q. 631.

25. U.S. CONST. art. II (“each *State* shall appoint electors in a manner specified by the legislature thereof.”)(emphasis added).

26. “May” is distinguished from “shall.” Cf. U.S. CONST. art. III, § 2 (“[T]he trial *shall* be at such place or places as the Congress *may* by law have directed.”) (emphasis

Presumably, legislatures were given this authority in the event that the legislatively provided-for special popular election was scheduled early enough that a temporary gubernatorial appointment would not be worth the effort and might even create more harm than good. But the power to decide whether it makes practical sense for the governor to be able to appoint is not the same as, and does not subsume, the power to dictate who shall be appointed.

We can see this when we look again at the Appointments Clause of the federal Constitution, in Article II. As noted above,²⁷ that clause gives Congress the power to “vest” appointment of inferior federal officers in the President alone, or in Cabinet members or Courts of Law. But Congress’s power to vest appointment authority in the President does not give Congress the power to generate a list of three names from which the President can be forced to choose. As the Court has noted, “[b]y vesting the President with the exclusive power to select the . . . officers of the United States, the Appointments Clause prevents congressional encroachment upon the Executive and Judicial Branches.”²⁸

And it should be noted that Congress enjoys more power in this regard than state legislatures under the Seventeenth Amendment; Congress, after all, creates federal offices that are to be filled, whereas state legislatures do not create the United States Senate or any other federal institution.²⁹ Congress’s substantive power to create offices, which is distinct from its power to authorize the President or others to appoint persons to the offices, gives Congress at least some leeway to prescribe qualifications for those who shall hold the offices.

D. Just as “May” Does Not Mean “Shall,” “Empower” Does Not Mean “Require”

There is yet another way in which the Wyoming statute likely impermissibly constrains the Governor. Not only does the statute purport to limit the Governor to a party-generated short list, it also

added). See *Martin v. Hunter’s Lessee*, 14 U.S. 304, 330 (1816) (providing that Constitution’s use of the term “shall” must be interpreted as imperative).

27. See *supra* note 17 and accompanying text.

28. *Edmond v. United States*, 520 U.S. 651, 659 (1997). See also *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995); *Buckley v. Valeo*, 424 U.S. 1, 133 (1976).

29. See *Thornton*, 514 U.S. at 837-38 (providing that members of congress, while elected by separate constituencies, hold “offices that are integral and essential components of a single National Government.”); see also *infra* notes 94, 100-09 and accompanying text.

purports to *require* him to make an appointment within days of receiving the three names.³⁰

This, too, seems problematic, under a careful reading of the text of Section 2. That provision says state legislatures may “*empower*” governors to make temporary appointments, until the people fill the vacancies by election.³¹ “Empower” does not mean “require;” rather, it means to create the power to do *or not do* something. The Constitution generally distinguishes between powers and duties, and the Seventeenth Amendment’s words seem to speak only to possible gubernatorial powers, not any gubernatorial duties.³²

Professor Levinson, in his Response essay,³³ does not explicitly discuss the meaning of “empower” in this context, but suggested in his oral remarks at the symposium that Section 2 perhaps ought to be read to require governors to make appointments. He reasoned that this result makes sense in light of the modern need to fill Senate vacancies quickly, especially, say, in the event of mass openings due to terrorism. In explaining his interpretive methodology here, Professor Levinson writes in his Response essay:

I strongly believe that the very first question should be the following: *How would we design the Constitution in 2008 with regard to filling senatorial vacancies?* Only after resolving that question should we move on to inquiries into text, structure and history. And, with regard to those interrogations, we should ask whether the text, structure and history so definitively point in a direction different from our own answer to the first question that we must reluctantly conclude that we must acquiesce³⁴

30. Wyoming is not the only state whose statute by its text attempts to require a governor to make temporary appointments. See, e.g., ARIZ. REV. STAT. ANN. § 16-222 (2007) (“For a vacancy in the office of United States senator, the governor shall appoint a person to fill the vacancy.”); UTAH CODE ANN. § 20A-1-502 (2007) (directing that Governor “shall” appoint someone from one of three persons nominated by the state central committee of the same political party as the prior officeholder.).

31. U.S. CONST. amend. XVII (emphasis added).

32. For example, the Recess Appointments Clause does not *require* Presidents to make recess appointments by giving him the “power” to do so. U.S. CONST. art. II, § 2. The same can be said for the President’s “power” to make treaties and nominate officers for Senate confirmation. *Id.* Nor does a President have to exercise the “power” he is given to grant reprieves and pardons. *Id.*

33. See Levinson, *supra* note 13.

34. Levinson, *supra* note 13 at 716.

If this “modern policy first” reasoning were sound, then perhaps we should also read Section 2 as requiring state legislatures to create gubernatorial appointment power to fill such vacancies promptly. Yet, as noted below,³⁵ there are at least four or five states that currently do not authorize their governors to make temporary Senate appointments, and under Professor Levinson’s approach, their schemes would seem to be problematic.

In any event, I tend to disagree with Professor Levinson about the order in which we should consider text, history, structure and modern drafting preferences; I think starting with modern desires is very unlikely to generate much interpretive consensus. I also likely disagree with him on the question of how ambiguous the text, history and structure needs to be before we read the document’s words, as he would, to mean that which we would write them to say were we drafting them today in light of our sense of current political and practical realities.³⁶ Terms like “empower” and “may” seem relatively clear in this context, and I feel they confine us more than Professor Levinson suggests.³⁷

II. Arguments from Supreme Court Authority

As Professor Hasen’s symposium article³⁸ (and my essay responsive to it)³⁹ points out, the Supreme Court has, in some early Twentieth Century cases, interpreted other provisions in the federal

35. See note 89 *infra* and accompanying text.

36. To support his methodology, Professor Levinson invokes, of all people, Justice Antonin Scalia for the proposition that “context is everything, and the context of the Constitution tells us not to expect nit-picking detail, and to give the words and phrases an expansive rather than narrow interpretation—though not an interpretation that the language will not bear.” Levinson, *supra* note 13, at 716. But shortly after observing that “context is everything,” Justice Scalia makes clear that by “context” he is talking about the context in which the words were originally used, and not the current circumstances in which they might be applied. See ANTONIN SCALIA, A MATTER OF INTERPRETATION 38 (1998) (“But the Great Divide with regard to constitutional interpretation is not between Framers’ intent and objective meaning, but rather between original meaning (whether derived from Framers’ intent or not) and current meaning.”). Justice Scalia is very critical of interpretive methods that place great reliance on whether a particular reading of a provision achieves a “desirable result for the case at hand.” *Id.* at 39. Although Justice Scalia may be more of a consequentialist than he admits, his stated views on interpretive methodology provide no real support for Professor Levinson in this area.

37. And importantly, as explained more below, see *infra* notes 63-64 and accompanying text, I probably have a different sense than Professor Levinson about how we would write the Seventeenth Amendment even if we were drafting it anew today.

38. Hasen, *supra* note 19.

39. Amar, *supra* note 24.

Constitution that use the phrase “legislature” of the state as *not* preventing states from structuring their own internal processes as they see fit, even when states were invoking those processes to discharge powers or obligations created by the federal Constitution.

Perhaps most importantly, in *Smiley v. Holm*,⁴⁰ the Supreme Court in 1932 said that the fact that Article I of the Constitution directs state “legislatures” to draw congressional district lines, subject to Congressional override, does not prevent a state from involving the state governor—through his veto power—in the state lawmaking process used to draw federal district boundaries. If Article I’s reference to “legislatures” did not foreclose gubernatorial involvement in *Smiley*, then arguably the Seventeenth Amendment’s reference to state “executive” ought not to foreclose state legislative involvement in temporary Senate appointments.⁴¹

On the other hand, there are cases like *Hawke v. Smith*,⁴² *Bush v. Gore*,⁴³ and most recently *Colorado v. Salazar*,⁴⁴ in which particular Justices (and sometimes the Court) have read references to state institutions more literally. In *Bush v. Gore*, a majority of Justices seemed to embrace precisely the kind of tight reading of the word “legislature” that would render Wyoming’s law problematic.⁴⁵

In particular, the *Bush v. Gore* concurring opinion by Chief Justice Rehnquist and Justices Scalia and Thomas (an opinion that likely had the tacit support of Justices O’Connor and Kennedy, as well)⁴⁶ concluded that when the federal Constitution, in Article II, enlists state “legislatures” to determine the method of selecting members of the so-called presidential electoral college, the Constitution necessarily forbids states from involving state courts in a

40. *Smiley v. Holm*, 285 U.S. 355 (1932).

41. See also Vikram David Amar, *Indirect Effects of Direct Election: A Structural Examination of the Seventeenth Amendment*, 49 VAND. L. REV. 1347, 1354-55 (1996) (explaining the pre-Seventeenth Amendment Oregon Plan and other (seemingly permitted) examples of states not hewing to narrow definitions of “legislature” in deciding how states should discharge federal electoral processes). For a more general discussion of the variation in Supreme Court and historical attitude, see Amar, *supra* note 24.

42. *Hawke v. Smith*, 253 U.S. 221 (1920).

43. *Bush v. Gore*, 531 U.S. 98 (2000).

44. *Colorado v. Salazar*, 541 U.S. 1093 (2004) (Rehnquist, C.J., joined by Scalia, J., and Thomas, J., dissenting from the Court’s denial of certiorari).

45. While the relevant *Bush v. Gore* concurrence had only three Justices, its logic was likely supported by two others as well. See Vikram David Amar and Alan Brownstein, *Bush v. Gore and Article II: Pressured Decision Makes Dubious Law*, 48 FED. LAW. 27 (2001).

46. *Id.*

way that interferes with the state legislature's wishes. That kind of interference, these Justices thought, was precisely the federal constitutional violation happening in Florida in late 2000: Florida courts were trammeling the unfettered discretion the federal Constitution gave to the state legislature, by use of the word "legislature" in Article II.

If Article II's specific reference to state "legislatures" insulates those legislatures from judicial oversight that otherwise would be provided for under state law, then the Seventeenth Amendment's reference to "executive" would seem to insulate governors from state legislative constraint, once the legislature has empowered the governor to make a temporary appointment in the first place.

What are we to make of this (seemingly uneven) body of Supreme Court case law? A few points seem in order. First, the Court has seemed to be more willing to allow flexible interpretation of a state "legislature's" powers and duties when the issue presented concerns popular input or control of the legislature rather than inter-branch encroachment.⁴⁷ For example, in *Bush v. Gore*, the concurring Justices objected to state judicial involvement in the Florida election process, and the same three Justices in *Salazar* dissented from the Court's denial of certiorari indicating their discomfort with state judicial involvement in Congressional district line drawing. Notably, their dissent from the denial of certiorari in *Salazar* intimated that popular, as opposed to judicial, involvement would be less constitutionally troubling.⁴⁸

47. It is true, of course, that the Constitution does sometimes seem to distinguish, textually, between the people of a state and a legislature of a state. Compare, for example, Article I, Section 3's conferral of Senate selection power on the "legislature" before the Seventeenth Amendment with Article I, Section 2's use of the term "people thereof" in providing for U.S. House elections. U.S. CONST. art. I, §§ 2 & 3. Such a textual contrast might raise an inference that legislatures in those contexts should be understood as distinct from the people who elected them, in the same way that when the term "legislature" is used next to the term "executive," the Constitution intends to allocate power exclusively between the two institutions. Yet it bears noting that state peoples create state legislatures in a way that state legislatures do not create state executives or *vice versa*, so there is a structural basis for not reading the textual distinction between people and legislature as strongly as that between executive and legislature. See Amar, *supra* note 19.

48. The dissenters from the denial of certiorari observed that "[c]onspicuously absent from Colorado's lawmaking regime, under the Supreme Court of Colorado's construction of the Colorado Constitution to include state-court orders as part of the lawmaking, is participation in the process by a body representing the people, or the people themselves in a referendum." *Salazar*, 541 U.S. at 1095 (Rehnquist, C.J., joined by Scalia, J., and Thomas, J., dissenting). See also Hasen, *supra* note 19, at 620.

Second, where the Court has permitted state deviation from the literal terms of the Constitution, it has done so in contexts where the Constitution mentioned state legislatures but did not in the same breath (or sentence) mention (and divide power with) state courts and/or governors.⁴⁹

Third, the most prominent case in which the Court allowed involvement of one branch (the governor) in a way that might arguably have encroached on textual powers of another (the legislature) was *Smiley*.⁵⁰ But the Court in *Smiley* was careful to rest its decision on the ground that district line-drawing, at issue there, is done ordinarily through a generic legislative process that includes gubernatorial presentment. As Rick Hasen has explained, the theory can be described as resting on a “legislature as lawmaking process” interpretation rather than a “legislature as distinct body of legislators” reading of the constitutional text.

Even if (as seems possible) this functional reading of the Constitution’s reference to state institutions makes sense,⁵¹ it offers little support to the Wyoming statutory implementation of the Seventeenth Amendment. Appointment processes, at least those called for in the federal Constitution,⁵² ordinarily do not involve significant substantive legislative constraints on personnel choices.⁵³ So even though *Smiley*’s result may suggest flexibility rather than rigidity in federal constitutional interpretation, the decision’s reasoning actually may cut the other way in the case of Section 2 of the Seventeenth Amendment and gubernatorial appointment power.⁵⁴

49. See *supra* notes 20-22, and accompanying text.

50. *Smiley v. Holm*, 285 U.S. 355 (1932) (holding that the U.S. Constitution’s silence with regard to a state governor’s role in the legislative process leaves governor’s participation as “a matter of state polity”).

51. See Amar, *supra* note 19.

52. I think the federal processes are most relevant since states are discharging a federal function. State constitutional processes might sometimes involve legislative appointments, but even these would be the exception, not the rule.

53. See, e.g., *supra* notes 17-18 and accompanying text.

54. Of course, *Smiley* may be good support for the idea that governors can participate (via presentment and the veto) in the enactment of laws that “empower” them to make temporary Senate appointments and the laws that provide for special elections, because laws that create appointment power and laws that regulate elections (both at the federal and state levels) ordinarily are made through generic lawmaking procedures that feature presentment.

III. Historical and Structural Reasons to Reject Wyoming's Vacancy-Filling Statute

A. The History of Direct Election and the Seventeenth Amendment Reflects a Distrust of Political Parties, Especially of Party Bosses

In addition to the textual analysis provided above, there are compelling historical and structural reasons for thinking the Wyoming statute and similar constraints on governors run afoul of the Seventeenth Amendment.

If the history of the Seventeenth Amendment reveals anything, it is the distrust and skepticism Progressives had concerning the influence of political parties. This distrust and skepticism was reflected in a number of specific concerns. First, those who pushed for direct election of U.S. Senators often blamed partisan excess and party machinations for the legislative deadlocks in filling Senate vacancies.⁵⁵ In state legislatures that were closely divided between the two parties, the reform proponents both invoked and criticized dirty tricks and sharp parliamentary practices.⁵⁶ In Colorado in 1903, for example, in an episode cited by Seventeenth Amendment proponents, each party accused the other of fraudulent behavior and tried to enlist the coercive arm of the state to punish the other: "The Democrats had at their back the police of Denver, while the Republicans appealed to the Governor for troops, and for a time chaos and bloodshed seemed inevitable."⁵⁷ In another notable instance, in Kentucky in 1896, "threats and assaults [between party leaders in the legislature] became so frequent that the Governor felt forced to call out the militia, and for three days the legislature met in a capital filled with troops enforcing martial law."⁵⁸

The discontent with partisan zeal and excess was not limited to inter-party dust-ups; critics of legislative election also complained

55. See, e.g., Laura E. Little, *An Excursion into the Uncharted Waters of the Seventeenth Amendment*, 64 TEMP. L. REV. 629, 641 (1991); Roger G. Brooks, Comment, Garcia, *The Seventeenth Amendment, and the Role of the Supreme Court in Defending Federalism*, 10 HARV. J. L. & PUB. POL'Y. 189, 200 (1987).

56. See, e.g., S. REP. NO. 60-518, at 18 (1908) ("[The] equilibrium of parties in the State legislatures . . . is an increasing mischief."), cited in Little, *supra* note 55, at 641 n.67; S. REP. NO. 60-518, at 26 ("[T]he conditions of political parties becomes sometimes so evenly balanced as that a very small number . . . is able to determine the choice of Senator, or to prevent one being made."), cited in Little, *supra* note 55, at 641 n.68.

57. GEORGE HENRY HAYNES, *THE SENATE OF THE UNITED STATES: ITS HISTORY AND PRACTICE* 93 (1938).

58. *Id.* at 91.

about the dysfunction and inefficiency of party caucuses that stalled U.S. Senate selection processes even when one party held a firm majority in the legislature. The “stubbornness” and “acrimony” of Senate selection before 1913 was due in part to “the extent to which the whole situation was often being dominated by party caucus, a body unknown to the law, meeting behind closed doors”⁵⁹

This vision of party secrecy and backroom party deals cut by a few persons who could not be counted on to represent the public’s interest was often described in terms of party machines or party “bosses.” As towering Senate historian George Haynes put it, “[s]ometimes the [S]enatorship was meekly handed over [by the legislature] to a state boss, whose phenomenal skill in the manipulation of legislators was out of all proportion to his hold upon the voters.”⁶⁰ In one prominent example, Haynes described a situation in 1897 New York in which the single name of Joseph Choate—a qualified and eminent man—was initially submitted to the majority party caucus; but when the vote was held, all but 7 of the 151 members of the majority party voted in favor of someone else—party boss Thomas Platt. One observer believed Platt’s “control of the legislature [to be] more complete than his control of any office boy in his employ; for the office boy, after all, is not owned by Mr. Platt, and could quit work if he did not find that the place suited him, but the legislature seems to be his, both soul and body.”⁶¹

In 1911, Indiana Senator Beveridge speaking on behalf of one of the many constitutional proposals of what became the Seventeenth Amendment, had this assessment of party influence and distortion:

Political parties . . . elect a legislature, and [the] majority in that legislature is not supposed, nor even permitted, according to the original theory of the Constitution, to select the best man in the State It must select a man of the party which elected the legislature So it comes to pass that Senators actually have been . . . selected by the “party managers” The party boss has become more potent than the legislature, or even the people themselves, in selecting United States Senators in more than one State.⁶²

59. *Id.*

60. *Id.* at 93.

61. *See id.* at 93 n.3.

62. 46 CONG. REC. 2253 (1911) (statement of Senator Beveridge).

The part of Wyoming law that delegates to Party chiefs the task of generating a short list seems to run quite counter to the historical anti-boss spirit of the direct election drive.

Professor Levinson sees virtues in a modern world where political parties are enduring and sometimes beneficial realities, to empowering party leadership to make replacement decisions, because such schemes may preserve important partisan balances and because party leaders can ensure that whoever fills a vacancy is a bona fide party member rather than a nominal one.⁶³ Yet party leaders are also often much more extreme and partisan than the median party member in a state, and certainly more extreme and partisan than the median state voter. Party leaders of one party in a state are thus poor surrogates for the voting public. Even if I were to agree with Professor Levinson that we could read the Seventeenth Amendment largely to reflect our modern drafting preferences, my own modern preferences would still disfavor empowering party heads. Indeed, at a minimum, a scheme in which a governor isn't constrained by party leaders but rather only bound to pick a member of the same party as the fallen incumbent (or perhaps better yet pick someone the fallen incumbent himself designated as a successor) would be a less problematic (though still to my mind problematic) means of preserving party continuity even if such continuity were strongly desired as a matter of modern policy.⁶⁴ Thus, even under Professor Levinson's interpretive methodology, the Wyoming scheme (and the others like it) remains to me quite problematic.

Professor Levinson also says that governors today are essentially party bosses whether we call them that or not:

State governors, with rare exceptions, are important members of their state party's hierarchy. If one doubts their designation as 'party bosses,' it may be only because in the modern era it is hard to designate *anyone* as a 'party boss' in the sense that term was used in the Progressive era⁶⁵

What Professor Levinson misses, however, is that governors (unlike Party central committees) are elected—by the very people of the state in whom the Seventeenth Amendment vests ultimate power

63. Levinson, *supra* note 13 at 722.

64. For a discussion of these alternatives and their unconstitutionality under our current Seventeenth Amendment, see *infra* Part IV.

65. Levinson, *supra* note 13 at 722 (emphasis in original).

to select U.S. Senators. And, as elaborated below,⁶⁶ governors—like U.S. Senators but unlike state legislatures—are elected in statewide contests that cannot be skewed by various kinds of common gerrymandering. Thus, there was, and is still today, a good reason for the Seventeenth Amendment’s textual preference for governors over state party officials and state legislators; governors can lay claim to represent the people of a state better than do unelected party officials or even elected, but malapportioned, legislatures in this context because governors are elected the exact same way that the Seventeenth Amendment requires Senators to be picked.⁶⁷ In short, my proffered reading of the Seventeenth Amendment’s text seeks to harmonize its provisions regarding temporary vacancy (the exceptional circumstance) with its provisions concerning regular popular elections every six years (the ordinary rule).

B. The History of Direct Election and the Seventeenth Amendment Reflects a Distrust of Unrepresentative Legislatures

What if the short list had come from the Wyoming legislature itself rather than the discredited party apparatus? The disdain reformers had for party machines and party bosses certainly spilled over to concern about the institutions of state legislatures themselves. Indeed, Section 1 of the Seventeenth Amendment—its heart and soul—is most easily understood as an injunction to get state legislatures out of the business of deciding who shall serve in the Senate.⁶⁸ At first blush, the essence of Section 1 ought to inform our interpretation of how far state legislative powers ought to extend in Section 2.

The attack reformers made on state legislatures was multi-pronged. For starters, supporters of the Seventeenth Amendment accused legislatures of the same kind of corruption that permeated the political party structure. As one modern commentator has put it, “[c]orruption, of both state legislators and senators, was the greatest

66. See *infra* notes 72-87 and accompanying text.

67. Indeed, it is noteworthy that the Constitution does not empower governors to fill House vacancies, perhaps because House members are generally elected by different (local) constituencies from the one that elects both Senators and the governor.

68. Some proposals would have given states the choice to keep legislative selection if they had wanted. See ALLEN BUSHNELL, ELECTION OF UNITED STATES SENATORS: VIEWS OF THE MINORITY, H.R. REP. NO. 52-368, at 1-2 (1892) [hereinafter MINORITY REPORT]. Rejection of this option revealed the high level of distrust of state legislatures altogether.

evil blamed on the system of indirect election.”⁶⁹ Whether that widely held perception of corruption was justified is a more complicated matter. Haynes summarizes,

[h]ow often resort has been had to bribery and corruption [in state legislatures] in connection with senatorial elections it is impossible to determine, but there is indisputable evidence that a number of legislatures were thus tainted in the interest of certain candidates, and that this tendency was not lessened but greatly increased after—if not because of—the enactment of the [federal] law of 1866 [that attempted to reduce the incidence of state legislative gridlock] . . . The only point to be noted here is that the increase of the evil [of legislative corruption] was one of the causes of the unrest and the popular belief, however unsubstantial may have been its foundation, that legislative election was at the root of this noxious growth.⁷⁰

One might argue that the undeniable concern over state legislative corruption shared by Seventeenth Amendment advocates would be a strong reason to read state legislative powers under Section 2 narrowly, and protect gubernatorial independence and discretion from legislative overreaching. I think ultimately such a pro-governor, anti-legislature reading is amply warranted, but I would caution not to overstress the rhetoric about legislative corruption in reaching this result. This is not because the rhetoric was overheated (after all, it did inform the perceptions of those who brought us the Seventeenth Amendment), but rather because when Seventeenth Amendment reformers discussed legislative dishonesty, they did not seem to compare the legislature to the purer, more trustworthy state “executive authority.” That state legislatures were a natural target for charges of bribery and the like seems somewhat driven by the fact that legislatures—and not governors—were the ones picking Senators before the direct election movement succeeded.⁷¹

69. Brooks, *supra* note 55, at 200.

70. HAYNES, *supra* note 57, at 91. See also Little, *supra* note 55, at 640-41 (quoting Senator Bradley: “[The original Constitution] was so framed . . . by its mechanism—as to permit corruption and successful rascality.”).

71. I do note, however, in this respect, that at the federal level, one reason to prefer presidential autonomy in making appointments is the belief that the President is more immune than the legislature to certain kinds of corruption. See *Edmond v. United States*, 520 U.S. 651, 659 (1997) (“This disposition [giving appointments to the President] was . . .

Perhaps the strongest historical/structural argument that buttresses the already-strong textual case against substantive legislative involvement and enhanced gubernatorial independence derives from the concerns Seventeenth-Amendment framers had about the way state legislatures did not represent the people of a state, and particular constituencies within the state, because of malapportionment.

Although largely unnoticed in most modern discussions of direct Senate election, recognition of the “antiquated systems of representation” used to draw state legislative districts, and the resulting unfairness to and misrepresentation of the state peoples was clear if not always trumpeted.⁷² Such malapportioned systems, rife during the period leading up to the Seventeenth Amendment, “caused the legislatures’ election of Senators to give far different results from those which would have been yielded by popular elections.”⁷³

Haynes describes one instance in which Democrats held the governorship for thirteen years during the period between 1865 and 1905, and thus presumably had a working majority of the state’s electorate during those years; and in four presidential elections Democratic candidates won the state, “but in all that period they elected but one Senator, and he was sent to Washington for but three years to fill a vacancy.”⁷⁴

As one legislative Report advocating the elimination of state legislative elections for Senators in 1892 put the point:

Under the present mode of election of Senators, the legislatures may be induced to make an unfair apportionment, and lay off unequal and unfair districts in order that the party temporarily in control in the legislature may reap the reward of the election

designed to assure a higher quality of appointments: The Framers anticipated that the President would be less vulnerable to interest-group pressure and personal favoritism than would a collective body.”). *See also*, THE FEDERALIST NO. 76, at 369 (Alexander Hamilton) (Terence Ball ed., 2003) (“The sole and undivided responsibility of one man will naturally beget a livelier sense of duty, and a more exact regard to reputation.”); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 374-75 (Fred B. Rothman & Co., 1991) (1833).

72. HAYNES, *supra* note 57, at 92.

73. *Id.*

74. *Id.* *See also* Brooks, *supra* note 55, at 200 (“Proponents of direct election also argued that federal politics provided too strong a motive for state gerrymandering.”); Little, *supra* note 55, at 640 (decrying the “inadequate representation” that resulted from indirect election).

of one of its partisans to the Senate and defeat the popular choice of the majority party in the State.⁷⁵

Even those Congresspersons who filed a Minority Report on the question agreed about the problem of political gerrymandering:

[It would be good to] do away with the legislative gerrymandering of the States to secure the election of United States Senators by the party happening to be in power when each new apportionment is made. That this has long been the common practice, no fair-minded, intelligent man will deny. That it will continue, until the temptation to it is removed, or our fundamental law otherwise changed, is to be reasonably expected. The law of retaliation, to some extent, will always be applied.⁷⁶

Because they are elected statewide, governors are not plagued by these problems, either a hundred years ago, or today. Governors were, and are, better surrogates for the people in this regard than are state legislatures. The Seventeenth Amendment generally requires Senators to be picked the exact same way that governors are picked—through statewide elections with simple majority or plurality rule.

Of course, certain kinds of gerrymandering are no longer possible in light of the one-person, one-vote cases.⁷⁷ But concerns about partisan gerrymandering are not eliminated by the one-person, one-vote principle. The recent *Vieth v. Jubelirer*⁷⁸ case from Pennsylvania, and the recent experience in Texas,⁷⁹ also illustrate that.

C. The Gerrymandering Concern Was Especially Powerful Relative to the Issues of Rural/Urban and Black/White Relations

Partisan gerrymandering at the state level wasn't the only kind of "misrepresentation" observers of the Seventeenth Amendment attributed to the legislative selection of Senators. There was an unmistakable recognition by all participants in the Seventeenth Amendment debates that legislative election affected the interests of urban Americans and Blacks. Detractors of the Seventeenth

75. H.R. REP. NO. 52-368, at 3 (1892).

76. *Id.*; MINORITY REPORT at 2.

77. See *Reynolds v. Sims*, 377 U.S. 533, 558 (1964); *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964); *Baker v. Carr*, 369 U.S. 186 (1962).

78. *Vieth v. Jubelirer*, 541 U.S. 267 (2004).

79. See *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006).

Amendment expressed worry that eliminating state legislative involvement would shift power to urban centers.

A speech by Albert Doub made at a 1909 Maryland Bar Association meeting and incorporated into a Senate Document two years later, albeit made by someone whose arguments lost in the ultimate enactment of the Seventeenth Amendment, highlights the common knowledge about geographical gerrymandering that is part of the backdrop of the debate over the Amendment:

It has been the settled policy of all the States to create divisions or districts, and to elect representatives of both houses of the legislature from these divisions, and not by voting en masse Mass voting for the members of the State legislatures would be subversive of the principles that have prevailed for more than a century, and soon would destroy self-government and menace the liberty of the Republic, and yet that is the very suggestion of the men who want to improve in this way upon the wisdom of their ancestors, whose genius designed the fabric of the Constitution. . . . To give the power of choosing Senators to the centers of population of the State, the great cities, which are constantly becoming both relatively and absolutely more populous, whose interests so often clash with those of other Sections of the States, and thereby ignore the rights of the minority, is a new and radical departure from the Constitution, which may soon undermine its very existence.⁸⁰

Another skeptic of direct election, Senator George Hoar, also played on geographic and class fears in defending continuing legislative involvement:

This proposed amendment requires the voice of the State to be uttered by masses of its citizens, and removes political power to the great masses who are collected in our cities. Chicago is to cast the vote of Illinois, Baltimore of Maryland, New York City of the State of New York, and Cincinnati of Ohio. The farmer class, which now have their just weight, will be outweighed by the dwellers of the great towns where the two extremes meet—great wealth and great poverty—and combine to take possession of the affairs of the Government.⁸¹

80. ALBERT A. DOUB, ELECTION OF UNITED STATES SENATORS, S. DOC. NO. 61-782, at 7 (3d Sess. 1911).

81. PAPERS RELATING TO THE ELECTION OF SENATORS BY DIRECT VOTE OF THE PEOPLE, S. DOC. NO. 59-232, at 22 (1906) (reprinting speech of Senator Hoar delivered to the U.S. Senate on April 6-7, 1893). *See also id.* at 62-63 (reprinting a speech of Senator Edmunds (“[T]he people of the several political subdivisions of the State should have the

In some ways, these opponents of the Seventeenth Amendment preview many of the arguments made by critics of one-person, one-vote cases fifty years later. In effect, the supporters of the Seventeenth Amendment rejected their arguments a half-century before the Warren Court did. But all of that only underscores the danger inherent in involvement in Senate selection by malapportioned state legislatures that Seventeenth Amendment backers perceived.

Nor were the ever-present issues of race, which were and are intimately connected with issues of class and geography as would be made clear over the course of the coming decades, lurking far beneath the surface. Of particular note is an attempt to derail the Seventeenth Amendment made by Southerners by adding to it a provision that would repeal Congress' power under Article I, Section 4 to override and displace state legislative choices about the "times, places and manner" of federal legislative elections. The debate over this proposed amendment was "frankly partisan and Sectional."⁸²

Lame-duck New York Senator Chauncey Depew spoke against the proposed addition on the floor of the Senate in 1911, arguing that honesty compels the recognition that Blacks were not treated justly under the current system and that federal oversight power was necessary to preserve any possibility of equality for African American voters.⁸³ Although other Senators accused him of maligning the South and using race and blacks as a "political football,"⁸⁴ Northern Senators successfully fended off the proposal by invoking the voting interests of Blacks.

This effort by Southerners to derail the Seventeenth Amendment by linking direct election to the elimination of federal control over elections of federal legislators, and the successful move by Northern Senators to rebuff this effort, highlights the extent to which concerns of race, class, and rural-urban schisms were on the minds of Seventeenth Amendment players. Since everyone in the debate seemed to appreciate that gerrymandered legislatures represented urban persons and persons of color less fairly than did governors

right to express their choice separately through their legal representatives, as they do in making laws, and not be overwhelmed by a mere weight of numbers that might occupy only a corner of the State . . .").

82. HAYNES, *supra* note 57, at 113.

83. *See* 61 CONG. REC. 1335-39 (1911).

84. 61 CONG. REC. 2657 (1911) (statement of Senator Borah).

elected in at-large statewide contests, these concerns cut in favor of readings of the Amendment that promote gubernatorial power and minimize legislative power.

Another way of putting the argument is to say that the same Seventeenth Amendment framers who didn't trust state legislatures to fairly administer federal elections enough to relinquish Article I, Section 4 oversight powers would not, it seems, trust them to pick interim Senators (or even short lists) pending a special election.⁸⁵ In this regard, it is worth remembering that a temporary appointee can run as a quasi-incumbent in the special election, which might not be held in many states for a year or more after the temporary appointment is made.

Whether our concern about partisan unfairness, geography, and race in the gerrymandering context is grounded in historical or originalist arguments about what the framers of the Seventeenth Amendment had on their minds,⁸⁶ or on structural arguments about adopting a reading of the Constitution that promotes democratic and egalitarian values,⁸⁷ a reading of Section 2 that limits legislative power and promotes gubernatorial power seems sound. After all, as Haynes' invocation of Connecticut's late nineteenth century experience is meant to suggest, statewide elections for executive offices are much less susceptible to gerrymandering manipulation and to certain rounding errors inherent in districting (on account of things like the discrepancy between voter registration and voter turnout, among others), and for that reason governors are better surrogates than state legislatures to pick temporary replacements for the Senate until a special popular election.

85. Indeed, if Congress were wary of state legislatures, giving up Article I, Section 4 power seems *less* alarming than allowing state legislatures to devise short lists, since the former deals only with time, place and manner rules—not substantive personnel selections.

86. *Cf. Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964) (concerning House elections and the originalist meaning of the “people” in Article I).

87. *See, e.g.,* Michael W. McConnell, *Two-and-a-Half Cheers for Bush v. Gore*, in *THE VOTE: BUSH, GORE & THE SUPREME COURT* 103 (Cass R. Sunstein & Richard A. Epstein eds., The University of Chicago Press 2001).

D. The Interest in Promptly Filling Senate Vacancies (Which Is Even More Pressing Today) Argues Against Allowing a Legislature to Constrain the Governor's Choices

The framers of the Seventeenth Amendment wanted to reduce stalemates and other glitches that resulted in long-term Senate vacancies. Indeed, persistent vacancies that injured both the underrepresented states and the Senate's ability to easily transact business were among the most persistent complaints concerning the broken state legislative selection process replaced by the Seventeenth Amendment. Thus, facilitating prompt Senate replacements was one of the principal objectives of reform. Haynes summarized the concern:

[T]hat the placing of the election of senators in the hands of the legislatures does not serve to thwart the intent of the framers of the Constitution [to keep the Senate filled], and to multiply vacancies with their attendant perils, can hardly be denied. During the past fifteen years [from 1890-1906], in fourteen contests in ten different States, the body charged with the duty of electing senators proved powerless to perform its office; four States have undergone the cost and inconvenience of a special session of the legislature for the sole purpose of filling vacancies thus caused; six States accepted vacancies, and thus, by this antique election process, were effectually deprived of their equal suffrage in the Senate.⁸⁸

It is true, of course, that state legislatures ordinarily would not want their states to be underrepresented in the Senate for long, which is why after the Seventeenth Amendment, almost every state has empowered its governor, on some terms or another, to make temporary appointments even before replacement elections can be promptly held.⁸⁹

88. GEORGE H. HAYNES, *AMERICAN PUBLIC PROBLEMS: THE ELECTION OF SENATORS* 159 (Ralph C. Ringwalt, ed., 1906); see also Ralph A. Rossum, *California and the Seventeenth Amendment*, 6 *NEXUS* 101, 110-11 (2001) (providing a detailed history of legislative deadlocks in senator selection); cf. 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, 199-200 (1997) (arguing that while forty-six deadlocks occurred in twenty states between 1891-1905, the volume of complaints and problems associated with deadlocks was largely exaggerated).

89. Oklahoma, Massachusetts, Oregon and Wisconsin currently have no statutes empowering their governors to make temporary Senate appointments, and their statutes instead suggest that an election is the only way to fill a Senate vacancy. OKLA. STAT. tit. 26, § 12-101 (2007); MASS. GEN. LAWS, ch. 54, § 140 (2007); OR. REV. STAT., § 188.120

But since governors under the terms of the Seventeenth Amendment can't be *forced*, rather only empowered, to fill vacancies by temporary appointment,⁹⁰ a reading of the Amendment that guarantees gubernatorial discretion in personnel choice is the one most likely to result in the prompt filling of vacancies. By contrast, a reading that allows state legislatures to constrain governors (perhaps to the point that governors might not exercise the powers given if they don't like the constraints) could increase the likelihood that vacancies go unfilled during the period before the election is held. This is especially true given that only some states try to limit their governors. Such an absence of uniformity increases the chances of stalemates caused by partisan wrangling.

More generally, a reading of the Seventeenth Amendment that gives either legislatures or governors the dominant role in making temporary appointments is more likely to reduce prolonged vacancies than a reading that requires the two branches to work together and negotiate with each other over specific candidates.⁹¹ And yet the legislature cannot, as a textual matter, actually make, nor mandate the making of, the temporary appointments. Thus, allowing broad legislative involvement can produce stalemates.

Of course, a legislature can statutorily decide to bypass the governor altogether and provide for a prompt special election, but this route is expensive and unusual. Moreover, even a prompt election is not nearly as quick as an executive appointment can be, which is one reason why few states would eschew temporary appointments. And as Stanford Levinson has pointed out, the need for prompt replacement mechanisms is greater now that the modern world is haunted by the specter of political and economic terrorism on a potentially grand scale.⁹² Should a large number of Senators be killed in a terror attack, the need for promptly filling Senate vacancies is particularly acute. But it is precisely at these times that wrangling

(2005); WIS. STAT. §§ 850(4)(b), 17.18. Alaska does have a statute authorizing gubernatorial temporary appointments, ALASKA STAT. § 15.40.145 (2008), but a 2004 initiative passed by the voters calls into question the validity of that statute. See Revisor's Note to § 1540.145.

90. See *supra* notes 30-37, and accompanying text.

91. Cf. *Edmond v. United States*, 520 U.S. 651, 660 (1997) (appointments clause option of vesting appointment in the President alone or Heads of Departments facilitates prompt appointments).

92. See SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) 70 (Oxford University Press) (2006).

between governors and legislatures (or their delegates) over personnel choices could be most costly. Reading Section 2 of the Seventeenth Amendment so as to minimize the possibility of such time-consuming intrastate clashes promotes the structural and historical goal of prompt replacement.

IV. Legislative Specification of Party Continuity

Let us move from the case against allowing party heads or state legislatures themselves to pick interim U.S. Senators, or even limit the governor to their short lists, to the related question of whether a state legislature should be free to specify, as at least one (Arizona's) has,⁹³ that the governor's pick to fill a temporary vacancy be drawn from the same political party as the departed Senator.

Even if legislatures cannot be trusted to pick actual candidates, wouldn't a legislative requirement that the replacement Senator be drawn from the same party as the departed one simply attempt to maintain the wishes of the voters from the last Senate election until the voters can speak directly again, and wouldn't that legislative instinct be legitimate?⁹⁴

While these questions may seem closer than those plaguing Wyoming's approach, the Arizona plan also directly implicates the Seventeenth Amendment's general distrust of state legislative motivation and ability to represent statewide voters, and violates the Amendment's bright-line allocation to governors (and corresponding exclusion of legislatures) of substantive decision-making power regarding temporary Senate appointments. To begin with, note that a state legislature certainly couldn't constrain the state electorate at the

93. See ARIZ. REV. STAT. ANN. §16-222 (2007) (requiring the Governor to fill U.S. Senator vacancy with appointee "from same political party as person vacating the office.").

94. Several federal statutes seem to require the President to take party status into account in filling congressionally-created posts. See Federal Elections Committee Act, 2 U.S.C. § 437c(a)(1) (2004) and Federal Sentencing Reform Act of 1984, 28 U.S.C. § 991(a) (discussed in *Buckley v. Valeo*, 424 U.S. 1, 113 (1976) and *Mistretta v. United States*, 488 U.S. 361, 368 (1989) respectively). I am not aware of any challenges to these provisions in particular; although the statutes, of which they are a part, have sometimes been challenged. In any event, the federal statutory situation is different, because Congress is not barred from creating qualifications for federal offices it creates. Still, there ought to be some discomfort about the practice. Could Congress apply it to federal judges, e.g., by requiring Presidents to pick an equal number of Democratic and Republican judges or Justices? Also, this presents First Amendment questions regarding the rights of potential appointees who may not be members of one of the two major parties; those questions are beyond the scope of this essay.

special election to pick only a person from the party of the departed senator. State law could not, for example, require that only persons from the same party as the departed Senator have their names placed on the special election ballot. The reason for this seems intuitive: any legislative interest in maintaining or predicting the wishes of the electorate vanishes when the electorate has a chance to express its wishes itself.

Even if state law constrains only gubernatorial interim appointments, and not the state electorate at special elections, there are difficult (indeed seemingly insurmountable) constitutional hurdles standing in the way of state legislative action. One problem arises from the possibility of partisan gamesmanship; although the potential for result-oriented manipulation by state legislatures in this area might seem minimal (especially if we insist that any state law of this variety be in place *before* a Senator departs), a legislature could still decide, after each gubernatorial election and depending on the party identity of the governor and the current U.S. Senators, to enact or repeal such a law requiring party continuity. In short, there is always some non-trivial potential for partisan shenanigans.⁹⁵

This gamesmanship possibility becomes even more problematic when considered against the backdrop, discussed above,⁹⁶ of the need for prompt filling of Senate vacancies and the variation in state laws. The fact that some, but not all states, might constrain governors to pick from a single party might lead some governors upon whom maintenance of party consistency is imposed to balk in filling a vacancy. The Wyoming episode last year itself provides an illustration. When Senator Thomas from that state died, there was the possibility of another Senate vacancy arising because of the tenuous health status of Senator Tim Johnson from neighboring South Dakota.⁹⁷ Happily, Senator Johnson, a Democrat, recovered

95. State legislatures have occasionally timed the enactment of their laws concerning gubernatorial appointment power around the partisan affiliation of the current officeholders. For example, Massachusetts amended its Senate vacancy statute before the 2004 general election perhaps because U.S. Democratic Senator John Kerry's seat would have become vacant had he been elected President and the Governor, Mitt Romney, was a Republican. *See also supra* notes 57-58, and accompanying text (discussing the Colorado legislature episode).

96. *See supra* notes 88-92, and accompanying text.

97. *See* Kate Zernike, *Ill Senator is Called Responsive; Incident Keeps Capital Riveted*, N.Y. TIMES, Dec. 14, 2006, at A1. *See also* Adam Nossiter, *Congressman Named to Fill Senate Seat in Mississippi*, N.Y. TIMES, Jan. 1., 2008, at A9; Vikram David Amar, *The Wyoming Governor's and the U.S. Senate's Unnoticed Options, Under the Seventeenth*

from the undiagnosed terminal illness. Had he died, Republican South Dakota Governor Mike Rounds would have had the power to appoint a temporary replacement. Because South Dakota statutes do not constrain the Governor there to maintain party consistency, Governor Rounds was expected to appoint a Republican to replace Democrat Johnson had a vacancy occurred.⁹⁸ This variation among even neighboring states could easily cause a Democratic governor in Wyoming to balk at appointing a Republican temporary appointee, for fear of creating a Republican semi-incumbent to run in the special election. A vacancy could thus have persisted if partisan pressures had prevailed.

The costs of extended vacancies, and perhaps the tendency to cater to partisan influences, are especially pronounced in times of national emergency where the balance of party power in the Senate could have monumental consequences, and lead to a shorthanded Senate for a longer time. As Professor Levinson has argued, in the event of catastrophic vacancies caused by, say, terrorism, filling vacancies with somebody is of the utmost importance. Perhaps party discontinuity is a small price to pay to have the legitimacy that comes from increasing Senate membership when its ranks are depleted due to catastrophe.⁹⁹ To the extent that governors might avoid making temporary replacements because of the constraints imposed even by party-continuation statutes, these statutes seem troubling.

Perhaps more important, limiting the governor to persons of one party amounts to adding “qualifications” to the office of U.S. Senator.¹⁰⁰ *Term Limit U.S.A., Inc. v. Thornton*¹⁰¹ makes clear that neither Congress nor states, including state legislatures, are entrusted to add qualifications for the Senate beyond those already provided for in Article I—age, residency, etc.

But is maintaining the party identity of a state’s U.S. Senate contingent between elections prescribing a “qualification”? *Thornton* suggests so. The Court there distinguished sharply between

Amendment, for Filling the Senate Vacancy Created by Senator Thomas’s Death, FINDLAW, June 8, 2007, <http://writ.news.findlaw.com/amar/20070608.html>.

98. See Zernike, *supra* note 97.

99. Levinson, *supra* note 92, at 71 (noting legitimacy and deliberation problems that arise when the legislative denominators get too small.) In his symposium commentary, Professor Levinson does not seem to address the problems of potential delay caused by disuniformity and the partisan wrangling it might generate.

100. This is also, of course, a challenge (in addition to those already discussed) that could be levied against more aggressive laws in Wyoming, Hawaii and Utah, as well.

101. 514 U.S. 779 (1995).

“procedural” time, place and manner regulations over which states have power, on the one hand, and “substantive” qualifications for office over which they do not, on the other. Surely, prescribing party affiliation is not a “time, place, or manner” regulation. A state legislature, as noted above, certainly could not adopt such a limit on the state electorate; nor could Congress impose such a limit on a state’s regular or special elections.¹⁰²

To be sure, the “time, place, and manner” clause by its terms concerns only elections—not gubernatorial appointments. An argument can be made that state legislative power over *special* elections under the “as the legislature may direct” language of the Seventeenth Amendment should track legislative power to regulate “times, places and manners” of *regular* federal elections. But, again, neither of these provisions seems to speak directly to the “process” of gubernatorial appointments.

But, if anything, the absence of specific textual state legislative power in the Seventeenth Amendment’s appointment provisions would indicate *less* leeway for state legislatures to regulate governors than to regulate voters. Even if there is some intuitive appeal for allowing state legislatures some leeway in structuring gubernatorial appointment processes in ways that seem truly procedural,¹⁰³ specifying party identity would fall outside such leeway.

Another set of challenges to a state law mandating party consistency goes to the very premise of these laws in the first place. Does maintaining party consistency really implement the will of the past voters? Suppose, for example, that Senate vacancies are caused by scandals that tar one political party or group of individuals, or that call into question the legitimacy of the (now departed) incumbent’s election itself.¹⁰⁴ Shouldn’t governors be able to take account of

102. *Id.* at 832-33 (states can regulate elections only in the same way Congress can override under Article I, Section 4). Professor Levinson implies that Thornton’s analysis is “wooden” and that he does not feel constrained by it, see Levinson, *supra* note 13, at 720, but as relevant judicial authority in the area, it must be accorded significant weight.

103. For example, few would doubt the power of a state legislature to prescribe the timeline for a gubernatorial appointment, even though there is no specific textual authority for it.

104. Oregon Senator Robert Packwood’s arguably illegitimate elections are called to mind in this regard. It is also worth noting that the majority party in the Senate will not likely expel members to take advantage of a party mismatch between the governor and Senator(s) from that state because the 2/3 supermajority needed to expel a Senator requires either that expulsions really be bi-partisan or that one party dominates the legislature already and doesn’t need to risk retribution down the line by abusing the expulsion power.

evolving attitudes by the state electorate about who is fit to serve? Isn't that why the Seventeenth Amendment chooses them as the people's surrogates? After all, governors (unlike members of the legislature) are accountable statewide and ignore what the statewide voters want at any given moment at their (and their party's) peril.¹⁰⁵ So, might a legislatively mandated party consistency provision largely be a solution to a non-existent problem?

Related, if the premise behind "maintaining the voters' wishes until the next election" is a sound one, why limit ourselves to party affiliation? Could a state legislature require the governor to pick a temporary replacement of the same race, sex, age, occupation, views on abortion, etc.? And wouldn't proceeding down this slippery slope necessarily take us into the out-of-bounds realms of impermissible "qualifications for office?"¹⁰⁶

Some proponents of the Arizona law may point to the fact that the Constitution's Framers chose a six-year Senate term in part for reasons of stability and consistency.¹⁰⁷ But the kind of consistency and insulation and stability that these longer (and staggered) Senate terms bring about relates to the *individual* Senators and the Senate as an *institution*, not to the political parties who happen to control the Senate at a given time.¹⁰⁸

Indeed, if we really wanted to replicate the departed Senator until the next election, wouldn't the obvious approach be to have a Senator designate his own successor (presumably pre-departure) and have the governor be required by law to respect that apostolic succession?¹⁰⁹ But wouldn't the plain text of the Seventeenth Amendment creating appointment power in governors, and not

105. Note also that in many places, governors are recallable for extremely unpopular things. See G. Alan Tarr, *The State of State Constitutions*, 62 LA. L. REV. 3, 7 (2001) (noting that a 1996 constitutional amendment in Minnesota brought the total number of states allowing recall of state elected officials to eighteen); NAT'L CONFERENCE OF STATE LEGISLATURES, RECALL OF STATE OFFICIALS, Mar. 21, 2006, available at <http://www.ncsl.org/programs/legismgt/elect/recallprovision.htm> (providing detailed analysis of the eighteen states allowing recall of state officials). See generally Vikram David Amar, *Adventures in Direct Democracy: The Top Ten Constitutional Lessons from the California Recall Experience*, 92 CAL. L. REV. 927 (2004).

106. Of course, race and gender (coupled with state action issues) raise their own set of constitutional problems.

107. Amar, *Indirect Effects of Direct Election*, *supra* note 31, at 1351-52; Vikram David Amar, Note, *The Senate and the Constitution*, 97 YALE L.J. 1111, 1116-19 (1987-1988).

108. Amar, *The Senate and the Constitution*, *supra* note 95, at 1118-19.

109. See Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113, 131 (1995).

Senators themselves, combined with *Thornton's* teaching that our current Constitution does not permit Congress to regulate the qualifications for Congressional officeholding, obviously foreclose such a scheme?

V. Although the Senate Did Not Appear to Appreciate Its Role Last Year, Senators Themselves Have the Authority to Interpret and Vindicate the Meaning of the Seventeenth Amendment

The Constitution makes each house, including the Senate, the "Judge of the . . . Qualifications of its own members."¹¹⁰ So if the Wyoming Governor had decided to appoint someone outside of the three names submitted to him, it would arguably have fallen upon the Senate to decide whether this person was "qualified" to be appointed, such that the Senate would have had to decide what it thought the Seventeenth Amendment did or did not mean.

Indeed if a majority of Senators believed that the constitutional flaws I have identified in Wyoming's statute are unseverable from the portion of the Wyoming statute that authorizes the Governor to make temporary Senate appointments in the first place, the Senate could have legitimately concluded that there is no valid "empower[ment]" of the Wyoming Governor under the current scheme. The Senate could then have rejected as unqualified (and therefore refused to seat) *anybody* the Governor appointed—including people on the list of three he will shortly get.

Under this quite plausible scenario, the vacancy from Wyoming would have remained unfilled until either a popular election had been held or until the Wyoming legislature passed a new gubernatorial authorization that would be free of the impermissible restraints and that would allow the Governor to appoint a Democrat.

And under the so-called "political question" doctrine (which, many thought should have been invoked in *Bush v. Gore*¹¹¹ itself), federal courts might very well say that since the Constitution gives the Senate power to judge its members' qualifications, federal courts ought to stay out of all these disputes.

110. U.S. CONST. art. I, § 5.

111. 531 U.S. 98 (2000).

The Senate should step up to its interpretive duties,¹¹² alas, it hasn't, and that is unfortunate. And if a new controversy ripens in Arizona this presidential election year, it could be tragic.

112. Amar, *The Senate and the Constitution*, *supra* note 95, at 1122.. See generally DONALD G. MORGAN, CONGRESS AND THE CONSTITUTION: A STUDY OF RESPONSIBILITY 344 (1966); Bernard W. Bell, *Marbury v. Madison and the Revolution of 1800: Marbury v. Madison and the Madisonian Vision*, 72 GEO. WASH. L. REV. 197, 206-07 (2003); Paul Brest, *Congress' Role and Responsibility in the Federal Balance of Power: Congress as Constitutional Decisionmaker and Its Power to Counter Judicial Doctrine*, 21 GA. L. REV. 57 (1986).

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