

**ACHIEVING FAIRNESS IN UNITED STATES
SENATE SUCCESSION LAWS:
A UNIFORM PROPOSAL**

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I. INTRODUCTION	444
II. THE CURRENT STATE OF LAW.....	449
III. THE PROBLEMS THAT ARISE WHEN POWER IS VESTED SOLELY IN THE GOVERNOR	451
A. Shifting the Balance of Power in the United States Senate	451
B. Unelected Governors.....	454
i. Lieutenant Governors	454
ii. States without a Lieutenant Governor Office	456
C. Conflicts of Interest	457
i. Florida Governor Charlie Crist’s Conundrum	457
ii. Alaska 2002: Keeping it in the Family	458
D. The Power of Incumbency	459
E. The Finality of the Decision.....	461
i. Judge v. Quinn	462
ii. The United States Senate’s Failed Attempt to Block Burr’s Appointment.....	462
iii. Valenti v. Rockefeller	463
IV. THE PROBLEMS THAT ARISE WITH SPECIAL ELECTIONS: THE NEED FOR REPRESENTATION	464
A. The Importance of Full Representation in the United States Senate.....	464
i. Minnesota 2008-2009	466
ii. Massachusetts 2009	468
B. The Potential for a Contested Special Election.....	469
V. A PROPOSED UNIFORM LAW.....	470
A. The Proposal.....	470
B. The Differences between the Proposal and Current State Laws	472
i. Utah.....	473
ii. Wyoming	474
iii. Hawai’i	475
C. Party Identification.....	477
i. True Independents: Lieberman and Sanders.....	477

ii. A Change of Heart: The Arlen Specter Situation	478
VI. THE IMPRACTICALITY OF IMPLEMENTATION	479
A. Changing the State Law	479
B. Constitutional Amendment.....	481
i. A Difficult Task	481
ii. Senator Feingold's Proposal	482
VII. CONCLUSION	482

I. INTRODUCTION

John Dalberg-Acton famously proclaimed that, “[p]ower tends to corrupt, and absolute power corrupts absolutely.”¹ Former Illinois Governor Rod Blagojevich, acting under state law to appoint a replacement to fill a vacant seat in the United States Senate, infamously quipped that such a seat is “a fucking valuable thing, you just don’t give it away for nothing.”² In Springfield, Illinois, in late 2008, Governor Blagojevich was John Dalberg-Acton’s word made flesh. The procedure followed by Illinois to fill a vacant Senate seat — to vest all of the power in the governor³ — is not only a policy filled with potential abuses and shortcomings, but also a policy followed by far too many states. Governors have acted under the color of similar laws numerous times over the past decade in ways that cast doubt on the legitimacy of government. It is time to end this policy.

The seat in Illinois was not the only senatorial office vacated following the 2008 election. While Barack Obama and Joe Biden resigned from the Senate to serve as President and Vice President, respectively, two other senators left office to accept positions in Obama’s Cabinet.⁴ In total, since June 4, 2007, nine senators have left

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¹ JOHN EMERICH EDWARD DALBERG-ACTON, *ESSAYS ON FREEDOM AND POWER* 364 (1948).

² Complaint at 56, *United States v. Blagojevich*, 08 CR 888 (N.D. Ill. 2008), available at www.usdoj.gov/usao/iln/pr/chicago/2008/pr1209_01a.pdf [hereinafter “Complaint”].

³ 10 ILL. COMP. STAT. ANN. 5/25-8 (West 2010).

⁴ Obama was replaced by Roland Burris. Rick Pearson & Ray Long, *Gov. Rod Blagojevich Picks Former Attorney General to Replace Obama*, CHICAGO TRIBUNE, Dec. 31, 2008, http://www.chicagotribune.com/news/local/chi-bлагоjevich-burris-senate-31dec31_0,2666580.story. Ted Kaufman was appointed to Biden’s seat. Jeff Montgomery, *Longtime Aide Ted Kaufman to Fill Biden’s Senate Seat*, USA TODAY, Nov. 25, 2008,

office during the middle of their term.⁵ In all of these instances, state law has determined how the seat is to be filled. As highlighted by the Blagojevich scandal, these laws are far from perfect.

On January 19, 2010, Scott Brown, a Republican from Massachusetts, won a special election to serve out the remainder of the late Edward “Ted” Kennedy’s senate term.⁶ His election had a national impact, as he became the forty-first Republican in the Senate, ending the Democrats’ filibuster-proof “super-majority.”⁷ For nearly a year, building off of the momentum of having a “super-majority,” the Democrats had been calling for major healthcare reform.⁸ With Brown’s election, pundits suddenly declared moot the months-long healthcare

http://www.usatoday.com/news/politics/2008-11-24-minner-biden_N.htm. Hillary Clinton left her New York seat to serve as Secretary of State, and was replaced by Kristin Gillibrand. Danny Hakim & Nicholas Confessore, *Paterson Picks Gillibrand for Senate Seat*, N.Y. TIMES, Jan. 23, 2009, <http://www.nytimes.com/2009/01/24/nyregion/24senator.html>. Finally, Ken Salazar of Colorado resigned to serve as the Secretary of the Interior and was replaced by Michael Bennet. Karen Crummy, *Ritter Taps Bennet as Senator*, DENVER POST, Jan. 2, 2009, http://www.denverpost.com/breakingnews/ci_11355396.

⁵ See Crummy, *supra* note 4 (Salazar (CO)); Hakim & Confessore, *supra* note 4 (Clinton (NY)); Montgomery, *supra* note 4 (Biden (DE)); Pearson & Long, *supra* note 4 (Obama (IL)). Further, Craig Thomas (WY) passed away on June 4, 2007, and was replaced by John Barrasso. Rita Healy & P.G. Sittenfeld, *Wyoming’s New Senator*, TIME, June 22, 2007, <http://www.time.com/time/nation/article/0,8599,1636439,00.html>. Next, Trent Lott (MS) resigned to work in the private sector, and Roger Wicker was appointed to fill his vacant seat. Adam Nossiter, *Congressman Named to Fill Lott’s Senate Seat*, N.Y. TIMES, Jan. 1, 2008, <http://www.nytimes.com/2008/01/01/washington/01senator.html>. Mel Martinez (FL) also resigned from the Senate and was replaced by George LeMieux. Adam C. Smith, *Gov. Charlie Crist Places a Bet on Loyalty by Appointing George LeMieux*, ST. PETERSBURG TIMES, Aug. 29, 2009, <http://www.tampabay.com/news/politics/state/no-one-was-a-safer-choice-than-george-lemieux-but-time-will-tell-if/1031984>. Following the death of Edward “Ted” Kennedy (MA), Paul Kirk was temporarily appointed to the seat, before Scott Brown won a special election. Paul Kane & Karl Vick, *Republican Brown Beats Coakley in Special Senate Election in Massachusetts*, WASH. POST, Jan. 20, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/01/19/AR2010011904517.html>. Finally, Sen. Robert Byrd (WV) died on June 28, 2010. Adam Clymer, *Robert Byrd, A Pillar of the Senate, Dies at 92*, N.Y. TIMES, June 28, 2010, <http://www.nytimes.com/2010/06/29/us/politics/29byrd.html>.

⁶ Kane & Vick, *supra* note 5.

⁷ David M. Herszenhorn & Robert Pear, *Democrats May Seek to Push Health Bill Through House*, N.Y. TIMES, Jan. 18, 2010, <http://www.nytimes.com/2010/01/19/health/policy/19health.html>.

⁸ Robert Pear & Sheryl Gay Stolberg, *Obama Says He Is Open to Altering Health Plan*, N.Y. TIMES, March 5, 2009, <http://www.nytimes.com/2009/03/06/us/politics/06web-health.html>. On March 5, 2009, the forty-fifth day of his Administration, President Obama hosted a “healthcare summit.” *Id.*

debate, which had been one of the top stories of the year,⁹ as the Republicans could now prevent a bill from coming to a vote by blocking a motion for cloture.¹⁰ Mara Liasson, a National Public Radio correspondent, captured the general consensus following the election when she stated, “[w]ell, a lot has happened since [Brown won]. Obviously health care was about to pass. Everybody here at this table and [in Washington, D.C.] felt that way. No longer.”¹¹ This drastic change on Capitol Hill occurred because of the vacancy in one Senate seat. It is apparent from this reaction that senators are important people, and that one vacancy can have a major impact on the national political landscape. Based on the number of senators that have left office early over the past few years, and the importance of the office, the time is ripe for state legislatures to reexamine the laws on the books, and to craft Senate succession laws that best encapsulate key public policy considerations.

The uniform law proposed in this Note recognizes that Senate succession laws should seek to advance four goals: (1) placing a check on the governor’s power; (2) ensuring legitimacy in the process; (3) guaranteeing that a state is not underrepresented in the Senate for a prolonged period of time; and, (4) seeking a fair result. It is important to place a check on the governor’s power because the Framers founded the United States government on a system of checks and balances.¹² Further, without placing a check on the governor’s power, a state is inviting the type of abuse that occurred in Illinois in 2008. Connected to this is the

⁹ *Top 10 Everything of 2009: The Divisive Debate Over Health Care Reform*, TIME, Dec. 8, 2009, http://www.time.com/time/specials/packages/article/0,28804,1945379_1944421_1944382,00.html.

¹⁰ *‘Special Report’ Panel on ‘Scott Brown Effect’ on Health Care Reform*, FOX NEWS (Jan. 22, 2010), <http://www.foxnews.com/story/0,2933,583661,00.html> [hereinafter *Scott Brown Effect*].

¹¹ *Id.*

¹² THE FEDERALIST NO. 51 (James Madison), available at <http://www.constitution.org/fed/federa51.htm>. In this paper, entitled “The Structure of Government Must Furnish the Proper Checks and Balances Between the Different Departments,” Madison begins:

To what expedient, then, shall we finally resort, for maintaining in practice the necessary partition of power among the several departments, as laid down in the Constitution? The only answer that can be given is, that as all these exterior provisions are found to be inadequate, the defect must be supplied, by so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places.

Id.

goal of ensuring that the electorate has faith in the legitimacy of the process. This not only applies to situations where illegal wrongdoing has occurred, but also to even the hint of a corrupting influence. Such legal, but questionable, appointments could include a governor appointing his daughter to the Senate, or a governor appointing his chief of staff to the office of Senator. When the governor is making an appointment, he or she is speaking in a situation where the voice of the public would normally be heard through election. Therefore, it is not only proper to allow more people to have a say in the process, but it is important that the people of the state have faith in that process.

Avoiding underrepresentation in the Senate for a prolonged period of time is another issue that ties in doctrinally to the founding of this country. Thanks to the Connecticut Compromise, the Senate is the only body in the government where each state has an equal voice.¹³ With just 100 members, every senator plays an important role in legislative action, as recently highlighted by the aftermath of the Scott Brown election.¹⁴ Because the federal government is set up to give each state equal power in the Senate, it is imperative that a state is fully represented in that legislative body. Thus, an appointee should fill a vacant Senate seat as quickly as reasonably possible.

Finally, fairness can be achieved by making sure that the balance of power in the Senate does not shift solely because one senator is no longer in office and the governor appointing the replacement identifies with a different political party. As the election of Scott Brown makes clear, the balance of power in the Senate can be altered when just one seat “flips” from being held by one party to another. It would be inequitable for such a shift in the national political landscape to occur simply because one senator resigned or passed away, and the governor in his state appointed a replacement from a different political party. Party continuity is therefore a way to assure a fair result when appointing someone to serve out the remainder of another’s term.

The law in forty states calls for the governor to have full discretion, without condition, to fill a vacancy in the Senate.¹⁵ These laws defy

¹³ Alec MacGillis, *Gangs of D.C.*, WASH. POST, Aug. 9, 2009, <http://www.washingtonpost.com/wpdyn/content/article/2009/08/07/AR2009080702045.html>.

¹⁴ *Scott Brown Effect*, *supra* note 10.

¹⁵ ALA. CODE § 36-9-7 (LexisNexis 2011); ARK. CODE ANN. § 7-8-102 (West 2011); CAL. ELEC. CODE § 10720 (West 2011); COLO. REV. STAT. ANN § 1-12-201 (West 2011); CONN. GEN. STAT. ANN. § 9-211 (West 2011); DEL. CODE ANN. tit. 15, § 7321 (West 2011); FLA. STAT. ANN. § 100.161 (West 2011); GA. CODE ANN. § 21-2-542 (West 2011); IDAHO

fundamental principles of fairness, legitimacy, and checks on power. Other states hold a special election to be held to fill the vacancy, but these laws leave the state underrepresented in the Senate for too long. The best solution is one that checks the governor's power while also assuring a fair and just result not only for voters within the state, but for all Americans.

This Note, therefore, proposes a law that draws from the various laws of the fifty states. Although the ultimate decision should be vested with the governor, he or she should choose from one of three candidates nominated by the state committee of the political party to which the former senator belonged at the time he or she left office. This proposed law would also have special stipulations for senators not registered to a party. The proposed legislation also assures that the balance of the Senate will not shift based on the political affiliation of the governor, while also foreclosing opportunities for corruption and assuring that the people of the state are not left without full representation in Washington for an extended period of time.

Before states pass a new law, however, there must be a realization that the current system is flawed. Instead of balancing the key policy considerations set forth above, it appears that state legislatures have been comfortable with the quid pro quo of politics — to the victor goes the spoils. Recognizing the shortcomings of this policy will pave the way to reform.

In 1881, President James A. Garfield was assassinated by Charles

CODE ANN § 59-910 (West 2011); 10 ILL. COMP. STAT. ANN. 5/25-8 (West 2011); IND. CODE ANN. § 3-13-3-1 (West 2011); IOWA CODE ANN § 69.8 (West 2011); KAN. STAT. ANN. § 25-318 (West 2010); KY. REV. STAT. ANN. § 63.200 (West 2011); LA. REV. STAT. ANN. § 18:1278 (2011); ME. REV. STAT. ANN. tit. 21-A, § 391 (2010); MD. CODE ANN. ELEC. LAW § 8-602 (West 2010); MASS. GEN. LAWS ANN. ch. 54, § 140 (West 2011); MICH. COMP. LAWS SERV. § 168.105 (LexisNexis 2011); MINN. STAT. ANN. § 204D.28 (West 2011); MISS. CODE ANN. § 23-15-855 (West 2010); MO. ANN. STAT. § 105.040 (West 2011); MONT. CODE ANN. § 13-25-202 (2010); NEB. REV. STAT. ANN. § 32-565 (LexisNexis 2010); NEV. REV. STAT. ANN. § 304.030 (LexisNexis 2011); N.H. REV. STAT. ANN. § 661:5 (LexisNexis 2011); N.J. STAT. ANN. § 19:3-26 (West 2011); N.M. STAT. ANN. § 1-15-14 (LexisNexis 2011); N.Y. PUB. OFF. LAW § 42 (McKinney 2011); N.C. GEN. STAT. ANN. § 163-12 (West 2010); N.D. CENT. CODE ANN. § 16.1-13-08 (West 2011); OHIO REV. CODE ANN. §3521.02 (West 2011); 25 PA. CONS. STAT. ANN. § 2776 (West 2011); S.C. CODE ANN. § 7-19-20 (2009); TENN. CODE ANN. § 2-16-101 (West 2011); TEX. ELEC. CODE ANN. §§ 204.002, 204.003 (West 2011); VT. STAT. ANN. tit. 17, § 2621 (West 2010); VA. CODE ANN. § 24.2-207 (West 2011); WASH. REV. CODE ANN. § 29A.28.030 (West 2011); W. VA. CODE ANN. § 3-10-3 (West 2011).

J. Guiteau, who was upset that the President did not give him a job in return for campaigning on Garfield's behalf at the Republican National Convention.¹⁶ At the time, the common practice — dubbed the “spoils system” — was for the winning public official to give nearly all of the government jobs to loyal members of his party.¹⁷ Following Garfield's assassination, Congress passed the Pendleton Act to reform the patronage system.¹⁸ Over the years, the law has been strengthened and reformed to the point where over ninety percent of government jobs are secure from one election to another.¹⁹

Hopefully the Blagojevich scandal is the tipping point in the call to reform Senate succession laws, much like Garfield's assassination led to the reform of civil service jobs. In both instances, the quid pro quo of the day is not in the best interest of the people. At present, state legislatures are either ignoring key policy considerations, or do not realize what they are doing by employing the laws that are currently on the books. Instead of giving governors so much power, it is necessary for state legislatures to balance the interests at stake, and to reform the law accordingly.

Part II of this Note examines the current state laws that are employed to determine how to fill a vacant Senate seat. Part III looks at the problems that arise when a state vests unchecked power in the governor, as is the current practice in forty states. Part IV highlights the potential pitfalls of calling for a special election to fill the vacancy. An alternate proposal is put forth in Part V of this Note, while the reality of how difficult it would be to implement such reform is addressed in Part VI.

II. THE CURRENT STATE OF LAW

The laws governing Senate succession can be separated into three groups. First, the law in forty states provides the governor with absolute

¹⁶ *Charles Guiteau Collection*: GEORGETOWN U. LIBR., <http://www.library.georgetown.edu/dept/speccoll/cl133.htm> (last visited Feb. 25, 2011).

¹⁷ *Andrew Jackson: Good, Evil & The Presidency, Special Features, The Spoils System*, PBS, http://www.pbs.org/kcet/andrewjackson/features/the_spoils_system.html (last visited Mar. 11, 2011) (noting that it was United States Senator William L. Marcy who first said, following the 1828 election of Andrew Jackson, that, “to the victor belongs the spoils[.]”).

¹⁸ Pendleton Act, ch. 27, 22 Stat. 403 (1883) (current version in scattered sections of 5 U.S.C.).

¹⁹ *Pendleton Act (1883)*, U.S. NAT'L ARCHIVES & RECORDS ADMIN., <http://www.ourdocuments.gov/doc.php?flash=true&doc=48>(last visited Mar. 11 2011).

authority to appoint a new senator in the event of a vacancy.²⁰ These laws also require the governor to call for a special election within two years of that appointment.²¹ The second group consists of six states that take the opposite approach, vesting no power in the governor.²² Instead, these states require the vacancy to be filled by a special election.²³ Although there is no uniform requirement, states generally hold these elections three to four months after the seat is vacated.²⁴ This leaves the final group, which consists of four states that have taken unique approaches to Senate succession laws.

The first of these four states is Arizona, whose statute calls for the governor to appoint a replacement when a Senator vacates his or her seat prematurely.²⁵ The power is qualified, however, by the requirement that the “appointee shall be of the same political party as the person vacating the office[.]”²⁶ This law provides little guidance to the governor, and could potentially be an invitation for abuse. The foundation upon which the law rests is not faulty, but could be written more concisely. Three states have enacted laws that avoid such vagueness — Hawai’i, Utah, and Wyoming.²⁷

In the event of a vacancy in the Senate, Wyoming law calls for the state political party that the senator represented at the time of his or her election to nominate three potential replacements to the governor.²⁸ The governor then has the sole power to appoint the replacement from this group.²⁹ Once the governor names a replacement, a special election occurs within two years.³⁰ In the event that the senator was not a registered member of a political party at the time of his or her election, the law calls for each party registered in the state to nominate one

²⁰ *E.g.*, N.Y. PUB. OFF. LAW § 42 (McKinney 2011).

²¹ *Id.*

²² ALASKA STAT. § 15.40.145 (2011); OKLA. STAT. ANN. tit. 26, §12-101 (West 2011); OR. REV. STAT. ANN. §188.120 (West 2011); R.I. GEN. LAWS ANN. § 17-4-9 (West 2010); S.D. CODIFIED LAWS § 12-11-1 (2011); WIS. STAT. ANN. §17.18 (West 2011).

²³ *E.g.*, ALASKA STAT. § 15.40.145.

²⁴ *Id.*

²⁵ ARIZ. REV. STAT. § 16-222 (LexisNexis 2011).

²⁶ *Id.*

²⁷ HAW. REV. STAT. ANN. § 17-1(LexisNexis 2011); UTAH CODE ANN. § 20A-1-502 (West 2010); WYO. STAT. ANN. § 22-18-111(a)(i) (West 2011).

²⁸ WYO. STAT. ANN. § 22-18-111(a)(i).

²⁹ *Id.*

³⁰ *Id.*

person.³¹ Any individual not registered with a political party may enter his or her name for consideration, provided a petition with 100 signatures to the Wyoming Secretary of State accompanies their application.³² The governor is then presented with the names of all of the candidates, and is vested with the power to fill the vacancy from that list.³³

Utah and Hawai'i have similar laws. Utah law calls for the governor to choose from one of three candidates "nominated by the state central committee of the same political party as the prior officeholder."³⁴ Utah law does not, however, have a provision that governs how to fill a vacancy if the exiting senator was not registered with a political party. The law in Hawai'i is similar, providing that the governor should make an appointment "from a list of three prospective appointees submitted by the same political party as the prior incumbent."³⁵ In the event that the previous legislator was an independent, the law states that "the Governor shall appoint a person who is not and has not been, for at least six months immediately prior to the appointment, a member of any political party."³⁶

III. THE PROBLEMS THAT ARISE WHEN POWER IS VESTED SOLELY IN THE GOVERNOR

A. Shifting the Balance of Power in the United States Senate

Forty states vest the governor with the unchecked power to appoint a replacement to the United States Senate.³⁷ Although these laws achieve

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ UTAH CODE ANN. § 20A-1-502 (West 2010).

³⁵ HAW. REV. STAT. ANN. § 17-1 (LexisNexis 2011).

³⁶ *Id.*

³⁷ ALA. CODE § 36-9-7 (LexisNexis 2011); ARK. CODE ANN. § 7-8-102 (West 2011); CAL. ELEC. CODE § 10720 (West 2011); COLO. REV. STAT. ANN. § 1-12-201 (West 2011); CONN. GEN. STAT. ANN. § 9-211 (West 2011); DEL. CODE ANN. tit. 15, § 7321 (West 2011); FLA. STAT. ANN. § 100.161 (West 2011); GA. CODE ANN. § 21-2-542 (West 2011); IDAHO CODE ANN. § 59-910 (West 2011); 10 ILL. COMP. STAT. ANN. 5/25-8 (West 2011); IND. CODE ANN. § 3-13-3-1 (West 2011); IOWA CODE ANN. § 69.8 (West 2011); KAN. STAT. ANN. § 25-318 (West 2010); KY. REV. STAT. ANN. § 63.200 (West 2011); LA. REV. STAT. ANN. § 18:1278 (2011); ME. REV. STAT. ANN. tit. 21-A, § 391 (2010); MD. CODE ANN. ELEC. LAW § 8-602 (West 2010); MASS. GEN. LAWS ANN. ch. 54, § 140 (West 2011); MICH. COMP. LAWS SERV. § 168.105 (LexisNexis 2011); MINN. STAT. ANN. § 204D.28 (West 2011); MISS. CODE ANN. § 23-15-855 (West 2010); MO. ANN. STAT. § 105.040 (West 2011); MONT.

the state's goal of being fully represented in Washington for as long as possible, placing such great power in the hands of one elected official runs contrary to the goals of fairness, placing a check on power, and ensuring legitimacy. If the exiting senator and the current governor are members of different political parties, then it seems almost inevitable that the Senate seat will change party hands. In a legislative body that is limited to 100 members, such a transformation could shift the balance of power. In any given situation, a vacant senate seat could give rise to the breaking of a 50-50 deadlock, the elimination of a 51-49 majority, or the end of a "super-majority." Needless to say, this is not the proper avenue by which to achieve a change in the power structure of the Senate.

This concern is legitimate, especially considering the recent makeup of the Senate. On January 2, 2001, a day before the 107th Congress first convened, the Senate was evenly split with fifty Democrats and fifty Republicans.³⁸ Two years later, when the 108th Congress met for the first time, the Republicans held a slim 51-48-1 majority, with the lone independent, Senator James Jeffords (VT), caucusing with the Democrats.³⁹ Further, the 110th Congress — which was in session from January 2007 through January 2009 — began with the Democrats holding onto a 49-49-2 "majority;"⁴⁰ both independent

CODE ANN. § 13-25-202 (2010); NEB. REV. STAT. ANN. § 32-565 (LexisNexis 2010); NEV. REV. STAT. ANN. § 304.030 (LexisNexis 2011); N.H. REV. STAT. ANN. § 661:5 (LexisNexis 2011); N.J. STAT. ANN. § 19:3-26 (West 2011); N.M. STAT. ANN. § 1-15-14 (LexisNexis 2011); N.Y. PUB. OFF. LAW § 42 (McKinney 2011); N.C. GEN. STAT. ANN. § 163-12 (West 2010); N.D. CENT. CODE ANN. § 16.1-13-08 (West 2011); OHIO REV. CODE ANN. §3521.02 (West 2011); 25 PA. CONS. STAT. ANN. § 2776 (West 2011); S.C. CODE ANN. § 7-19-20 (2009); TENN. CODE ANN. § 2-16-101 (West 2011); TEX. ELEC. CODE ANN. §§ 204.002, 204.003 (West 2011); VT. STAT. ANN. tit. 17, § 2621 (West 2010); VA. CODE ANN. § 24.2-207 (West 2011); WASH. REV. CODE ANN. § 29A.28.030 (West 2011); W. VA. CODE ANN. § 3-10-3 (West 2011).

³⁸ Alan Fram, *Power-Sharing Divides Evenly Split 107th*, ABC NEWS (Jan. 2, 2001), <http://abcnews.go.com/Politics/Story?id=122135&page=1> (noting that a series of events unfolded over the two years while the 107th Congress was in session, ultimately resulting in a Republican majority, 51-48-1).

³⁹ MILDRED L. AMER, CONG. RESEARCH SERV., RS21379, MEMBERSHIP OF THE 108TH CONGRESS: A PROFILE 1 (2004), available at, <http://www.senate.gov/reference/resources/pdf/RS21379.pdf>; Brian Knowlton, *Switch by Jeffords Would Give 51-to-49 Majority to Democrats: Senator Set to Defect From the Republicans*, N.Y. TIMES, May 24, 2001, http://www.nytimes.com/2001/05/24/news/24iht-jefford_ed3_.html.

⁴⁰ MILDRED AMER, CONG. RESEARCH SERV., RS22555, MEMBERSHIP OF THE 110TH CONGRESS: A PROFILE 1 (2008), available at <http://www.senate.gov/reference/resources/pdf/RS22555.pdf>.

Senators, Joseph Lieberman (CT) and Bernie Sanders (VT), caucused with the Democrats.⁴¹ Finally, during the 111th Congress the Democrats held the coveted 60-40 “super majority,” allowing them to prevent a filibuster if the interests of all of the Democrat Senators aligned.⁴² A year into the congressional term, however, the Democrats’ majority fell to 59-41, after Scott Brown, a Republican, won a special election in Massachusetts following the death of Senator Kennedy, a Democrat.⁴³ Therefore, in four of the past five sessions of Congress, the balance of power not only could have shifted if one senator were to leave office, but the death of a senator and the law used to fill his remaining term actually did impact the balance of power.

During the 110th Congress, the Democrats missed an opportunity to gain an extra seat because of the law in place in Wyoming.⁴⁴ The Democrats began the 110th Congress with a 49-49-2 “majority.” On June 4, 2007, Republican Senator Craig Thomas (WY) passed away after a long battle with leukemia.⁴⁵ If Wyoming were one of the forty states that vests sole authority in appointing a replacement with the governor,⁴⁶ it is likely that the Democrats would have gained an extra seat because Dave Freudenthal, a Democrat, was governor at the time.⁴⁷ However, as mentioned, Wyoming law prevents a political party from capitalizing on such an unfortunate situation.⁴⁸ Thus, the Wyoming Republican Party presented Governor Freudenthal with a list of three nominees, and he selected John Barrasso from the list to serve as the state’s junior senator.⁴⁹

In the current era of politics, where tremendous emphasis is placed

⁴¹ David M. Herszenhorn & Robert Pear, *Democrats Address Their Own Rifts on Health Care*, N.Y. TIMES, Oct. 16, 2009, <http://www.nytimes.com/2009/10/16/health/policy/16health.html> [hereinafter *Democratic Rifts on Health Care*]; Paul Kane & Shailagh Murray, *Senate Democrats Allow Lieberman to Retain Key Chairmanship*, WASH. POST, Nov. 19, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/11/18/AR2008111800231.html>.

⁴² Monica Davey & Carl Hulse, *Franken’s Win Bolsters Democratic Grip in Senate*, N.Y. TIMES, June 30, 2009, <http://www.nytimes.com/2009/07/01/us/politics/01minnesota.html>.

⁴³ Kane & Vick, *supra* note 5.

⁴⁴ WYO. STAT. ANN. § 22-18-111(a)(i) (West 2011).

⁴⁵ Rita Healy & P.G. Sittenfeld, *Wyoming’s New Senator*, TIME, June 22, 2007, <http://www.time.com/time/nation/article/0,8599,1636439,00.html>.

⁴⁶ *E.g.*, N.Y. PUB. OFF. LAW § 42 (McKinney 2011).

⁴⁷ Healy & Sittenfeld, *supra* note 45.

⁴⁸ *Id.*

⁴⁹ *Id.*

on which states are “blue” and which states are “red,” it is easy to think that the political climate of a state is defined by a color. As it turns out, the party affiliation of a state’s governor and two senators cannot easily be ascertained based on how a state voted in the last Presidential election. Currently, there are thirty-one senators who serve twenty-five states where the governor has a party affiliation that differs from their own.⁵⁰ As such, if hypothetical Senator A from State One were to leave office tomorrow, there is nearly one out of three odds that the Governor of State One has a different political party affiliation than Senator A.⁵¹ A vast majority of states are ignoring the issue of fairness that arises in this situation.

B. Unelected Governors

While interests of legitimacy, fairness, and placing a check on power are already being ignored when a state gives the governor unchecked power to fill a senate vacancy, these interests are heightened when the governor is not actually elected to the state’s highest office. There are two different scenarios that could give rise to such a situation: (1) when the new governor was elected lieutenant governor and succeeded the former governor from that position; or, (2) if the state does not have a lieutenant governor’s office and the new executive was not elected statewide. The latter scenario is the more likely of the two to raise additional concerns about the appointment.

i. Lieutenant Governors

If a state has a lieutenant governor, the concern over the legitimacy of an appointment made by an unelected governor is mitigated. At the federal level, the vice president has ascended to the presidency on eight

⁵⁰ Compare *Governor Roster 2011*, NAT’L GOVERNORS ASS’N (Mar. 8, 2011), <http://www.nga.org/Files/pdf/GOVLIST.PDF>, with *Senators of the 112th Congress*, U.S. SENATE, http://senate.gov/general/contact_information/senators_cfm.cfm (last visited Mar. 13, 2011).

⁵¹ It is important to note that it is “different party affiliation,” because it cannot be assumed that one is a Democrat, the other a Republican. For example, Connecticut’s Governor is a Republican, while one of its Senators, Richard Blumenthal, is a Democrat, and the other, Joseph Lieberman, an independent. NAT’L GOVERNORS ASS’N, *supra* note 50; U.S. SENATE, *supra* note 50. Similarly, Senator Bernie Sanders from Vermont is an independent who serves alongside Senator Leahy, a Democrat, while Vermont is governed by a Democrat. NAT’L GOVERNORS ASS’N, *supra* note 50; U.S. SENATE, *supra* note 50. Because the issue of senators without a party affiliation will be addressed later, this distinction is necessary. See *infra* Part V(B).

occasions following the death of the president, and once following a resignation.⁵² Fighting over the legitimacy of the Administration of a former vice president was John Tyler's cross to bear.⁵³ It is now a long established norm that a vice president or lieutenant governor can ascend to the executive office.⁵⁴

The most recent example of a lieutenant governor ascending to the office of governor, and then having the responsibility of appointing a senator, occurred in New York in 2009.⁵⁵ After Governor Elliot Spitzer's resignation following a sex scandal, David Paterson rose from lieutenant governor to governor.⁵⁶ Paterson was then responsible, under New York law,⁵⁷ for appointing a replacement for Senator Hillary Clinton, who resigned to serve as Secretary of State in the Obama Administration.⁵⁸ Governor Paterson selected United States Representative Kristen Gillibrand to fill the vacancy.⁵⁹ Concerns of the electorate losing faith in the system in this situation are mitigated because Paterson was elected to the lieutenant governor position with the understanding that he may one day have to exercise the powers of the governor. By implementing a law that calls for the governor's successor to be voted into office at the statewide level, the New York Legislature found a way to protect the process.⁶⁰ There are states,

⁵² *Vice President of the United States (President of the Senate)*, U.S. SENATE, http://www.senate.gov/artandhistory/history/common/briefing/Vice_President.htm#4 (last visited Mar. 13, 2011).

⁵³ John Tyler became the first Vice President to assume the Office of the President following the death of his predecessor (William Henry Harrison). *John Tyler*, THE WHITE HOUSE, <http://www.whitehouse.gov/about/presidents/johntyler> (last visited Mar. 15, 2011). Dubbed "His Accidency," it was unclear at the time whether it was proper for Tyler to assume the full powers of an elected President. *Id.*

⁵⁴ *Id.*

⁵⁵ Danny Hakim & Nicholas Confessore, *Paterson Picks Gillibrand for Senate Seat*, N.Y. TIMES, Jan. 23, 2009, <http://www.nytimes.com/2009/01/24/nyregion/24senator.html>.

⁵⁶ Nicholas Confessore, *Paterson Is Sworn In As Governor*, N.Y. TIMES, Mar. 17, 2008, <http://www.nytimes.com/2008/03/17/nyregion/17cnd-paterson.html>.

⁵⁷ N.Y. PUB. OFF. LAW § 42 (McKinney 2011).

⁵⁸ Hakim & Confessore, *supra* note 55.

⁵⁹ *Id.*

⁶⁰ This process includes more than just exercising the appointment power when a seat in the United States Senate has been vacated. Governors sign legislation into law and make numerous appointments — for various boards or local judgeships — on a weekly basis. By having a lieutenant governor office, some states have assured the integrity of all of these acts. It should be noted, however, that when exercising the appointment power when a Senate seat is vacated, the governor is being asked to substitute his or her own opinion for the will of the electorate (as opposed to when the governor appoints a local judge). Thus, the

however, that have failed to make such a value judgment, and have thus exposed themselves to situations where the legitimacy of an unelected governor exercising the appointment power could be called into question.

ii. States without a Lieutenant Governor Office

There are currently seven states that do not have an office of lieutenant governor.⁶¹ These states instead call for the senate president, attorney general, or secretary of state to succeed the governor in the event that the governor vacates the office.⁶² If such an official were to rise to the office of governor and be charged with filling a vacant senate seat, unique issues would arise.

The political scandal that rocked New Jersey in 2004 illustrates the potential problem. Following the resignation of Governor James McGreevey, New Jersey Senate President Richard Codey served as the acting governor for fifteen months.⁶³ Had a United States Senate seat been vacated during that time, Governor Codey would have had unchecked power to appoint a replacement to serve the people of New Jersey.⁶⁴ Governor Codey possessed such power despite the fact that the electorate in only one of New Jersey's forty state senate districts voted him into office.⁶⁵ Despite his high approval ratings as governor, the people of New Jersey, as a whole, never elected him to serve in any office, let alone the state's highest executive office.⁶⁶ Instead, essentially two and a half percent of the people had the opportunity to vote for him in his state senate election. Regardless of this discrepancy, New Jersey law would have authorized him to speak for the people of New Jersey with respect to the person they wished to serve them in Washington.

concerns over legitimacy are necessarily heightened.

⁶¹ These seven states are: Arizona, Maine, New Hampshire, Oregon, Tennessee, West Virginia, and Wyoming. *Roster of Lieutenant Governors/NLGA Members*, NAT'L LIEUTENANT GOVERNORS ASS'N, http://www.nlga.us/web-content/LtGovernors/LG_Roster.html (last visited Mar. 13, 2011).

⁶² *Id.*

⁶³ *No Special Election to Replace McGreevey*, MSNBC (Sept. 15, 2004, 6:31PM), <http://www.msnbc.msn.com/id/6012950>.

⁶⁴ N.J. STAT. ANN. § 19:3-26 (West 2011).

⁶⁵ *Districts by Number*, NEW JERSEY LEGISLATURE, <http://www.njleg.state.nj.us/districts/districtnumbers.asp> (last visited Mar. 13, 2011).

⁶⁶ On January 31, 2005, Governor Codey enjoyed a seventy-six percent approval rating. *Did Codey Back Out Too Soon?*, THE STAR-LEDGER/EAGLETON-RUTGERS POLL (Feb. 7, 2005), <http://slerp.rutgers.edu/retrieve.php?id=152-2>.

The concerns over legitimacy that were foreclosed by allowing an elected lieutenant governor like David Paterson to fill a vacancy reemerge when the governor appointing a replacement has not won a statewide election.

New Jersey is no longer one of the seven states without an office of lieutenant governor. On November 8, 2005, exactly fifty-one weeks after Governor Codey took office from the embattled Governor McGreevey,⁶⁷ the voters of New Jersey passed a state constitutional amendment creating the lieutenant governor office.⁶⁸ In New Jersey, the people were able to safeguard the process by voting to have a statewide election for the governor's successor. While suggesting that the remaining seven states add a lieutenant governor office is beyond the scope of this proposal, stripping one person of the absolute power to appoint a senator is another way to safeguard the process, as well as mitigate questions about the legitimacy of the appointment.

C. Conflicts of Interest

By endorsing the political quid pro quo and vesting the appointment power solely in one person's hands, state legislatures have passively endorsed situations where the governor is clearly torn between self-interest and the interests of the state. This is not a situation unique in the appointment of a senator, as governors are asked to appoint people to numerous positions, from judges to members of a board or committee. However, in the situation of appointing a senator, the governor is substituting his or her own judgment in a situation where the electorate normally has the opportunity to speak. Twice in the past decade a governor, acting with unchecked power, has, it appears, been able to place his interests above that of the state.

i. Florida Governor Charlie Crist's Conundrum

On December 2, 2008, Senator Mel Martinez (FL) announced that he would not seek reelection in November 2010.⁶⁹ By May 12, 2009, Florida Governor Charlie Crist, widely considered a rising star in the Republican Party, announced that he would not run for reelection,

⁶⁷ *No Special Election to Replace McGreevey*, *supra* note 63.

⁶⁸ *New Jersey Lieutenant Governor*, EAGLETON INST. OF POLITICS AT RUTGERS U., <http://www.njvoterinfo.org/lieutenantgov.php> (last visited Mar. 13, 2011).

⁶⁹ Chris Cillizza, *Mel Martinez to Retire*, WASH. POST, Dec. 2, 2008, <http://voices.washingtonpost.com/thefix/senate/mel-martinez-to-retire.html>.

instead opting to seek Martinez's seat in 2010.⁷⁰ On August 7, 2009, Senator Martinez announced that he was resigning before the end of his term.⁷¹ Crist was then charged with appointing a replacement under Florida law.⁷² Clearly, there was a natural tension between doing what was in the best interests of the people of Florida and what Governor Crist needed to do to further his own political ambitions. In the end, Crist appointed a man he knew would warm the seat for him and would not seek reelection in 2010: his former chief of staff, George LeMieux.⁷³

With a political system built on placing a check on power,⁷⁴ it seems unfathomable that an overwhelming majority of state legislatures would foster an environment where such conflicts of interest can occur. Yet, such a framework is in place as a result of laws in states like Florida, which ignore the interests of the citizens in believing in the legitimacy of the process, opting instead to allow the quid pro quo of state politics to rule the day.

ii. Alaska 2002: Keeping it in the Family

On November 5, 2002, United States Senator Frank Murkowski was elected Governor of Alaska.⁷⁵ Pursuant to Alaska law, one of his very first tasks was selecting a replacement for his seat on Capitol Hill.⁷⁶ Governor Murkowski selected a former Anchorage District Attorney who had served two terms in the Alaska State House: his daughter, Lisa

⁷⁰ Damien Cave & Gary Fineout, *Restless in Tallahassee, or With Eye on 2012, Governor Rolls Dice*, N.Y. TIMES, May 12, 2009, <http://www.nytimes.com/2009/05/13/us/13cristq.html>.

⁷¹ Aaron Deslatte & Josh Hafenbrack, *Sen. Mel Martinez's Exit Kicks Ball to Crist*, ORLANDO SENTINEL, Aug. 8, 2009, <http://www.orlandosentinel.com/news/local/breakingnews/orl-mel-martinez-resigns-080709,0,2817086.story>.

⁷² FLA. STAT. ANN. § 100.161 (West 2011).

⁷³ Josh Hafenbrack, *Gov. Crist Picks George LeMieux to Replace Mel Martinez as Florida's Senator*, ORLANDO SENTINEL, Aug. 28, 2009, <http://www.orlandosentinel.com/news/local/seminole/orl-crist-picks-senator-replacement-martinez-0828,0,3403253.story?track=rss>; Adam C. Smith, *Gov. Charlie Crist Places a Bet on Loyalty by Appointing George LeMieux*, ST. PETERSBURG TIMES, Aug. 29, 2009, <http://www.tampabay.com/news/politics/state/no-one-was-a-safer-choice-than-george-lemieux-but-time-will-tell-if/1031984>.

⁷⁴ THE FEDERALIST NO. 51 (James Madison), available at <http://www.constitution.org/fed/federa51.htm>.

⁷⁵ Jill Lawrence, *Career Politician to Head Home State*, USA TODAY, Nov. 7, 2002, http://www.usatoday.com/news/politicselections/2002-11-06-murkowski_x.htm.

⁷⁶ ALASKA STAT. § 15.40.145 (20011).

Murkowski.⁷⁷ Two years later, the people of Alaska voted Ballot Initiative #4 into law, which stripped the governor of such power, opting instead to call for a special election.⁷⁸ It would appear the people of Alaska doubted the process by which Governor Murkowski made the appointment. By reforming the law through a ballot measure, Alaskans were able to establish a safeguard so that their interest in the legitimacy of the process would not be ignored again.

The problem with Alaska's Ballot Initiative #4 is that it is reactionary. Currently, forty states are prone to such potential conflicts of interest.⁷⁹ In the same election where Alaskans voted Ballot Initiative #4 into law, they elected Lisa Murkowski to serve a full term on Capitol Hill.⁸⁰ Alaskan voters (perhaps tacitly)⁸¹ approved of Governor Frank Murkowski's appointee, but they disapproved of the process used to first seat her.

D. *The Power of Incumbency*

The laws in the forty states that provide the governor with the sole authority to fill a vacancy in the Senate require a special election to be called within two years of the appointment.⁸² Therefore, the governor's appointee will not necessarily serve the duration of the term. Yet, as the 2004 election in Alaska demonstrates, these senators may not be voted out of office merely because the electorate disapproves of the manner in

⁷⁷ Katharine Q. Seelye, *New Alaska Governor Gives Daughter His Seat*, N.Y. TIMES, Dec. 21, 2002, <http://www.nytimes.com/2002/12/21/us/new-alaska-governor-gives-daughter-his-seat-in-senate.html>.

⁷⁸ *Alaska Election Results 2004*, WASH. POST, Nov. 24, 2004, <http://www.washingtonpost.com/wp-srv/elections/2004/ak/>; Al Grillo, *Murkowski Wins Close Race for Alaska Senate Seat*, USA TODAY, Nov. 2, 2004, http://www.usatoday.com/news/politicselections/vote2004/2004-11-02-ak-ussenate-battle_x.htm.

⁷⁹ E.g., N.Y. PUB. OFF. LAW § 42 (McKinney 2011).

⁸⁰ Grillo, *supra* note 78.

⁸¹ It would be improper to conclude merely from the election results that the people of Alaska whole-heartedly endorsed the selection of Lisa Murkowski. First, it is important to note that Alaskans have consistently voted overwhelmingly Republican. In fact, at the time of the 2004 election, Alaska's two U.S. Senate seats had been occupied by Republican lawmakers since 1981. *U.S. Senators from Alaska*, U.S. SENATE, http://www.senate.gov/pagelayout/senators/one_item_and_teasers/alaska.htm (last visited Mar. 13, 2011). Second, the Murkowski "brand" was powerful and popular in Alaska. Frank Murkowski had served in the Senate since 1981 and had just been elected governor; his political capital could certainly carry over to his daughter. *Id.* Third, and tied into that second point, is the power of incumbency. *See infra* Part III(D).

⁸² E.g., N.Y. PUB. OFF. LAW § 42 (McKinney 2011).

which they were appointed.⁸³ The truth is that United States Senators enjoy an incredibly high retention rate, and the power of incumbency in an election is undeniable.⁸⁴ The argument here is not that high retention rates themselves are bad, but that the decision made by the governor in this situation, even if later checked by the people through a special election, has long-lasting and powerful implications. Because of this, it is important to safeguard the process by which these senators are appointed.

If incumbency were not such an advantage in an election, the need to safeguard the process used to fill vacancies would be mitigated, if not altogether mooted. The reality of Washington, however, is that, on average, seven out of eight senators up for re-election are sworn into office for another six-year term.⁸⁵ There have been eleven bi-annual Senatorial elections since (and including) 1990, and the average rate of incumbency is an astounding eighty-six and a quarter percent.⁸⁶ The lowest retention rate during that time came in 2006, when the Democrats retook control of the Senate.⁸⁷ Still, senators were re-elected that year at a rate of seventy-nine percent.⁸⁸ Even the “Republican Revolution” of 1994 resulted in a ninety-two percent senatorial retention rate.⁸⁹ While it is true that forty states call for a special election after the governor has made his or her appointment, an appointed senator has an advantage on the ballot.

The aforementioned Senator Kristen Gillibrand (NY), a Democrat, is a great example of the clout that incumbency carries. In only her second term as a member of the United States House of Representatives, Gillibrand would have been a long shot to fill the seat vacated by Hillary Clinton if there had been an open primary, especially considering her upstate roots and 100% rating from the National Rifle Association.⁹⁰ New York law requires that a special election be called

⁸³ Grillo, *supra* note 78.

⁸⁴ *Reelection Rates Over the Years*, CENTER FOR RESPONSIVE POLITICS, <http://www.opensecrets.org/bigpicture/reelect.php> (last visited Mar. 13, 2011).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Mary Lu Carnevale, *Paterson's Choice of Gillibrand Touches Off Chain Reaction*, WALL ST. J., Jan. 23, 2009, <http://blogs.wsj.com/washwire/2009/01/23/patersons-choice-of-gillibrand-touches-off-chain-reaction/>.

within two years of an appointment,⁹¹ and it appeared early on that the newly minted senator would face a primary challenge from a member of the more liberal wing of the party.

United States Representatives Steve Israel and Carolyn B. Maloney both originally stated that they intended to challenge Senator Gillibrand in a 2010 Democratic Primary.⁹² Representative Israel, however, abandoned his plan to run after President Obama called the Congressman, urging him not to challenge the sitting senator.⁹³ In a similar move, Representative Maloney aborted her plans, recognizing the “long odds” she faced in defeating Senator Gillibrand.⁹⁴ She made this decision despite the fact that at that time she was holding an early 33-27 lead over Gillibrand in a poll of New York Democrats.⁹⁵ As a result of her newfound status as an incumbent in the Senate, Gillibrand dodged a serious primary challenge.⁹⁶ Governor Paterson’s decision clearly had a long-lasting impact.

E. The Finality of the Decision

In two separate instances, separated by four decades, voters have attempted to challenge a governor’s appointment to the Senate in court. Specifically, voters have challenged the constitutionality of state laws that vest the appointment power with the governor. The first challenge came in 1968, following the appointment made after the assassination of Senator Robert Kennedy,⁹⁷ while the second came in 2009, after Governor Blagojevich appointed Roland Burris to fill the remainder of President Obama’s senatorial term.⁹⁸ The common thread between the two judgments is that a decision made by the governor of a state that provides him or her with full discretion is unquestionably final.

⁹¹ N.Y. PUB. OFF. LAW § 42 (McKinney 2011).

⁹² Raymond Hernandez, *Recognizing Long Odds, Maloney Drops Her Senate Bid*, N.Y. TIMES, Aug. 7, 2009, <http://www.nytimes.com/2009/08/08/nyregion/08maloney.html>.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Toplines - 2010 New York Democratic Primary for Senate- July 14, 2009*, RASMUSSEN REP. (July 14, 2009), http://www.rasmussenreports.com/public_content/politics/elections/election_2010/election_2010_state_toplines/new_york/toplines_2010_new_york_democratic_primary_for_senate_july_14_2009.

⁹⁶ Former Congressman Harold Ford, Jr. also mulled a primary challenge, ultimately deciding against it. Michael Barbaro, *Ford Decides Not to Run for Senate Seat*, N.Y. TIMES, March 1, 2010, <http://www.nytimes.com/2010/03/02/nyregion/02ford.html>.

⁹⁷ *Valenti v. Rockefeller*, 292 F. Supp. 851, 853 (S.D.N.Y. 1968).

⁹⁸ *Judge v. Quinn*, 623 F. Supp. 2d 933, 934 (N.D. Ill. 2009).

i. Judge v. Quinn

Following then-Governor Rod Blagojevich's appointment of Roland Burris to the Senate, a class consisting of Illinois voters brought legal action, seeking an emergency injunction.⁹⁹ Blagojevich had made the appointment despite being indicted on federal charges of corruption after allegedly attempting to sell the open seat.¹⁰⁰ The plaintiff-voters challenged the constitutionality of the state statute that governs how Senate vacancies are filled.¹⁰¹ Specifically, they believed the law violated the Seventeenth Amendment.¹⁰²

Despite the inferences of illegitimacy that arose following the appointment of Roland Burris, a federal district judge found no legal justification for blocking the appointment.¹⁰³ The court held that "Illinois' statutory scheme is reasonable; the fact that the circumstances of this particular appointment have become one of the subjects of a criminal indictment is constitutionally irrelevant."¹⁰⁴ Although the Constitution is silent as to selections made under a cloud of illegitimacy, state legislatures could reform their law to avoid such situations. Few states, however, have chosen to do so.

ii. The United States Senate's Failed Attempt to Block Burris' Appointment

Following his indictment on federal charges, Governor Blagojevich refused to resign from office.¹⁰⁵ The calls for his resignation came quickly from those in both state and federal government.¹⁰⁶

⁹⁹ *Id.*

¹⁰⁰ See Complaint, *supra* note 2 at 75-76.

¹⁰¹ 10 ILL. COMP. STAT. ANN. 5/25-8 (West 2011); *Quinn*, 623 F. Supp. 2d at 934.

¹⁰² *Quinn*, 623 F. Supp. 2d at 934. The Seventeenth Amendment states:

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 ... When vacancies happen in the representation of any State in the Senate, the executive authority 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 cl. 1, 2.

¹⁰³ *Quinn*, 623 F. Supp. 2d at 940.

¹⁰⁴ *Id.*

¹⁰⁵ Susan Saulny, *Resignation is Rumored; Response is a Firm 'No'*, N.Y. TIMES, Dec. 14, 2008, at A18, <http://www.nytimes.com/2008/12/15/us/politics/15illinois.html>.

¹⁰⁶ *Politicians to Blago: Resign, Resign, Resign*, NBC CHICAGO (Jan. 10, 2009, 7:58

Ultimately, the Illinois Senate was successful in impeaching the Governor by unanimous vote.¹⁰⁷ However, he still managed to make his appointment to fill the Senate seat prior to impeachment.¹⁰⁸

In the time between the indictment and impeachment, Senator Harry Reid (NV), the Senate Majority Leader, wrote the Governor urging him to resign so that an appointment could be made in a more favorable political climate.¹⁰⁹ Senator Reid also warned that if Governor Blagojevich were to appoint a replacement before leaving office, the Senate would prevent that appointee from taking office under the power vested in Congress by Article 1, Section 5, Clause 1 of the United States Constitution.¹¹⁰ This assertion of power, however, proved to be unfounded, and the Senate was unable to block the appointment.¹¹¹

iii. *Valenti v. Rockefeller*

In 1968, a class of voters in New York challenged the constitutionality of a state law that called for the governor to make an appointment to fill a Senate vacancy, followed by a special election.¹¹² The plaintiff-voters in *Valenti* asserted that the law, which was applied following the assassination of Senator Robert F. Kennedy on June 6, 1968, violated the Seventeenth Amendment.¹¹³ Given the circumstances, the court interpreted the statute to mean that “[s]ince this vacancy arose less than 60 days prior to New York’s regular spring primary in an

AM), <http://www.nbcchicago.com/news/local-beat/Cries-For-Governors-Resignation-Grow-Louder.html>. Elected officials calling for Governor Blagojevich’s resignation included: Tom Cross, Republican Leader of the Illinois House of Representatives; Jack D. Franks and John A. Fritchey, Members of the Illinois House of Representatives; United States Senator Dick Durbin (IL); Illinois Lieutenant Governor Pat Quinn; Illinois Attorney General Lisa Madigan; and United States Representative Dan Manzullo (IL-16). *Id.*

¹⁰⁷ Rick Pearson & Ray Long, *Senate Convicts Blagojevich, Making Him the 1st Illinois Governor to be Thrown Out of Office*, CHICAGO TRIBUNE, Jan. 30, 2009, at 1.

¹⁰⁸ Rick Pearson & Ray Long, *Gov. Rod Blagojevich Picks Former Attorney General to Replace Obama*, CHICAGO TRIBUNE, Dec. 31, 2008, <http://www.chicagotribune.com/news/local/chi-bлагоjevich-burris-senate-31dec31,0,2666580.story>.

¹⁰⁹ Letter from Senator Harry Reid, U.S. Senate Majority Leader to Rod Blagojevich, Governor of Ill. (Dec. 10, 2008), available at <http://democrats.senate.gov/pdfs/Letter%20to%20Governor%20Blagojevich.pdf>.

¹¹⁰ *Id.*; U.S. CONST. art. I, § 5, cl. 1 (“Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business...”).

¹¹¹ Monique Garcia & Jill Zuckman, *Senate Lets Burris In*, CHICAGO TRIBUNE, Jan. 13, 2009, <http://www.chicagotribune.com/news/local/chi-burris-13-jan13,0,6205163.story>.

¹¹² *Valenti v. Rockefeller*, 292 F. Supp. 851, 853 (S.D.N.Y. 1968).

¹¹³ *Id.*

even-numbered year, under New York Election Law § 296 the vacancy will be filled at the general election in the next even-numbered year, in this instance November, 1970.”¹¹⁴ The court went on to authorize the governor to make a temporary appointment, with that replacement serving until December 1, 1970.¹¹⁵ In *Valenti*, the court held that a law that delayed an election for twenty-nine months was not a violation of the Seventeenth Amendment.¹¹⁶ This same law, still followed today in New York, allowed Governor Paterson to appoint Senator Gillibrand to her position.

The scandal in Illinois in 2008 is probably the most extreme example of an alleged abuse of power that one could imagine with regard to the appointment procedure, and still there was no legal remedy. Meanwhile, the timing of Senator Kennedy’s assassination was such that under New York law, his replacement was able to serve over forty percent of a full term before answering to the people of the state in an election.¹¹⁷ Combined with the power of incumbency and the numerous questions that could arise over the legitimacy of a governor’s unchecked action, it is evident that the law employed by forty states is not sound policy.

IV. THE PROBLEMS THAT ARISE WITH SPECIAL ELECTIONS: THE NEED FOR REPRESENTATION

A. The Importance of Full Representation in the United States Senate

Six states call for a special election to be held in the event a Senate seat is vacated.¹¹⁸ The length of time that passes between the date the seat is vacated and the date of the election varies based on the particular state. Oklahoma and Wisconsin law provide for the shortest possible length of time — thirty and sixty-two days, respectively.¹¹⁹ These time-frames, however, can easily balloon to eighty or seventy-seven days, depending on factors like when the secretary of state calls for the

¹¹⁴ *Id.* at 853.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 858.

¹¹⁸ ALASKA STAT. § 15.40.145 (2011); OKLA. STAT. ANN. tit. 26, §12-101 (West 2011); OR. REV. STAT. ANN. §188.120 (West 2011); R.I. GEN. LAWS ANN. § 17-4-9 (West 2010); S.D. CODIFIED LAWS § 12-11-1 (2011); WIS. STAT. ANN. §17.18 (West 2011).

¹¹⁹ OKLA. STAT. ANN. tit. 26 § 12-101; WIS. STAT. ANN. §8.50(2)(a).

election.¹²⁰ After surveying the current law in the six states, it is reasonable to conclude that a state that calls for a special election to fill a Senate vacancy will be underrepresented on Capitol Hill for three to four months, if not longer. Given the great power that a senator possesses, a state speaking with half of its voice in the Upper House for such a prolonged period is unacceptable.

United States Senators are important people. They have unique powers and responsibilities that Members of the House of Representatives do not possess.¹²¹ The Senate is also the only place in government where each state has equal representation, regardless of population.¹²² It also has fewer members, and as such, each senator's vote carries more weight.

While not an exhaustive list, there are four unique powers that demonstrate the difference between senators and representatives. First, under Article II, Section 2, Clause 2 of the Constitution, two-thirds of the Senate must approve any treaty into which the President wishes to enter.¹²³ Second, the same section of the Constitution calls on the Senate to confirm the appointments of members of the Cabinet, federal judges, Ambassadors, and other officials.¹²⁴ Third, pursuant to Article I, Section 3, the Senate tries all impeachment proceedings brought against the President, Vice President, and all other civil officers of the United States.¹²⁵ Finally, under Senate Rule 22, senators have the power of the

¹²⁰ See OKLA. STAT. ANN. tit. 26 §§ 12-101, 103; WIS. STAT. ANN. §17.18.

¹²¹ *Powers & Procedure*, U.S. SENATE, http://www.senate.gov/pagelayout/history/one_item_and_teasers/powers.htm (last visited Mar. 15, 2011).

¹²² MacGillis, *supra* note 13.

¹²³ U.S. CONST. art. II, § 2, cl. 2. The Constitution states:

[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; and he 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.

Id.

¹²⁴ *Id.*

¹²⁵ U.S. CONST. art. I, § 3 (“[T]he Senate shall have the sole Power to try all Impeachments [but] no person shall be convicted without the Concurrence of two-thirds of the Members present.”).

filibuster.¹²⁶ This weapon in a senator's procedural arsenal provides the legislator with the opportunity to block a vote on a bill by refusing to stop a debate on the Senate floor.¹²⁷

Aside from these unique powers vested in senators, one of the greatest powers a senator possesses stems from the Connecticut Compromise. There are only 100 senators, therefore the vote of one senator represents one percent of the final tally, while the vote of a representative equates to less than one quarter of one percent of the House's final vote. More importantly, the United States Senate is the only legislative body in the country that is allowed to violate the principle of "one-person, one-vote," as necessitated by the Equal Protection Clause of the Fourteenth Amendment.¹²⁸ All states are equal in the Senate regardless of size; while senators from Wyoming and California both represent half of their state's vote in the Senate, there is an obvious discrepancy in the number of people each lawmaker represents. Because the Senate treats all states equally, there is no excuse for a state to be under-represented for three to four months (over five percent of a senatorial term).

i. Minnesota 2008-2009

This desire to be fully represented in the Senate was recently captured — albeit in a different way — in Minnesota. In the November 2008 general election, incumbent Senator Norm Coleman and challenger Al Franken were locked in a contested election until the end of June 2009, leaving the state of Minnesota without its second senator for six months.¹²⁹ By mid-May, six weeks before Senator Coleman

¹²⁶ *Filibuster and Cloture*, U.S. SENATE, http://www.senate.gov/artandhistory/history/common/briefing/Filibuster_Clature.htm (last visited Mar. 13, 2011).

¹²⁷ *Id.* Sen. Huey Long (LA) once spent fifteen hours on the floor of the Senate. His "debate" included recitations of Shakespeare and the reading of recipes for "pot-likkers." Sen. J. Strom Thurmond (SC), however, holds the record for the longest filibuster. He set the record when he spoke out against the Civil Rights Act of 1957 for twenty-four hours and eighteen minutes. *Id.*

¹²⁸ *Lucas v. Forty-Fourth Gen. Assembly of Colo.*, 377 U.S. 713 (1964) (holding unconstitutional a plan where the districts for the lower body of the state legislature were drawn according to population and the upper body districts drawn geographically-proportionately); *Gray v. Sanders*, 372 U.S. 368, 381 (1963) ("The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing -- one person, one vote.").

¹²⁹ Pat Doyle, *At Last, a Second Senator for Minnesota*, STAR-TRIBUNE (Minneapolis-St. Paul), July 1, 2009 <http://www.startribune.com/politics/national/senate/49520987.html>.

finally ended his legal challenge, fifty-four percent of Minnesotans hoped that Coleman would concede, allowing for the certification of Al Franken as the new Junior Senator from Minnesota.¹³⁰ The poll numbers are notable because Franken received only forty-two percent of the vote in the election.¹³¹ The poll captures the dissatisfaction Minnesotans felt at being underrepresented in the Senate for one-twelfth of a term.

While six months may seem like a trivial amount of time, the dispute left Minnesota with just one senator during some of the most trying economic times since the Great Depression.¹³² On February 17, 2009, President Obama signed into law the American Recovery and Reinvestment Act, also known as the “Economic Stimulus Bill.”¹³³ One of the most important pieces of legislation during the Obama Administration to date, it was passed just six weeks after the 111th Congress commenced. The Senate approved the Act on Monday, February 9, 2009, a mere thirty-seven days after the congressional session began.¹³⁴

While far from a perfect analogy, the speed in which the Senate was able to pass major legislation is worth noting. Had Minnesota’s seat simply been vacated on January 3, 2009, the day the 111th Congress began, under no state law that calls for a special election would a senator be seated in time for the vote. On the other hand, under a law that allows the governor to make an appointment, such a selection could have been made. Even under Wyoming law, which calls for the state political party to make nominations to the governor,¹³⁵ the vacancy would have been filled in a timely manner. In fact, such efficiency has occurred. In the aforementioned application of the Wyoming law

¹³⁰ 54% in Minnesota Say Coleman Should Concede Senate Race to Franken, RASMUSSEN REP. (May 19, 2009), http://www.rasmussenreports.com/public_content/politics/general_state_surveys/minnesota/54_in_minnesota_say_coleman_should_concede_senate_race_to_franken.

¹³¹ Kevin Duchscher, Curt Brown & Pam Louwagie, *Recount: The Franken-Coleman Brawl Drags On*, STAR TRIBUNE (Minneapolis-St. Paul), Nov. 6, 2008, <http://www.startribune.com/politics/recount/33900844.html>.

¹³² See generally Bruce Bartlett, *The Great Depression and The Great Recession*, FORBES (Oct. 30, 2009), <http://www.forbes.com/2009/10/29/depression-recession-gdp-imf-milton-friedman-opinions-columnists-bruce-bartlett.html>.

¹³³ Michael A. Fletcher, *Obama Leaves D.C. to Sign Stimulus Bill*, WASH. POST, Feb. 18, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/02/17/AR2009021700221.html>.

¹³⁴ David M. Herszenhorn, *By Slim Margin, Senate Advances Stimulus Bill*, N.Y. TIMES, Feb. 9, 2009, <http://www.nytimes.com/2009/02/10/washington/10stimulus.html>.

¹³⁵ WYO. STAT. ANN. § 22-18-111(a)(i) (West 2011).

following the death of Senator Thomas, the governor named his replacement just eighteen days after the seat was vacated.¹³⁶ In the present hypothetical, where the seat is vacated on January 3 and the Senate votes on a bill on February 9, such a law would assure that the important vote would not be missed, while also safeguarding the procedures used to fill the vacancy.

While it is true that the Minnesota controversy was the result of a contested election, as opposed to a vacated seat, this situation illustrates the importance of being fully represented on Capitol Hill. Although no state law used to fill a vacancy would leave a state underrepresented for six months, a three to four month vacancy can be expected if the state selects a replacement through special election.¹³⁷ State legislators in the six states that call for a special election have addressed the goal of maintaining legitimacy in the process, and placing a check on power.¹³⁸ In doing so, however, they have failed to recognize the goal of being underrepresented in Washington for as short of a time as possible.

ii. Massachusetts 2009

These concerns of underrepresentation were recently raised in Massachusetts following the death of Senator Kennedy, a Democrat, on August 25, 2009, after a long bout with brain cancer.¹³⁹ In a twist of irony, Senator Kennedy, a man who had made universal healthcare the primary cause of his decades-long public career, passed away in the midst of the most meaningful legislative progress on the issue.¹⁴⁰ Recognizing his own mortality, Senator Kennedy lobbied just five days before his death for a change in the Massachusetts law governing Senate succession.¹⁴¹ The law at the time called for a special election 145 to 160 days following the date of a vacancy.¹⁴² Kennedy, who served the people

¹³⁶ Healy & Sittenfeld, *supra* note 45.

¹³⁷ ALASKA STAT. § 15.40.145 (2011); OKLA. STAT. ANN. tit. 26, §12-101 (West 2011); OR. REV. STAT. ANN. §188.120 (West 2011); R.I. GEN. LAWS ANN. § 17-4-9 (West 2010); S.D. CODIFIED LAWS § 12-11-1 (2011); WIS. STAT. ANN. §17.18 (West 2011).

¹³⁸ *Id.*

¹³⁹ John M. Broder, *Social Causes Defined Kennedy, Even at the End of a 46-Year Career in the Senate*, N.Y. TIMES, Aug. 26, 2009, <http://www.nytimes.com/2009/08/27/us/politics/27kennedy.html>.

¹⁴⁰ See Frank Phillips, *Kennedy, Looking Ahead, Urges a Quick Filling of Senate Seat*, BOSTON GLOBE, Aug. 20, 2009, at 1.

¹⁴¹ *Id.*

¹⁴² MASS. GEN. LAWS ANN ch. 54, § 140(a) (West 2011); *Id.*

of Massachusetts for forty-seven years in the Senate,¹⁴³ realized this law needed to be changed.¹⁴⁴

Nearly a month after Senator Kennedy's death, on September 24, 2009, Massachusetts Governor Deval Patrick signed a bill changing state law to permit the governor to appoint a replacement before the special election.¹⁴⁵ Later that day, he filled the vacancy in accordance with that new law, appointing Paul Kirk, a Junior Senator from Massachusetts.¹⁴⁶ At a press conference introducing Kirk as his appointee, Governor Patrick stated that Kirk "will not seek the open seat in the special election coming up in January. But for the next few months, he will carry on the work and the focus of Senator Kennedy, mindful of his mission, and his values, and his love of Massachusetts."¹⁴⁷ There are two important takeaways from that statement. First, Patrick was not seeking to appoint a long-term replacement; rather, he delegated that matter to the people of Massachusetts in the January 2010 special election. Second, Kirk was to continue fighting for the causes of Kennedy's life. The undertone of this statement was clearly that having two senators in Washington best serves the interests of the people of Massachusetts. Patrick also realized the importance of party symmetry when naming a replacement. Full representation in the Upper House is essential, and to go for a prolonged period with a vacant seat — even for a few months — is not sound policy.

B. *The Potential for a Contested Special Election*

Another danger in requiring a vacancy to be filled through special election is the potential that the special election could be contested. If a recount or lengthy court battle ensues, the length of time the people of a state are represented by just one senator could double or triple. Such a situation would aggregate the pitfalls discussed in Part IV(A), *supra*, by increasing the time of underrepresentation.

Take, for example, a combination of two previously mentioned scenarios. Minnesotans cast their ballots for the 2008 senatorial race on

¹⁴³ Martin F. Nolan, *Kennedy Dead at 77*, BOSTON GLOBE, Aug. 26, 2009, http://www.boston.com/news/local/massachusetts/articles/2009/08/26/kennedy_dead_at_77.

¹⁴⁴ Phillips, *supra* note 140.

¹⁴⁵ MASS. GEN. LAWS ANN. ch 54, § 140; *Paul Kirk to Fill Kennedy's Senate Seat*, CNN (Sept. 24, 2009), http://articles.cnn.com/2009-09-24/politics/kennedy.replacement_1_interim-senator-vicki-kennedy-senate-seat?_s=PM:POLITICS.

¹⁴⁶ *Paul Kirk to Fill Kennedy's Senate Seat*, *supra* note 145.

¹⁴⁷ *Id.*

November 4, 2008. Due to the contested election, Al Franken was not declared the winner until July 1, 2009, nearly eight months later.¹⁴⁸ If this had been a special election, as was the case in Massachusetts following the death of Sen. Kennedy, where the seat was vacated three to four months prior to Election Day, the people of Minnesota could have been represented by only one senator for over a year.

Assume for example that a United States Senator serving the people of Oklahoma vacates his or her seat. Under Oklahoma law, this vacancy would be filled in fifty to seventy days;¹⁴⁹ with the fifty days representing the quickest possible turnaround for any of the six states that call for a special election. Were a contested election of the magnitude that unfolded in Minnesota in 2008-09 to occur, that seat would remain vacant for ten to eleven months. These hypothetical situations demonstrate that some states have sacrificed the goal of full representation to satisfy goals of checking the governor's power, ensuring legitimacy in the process, and having a fair result. The law proposed in this Note demonstrates that such a sacrifice is unnecessary, and all four goals are attainable.

V. A PROPOSED UNIFORM LAW

A. *The Proposal*

There is undoubtedly something to be learned from all of the state laws mentioned thus far. While none of them, standing alone, is without fault, they all address at least one of the concerns discussed in this Note regarding a Senate succession law. The forty states that vest the governor with the power of appointment recognize that going for a prolonged period of time without full representation in the Senate is not in the state's best interest. The six states that call for a special election realize that the people of the state should ultimately decide who represents them on Capitol Hill, assuring that the people have faith in the system. Finally, the laws in Utah, Wyoming, Arizona, and Hawai'i recognize the national interest in assuring that the balance of power in the Senate does not shift as the result of a senator's resignation or death, while at the same time placing a check on the governor's power.¹⁵⁰

¹⁴⁸ Doyle, *supra* note 129.

¹⁴⁹ See OKLA. STAT. tit. 26 §§ 12-101, 103 (West 2011).

¹⁵⁰ ARIZ. REV. STAT. § 16-222 (LexisNexis 2011); HAW. REV. STAT. ANN. § 17-1 (LexisNexis 2011); UTAH CODE ANN. § 20A-1-502(2) (West 2010); WYO. STAT. ANN. § 22-

The proposed law herein takes into account the four main policy considerations that should be balanced when crafting such a law. Those four goals are: (1) placing a check on power; (2) ensuring legitimacy in the process; (3) avoiding underrepresentation in the Senate for a prolonged period of time; and, (4) fairness. While a majority of current state laws account for one or two of these goals, this proposal accounts for all four.

With those goals in mind, there are five main features to the proposed uniform law: (1) assuming the exiting senator is a registered member of a political party, the governor has the power to make a temporary appointment, but he or she must choose from a list of three candidates supplied by the state political party committee of the exiting senator; (2) if the exiting senator is not a member of a political party, the state senate should meet to provide three names to the governor for appointment; (3) neither of these lists can include the governor, as he or she cannot appoint him- or herself to the seat; (4) the list of candidates must be submitted to the governor within fifteen days of the vacancy, and the governor must then make a decision within fifteen days of receiving the nominees, meaning that the seat will not be vacant for more than a month; and, (5) a special election will also be called to fill the remainder of the term, provided that more than thirty months remain in the term (if less than twenty-eight months remain, the governor's appointee will serve out the balance of the term).¹⁵¹

The interest of being fully represented on Capitol Hill is addressed by assuring that the seat remains vacant for no less than thirty days. The interests in fairness and placing a check on the governor's power are dealt with by requiring the executive committee of the state political party of which the exiting senator was a member to nominate three candidates for the governor's consideration. Finally, the issue of legitimacy in the process is tackled by having more people involved in the selection. The following is a uniform law that encapsulates these

18-111(a)(i) (West 2011).

¹⁵¹ At first blush, allowing an appointee to serve for so long without answering to the electorate might appear to be in direct contrast with what was previously stated in regard to the *Valenti* decision, where New York law called for a similar waiting period after Robert Kennedy's death. *Valenti v. Rockefeller*, 292 F. Supp. 851, 853 (S.D.N.Y. 1968). The difference, however, is that in New York the governor was the sole decision maker. N.Y. PUB. OFF. LAW § 42 (McKinney 2011). Under this Note's proposal, the need for the electorate to check that decision in a timely manner is mitigated by involving more people in the appointment process.

policy considerations:

If a vacancy should occur in the office of United States Senator, it shall be filled by special election on the day of the next general election in an even-numbered year, provided that the vacancy occurred ninety (90) days prior to said election day. If the vacancy occurred within ninety (90) days of the next general election in an even-numbered year, then a special election should be called on the first Tuesday following the first Monday of the next November in an odd-numbered year. If, however, the vacancy occurred within ninety (90) days of the next general election in an even-numbered year and less than twenty-eight (28) months remain in the term of the vacated United States Senate seat, no special election shall be called. Under any of the above scenarios, the governor shall be vested with the power to appoint a qualified candidate to the office of United States Senate, doing so no more than thirty (30) days after the day of the vacancy. To facilitate the governor's appointment, the chairman of the state political party committee of which the previous incumbent was a registered member shall meet with members of the state political party's board, and they shall nominate three (3) qualified candidates for the office of United States Senator, and submit that list to the governor within fifteen (15) days of the vacancy. The party affiliation of the incumbent shall be determined solely based on what the previous incumbent had declared on his or her voter registration card. No other circumstances shall be taken into consideration in determining the former Senator's political party affiliation. The Governor will then be charged with appointing a United States Senator from the list of the three candidates submitted to the Governor's Office. In the event that the incumbent was not affiliated with any political party registered in the state, the state senate shall be charged with fulfilling the same duties as would otherwise be required of the state political party committee with whom the incumbent had been registered. The state senate, meeting as a whole, shall nominate three (3) qualified candidates for the office of United States Senator, and the governor shall fill the vacancy by appointing one of those three nominated candidates to the office of United States Senator within thirty (30) days of the date the seat was vacated. The state senate shall be charged with creating and enforcing the appropriate legislation governing the procedure in which the state senate shall meet as a whole and nominate the three candidates. Under no circumstances shall the governor be allowed to appoint him- or herself to the vacated United States Senate seat.

B. The Differences between the Proposal and Current State

Laws

The proposed uniform legislation adopts more from the laws of Utah, Wyoming, and Hawai'i, than from any of the other states.¹⁵² While the proposal calls for a special election after the governor has made an appointment, just like the laws governing Senate succession in the first group of forty states,¹⁵³ it also calls for a check on the power the governor possesses in selecting an appointment. That said, the proposal is not identical to the law of any state.

i. Utah

The Senate succession law in Utah reads, in part, that “[t]he governor shall appoint a person to serve as U.S. senator until the vacancy is filled by election from one of three persons nominated by the state central committee of the same political party as the prior officeholder.”¹⁵⁴ The major pitfall of this law is that it does not take into account the possibility that the people of Utah will elect an independent to the Senate. Relatedly, the law does not identify how the former senator’s party affiliation will be determined. It is also possible that, once in office, a senator will leave his or her political party and then

¹⁵² HAW. REV. STAT. ANN. § 17-1; UTAH CODE ANN. § 20A-1-502(2); WYO. STAT. ANN. § 22-18-111(a)(i).

¹⁵³ ALA. CODE § 36-9-7 (LexisNexis 2011); ARK. CODE ANN. § 7-8-102 (West 2011); CAL. ELEC. CODE § 10720 (West 2011); COLO. REV. STAT. ANN. § 1-12-201 (West 2011); CONN. GEN. STAT. ANN. § 9-211 (West 2011); DEL. CODE ANN. tit. 15, § 7321 (West 2011); FLA. STAT. ANN. § 100.161 (West 2011); GA. CODE ANN. § 21-2-542 (West 2011); IDAHO CODE ANN. § 59-910 (West 2011); 10 ILL. COMP. STAT. ANN. 5/25-8 (West 2011); IND. CODE ANN. § 3-13-3-1 (West 2011); IOWA CODE ANN. § 69.8 (West 2011); KAN. STAT. ANN. § 25-318 (West 2010); KY. REV. STAT. ANN. § 63.200 (West 2011); LA. REV. STAT. ANN. § 18:1278 (2011); ME. REV. STAT. ANN. tit. 21-A, § 391 (2010); MD. CODE ANN. ELEC. LAW § 8-602 (West 2010); MASS. GEN. LAWS ANN. ch. 54, § 140 (West 2011); MICH. COMP. LAWS SERV. § 168.105 (LexisNexis 2011); MINN. STAT. ANN. § 204D.28 (West 2011); MISS. CODE ANN. § 23-15-855 (West 2010); MO. ANN. STAT. § 105.040 (West 2011); MONT. CODE ANN. § 13-25-202 (2010); NEB. REV. STAT. ANN. § 32-565 (LexisNexis 2010); NEV. REV. STAT. ANN. § 304.030 (LexisNexis 2011); N.H. REV. STAT. ANN. § 661:5 (LexisNexis 2011); N.J. STAT. ANN. § 19:3-26 (West 2011); N.M. STAT. ANN. § 1-15-14 (LexisNexis 2011); N.Y. PUB. OFF. LAW § 42 (McKinney 2011); N.C. GEN. STAT. ANN. § 163-12 (West 2010); N.D. CENT. CODE ANN. § 16.1-13-08 (West 2011); OHIO REV. CODE ANN. § 3521.02 (West 2011); 25 PA. CONS. STAT. ANN. § 2776 (West 2011); S.C. CODE ANN. § 7-19-20 (2009); TENN. CODE ANN. § 2-16-101 (West 2011); TEX. ELEC. CODE ANN. §§ 204.002, 204.003 (West 2011); VT. STAT. ANN. tit. 17, § 2621 (West 2010); VA. CODE ANN. § 24.2-207 (West 2011); WASH. REV. CODE ANN. § 29A.28.030 (West 2011); W. VA. CODE ANN. § 3-10-3 (West 2011).

¹⁵⁴ UTAH CODE ANN. § 20A-1-502(2)(b).

either serve as an independent, or join a different party. Utah's law fails to foresee any of these situations.

ii. Wyoming

The proposal more or less mirrors Wyoming's law as it pertains to how to fill a seat vacated by a senator registered with a political party.¹⁵⁵ While the Wyoming law also fails to state how the party affiliation of the former senator will be determined, this is a minor discrepancy. The biggest problem with the law in Wyoming is the way in which it instructs the governor to appoint a replacement in the event the former senator was not registered with a political party.

The governing law in Wyoming states that in the event the former senator was an independent:

[all of the] state central [party] committees [registered with the Secretary of State] 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.¹⁵⁶

Although the law does successfully place a check on the governor's power, more could be done to ensure legitimacy in the process. Realistically, the governor will care about one nomination and one nomination only: that of his or her own political party. As a result, the law runs the risk of falling into the same traps as the current law in forty states, by giving the governor full discretion to appoint a replacement.¹⁵⁷

Under this proposed law, having the state senate nominate three candidates for the governor's consideration mitigates this potential pitfall. Although there is no perfect way to deal with independents, the proposed law would provide more legitimacy to the process by allowing dozens of elected officials to influence the decision, as opposed to one elected official and his or her political party. This proposal places a check on the governor's power in a way that would reinforce legitimacy

¹⁵⁵ See WYO. STAT. ANN. § 22-18-111(a)(i).

¹⁵⁶ *Id.*

¹⁵⁷ *E.g.*, N.Y. PUB. OFF. LAW § 42 (McKinney 2011).

in the process where the Wyoming law falls short.

iii. Hawai'i

Once again, the biggest difference between the proposal and the governing law in Hawai'i is the way in which a seat is filled when vacated by an independent.¹⁵⁸ Hawai'i law provides: "[i]f the prior incumbent was not a member of any political party, the governor shall appoint a person who is not and has not been, for at least six months immediately prior to the appointment, a member of any political party."¹⁵⁹ Although it is commendable that the Hawaiian legislature has recognized the possibility of such a scenario, the law falls short of being the ideal way to govern the situation.

The first problem with the law is the way in which it improperly lumps all independents together. While not every Democrat or Republican will be an ideological copy of another Democrat or Republican, they generally share common core values. Although there are pro-choice Republicans,¹⁶⁰ and there are Democrats endorsed by the National Rifle Association,¹⁶¹ as a general principle a voter will be able to draw many correct conclusions on the politician's beliefs based on that politician's political party affiliation. In the 110th Congress, which was in session from January 2007 through January 2009, Democrat Senators voted along party lines on eighty-seven and a half percent of the issues, while Republican Senators were in line with their party on just over seventy-seven percent of the votes.¹⁶² Senator Olympia Snowe (ME), a Republican, displayed the least loyalty to her party, but still

¹⁵⁸ See HAW. REV. STAT. ANN. § 17-1 (LexisNexis 2011).

¹⁵⁹ *Id.*

¹⁶⁰ Current pro-choice Republicans in the Senate include Scott Brown (MA), Susan Collins (ME), and Olympia Snowe (ME). John Amick, *Brown Advocates a Big Tent GOP*, WASH. POST, Jan. 31, 2010, <http://voices.washingtonpost.com/44/2010/01/brown-advocates-a-big-tent-gop.html>; *Susan Collins on Abortion*, ON THE ISSUES, http://www.ontheissues.org/social/Susan_Collins_Abortion.htm (last visited Mar. 15, 2011); *Olympia Snowe on Abortion*, ON THE ISSUES, http://www.ontheissues.org/social/Olympia_Snowe_Abortion.htm (last visited Mar. 15, 2011).

¹⁶¹ In the 2010 midterm elections, the NRA endorsed the Democrat in fifty-eight contested elections for seats in the House of Representatives. Ben Pershing, *Pro-gun Democrats Win Endorsements from NRA*, WASH. POST, Oct. 7, 2010, <http://www.washingtonpost.com/wpdyn/content/article/2010/10/06/AR2010100606329.html>.

¹⁶² See *The U.S. Congress Votes Database*, WASH. POST (2009), <http://projects.washingtonpost.com/congress/110/senate/party-voters> [hereinafter *U.S. Congress Votes*].

toed the party line on sixty-four and a half percent of the votes.¹⁶³

Based on these numbers, it is reasonable to conclude that a senator from one of the two major political parties will be in agreement with the party on eight or nine of every ten votes. This ideological uniformity cannot be assured among members of the public who are not registered to a political party. Choosing not to be registered Democrat or Republican does not mean that a person is a member of a distinct third party with unified beliefs. There are many reasons why a person elects to be independent, and appointing an unregistered person to fill the vacancy fails to assure that the balance of power in the Senate will not shift. In fact, Senators Lieberman (CT) and Sanders (VT), both independents, voted with the Democrats on roughly eighty-seven percent and ninety-four and a half percent of the issues, respectively.¹⁶⁴ These two Senators have elected to affiliate with Democrats by caucusing with the party, but they have chosen not to be registered members. Despite this, these two senators have displayed more loyalty, through their votes, to the Democratic Party than the average Republican shows to the GOP.¹⁶⁵

Under the proposed law, which would call for the state senate to nominate three candidates, there admittedly could still be an ideological shift in the Senate. That is to say, if, hypothetically, Senator Sanders were to leave office and the Vermont Senate was under Republican control, it would be safe to assume that the state senate would not nominate someone who would vote with the Democrats on roughly ninety-four and a half percent of the issues.¹⁶⁶ At the same time, under this proposed law, if Senator Sanders were that devoted to the Democratic Party he could register as a Democrat and be assured a Democrat would be appointed to his seat if he were to leave office. By not being a registered Democrat, however, Senator Sanders has assumed a certain risk. Although it is possible that this proposal will still give rise to an ideological shift in the Senate, this raises the second major problem with the governing law in Hawai'i: if the former senator was an independent, the governor is once again the sole decision maker, albeit with the qualification that he or she not allow the appointment of

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* (showing 86.9% (Lieberman) and 94.6% (Sanders), compared with 77.8% for the average Republican).

¹⁶⁶ *Id.*

a Democrat or Republican.¹⁶⁷ Under the law of Hawai'i, this situation once again opens the door for the potential abuses of power discussed in Part III, *supra*.

There is no perfect answer as to how a seat should be filled when vacated by an independent, and there will inevitably be shortfalls in the law. Policy decisions can, however, be made. In this situation, the proposed law places a greater premium on checking the governor's power, rather than attempting to assure political ideology replication. Further, as evidenced by the voting records of Senators Sanders and Lieberman, attempting to equate one independent with another is a faulty premise from the beginning. Therefore, the best answer is to address a policy concern that is redressable, which in this case is placing a check on the governor's power of appointment by bringing the state senate into the process.

C. Party Identification

Unlike any law currently employed by a state, the proposed law establishes a way in which a senator's party affiliation will be identified. Such a measure is necessary because there are senators who might be independent, but caucus with a political party, and that political party might seek to have control over filling that senator's vacated seat. It is also possible for a senator to change political party affiliation while in office. Under the proposed law, the burden would be on the senator to change his or her voter registration card to reflect which political party he or she represents. It is a simple and definitive way to address the issue.

i. True Independents: Lieberman and Sanders

Senators Lieberman and Sanders are true independents. They ran as independents in their respective elections and they are not currently registered as a member of a political party.¹⁶⁸ Under my proposal, in the event that either of these senators were to leave office, the state senate

¹⁶⁷ HAW. REV. STAT. ANN. § 17-1 (LexisNexis 2011).

¹⁶⁸ *Democrats Back Lamont; Lieberman Files for Independent Run*, FOX NEWS (Aug. 9, 2006), <http://www.foxnews.com/story/0,2933,207516,00.html> (it is true that Lieberman was the Democratic nominee for Vice President in 2000, and ran an unsuccessful primary campaign for President in 2004. That said, since 2006, he has not been registered with a political party); *Independent Sanders Elected to Senate; Democrat Welch Beats Rainville*, USA TODAY, Nov. 8, 2006, <http://www.usatoday.com/news/politicselections/vote2006/VT/VT.htm>.

would be charged with nominating three candidates to the governor. The fact that both Senators Lieberman and Sanders caucus with the Democrats is irrelevant.¹⁶⁹ Rather, the burden will be on the sitting senator to assure that his or her successor shares similar political views by properly identifying him- or herself on a voter registration card. No other state law adequately addresses how the politician's party affiliation will be determined.¹⁷⁰

ii. A Change of Heart: The Arlen Specter Situation

On April 28, 2009, Senator Arlen Specter (PA) surprised many by announcing that, after twenty-eight years in office, he was leaving the Republican Party and would run for reelection as a Democrat in 2010.¹⁷¹ Although not the most conservative of Republicans,¹⁷² the Senator had sought the Republican nomination for President in 1996,¹⁷³ so his announcement still came as a surprise.¹⁷⁴ Although Pennsylvania law calls for the governor to have unchecked power in appointing a replacement,¹⁷⁵ a situation like this would present real consequences under Wyoming and Hawai'i law,¹⁷⁶ as well as under this Note's proposal.

If such a situation were to play itself out in Wyoming, and the senator were then to leave office, the law would call for the Republican Party to nominate three candidates to fill the seat. Such an inequitable result is a product of state law, which calls for "the state central committee of the political party which the last incumbent represented *at the time of his election* . . ." to nominate three candidates to the governor.¹⁷⁷ Wyoming law does not adequately take into consideration the possibility of a senator changing his or her political party affiliation while in office. While such a change in identification is uncommon, it is

¹⁶⁹ *Democratic Rifts on Health Care*, *supra* note 41; Kane & Murray, *supra* note 41.

¹⁷⁰ *See supra* Part V(B).

¹⁷¹ Paul Kane, Chris Cillizza, & Shailagh Murray, *Specter Leaves GOP, Shifting Senate Balance*, WASH. POST, April 29, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/04/28/AR2009042801523.html>.

¹⁷² *U.S. Congress Votes*, *supra* note 162.

¹⁷³ Arlen Specter, Presidential Announcement (Mar. 30, 1995), *available at* <http://www.4president.org/speeches/specter1996announcement.htm>.

¹⁷⁴ Kane, Cillizza, & Murrary, *supra* note 171.

¹⁷⁵ 25 PA. CONS. STAT. ANN. § 2776 (West 2011).

¹⁷⁶ HAW. REV. STAT. ANN. § 17-1 (LexisNexis 2011); WYO. STAT. ANN. § 22-18-111(a)(i) (West 2011).

¹⁷⁷ WYO. STAT. ANN. § 22-18-111(a)(i) (emphasis added).

not unprecedented.¹⁷⁸ In fact, it has happened three times since 2000.¹⁷⁹

The Hawai'i law would also fail to answer which party should nominate three candidates, as it states the governor shall "select [] a person from a list of three prospective appointees submitted by the same political party as the prior incumbent."¹⁸⁰ When adopting this new law in 2007, the Hawai'i legislature made the following finding:

[R]equiring the political party of the prior incumbent to provide the governor with a list of qualified nominees from which to choose would not unreasonably restrict the pool of qualified candidates for the vacancy. Rather, such a process would eliminate skepticism and mistrust and increase public trust and confidence in the appurtenant process.¹⁸¹

While these are unquestionably legitimate goals that the legislature is attempting to reach in its reform, the law would fall short were a senator from Hawai'i to switch political parties while in office. Rather than ending skepticism and mistrust, the law would invite additional drama as political parties fight for the right to nominate three candidates for the governor's consideration. However, all is not lost, as the legislature's goals are achievable by amending the law once more to provide for a clear way to identify the former senator's political party affiliation.

VI. THE IMPRACTICALITY OF IMPLEMENTATION

A. Changing the State Law

The problem with changing a state law is that it can be changed again, and as such, the reform process can be abused. Headlines were made in Massachusetts in 2009, when the state senate reformed its Senate succession law by allowing Governor Deval Patrick to appoint a replacement during the 145 to 160 days before the statutorily required special election.¹⁸² As discussed earlier, full representation in the Senate

¹⁷⁸ *Senators Who Changed Parties During Senate Service (Since 1890)*, U.S. SENATE, http://www.senate.gov/artandhistory/history/common/briefing/senators_changed_parties.htm (last visited Mar. 13, 2011).

¹⁷⁹ *Id.* (specifically, James Jeffords (VT), Joseph Lieberman (CT), and Arlen Specter (PA)).

¹⁸⁰ HAW. REV. STAT. ANN. § 17-1.

¹⁸¹ *Id.*

¹⁸² MASS. GEN. LAWS ANN ch. 54, § 140(a) (West 2011); Matt Viser, *Senate OK's*

is important and a state should attempt to fill the vacancy as soon as possible.¹⁸³ Under that theory, the decision by the Massachusetts legislature was proper and served an important function. The problem arises when the legislative move is viewed in a historical context, which shows that it was clearly a misuse of power.

In 2004, Senator John Kerry (MA) was the Democrat nominee for President.¹⁸⁴ At the time, Mitt Romney, a Republican, was the Governor of Massachusetts.¹⁸⁵ Before Senator Kerry won the nomination, the state law called for the governor to have unchecked power to fill a vacancy in the Senate.¹⁸⁶ With a majority in both chambers of the Massachusetts Legislature, the Democrats were able to reform the relevant state law, requiring the aforementioned special election to occur 145 to 160 days after a senator vacates a seat.¹⁸⁷ Thus, had Kerry won, the state Democrats would have successfully stripped Romney of his appointment power.

Looking at the way the Democrat-majority Massachusetts Legislature has reformed the law to their advantage twice in the past seven years, it is clear that the lawmakers were motivated by a desire to maintain power, rather than a desire to place a check on the governor's decision, or to avoid going underrepresented in Washington. While avoiding a shift in the balance of power in the Senate is a legitimate goal, the ends fail to justify the means in this situation. Rather, Massachusetts lawmakers fostered an environment of illegitimacy and mistrust in government, as opposed to constructing a law to combat such concerns.

While there are situations where changing the law would be advantageous given the current political circumstances, there are other situations where even the best-intentioned reform will be met with doubt. Virginia, which is one of the forty states that calls on the governor to unconditionally appoint a replacement, is a good example

Kennedy Successor Bill, BOSTON GLOBE, Sept. 23, 2009, at 1.

¹⁸³ See *supra* Part IV(A).

¹⁸⁴ *Kerry Accepts Presidential Nomination*, CNN (July 30, 2004, 12:56 PM), <http://www.cnn.com/2004/ALLPOLITICS/07/30/fri.hot/index.html>.

¹⁸⁵ *Biography of Willard Mitt Romney*, WASH. POST, Feb. 13, 2007, <http://www.washingtonpost.com/wpdyn/content/article/2007/02/13/AR2007021300497.html>.

¹⁸⁶ MASS. GEN. LAWS ANN. ch 54, § 140.

¹⁸⁷ Viser, *supra* note 182.

of this.¹⁸⁸ The Old Dominion State is represented in the Senate by Jim Webb and Mark Warner, both Democrats.¹⁸⁹ On November 3, 2009, Robert F. McDonnell, a Republican, was elected Governor.¹⁹⁰ Even if a well-intentioned Virginia legislator sought to reform the Senate succession law over the next four years,¹⁹¹ he or she would be met with cynicism. The state's political climate will always be gauged by the legislators and the governor when considering reform, and there are likely few, if any, situations where a governor would be willing to cede some of his or her power. At the same time, the legislators who belong to the same political party as the governor would be unlikely, under most circumstances, to be motivated to reform the law.

B. Constitutional Amendment

i. A Difficult Task

Passing a constitutional amendment would foreclose the opportunity for future reform. The problem, however, is the near impossibility of getting the amendment ratified. The same problems previously raised in getting a law passed in an individual state would be magnified thirty-eight times over in the ratification process.

A constitutional amendment can be proposed by receiving a two-thirds majority vote in both the United States House of Representatives and Senate.¹⁹² Even assuming the amendment could get the necessary support in Congress — which is in no way guaranteed — it must be ratified by thirty-eight state legislatures.¹⁹³ Considering only three states (Wyoming, Utah, and Hawai'i) have analogous state laws,¹⁹⁴ it seems unlikely that the proposed amendment could gain support of thirty-five of the remaining forty-seven states during ratification. If this analysis is wrong, and the amendment could gain such support, then it would

¹⁸⁸ *E.g.*, VA. CODE ANN. § 24.2-207 (West 1993).

¹⁸⁹ *Senators of the 112th Congress*, U.S. SENATE, http://www.senate.gov/general/contact_information/senators_cfm.cfm?State=VA (last visited Mar. 13, 2011).

¹⁹⁰ Rosalind S. Helderman & Anita Kumar, *GOP Reclaims Virginia*, WASH. POST, Nov. 4, 2009, <http://www.washingtonpost.com/wpdyn/content/article/2009/11/03/AR2009110300371.html>.

¹⁹¹ VA. CODE ANN. § 24.2-207 (West 2011).

¹⁹² *The Constitutional Amendment Process*, NAT'L ARCHIVES, <http://www.archives.gov/federal-register/constitution/> (last visited Mar. 13, 2011).

¹⁹³ *Id.*

¹⁹⁴ HAW. REV. STAT. ANN. § 17-1 (LexisNexis 2011); UTAH CODE ANN. § 20A-1-502(2) (West 2010); WYO. STAT. ANN. § 22-18-111(a)(i) (West 2011).

prevent future abuses of the law. Given that this would cause drastic change in the laws governing forty-seven states, however, it seems unlikely that an amendment could garner sufficient support to be ratified.

ii. Senator Feingold's Proposal

Former Senator Russ Feingold (WI) agrees that there is a problem with the current law employed by more than four-fifths of the states.¹⁹⁵ In the midst of the scandal involving Governor Blagojevich, then-Senator Feingold opined that “[w]hat we’ve seen this year is a disturbing problem and an abuse of this power that suggests this is not the way to go about [filling Senate vacancies].”¹⁹⁶ To that end, Feingold proposed a constitutional amendment that calls for every state to follow the model of his home state, Wisconsin,¹⁹⁷ and fill a vacant seat in the Senate by special election, with no power of appointment vested in the governor.¹⁹⁸

It is first worth noting that the former senator is absolutely correct in his assessment that there is a problem with the law followed by forty states. It is encouraging that a lawmaker recognizes the pitfalls in the policy and is taking action to remedy the problem. That being said, there are better alternatives than that which Feingold proposes. His proposal is an oversimplified answer to the task of finding a law that balances all of the concerns with Senate succession laws heretofore mentioned. Instead of looking to his own state for guidance on this issue, Senator Feingold should have looked westward, to the laws of Wyoming, Utah, and Hawai’i.¹⁹⁹ By modeling his proposal after the law in those three states, Feingold could reach all four goals of a strong Senate succession law, as opposed to just three.

VII. CONCLUSION

Forty states have failed to heed John Dalberg-Acton’s warning,²⁰⁰

¹⁹⁵ Emily Friedman, *Feingold Seeks Change in Empty Senate Seat Protocol*, ABC NEWS (Jan. 27, 2009), <http://abcnews.go.com/Politics/story?id=6734789>.

¹⁹⁶ *Id.*

¹⁹⁷ WIS. STAT. ANN. § 17.18 (West 2011).

¹⁹⁸ Friedman, *supra* note 195.

¹⁹⁹ HAW. REV. STAT. ANN. § 17-1; UTAH CODE ANN. § 20A-1-502(2); WYO. STAT. ANN. § 22-18-111(a)(i).

²⁰⁰ See DALBERG-ACTON, *supra* note 1 (“Power tends to corrupt, and absolute power corrupts absolutely”).

2011 *FAIRNESS IN U.S. SENATE SUCCESSION LAWS* 483

instead creating an environment where absolute power can corrupt. As the legislatures in Wyoming, Utah, and Hawai'i have shown, stripping the governor of this absolute power is easily attainable. While these states have all achieved successful reform, all three of these state laws have potential pitfalls. The law proposed in this Note attempts to close these loopholes, while never losing sight of the goals of fairness, placing a check on power, full representation, and maintaining legitimacy in the process.