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Same-Party Legislative Appointments and the Problem of Party-Switching

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SAME-PARTY LEGISLATIVE APPOINTMENTS AND THE PROBLEM OF PARTY- SWITCHING

by: Tyler Yeargain*

ABSTRACT

For half of the states and almost every territory in the United States, legislative vacancies are filled by some system of temporary appointments rather than by special elections. Most of these systems utilize “same-party” appointments to ensure continuity of representation. But few states have anticipated the problem of state legislators switching parties. Though party-switching is rare, it happens frequently enough that several state supreme courts have already interpreted same-party appointment statutes as applied to party-switchers.

This Article argues for a uniform approach to the problem of party-switchers in same-party appointment systems. First, this Article reviews the current legislative appointment schemes as they operate today and analyzes each statute or constitutional provision to determine how each of them might treat a vacancy caused by a party-switching state legislator, as well as the four state supreme court decisions addressing this question of statutory interpretation. It then argues that the principles underlying same-party appointment systems support statutory amendments to clarify how party-switching state legislators are replaced.

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I. INTRODUCTION

“I grant you, that non-representation is an evil; but it is not so great an evil as misrepresentation.”

—Congressman Daniel W. Gooch, delegate to the
1853 Massachusetts Constitutional Convention¹

The 2014 midterm election didn’t go well for Democrats across the country: the party lost ground in the House, sinking to its lowest level since 1928;² lost control of the Senate by a wide margin;³ and lost even further ground in gubernatorial elections.⁴ The results were equally bad at the state level, especially in ancestrally Democratic states like Arkansas, Kentucky, and West Virginia—it appeared on election night that Democrats had lost ground in all three state legislatures, shrinking to a smaller minority in Arkansas,⁵ barely holding onto the Kentucky Senate,⁶ and losing the West Virginia House outright.⁷ At first, it appeared that the Republicans had barely missed an outright

1. 3 1853 Mass. Const. Convention, Official Report of the Debates and Proceedings in the State Convention, Assembled May 4th 1853, to Revise and Amend the Constitution of the Commonwealth of Massachusetts, at 107 (Boston, White & Potter 1853) (remarks of Delegate Daniel W. Gooch).

2. Josh Zeitz, *What Happened the Last Time Republicans Had a Majority This Huge? They Lost It*, POLITICO (Nov. 15, 2014), <https://www.politico.com/magazine/story/2014/11/1928-congress-last-time-republicans-had-a-majority-this-huge-112913> [<http://perma.cc/6MV2-4Y3M>].

3. Jonathan Weisman & Ashley Parker, *Riding Wave of Discontent, G.O.P. Takes Senate*, N.Y. TIMES (Nov. 4, 2014).

4. Reid Wilson, *Republican Sweep Extends to State Level*, WASH. POST (Nov. 5, 2014, 8:30 AM), <https://www.washingtonpost.com/blogs/govbeat/wp/2014/11/05/republican-sweep-level/> [<https://perma.cc/8C6M-45E8>].

5. Kyle Trygstad, *The First Test of GOP Dominance in Arkansas*, ROLL CALL (Feb. 2, 2015, 5:00 AM), <https://www.rollcall.com/2015/02/02/the-first-test-of-gop-dominance-in-arkansas-2/> [<https://perma.cc/YKS5-6PEU>].

6. Tom Loftus, *Democrats Hold Control of Ky. House*, COURIER J. (Nov. 4, 2014), <https://www.courier-journal.com/story/news/politics/elections/kentucky/2014/11/04/ten-kentucky-races-determine-controls-house/18478605/> [<https://perma.cc/R4L4-AH3V>].

7. Dave Mistich & Ashton Marra, *Five Ways the West Virginia GOP Made History in the 2014 Election*, W. VA. PUB. BROAD. (Nov. 5, 2014), <https://www.wvpub>

majority in the West Virginia Senate, which was split 17–17.⁸ This would've resulted in an uncommon power-sharing agreement between the Senate Democrats and Republicans, which last happened after the 1910 and 1912 elections.⁹

But the news got worse from there. The next day, State Senator Daniel Hall, a Democrat who had served in the Senate for just two years, announced that he was switching parties, which gave the Republicans a narrow 18–16 majority.¹⁰ This gave West Virginia Republicans control over the State Legislature for the first time in nearly a century.¹¹ And because the West Virginia Constitution only requires a simple majority to override the Governor's veto of non-budgetary bills,¹² Democratic Governor Earl Ray Tomblin was powerless to stop the legislature from passing anti-abortion,¹³ prevailing wage, right-to-work,¹⁴ and concealed carry legislation.¹⁵

So when Daniel Hall—whose party switch made all of those far-reaching changes possible—announced that he would resign from the State Senate to become the National Rifle Association's West Virginia state liaison,¹⁶ he created a “unique situation” for West Virginia Democrats.¹⁷ Under West Virginia state law, legislative vacancies are not

lic.org/news/2014-11-05/five-ways-the-west-virginia-gop-made-history-in-the-2014-election [https://perma.cc/8XUL-W2V9].

8. *Id.*

9. Ashton Marra, *After Tuesday's Election West Virginia's State Senate Was Tied. Now, It's Not.*, W. VA. PUB. BROAD. (Nov. 5, 2014), <https://www.wvpublic.org/post/after-tuesdays-election-west-virginias-state-senate-was-tied-now-its-not> [https://perma.cc/2T4Z-833F].

10. Reid Wilson, *Party Switch Gives Republicans Control of West Virginia Senate*, WASH. POST (Nov. 5, 2014, 7:55 PM), <https://www.washingtonpost.com/blogs/govbeat/wp/2014/11/05/party-switch-gives-republicans-control-of-west-virginia-senate/> [https://perma.cc/ABA6-7NPW].

11. Derek Willis, *Election Was Rough for Democrats. It Was Worse for West Virginia Democrats.*, N.Y. TIMES (Nov. 24, 2014), <https://www.nytimes.com/2014/11/25/upshot/election-was-rough-for-democrats-it-was-worse-for-west-virginia-democrats.html> [https://perma.cc/Q4T5-TBH4].

12. W. VA. CONST. art. VI, § 14.

13. Ashton Marra, *West Virginia Legislature Votes to Reverse Tomblin's Veto of Abortion Ban Bill*, W. VA. PUB. BROAD. (Mar. 10, 2016), <https://www.wvpublic.org/post/west-virginia-legislature-votes-reverse-tomblins-veto-abortion-ban-bill> [https://perma.cc/6S6F-J9BP].

14. David Gutman, *WV Right-to-Work, Prevailing Wage Vetoes Overridden*, CHARLESTON GAZETTE-MAIL (Feb. 12, 2016), https://www.wvgazetteemail.com/news/politics/wv-right-to-work-prevailing-wage-vetoes-overridden/article_-3c47-505d-acb9-bf0723c6483c.html [https://perma.cc/3QXW-KDSX].

15. David Gutman, *Legislature Overrides Tomblin, Allows Permitless Hidden Guns*, CHARLESTON GAZETTE-MAIL (Mar. 5, 2016), https://www.wvgazetteemail.com/news/politics/legislature-overrides-tomblin-allows-permitless-hidden-guns/article_79b9c6c0-899f-5fb6-b6dc-75058bd1af0d.html [https://perma.cc/87T7-H2Q4].

16. *Senator Hall Announces Resignation to Take New Job with NRA*, W. VA. METRONews (Dec. 29, 2015, 4:18 PM), <http://wvmetronews.com/2015/12/29/senator-hall-announces-resignation-to-take-new-job-with-nra/> [https://perma.cc/X9N2-BD5T].

17. David Gutman, *Tomblin's Office: State Senator's Resignation Creates "Unique Situation"*, CHARLESTON GAZETTE-MAIL (Dec. 29, 2015), <https://www.wvgazetteemail.com/news/politics/tomblin-s-office-state-senator-s-resignation-creates-unique-situation/>

filled by special elections, as is the case in many other states, but instead by same-party gubernatorial appointments.¹⁸ The “party with which the person holding the office immediately preceding the vacancy was affiliated at the time the vacancy occurred” is tasked with sending the Governor a list of three candidates, one of whom is appointed by the Governor.¹⁹ The Democratic and Republican Parties each insisted that they had the power to make nominations to the Governor—the Democrats because Hall had been elected as a Democrat in 2012, and the Republicans because Hall was a Republican at the time of the vacancy.²⁰ Attorney General Patrick Morrissey, a Republican, issued an opinion that the Republican Party was entitled to fill the vacancy,²¹ and the Chair of the West Virginia State Democratic Executive Committee sought a writ of mandamus from the state’s Supreme Court of Appeals, seeking to compel Governor Tomblin to fill the vacancy from a list of candidates that *it* selected.²²

The Supreme Court of Appeals denied the writ, holding that the statute unambiguously required the Governor to select a replacement from a list generated by the Republican Party.²³ The statute required that the party to which the legislator belonged “immediately preceding the vacancy” generate the list, and “Hall was affiliated with the Republican Party immediately preceding the vacancy.”²⁴ Justice Robin Davis dissented, arguing that the statute was unconstitutional “because it cannot, as it is written, carry out the will of the voters.”²⁵ Immediately following the decision, Governor Tomblin appointed a Republican to fill the vacancy, preserving the Party’s narrow control of the chamber.²⁶

The issue raised by this case—along with a handful of others from Kansas,²⁷ Ohio,²⁸ and Wyoming²⁹—presents a relatively discrete,

com///office-state-senator-s-resignation-creates-unique-situation/_—546f-abbd-46bbea662e66.html [https://perma.cc/F2G2-ZZ7Q].

18. W. VA. CODE ANN. § 3-10-5 (West 2018).

19. *Id.* § 3-10-5(a).

20. State *ex rel.* Biafore v. Tomblin, 782 S.E.2d 223, 226 (W. Va. 2016).

21. Letter from Patrick Morrissey, W. Va. Att’y Gen., to William P. Cole III, W. Va. Senate President (Jan. 5, 2016) (on file with the Attorney General of West Virginia’s Office), [https://ago.wv.gov//%%/Documents/Senate%20Vacancy%20%20\(M011493\).pdf](https://ago.wv.gov//%%/Documents/Senate%20Vacancy%20%20(M011493).pdf) [https://perma.cc/Y9FA-LHV3]; see also *Morrissey Issues Advisory Opinion on Hall Replacement Issue*, METRONews (Jan. 5, 2016, 12:54 PM), <http://wv.metronews.com/01/05/morrissey-issues-advisory-opinion-on-hall-replacement/> [https://perma.cc/GNR4-9XBM].

22. *Biafore*, 782 S.E.2d at 226.

23. *Id.* at 228–29.

24. *Id.* at 229.

25. *Id.* at 240 (Davis, J., dissenting).

26. David Gutman, *Appointee to Fought-Over Senate Seat No Stranger to State Politics*, CHARLESTON GAZETTE-MAIL (Jan. 25, 2016), https://www.wvgazette.com/news//fought-over-senate-seat-no-stranger-to-state/article_f0546e45-0f74-55b2-9256-08a32801d0bc.html [https://perma.cc/3H5L-833Z].

27. See generally *Wilson v. Sebelius*, 72 P.3d 553 (Kan. 2003) (determining whether same-party appointment in filling county treasurer vacancy is constitutional).

largely unanswered question: When a state's legislative vacancies are filled by same-party appointments, what happens when the vacating legislator switched parties? Some states make answering this question relatively easy—either their statutes are drafted in a manner suggesting a clear answer, or they are one of the four states with an answer from its supreme court.³⁰ But in others, which lack statutory clarity or judicial imprimatur, this question presents real (albeit statistically unlikely) political time bombs.

Accordingly, this Article suggests a way forward. It seeks to provide an objective answer to this question—that is, under the current law, *how* are these vacancies filled?—as well as one to a more aspirational question—how *should* these vacancies be filled? Part II begins by laying the foundation for these questions. Which states provide for legislative appointments, and through what method? How often do party-switches and legislative vacancies occur? Part III conducts a series of bite-sized exercises in statutory interpretation and categorizes these state statutory schemes depending on how the present question—how *are* the vacancies filled?—seems to be answered. It also reviews in greater detail how the four state supreme courts that have answered the question did so. Finally, Part IV addresses the core question—how *should* these vacancies be filled? What statutory changes should be made to provide courts (and appointing actors) with a clear answer to this question? Further, given the relative rarity with which these questions present themselves, why is any of this relevant?

II. LEGISLATIVE VACANCIES AND PARTY-SWITCHING

This Part lays the intellectual framework for the remainder of the Article. Section A provides a brief overview of the states and territories (and the District of Columbia, which, for now, is neither) in which legislative vacancies are filled through appointments. Section B addresses several threshold matters—namely, the frequency of both state legislative vacancies and state legislative party-switching. It also answers more critical threshold questions, e.g., what is the impact, and why does it matter?

A. *The States in Play*

Thirty-one jurisdictions in the United States employ *some* form of appointment scheme to fill legislative vacancies at least *some* of the time. Though these procedures are sometimes dependent on the char-

28. See generally *State ex rel. Herman v. Klopfleisch*, 651 N.E.2d 995 (Ohio 1995) (finding same-party appointment in filling mayoral vacancy is constitutional).

29. See generally *Richards v. Bd. of Cty. Comm'rs*, 6 P.3d 1251 (Wyo. 2000) (determining whether same-party appointment in filling county commission vacancy is constitutional).

30. See *infra* Part III.

acteristics of the former legislator³¹ or the time at which the vacancy occurs,³² it is nonetheless the case that these systems are pervasive throughout the United States.

Most of the states and territories in question use some form of same-party appointment. Only a few don't—American Samoa, Nebraska, New Mexico, the Northern Mariana Islands, South Dakota, Tennessee, and Vermont.³³ Though non-same-party appointments are outside the scope of this Article, these systems are worth briefly discussing given their unique nature. Most states utilizing non-same-party appointments vest their governors with the responsibility of filling vacancies,³⁴ though Tennessee exclusively delegates this power to its county commissions,³⁵ and in New Mexico, the power rests with county commissions if the vacant district is located solely within one county, and with the Governor otherwise.³⁶ In most of these jurisdictions, parties exist entirely outside the appointment process altogether. This is especially true in Nebraska, which has the country's only nonpartisan legislature,³⁷ making same-party appointments practically impossible. Though legislatures in American Samoa, New Mexico, South Dakota, and Tennessee are elected in partisan elections, party affiliation is not a *de jure* prerequisite for filling a vacancy.³⁸ In Vermont, though the Governor is allowed to solicit recommendations from the former legislator's party, she isn't required to do so and isn't required to abide by the recommendation anyway.³⁹ Interestingly, in the Northern Mariana Islands, the Governor is held to an *anti*-same-party requirement—she is obligated to appoint the runner-up from the most recent election.⁴⁰

These states are far and away the minority, however. Of the thirty-one states with appointment procedures, the other twenty-four impose

31. For example, legislators elected as independents or poorly organized third parties may be replaced through slightly different methods.

32. Some states only allow for appointments if the vacancy occurs past a certain point in the legislator's term or close enough to the next regularly scheduled election.

33. S.D. CONST. art. III, § 10; N. MAR. I. CONST. art. II, § 9; NEB. REV. STAT. ANN. § 32-566 (West 2020); N.M. STAT. ANN. §§ 2-7C-5, 2-8D-4 (West 2020); TENN. CODE ANN. § 2-14-202 (West 2019); VT. STAT. ANN. tit. 17, § 2623 (West 2020); AM. SAMOA CODE ANN. §§ 2.0204, 6.0108 (2011).

34. S.D. CONST. art. III, § 10; N. MAR. I. CONST. art. II, § 9; NEB. REV. STAT. ANN. § 32-566 (West 2017); VT. STAT. ANN. tit. 17, § 2623 (West 2020); AM. SAMOA CODE ANN. §§ 2.0204, 6.0108 (2011).

35. TENN. CODE ANN. § 2-14-202 (West 2019).

36. N.M. STAT. ANN. §§ 2-7C-5, 2-8D-4 (West 2020).

37. Kim Robak, *The Nebraska Unicameral and Its Lasting Benefits*, 76 NEB. L. REV. 791, 805 (1997).

38. S.D. CONST. art. III, § 10; N.M. STAT. ANN. §§ 2-7C-5, 2-8D-4 (West 2020); TENN. CODE ANN. § 2-14-202 (West 2019); AM. SAMOA CODE ANN. §§ 2.0204, 6.0108 (2011).

39. VT. STAT. ANN. tit. 17, § 2623 (West 2020).

40. N. MAR. I. CONST. art. II, § 9.

a strict same-party requirement.⁴¹ In these states, the governors, county commissions, and political parties themselves are the most common actors responsible for filling legislative vacancies.⁴² Governors are responsible for appointment in nine jurisdictions, county commissions in six, and political parties in seventeen. (These numbers don't add up to twenty-four because there's a great deal of power shared amongst them.) In three other jurisdictions—Alaska, Ohio, and Puerto Rico—the legislature, or the presiding officers thereof, are vested with appointment *or* confirmation powers.⁴³

Examining the mechanics of these procedures certainly reveals commonalities among them, but no majority rule or dominant scheme. Take, for example, the nine states and territories in which governors fill legislative vacancies. In five of those states, the governor merely serves as a rubber stamp on the selection of the party, perhaps to add democratic legitimacy—the governor possesses no power to reject the party's nominee, and in some states, if she refuses to appoint the party's nominee, the nominee is installed anyway. In three of the other states, the governor does not make an entirely volitional choice—she is restricted to picking from a list of nominees generated by the state party. And in the final state, Alaska, the Governor may *nominate* whomever she likes, but the party's legislative caucus may reject that nominee. In other words, no state trusts its governor enough to select a same-party replacement entirely of her own choice.

It's a similar story for county commissions, though they are granted a meaningful amount of additional latitude. No county commission rubber-stamps the party's single nominee, for example, and in Nevada, the county commission can make a same-party appointment of its choice with no party involvement whatsoever. The other five states require county commissions to pick from a set list of nominees—usually three—generated by the state party.

The seventeen states in which political parties play a role feature much more diversity. Ten of them have been mentioned previously, and they feature interaction between the parties and either the governor or county commission. Of the remaining seven, six of them grant full appointment authority to the political party directly. Puerto Rico presents an unusual case in which the legislature's presiding officers *sometimes* serve as the formal appointing authority of the party's nominee—like the aforementioned rubber-stamp governors—and in other cases, the party makes the appointment itself.⁴⁴

41. Tyler Yeargain, *The Legal History of State Legislative Vacancies and Temporary Appointments*, 28 J.L. & POL'Y 564, 610 (2020).

42. *Id.*

43. *Id.*

44. P.R. LAWS ANN. tit. 16, § 4146 (2020).

B. Frequency and Impact

There's no getting around the obvious—regardless of how states fill their vacancies, both state legislative vacancies and party-switching are relatively infrequent events separately and are even unlikelier combined. Though research on their prevalence is sparse, the best available data suggest that legislative vacancies occur at a rate of about 3.4% every two years.⁴⁵ In other words, per 100 legislators in a given two-year term, a little more than 3 legislators will resign, die, or be removed through expulsion or recall.⁴⁶ (Though the first two are much likelier than the last.⁴⁷) The rate of legislative vacancies is a frequency roughly on par with the frequency of blue moons.⁴⁸

The same is true for party-switching. Over a nearly thirty-year period, approximately 400 state legislators switched parties—a number that is large in absolute terms but reflects only 0.2% of all legislators during that time period.⁴⁹ Party-switching is disproportionately more likely to occur in states that employ special elections, not temporary appointments, to fill legislative vacancies. Over the past thirty years, the majority of party switches in state legislatures occurred in the South,⁵⁰ and the vast majority of those occurred in deep southern

45. Keith Hamm & David M. Olson, *Midsession Vacancies: Why Do State Legislators Exit and How Are They Replaced?*, in *CHANGING PATTERNS IN STATE LEGISLATIVE CAREERS* 127, 133 (Gary F. Moncrief & Joel A. Thompson eds., 1992). This rate may increase as states impose term limits or see the imposition of less-gerrymandered legislative maps. See, e.g., BRUCE E. CAIN & THAD KOUSSER, *ADAPTING TO TERM LIMITS: RECENT EXPERIENCES AND NEW DIRECTIONS* 6–8 (2004) (discussing the spikes in California state legislative elections following 1973 court-ordered redistricting and imposition of term limits in the early 1990s); Gary F. Moncrief et al., *Time, Term Limits, and Turnover: Trends in Membership Stability in U.S. State Legislatures*, 29 *LEGIS. STUD. Q.* 357, 375–76 (2004).

46. See Hamm & Olson, *supra* note 45, at 133.

47. Hamm and Olson estimate that “involuntary” vacancies—those caused by death, arrest, or recall—constitute about 29% of all legislative vacancies, with dying as the most popular way to involuntarily leave legislative service. *Id.* at 130. Only thirty-nine recall elections have ever occurred for state legislators, 55% of which were successful, and in the last half-century, only around twenty legislators have been expelled. Nat'l Conf. of State Legislators, *Expulsions of State Legislators Are Rare*, *THE THICKET AT ST. LEGISLATURES* (Apr. 1, 2013), https://ncsl.typepad.com/the_thicket/2013/04/expulsions-of-state-legislators-are-rare.html [<https://perma.cc/8ERV-X9G5>]; *Recall of State Officials*, NAT'L CONF. OF ST. LEGISLATORS (July 8, 2019), <http://www.ncsl.org/research/elections-and-campaigns/recall-of-state-officials.aspx> [<https://perma.cc/LFB5-HZU6>].

48. Ethan Siegel, *How Rare is the All-in-One Supermoon, Blue Moon, and Lunar Eclipse, Really?*, *FORBES* (Jan. 24, 2018, 10:00 AM), <https://www.forbes.com/sites/startswithabang/2018/01/24/how-rare-is-the-all-in-one-supermoon-blue-moon-and-lunar-eclipse-really/#381676cc3cf2> [<https://perma.cc/46X8-A3Z8>] (noting that blue moons occur “about 7 times every 19 years: a little more frequently than once every 3 years,” or about 2.7% of the time).

49. Boris Shor, *Out of Step, Out of Party: Party Switching in American State Legislatures* 4, 11 (June 4, 2018) (unpublished manuscript) (on file with Author).

50. *Id.* at 5, 7.

states.⁵¹ But of the sixteen states (and the District of Columbia) in the South,⁵² only five—Maryland, North Carolina, Tennessee, West Virginia, and the District of Columbia—ever use appointments instead of elections. Meanwhile, only 20% of legislative party switches occurred in the Midwest and West,⁵³ where nineteen out of twenty-five states use appointments.⁵⁴ As a result, it has been statistically unlikely that a legislator switching parties and then vacating her seat prior to the next election—voluntarily or involuntarily—would occur in a state with a same-party replacement system. Accordingly, resolving the legal question of which party is entitled to replace the former legislator who switched parties has rarely been necessary.

Neither of these realities, however, suggest that the interaction of party-switching and legislative vacancies is irrelevant. For a start, party-switching has tangible consequences. Some of the most prominent party-switchers ended up successfully running for statewide office over the last few decades—especially Democratic-to-Republican party-switchers in the deep south, which frequently enabled them to win control of offices for their new parties for the first time since Reconstruction.⁵⁵ An even more serious consequence of party-switching among state legislators is the result that it has on partisan control of state legislatures, especially in closely-divided chambers. Since 1980, at least thirteen state legislative houses have changed party control solely as the result of party-switching by their members.⁵⁶

Vacancies have consequences, too, but the results are less-established. Though it's uncommon for special elections (or appointments) following vacancies to decide control of state legislative chambers, there are certainly cases where it has happened. For example, in 2017, Democrats held on to a State Senate seat in Delaware that allowed them to retain control of the chamber; had they lost the seat, Republicans would have gained control of the chamber for the first time since 1972.⁵⁷ Later that year, a special election for a State Senate seat in Washington allowed Democrats to win control of the chamber and

51. James M. Glaser, *When Legislators Change Sides: The Implications of Party Defections in the South*, in *EYE OF THE STORM: THE SOUTH AND CONGRESS IN AN ERA OF CHANGE* 3, 70–71 (John C. Kuzenski et al. eds., 2001); see also Shor, *supra* note 49, at 11.

52. See generally *Census Regions and Divisions of the United States*, U.S. CENSUS BUREAU, https://www2.census.gov/geo/pdfs/maps-data/maps/reference/us_regdiv.pdf [<https://perma.cc/K3TL-J7B5>].

53. Shor, *supra* note 49, at 5.

54. Yeargain, *supra* note 41, at 602–15.

55. ANTOINE YOSHINAKA, *CROSSING THE AISLE: PARTY SWITCHING BY US LEGISLATORS IN THE POSTWAR ERA* 88–89 (2015).

56. Specifically, party-switchers swung the control of the Georgia Senate (2003), Kentucky Senate (1999), Maine House (thrice from 1995 to 1996), Mississippi Senate (2007), Montana Senate (2007), North Carolina House (2003), Pennsylvania House (1994), Pennsylvania Senate (1992), and Washington Senate (1980). *Id.* at 86–94.

57. Janet Hook, *Newly Energized Liberals Pour Record Effort into Local Races*, WALL ST. J. (Apr. 21, 2017), <https://www.wsj.com/articles/liberal-activists-pour-record>

gain unified control in the state.⁵⁸ Similarly, in 2014, after Democratic State Senator Phillip Puckett resigned his seat—apparently in exchange for being appointed to the state tobacco commission and for his daughter being appointed to a judgeship⁵⁹—Republicans were able to pick up his dark-red seat, and with it the Virginia State Senate, in the ensuing special election.⁶⁰ And in West Virginia, as previously mentioned, West Virginia State Senator Daniel Hall switched to the Republican Party after the 2014 election, giving the Republicans a one-vote majority in the chamber, before resigning in 2016, putting control of the chamber on the line.⁶¹ Less dramatically, Democrats won special elections in 2015 and 2017 that allowed them to end Republicans' supermajority control in both the Georgia House and Senate.⁶²

Due to the rarity of both vacancies and party-switching in state legislatures, it is unsurprising that no studies have been done on the frequency of *both* occurring simultaneously or on the role that party-switching plays in states that fill vacancies through same-party appointments. But that may be a function of where the bulk of party-switching occurs. In most of the states in the deep south, along with ancestrally Democratic areas in Arkansas, Kentucky, Oklahoma, and West Virginia, old-school, Blue Dog Democrats have completely bottomed out.⁶³ Few Democratic state legislators remain in these areas, meaning that the era of Southern-dominated party-switching may be coming to a close.

-amounts-of-time-and-money-local-gop-strongholds-1491925602 [https://perma.cc/7K4J-QT2Z].

58. Joseph O'Sullivan, *With Manka Dhingra's Washington State Senate Win, Democrats Plot Ambitious Course in Olympia*, SEATTLE TIMES, <https://www.seattletimes.com/politics/manka-dhingras-double-digit-lead-in-45th-district-senate-race-sends-message-to-trump-gov-inslee-says/> [https://perma.cc/SM9U-CT93].

59. Laura Vozzella, *Puckett Resignation Inquiry Yields No Charges*, WASH. POST (Dec. 12, 2014), https://www.washingtonpost.com/local/virginia-politics/federal-prosecutors-will-not-charge-puckett-in-virginia-senate-resignation-scandal/2014/12/12/b86eb5a8-8230-11e4-81fd-8c4814dfa9d7_story.html [https://perma.cc/H39K-MVZ9].

60. Laura Vozzella & Wesley Robinson, *GOP Win in Southwest Virginia Senate Race Secures Republican Control of Legislature*, WASH. POST (Aug. 19, 2014), https://www.washingtonpost.com/virginia-politics/virginia-voters-go-to-polls-today-in-special-elections-as-new-id-law-takes-effect/2014/08/19/509db796-27c5-11e4-8593-da634b334390_story.html [https://perma.cc/MX9T-ZG94].

61. See generally *supra* Part I.

62. Dayana Morales Gomez, *Georgia Democrat Wins House Seat on Platform Against Gay Discrimination*, HUFFINGTON POST (Aug. 14, 2015, 4:11 PM), https://www.huffpost.com/entry/georgia-taylor-bennett_n_55cd0d8ae4b07addcb4281e5 [https://perma.cc/UVC7-7TTQ]; Maya T. Prabhu, *Georgia Republicans Eye Reclaiming Atlanta-Based State Senate Seat*, ATLANTA J.-CONST. (Oct. 23, 2018), <https://www.ajc.com/news/state—regional-govt—politics/georgia-republicans-eye-reclaiming-atlanta-based-state-senate-seat/5TM4hruQ5nC56SmTkFUw6I/> [https://perma.cc/M9DC-UA NB].

63. See *supra* notes 4–7.

Accordingly, it may be helpful to consider where the next phase of party-switching is likely to take place: the suburbs and areas with burgeoning Latinx populations. Though it has largely been the case over the last few decades that more Democrats have switched to the Republican Party than vice-versa, that may be changing as suburban America and the West trend toward the Democrats.⁶⁴ Since an alignment in 2016, for example, more Republicans have switched to the Democratic Party than vice-versa.⁶⁵ Most of those party switches took place in states that use appointments, not special elections, to fill vacancies,⁶⁶ perhaps suggesting that more vacancies will occur as the result of party-switching.

III. THE CURRENT LEGAL REALITY

A critical (and obvious) component of same-party appointments is measuring what “same-party” means in each instance. “Same-party” is relatively obvious in most situations. Imagine, for example, the clearest possible case: A legislator, who has repeatedly been elected as the Democratic nominee, and who served, until recently, as the Democratic Party’s floor leader in the State Senate, resigns in a state with same-party appointments. In that instance, the succession plan is clear; she would be replaced by a Democrat. In the vast majority of cases, this is roughly the context that is presented: Legislators vacating their seats were elected as the nominees of, and at the time of their vacancy were members of, the same party.

Party-switchers present a different situation, however. When there’s a mismatch between the party nomination from the most recent election and party membership at the time of the vacancy, what does (or should) win out? This Part seeks to answer the objective question of what actually *does* happen, or might reasonably be predicted to happen. Section A begins by identifying how state statutes and constitutions determine a vacating legislator’s “party” for the purpose of filling her vacancy. It identifies several different answers to the question, which focus on the distinction between party nomination and membership. Then, Section B reviews the available caselaw from Ohio, Wyoming, Kansas, and West Virginia—the only states that have even tangentially answered this question—to determine how courts

64. See Aaron Blake, *Trump Spurs an Uptick in Politicians Leaving the GOP*, WASH. POST (Apr. 24, 2019, 10:45 PM), <https://www.washingtonpost.com/politics/2019/04/24/trump-spurs-an-uptick-politicians-leaving-gop/> [<https://perma.cc/9XPZ-47PU>] (Since 1994, “71 state lawmakers have switched from Democrat to Republican, while 18 have switched from the GOP to the Democratic Party. Only twice over that span have we had more Republicans switching to Democrats than Democrats switching Republicans in consecutive years: the tail-end of George W. Bush’s presidency (2006–[20]07) and the last two years of Trump’s.”).

65. *Id.*

66. *Compare id.*, with *supra* Part II.A.

have answered this question. It then compares the answers from the caselaw to the answers from Section A's statutory interpretation.

A. *The Statutory Answer*

Every state answers the question, "Which party?" Some of them answer it better and more clearly than others. Only Arizona's same-party appointment statute explicitly addresses how vacancies caused by party-switching legislators are filled—it provides that the political party the legislator was nominated by at the most recent election is responsible for nominating a list of replacements.⁶⁷ The remaining states may not answer the question of party-switching *directly*, but a plain reading of the statutes (and some constitutional provisions) at issue shows that most of them provide some sort of implicit answer. These states fall into one of three camps: (1) those that fill the vacancy depending on the legislator's affiliation or membership; (2) those that fill it depending on which party nominated the legislator; and (3) those that provide no clarity whatsoever. The following discussion addresses the three camps in turn.

1. Affiliation or Membership

Four states—Colorado, Kansas, North Dakota, and West Virginia—along with the District of Columbia, appear to look to the legislator's party affiliation or membership at the time of the vacancy itself. In identifying the legislator's political party, these statutes reference the party "represented by the former member,"⁶⁸ the party with which the former member "is affiliated,"⁶⁹ the party "of which the officer . . . whose position has become vacant was a member,"⁷⁰ or the party "with which the person holding the office immediately preceding the vacancy was affiliated at the time the vacancy occurred."⁷¹

This emphasis on affiliation or membership implicitly—and in the case of West Virginia, explicitly—suggests a temporal connection between the party and the vacancy itself.⁷² Though we might reasonably

67. ARIZ. REV. STAT. ANN. § 41-1202(C) (West 2018) ("For the purposes of this section, 'appropriate political party' means the same political party of which the person who was elected to or appointed to the office was a member immediately before the vacancy occurred except that if the person vacating the office changed political party affiliation after taking office, the person who is appointed to fill the vacancy shall be of the same political party that the vacating officeholder was when the vacating officeholder was elected or appointed to that office.").

68. COLO. REV. STAT. ANN. § 1-12-203 (West 2017); *see also* N.D. CENT. CODE ANN. § 16.1-13-10 (West 2009).

69. D.C. CODE ANN. § 1-204.01 (West 2013).

70. KAN. STAT. ANN. §§ 25-3901, 25-3902, 25-3903 (West 2016).

71. W. VA. CODE ANN. § 3-10-5 (West 2018).

72. Beyond the West Virginia Supreme Court of Appeals decision in *Biafore*, the District of Columbia Court of Appeals held—albeit in a different context—that the word "affiliated" has a meaning "delimit[ed] . . . to party affiliation (or not) as shown by formal registration" and explicitly rejected the argument that "affiliated" should

want these statutes to make the temporal connection more explicit—e.g., the party with which the former member “is affiliated” *at what point?*—the text is clear enough to establish that party-switching legislative vacancies ought to be filled by the party of the member at the time of the vacancy.

Two other additions here are Alaska and Illinois, at least as they provide for filling vacancies caused by legislators elected as independents. Both states normally fall into the second category, which determines party replacement by which party nominated the legislator, but provide a different method for filling independent vacancies in some situations. In Alaska, when a legislator is elected as an independent but is formally recognized “as a member of a party caucus of members of the legislature,” that counts as recognition of a person’s party membership for purposes of filling the vacancy.⁷³ Similarly, in Illinois, if the assembly’s lawmakers pass a resolution allowing an independent “to affiliate with a political party,” the political party with which she is affiliated at the time of the vacancy is responsible for filling it.⁷⁴

2. Nomination or Election

Most of the remaining states and territories—Alaska, Illinois, Indiana, Maryland, Nevada, New Jersey, North Carolina, Ohio, Oregon,

be determined “by examining [the candidate’s] day-to-day ‘associations’ with one party or another[.]” *Kabel v. D.C. Bd. of Elections & Ethics*, 962 A.2d 919, 920–22 (D.C. 2008). The court in *Kabel* didn’t decide the meaning of “affiliated” in the context of vacancy caused by a party-switcher, but rather by the election of a candidate to the District of Columbia City Council who had switched from the Democratic Party to “no party,” but nonetheless retained an informal and somewhat abstract membership with the Democratic Party. *Id.* at 920. The question of the candidate’s affiliation was relevant because the District of Columbia doesn’t allow more than three at-large city councilmembers to be “affiliated with the same political party.” *Id.* (quoting D.C. CODE 1.20-4.01(d)(3)). Nonetheless, despite the different context, its holding is supportive of the conclusion that “affiliated” refers to temporary membership. *Id.*

73. ALASKA STAT. ANN. § 15.40.330(b) (West 2019). It doesn’t appear that this system accounts for legislators who are elected as members of one party but join a cross-partisan governing coalition with another party or parties, as frequently happens in Alaska. While this doesn’t often become relevant, the recent death of Alaska State Representative Gary Knopp—who was elected as a Republican, joined a cross-party coalition of Democrats and Republicans, and refused to change his party affiliation—and his scheduled replacement by a run-of-the-mill Republican perhaps reflects some inadequacies with the current system. See Elizabeth Earl, *Despite Republicans’ Ire, Knopp Says He Won’t Resign or Change Party*, ALASKA J. OF COM. (Feb. 18, 2019), <https://www.alaskajournal.com/2019-02-18/despite-republicans%E2%80%99-ire-knopp-says-he-wont-resign-or-change-party> [https://perma.cc/B2Y3-NUG9]; Sean Maguire, *Alaska GOP Names 3 Candidates to Replace Late Rep. Gary Knopp*, MSN (Aug. 14, 2020), <https://www.msn.com/en-us/news/politics/alaska-gop-names-3-candidates-to-replace-late-rep-gary-knopp/ar-BB17YGL5> [https://perma.cc/VT4J-R5FG].

74. 10 ILL. COMP. STAT. ANN. 5/25-6(b) (West 2019). For a greater discussion of how states that fill legislative vacancies through same-party appointments account for independent and third-party legislators, see Tyler Yeargain, *Third Wheeling in the Two-Party System: How Same-Party Replacement Systems Impede the Replacement of Independent and Third-Party Legislators*, 123 W. VA. L. REV. (forthcoming Fall 2020).

Puerto Rico, the U.S. Virgin Islands, and Wyoming—define “party” based on which party nominated the previous incumbent or the affiliation of the incumbent when she was elected. The usual result of the constitutional and statutory language used by these states is likely the same, but how they get there differs in a way that could produce different results in different contexts.

For example, five states—Alaska, Illinois, Nevada, New Jersey, and Oregon—along with Puerto Rico, focus on the party of the legislator as measured by formal nomination or ballot placement by a political party. This language refers to the party that “nominated the predecessor in office,”⁷⁵ the party that “elected such” legislator,⁷⁶ the party “of which the incumbent was the nominee,”⁷⁷ the party “by which the elected predecessor in the office was designated on the election ballot,”⁷⁸ the party that the legislator was “elected in representation of,”⁷⁹ or the party “of which the incumbent was a candidate at the time of [her] election.”⁸⁰

Contrast those states with Indiana, Maryland, North Carolina, Ohio, and Wyoming, which determine party affiliation based on the previous incumbent’s membership at the time of the election. These states refer to the party that the previous incumbent was a member of when she was “elected or selected,”⁸¹ the “same political party [of the previous incumbent] at the time of the last election or appointment,”⁸² the party “with which the vacating member was affiliated when elected,”⁸³ the “same political party as the person last elected by the electors to the seat,”⁸⁴ or the party that “the last incumbent represented at the time of [her] election.”⁸⁵

In either the usual case or the case of a party-switcher elected with one party who switched to another, the result would be the same. But as it’s applied to candidates in more unusual situations, the former’s focus on formal *nomination* may cause absurd results. In some states, ballot access requirements are so stringent and mechanically enforced that they’re regularly used by campaigns to kick their opponents off

75. ALASKA STAT. ANN. § 15.40.330 (West 2019).

76. NEV. CONST. art. 4, § 12.

77. N.J. CONST. art. IV, § 4, para. 1. In its statutory enactment of this provision, New Jersey has further made clear that “the vacancy shall be filled . . . by a member of the political party of which the person who vacated the office was the candidate at the time of his election thereto.” N.J. STAT. ANN. § 19:27-11.2 (West 1988) (emphasis added).

78. OR. REV. STAT. ANN. § 236.100 (West 2020).

79. P.R. LAWS ANN. tit. 16, § 4146 (2011) (amended 2014).

80. 10 ILL. COMP. STAT. ANN. 5/25-6(b) (West 2019).

81. IND. CODE ANN. § 3-13-5-0.1 (West 2020).

82. MD. CONST. art. III, § 13.

83. N.C. GEN. STAT. ANN. § 163-11(b)-(d) (West 2019).

84. OHIO CONST. art. II, § 11.

85. WYO. STAT. ANN. § 22-18-111 (West 2018).

the ballot.⁸⁶ This can result in oddities in individual elections. Take, for example, a 2017 special election for a safely Democratic state house district in Philadelphia, wherein the Democratic nominee was kicked off the ballot over residency issues, leaving only Republican and Green Party nominees.⁸⁷ The local Democratic Party organized a write-in effort, and Emilio Vazquez, the *de facto* Democratic nominee, running as a write-in, ended up overwhelmingly winning.⁸⁸ But Vazquez, despite being a registered Democrat and running with the party's explicit support, wasn't elected *as* a Democrat. So in a same-party appointment system that determines party based on which party *nominated* the legislator, a vacating legislator elected like Vazquez would present a gray area.

Nonetheless, that (unlikely⁸⁹) scenario notwithstanding, these states chart a clear path forward: a legislator's party, for purposes of filling her vacancy, is determined by how she was elected. Therefore, in a case where a legislator was elected as a Republican and switched to

86. See, e.g., Steve Edwards, *How to Kick Your Opponent Off the Ballot*, WBEZ (Nov. 26, 2010, 8:35 PM), <https://www.wbez.org/shows/wbez-blogs/how-to-kick-your-opponent-off-the-ballot/8fe5cdd6-cada-4d5d-b2dd-9fbc2d44d976> [https://perma.cc/44XF-H9E7]; see generally Nathaniel Persily, *Candidates v. Parties: The Constitutional Constraints on Primary Ballot Access Laws*, 89 GEO. L.J. 2181 (2001).

87. Claire Sasko, *Democratic Write-In Candidate Emilio Vazquez Wins Special Election*, PHILLY MAG. (Mar. 24, 2017, 2:21 PM), <https://www.phillymag.com/news/2017/03/24/democrat-emilio-vazquez-special-election/> [https://perma.cc/4CZU-SZ68].

88. *Id.*

89. Little data exist on how frequently write-in candidates are elected, but common sense dictates that it is not often. Many states do not allow voters to write in candidates or severely restrict it, see Michelle Logan, Note, *The Right to Write-In: Voting Rights and the First Amendment*, 44 HASTINGS L.J. 727, 728 n.11, 734 (1993), and “[w]rite-ins usually account for less than 1[%] of all votes cast.” Denise Lu & Kevin Uhrmacher, *Planning to Write in Paul Ryan or Bernie Sanders? It Won't Count in Most States.*, WASH. POST (Nov. 3, 2016), <https://www.washingtonpost.com/graphics/politics/2016-election/write-in-votes/> [https://perma.cc/8GQC-QB5Q]. Furthermore, write-in victories are relatively notable, which serves as further indicia of their rarity. See, e.g., Nancy Eve Cohen, *Jo Comerford Prevails as Write-in Candidate in Massachusetts Legislative Dem Primary*, NEW ENG. PUB. RADIO (Sept. 5, 2018), <https://www.nepr.net/post/jo-comerford-prevails-write-candidate-massachusetts-legislative-dem-primary#stream/0> [https://perma.cc/KNT3-7K2Y] (noting Massachusetts State Senator Jo Comerford's write-in primary victory); Sasko, *supra* note 87, at 11 (noting Pennsylvania State Representative Emilio Vazquez's write-in victory); Sandhya Somashekhar, *In Alaska's Senate Race, Murkowski's Write-in Bid Bears Fruit*, WASH. POST (Nov. 4, 2010, 12:25 AM), <https://www.washingtonpost.com/wp-dyn/content/article/2010/11/03/AR2010110308817.html> [https://perma.cc/E77A-M895] (noting U.S. Senator Lisa Murkowski's write-in victory); see also Laura Vozzella, *From Shoo-in to Write-in: Paperwork Stumble Forces a Va. Republican to Run the Hard Way*, WASH. POST (Oct. 23, 2019, 3:36 PM), https://www.washingtonpost.com/virginia-politics/from-shoo-in-to-write-in-paperwork-stumble-forces-a-va-republican-to-run-the-hard-way/2019/10/22/e1831770-ef74-11e9-b648-76bcf86eb67e_story.html [https://perma.cc/D4F6-KAMS] (noting that, prior to State Delegate Nick Freitas's successful 2019 write-in campaign, the last time that a write-in won “was in 1989, when independent Jackie Stump, president of the local coal miners' union in far southwest Virginia, pulled one off in the midst of a bitter strike to win a House of Delegates seat”).

no-party affiliation, she would likely be replaced by a Republican. Indeed, this was the exact scenario presented in Maryland in 2009, when State Delegate Richard Weldon, who was initially elected as a Republican but became an independent afterwards, resigned from office.⁹⁰ Because Weldon was elected as a Republican, the local Republican Party nominated his replacement, who was formally appointed to fill Weldon's vacancy by then-Governor Martin O'Malley.⁹¹

3. The States That Provide No Clarity

But regardless of how we may quibble over the efficacy of the first two systems, they are unequivocally better than the third. Hawai'i, Idaho, Montana, Utah, and Washington provide no meaningful clarity whatsoever. In imposing a same-party replacement system, these states stick to those words—"same party"—and no more.⁹² All of these frameworks use pretty much the same language, so let's consider Idaho's. Under state law, the "legislative district committee of the *same political party, if any*, of the former member whose seat is vacant" submits three nominees to the Governor, who picks one.⁹³ This presents an obvious problem: the same political party, as of when? Is it the same party as of the election? As of the vacancy? The constitutional and statutory frameworks in these states exist in blissful ignorance, providing no answer at all.

They certainly should. Hawai'i, in particular, is disproportionately likely to face this question: it requires same-party replacement, provides no elaboration on when party membership or affiliation is determined, and has faced the highest number of party-switching legislators outside of the South.⁹⁴ And in Idaho, Utah, and Washington, a diversifying population and blue-trending metropolitan areas⁹⁵ could lay the

90. *House of Delegates: Former Delegates*, MD. MANUAL ON-LINE, <https://msa.maryland.gov/msa/mdmanual/06hse/former/html/msa13978.html> [<https://perma.cc/E9Y6-LR8V>].

91. Julie Bykowicz, *Final Three Selected for Frederick County Delegate Seat*, BALTIMORE SUN (Jan. 4, 2010, 10:13 AM), https://www.baltimoresun.com/bs-mtblog-2010-01-final_three_selected__y.html [<https://perma.cc/P3PU-CHNR>].

92. HAW. REV. STAT. § 17-3(a)(1) (2020) ("same political party as the prior incumbent"); IDAHO CODE § 59-904A (2020) ("the same political party, if any, of the former member whose seat is vacant"); MONT. CODE ANN. § 5-2-403(1) (2019) ("the same political party"); UTAH CODE ANN. § 20A-1-503(2), (3)(b) (West 2019) ("same political party as the prior representative"); WASH. CONST. art. II, § 15 ("the same political party as the legislator . . . whose office has been vacated").

93. IDAHO CODE § 59-904A (2019) (emphasis added).

94. See Ian Lovett, *Hawaii Republicans, Down to Five Members in the State Legislature, Try to Regroup*, WALL ST. J. (Mar. 24, 2017), at A3; Darwin Peng, *Why Hawaii Is a One-Party State*, HARV. POL. REV. (Apr. 12, 2017), <https://harvardpolitics.com/united-states/why-hawaii-is-a-one-party-state/> [<https://perma.cc/62CL-GXC6>].

95. Daniel Allott, *The Next Red State to Turn Purple: Utah*, WASH. EXAM'R (Apr. 17, 2019, 8:00 AM), <https://www.washingtonexaminer.com/opinion/the-next-red-state-to-turn-purple-utah> [<https://perma.cc/224N-NT75>]; Kirk Johnson, *What the Fastest Growth in the U.S. Means for Idaho Politics*, N.Y. TIMES (May 13, 2018), <https://>

groundwork for Republican state legislators to switch parties as a means of political survival.

B. *The Jurisprudential Answer*

For the most part, the four state supreme courts—Ohio, Wyoming, Kansas, and West Virginia—that have answered the question of how to fill party-switcher vacancies have echoed the categorization identified in Section A. It is worth noting at the outset that only one of these cases—the aforementioned case from West Virginia—actually involves *legislative* vacancies. The others involve vacancies in the offices of county treasurer, county commissioner, and mayor. However, because the constitutional provisions and laws governing these systems are roughly the same, regardless of the office in question, these cases are largely on-point. The following Subsections discuss the cases in chronological order because the cases articulate two different schools of thought and generally cite each other.

1. Ohio: *State ex rel. Herman v. Klopfleisch* (1995)

Herman was the first case, in a state wherein vacancies are filled by same-party appointments, that addressed how to fill vacancies caused by party-switchers. The case involved a dispute over which party was entitled to fill the mayoral vacancy in the City of Celina, Ohio.⁹⁶ James Mustard won the Democratic Party’s nomination for mayor and, subsequently, the general election in 1991.⁹⁷ Prior to the election, however, he had apparently spoken with the chairman of the Mercer County, Ohio, Republican Party about running as a Republican, which he was legally unable to do.⁹⁸ Accordingly, after winning the 1991 election, Mustard voted in the 1992 and 1994 Republican primaries, publicly joined the Republican Party, and became a member of the Mercer County Republican Central Committee.⁹⁹ In 1994, prior to the 1995 mayoral election, Mustard resigned.¹⁰⁰

Ohio statutes provided that mayoral vacancies were filled “by a person chosen by the residents of the city who are members of the city central committee . . . of the political party with which the last occupant of the office was *affiliated*.”¹⁰¹ Accordingly, both parties believed

www.nytimes.com/2018/05/13/us/boise-idaho-primary-election-growth [https://perma.cc/EC7L-SJVE]; Jessica Lee, *Worked Up in Washington: Seattle Rallies Against President Donald Trump with Its Own Progressive Agenda*, U.S. NEWS (Oct. 2, 2017, 12:01 AM), <https://www.usnews.com/best-states/articles/2017-10-02/washington-voters-divided-as-seattle-becomes-more-liberal> [https://perma.cc/4RY6-9PHL].

96. *State ex rel. Herman v. Klopfleisch*, 651 N.E.2d 995, 996 (Ohio 1995).

97. *Id.* at 996.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 997 (quoting OHIO REV. CODE ANN. § 733.08 (West 1997), amended by OHIO REV. CODE ANN. § 733.08 (West 2016)) (emphasis added).

that they were entitled to fill the vacancy—the Democrats because Mustard was elected mayor as the Democratic nominee, and the Republicans because Mustard was a Republican when he resigned.¹⁰² The Ohio Secretary of State determined that the Republican replacement, Craig Klopfleisch, should be issued a certificate of appointment, and so the Democratic replacement, Henry Herman, sought a writ of *quo warranto* seeking Klopfleisch's ouster as mayor.¹⁰³

The Ohio Supreme Court noted that the word "affiliated" in the statute "signifies a condition of being in close connection, allied, or associated as a member," citing Black's Law Dictionary.¹⁰⁴ It went on to state that because the meaning of "affiliated" was unclear in context, the statute itself was ambiguous, and therefore the court would employ canons of construction to interpret the statute's meaning.¹⁰⁵ The court then considered another statute, which related to legal challenges to a voter's ability to vote in a partisan primary and also used the word "affiliated."¹⁰⁶ That statute noted that voter affiliation was determined "by examining the elector's voting record for the current year and the next two preceding calendar years as shown on the voter's registration card."¹⁰⁷ Accordingly, the court read the ambiguous statute *in pari materia* with that statute, and looked to Mustard's voting history, which showed that he had voted in the last two Republican primaries.¹⁰⁸ The court rejected Herman's argument that "affiliated" had a meaning equivalent to "elected as," a phrase used in the replacement statute regarding a mayor elected as an independent, determining that the legislature "presumably intended different results for the two situations when it used 'affiliated' in one portion of [the statute] and 'elected as' in another."¹⁰⁹

It's worth noting, however, that the Ohio statute interpreted in *Herman* differs quite substantially from the Ohio constitutional provision providing for same-party appointments to fill legislative vacancies. The statute in *Herman* merely referred to the "political party with which the last occupant of the office was *affiliated*."¹¹⁰ But the Ohio Constitution's provision for legislative vacancies suggests that the party responsible for filling a vacancy is "the same political party as *the person last elected by the electors to the seat which has become vacant*."¹¹¹

102. *Id.* at 996.

103. *Id.*

104. *Id.* at 998.

105. *Id.*

106. *Id.* (quoting OHIO REV. CODE ANN. § 3513.19).

107. *Id.* (quoting OHIO REV. CODE ANN. § 3513.19).

108. *Id.*

109. *Id.* at 999.

110. OHIO REV. CODE ANN. § 733.08 (West 1997), amended by OHIO REV. CODE ANN. § 733.08 (West 2016).

111. OHIO CONST. art. II, § 11 (emphasis added).

2. Wyoming: *Richards v. Board of County Commissioners of Sweetwater County* (2000)

The Supreme Court of Wyoming reached a different result in *Richards*, albeit with a materially different statute. In this case, Elwin McGrew was elected as a Democrat to the Sweetwater County, Wyoming, Board of County Commissioners in 1996.¹¹² He subsequently switched to the Republican Party in 1999 and resigned several months later.¹¹³

The Wyoming statute that governed filling county commission vacancies provided that the “county central committee of the political party to which the member whose office is vacant *belonged*” was responsible for filling the vacancy.¹¹⁴ Accordingly, the Sweetwater County Board of Commissioners notified the county’s Democratic Party of the vacancy, which prompted Island Richards, the chairman of the county’s Republican Party, to file a declaratory action.¹¹⁵

The court aptly summed the question presented: “[T]he parties come to us with a question which requires this Court to finish the first sentence in [the statute], that is, ‘the political party to which the member whose office is vacant belonged’ *when?*”¹¹⁶ It concluded that the statute was ambiguous and resorted to “general principles of statutory construction” to ascertain legislative intent.¹¹⁷ It noted that its review of “the ‘historical setting surrounding [the statute’s] enactment,’ ‘the conditions of law and all other contemporaneous facts and circumstances,’ including both parties’ persuasive arguments and counter-arguments,” was unhelpful in determining legislative intent.¹¹⁸ However, in considering “the mischief the act was intended to cure,” the court determined that, generally, when the legislature failed to provide for a specific situation, it enacted the law “assuming the situation that occurs in the majority of instances.”¹¹⁹ Therefore, because party-switching is “a relatively rare and infrequent occurrence,” a public official leaving office is usually “affiliated with the political party which supported him in the last election.”¹²⁰ Moreover, the court determined that “[i]t would be contrary to public policy to allow” a party-switcher to “frustrate the assumption of the political party which supported him that a person from that political party would hold that office until the next election.”¹²¹ Accordingly, it concluded that “the statute call[ed] for the board of county commissioners to notify the central

112. *Richards v. Bd. of Cty. Comm’rs*, 6 P.3d 1251, 1252 (Wyo. 2000).

113. *Id.*

114. *Id.* at 1253 (quoting WYO. STAT. ANN. § 18-3-524 (1999)) (emphasis added).

115. *Id.* at 1252.

116. *Id.* at 1253.

117. *Id.* at 1253 (quoting *Story v. State*, 755 P.2d 228, 231 (Wyo. 1988)).

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

committee of the party to which the former member belonged *at the time of the last election.*"¹²²

3. Kansas: *Wilson v. Sebelius* (2003)

A similar situation presented in Kansas through *Wilson*. Here, Rita Cline was elected Shawnee County, Kansas, Treasurer in 2000 as the Democratic nominee.¹²³ But shortly after being inaugurated in 2001, Cline switched to the Republican Party.¹²⁴ She resigned in 2003 as a registered Republican.¹²⁵ The Kansas statute providing for filling partisan vacancies was less conceptually clear than the Ohio or Wyoming statutes, and provided that "such vacancy shall be filled by appointment by the governor of the person elected to be so appointed by a district convention."¹²⁶ The statute providing for district conventions required the county chairperson of the political party to "call and convene a convention of all committeemen and committeewomen *of the party* of the precincts in such district for the purpose of electing a person to be appointed by the governor to fill the vacancy."¹²⁷

Accordingly, both Parties determined that they were entitled to fill the vacancy and held conventions to that effect. The Democrats nominated Larry Wilson as Cline's replacement, and the Republicans nominated Chearie Donaldson, and both parties sent their nominees to then-Governor Kathleen Sebelius.¹²⁸ Wilson and the Democratic Party filed for a writ of mandamus and *quo warranto* with the Kansas Supreme Court.¹²⁹

The court, therefore, had to determine what the language "of the party [of the prior incumbent]" meant in the Kansas statute.¹³⁰ It considered arguments from the Republican Party that "of the party" "must be construed to mean the public official's party at the time the vacancy occurs in order to avoid a situation in which no party is authorized to fill the vacancy" in the event that an unaffiliated candidate is elected to office.¹³¹ The court countered that the exact harm could result with the inverse; if an unaffiliated person never joined a party or a party's nominee switched to unaffiliated, then no one could fill the vacancy in that event.¹³² The court also rejected the Republicans' argument that "because the only time the statutory provisions have application is when a vacancy occurs, the plain meaning of 'of the

122. *Id.* (emphasis added).

123. *Wilson v. Sebelius*, 72 P.3d 553, 555 (Kan. 2003).

124. *Id.*

125. *Id.*

126. *Id.* (quoting KAN. STAT. ANN. § 25-3903 (West 2016)).

127. *Id.* (quoting KAN. STAT. ANN. § 25-3902(a) (West 2016)).

128. *Id.*

129. *Id.* at 554.

130. *Id.* at 556.

131. *Id.* at 559.

132. *Id.*

party' is the official's party at the time of the vacancy."¹³³ Here, it reasoned that "the legislature did not identify the time because it assumed that the time would not be an issue . . . because it seems unlikely that the legislature considered the possibility of an elected official's switching parties" ¹³⁴

Ultimately, the court concluded that the Democratic Party was entitled to fill the vacancy due to overriding public policy concerns.¹³⁵ Specifically, the court concluded that "the will of the electorate at the preceding election [should] control[] which party fills the vacancy."¹³⁶ "It seems reasonable and logical to conclude," it added, "that the legislature did not intend that the outcome be different simply because the individual officeholder changed party affiliation while in office."¹³⁷ Accordingly, "the statutory phrase, 'of the party' . . . mean[s] the political party to which the officeholder belonged at the time of the preceding election for that office."¹³⁸

4. West Virginia: *State ex rel. Biafore v. Tomblin* (2016)

The most recent state court to address this question was West Virginia's Supreme Court of Appeals, as mentioned in Part I.¹³⁹ Given Part I's discussion of *Biafore*, this Subsection need not regurgitate the facts or the court's holding in great detail. Instead, the purpose of discussing *Biafore* here is to contrast it with *Herman*, *Richards*, and *Wilson*, cases that the *Biafore* court considered.

The West Virginia statute provides that vacancies in the legislature "shall be filled by appointment by the Governor, from a list of three legally qualified persons submitted by the party executive committee of the party with which the person holding the office immediately preceding the vacancy was affiliated."¹⁴⁰ This language, the majority concluded, was "clear and unambiguous."¹⁴¹ "The legislature's use of the phrase 'immediately preceding the vacancy' is manifestly plain, enunciating a specific and incontrovertible time criterion for the determination of the vacating officeholder's party affiliation."¹⁴² The court rejected the analogies drawn by the Democratic Party to the Wyoming and Kansas cases, stating: "[W]hile the principles advanced in *Rich-*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. See *supra* Part I.

140. *State ex rel. Biafore v. Tomblin*, 782 S.E.2d 223, 228 (W. Va. 2016) (quoting W. VA. CODE ANN. § 3-10-5(a) (West 2020)).

141. *Id.*

142. *Id.* at 229.

ards and *Wilson* are arguably laudable, this Court's role is to apply the language of our governing statute."¹⁴³

Justice Davis dissented, however, and accused the majority of ignoring the statute's ambiguity.¹⁴⁴ She noted that, while the language cited by the majority—that is, “the party with which the person holding the office immediately preceding the vacancy was affiliated”—was correctly interpreted “as referring to the party that the outgoing legislator belonged to at the time he/she vacated his/her office,” the majority ignored another provision of the same statute.¹⁴⁵ She pointed out that the statute required “‘the party executive committee of the state senatorial district in which the vacating senator resided *at the time of his or her election or appointment*’ to supply the Governor with the list of names. . . .”¹⁴⁶ She argued that these inconsistent references to what was, ostensibly, the same actor constituted “incongruous directives” that made the statute “internally inconsistent.”¹⁴⁷ Accordingly, she concluded that the statute was unconstitutional under the West Virginia Constitution because it deprived the people of the state senatorial district of effective representation.¹⁴⁸

5. Takeaways

The available caselaw is quite limited and, for the most part, yields inconsistent interpretations of similarly worded statutes. For example, the Kansas, Ohio, and West Virginia supreme courts reached different interpretations of statutes worded quite similarly. In cases involving party-switchers, despite working with similar concepts, each court reached a different result. The Kansas Supreme Court in *Wilson* and the Wyoming Supreme Court in *Richards* determined that the political party “of which the officer . . . whose position has become vacant was a member”¹⁴⁹ and the “political party to which the member whose office is vacant belonged,”¹⁵⁰ respectively, referred to the party with which the previous incumbent was *elected*.¹⁵¹ This result doesn't necessarily track with what we might expect about how the statute would be interpreted,¹⁵² but it ultimately reflects a conscious decision by each court to render a decision consistent with legislative intent.¹⁵³

143. *Id.* at 230.

144. *Id.* at 240.

145. *Id.* at 240 (Davis, J., dissenting).

146. *Id.* (quoting W. VA. CODE ANN. § 3-10-5(c) (West 2020)).

147. *Id.*

148. *Id.* (citing W. VA. CONST. art. II, § 2 (“The powers of government reside in all the citizens of the state, and can be rightfully exercised only in accordance with their will and appointment.”)).

149. KAN. STAT. ANN. § 25-3901(b) (2019).

150. WYO. STAT. ANN. § 18-3-524 (1999).

151. *Wilson v. Sebelius*, 72 P.3d 553, 559 (Kan. 2003); *Richards v. Bd. of Cty. Comm'rs*, 6 P.3d 1251, 1253 (Wyo. 2000).

152. See *supra* Part III.A.1 (discussing Kansas statute).

153. See *Wilson*, 72 P.3d at 559; *Richards*, 6 P.3d at 1253.

Meanwhile, the Ohio Supreme Court in *Herman* and the West Virginia Supreme Court of Appeals in *Biafore* determined that the “political party with which the last occupant of the office was affiliated”¹⁵⁴ and “the party with which the person holding the office immediately preceding the vacancy was affiliated,”¹⁵⁵ respectively, referred to the party in which the previous incumbent was a member *at the time of the vacancy*.¹⁵⁶

These cases, therefore, represent a split of authority in answering the ultimate question. Each of them dealt with an ambiguous statute that was silent as to the temporal quality of party affiliation or membership. That is, each of them referred to the party with which the previous incumbent was “a member,” “belonged,” or “was affiliated,” but didn’t provide a meaningful measuring point for that association. Though the statutes that the courts interpreted don’t always mirror the statutes and constitutional provisions in force today,¹⁵⁷ they nonetheless provide a meaningful body of caselaw in interpreting *some* of these statutes. However, none of these four cases address the affiliation or membership and the nomination or election distinctions identified earlier.¹⁵⁸ The conclusions about those distinctions, therefore, are untested.

IV. JUSTIFYING A “MOST RECENT ELECTION” BASED REPLACEMENT MODEL

Having reviewed the current state of the law and speculated as to how certain states answer the underlying question differently, this Part argues for the adoption of a specific model—one in which same-party replacements are determined on the basis of the last election,

154. State *ex rel.* *Herman v. Klopfleisch*, 651 N.E.2d 995, 996 (Ohio 1995) (quoting OHIO REV. CODE ANN. § 733.08 (West 1997), *amended by* OHIO REV. CODE ANN. § 733.08 (West 2016)).

155. State *ex rel.* *Biafore v. Tomblin*, 782 S.E.2d 223, 229–30 (W. Va. 2016) (quoting W. VA. CODE § 3-10-5 (West 2018)).

156. *Biafore*, 782 S.E.2d at 229–30; *Herman*, 651 N.E.2d at 998.

157. For example, four years after the Wyoming Supreme Court’s decision in *Richards*, the Wyoming Legislature amended the statute to clarify that party membership is determined by representation “at the time of” the official’s election. 2004 Wyo. Legis. Serv. 22 (West, Westlaw through 2004 Sess.); *see* WYO. STAT. ANN. § 18-3-524 (West 2020) (referring to “the political party which the member whose office is vacant represented at the time of his election”). Similarly, after the decision in *Biafore*, the West Virginia Legislature amended the statute to affirm that party membership is determined by party membership “at the time the vacancy occurred.” 2018 W. Va. Acts 665; *see* W. VA. CODE ANN. § 3-10-5(a) (West 2018) (referring to “the same political party with which the person holding the office immediately preceding the vacancy was affiliated at the time the vacancy occurred”). And as mentioned previously, the Ohio statute interpreted includes different language than the state constitutional provision relating to legislative vacancies. *Compare* OHIO REV. CODE ANN. § 733.08 (West 1997), *amended by* OHIO REV. CODE ANN. § 733.08 (West 2016), *with* OHIO CONST. art. II, § 11.

158. *See supra* Part III.A.

not on the vacating member's most recent party affiliation. In so doing, it proceeds in three parts: First, Section A outlines the basic principles underlying same-party replacement schemes in the first place. Second, Section B explains how the operation of same-party replacements directly supports effective governance and maximizing voter choice. Finally, Section C argues that these principles strongly support clarification of the constitutional or statutory provisions at issue to guarantee that party-switching shouldn't preserve a party's ill-gotten gains.

A. *The Principles*

Same-party appointment schemes seek to guarantee accurate and efficient representation for the voters in each legislative district.¹⁵⁹ It is often repeated that “people vote for an individual candidate and not for a party,”¹⁶⁰ but this statement is less an aphorism and more an empirical claim not supported by the data. Party identification is “one of the most important factors, if not the single most important factor, in models of voting behavior in the American public.”¹⁶¹ Voters will import their partisan preferences even into ostensibly nonpartisan elections, which is strong support for the pervasiveness of partisan voting.¹⁶² Moreover, ticket-splitting is rapidly declining,¹⁶³ especially in recent elections.¹⁶⁴ As a result, it is simply inaccurate to say that voters vote for the person any more than they vote for the person's party or ideology.¹⁶⁵

Accordingly, same-party appointment schemes operate with this behavior in mind and do a better job of matching legislative representation to voter intent—that is, these schemes are better than special elections at providing voters with *accurate* representation following a vacancy. Special elections, the alternative procedure, feature low, un-

159. Yeagain, *supra* note 41, at 619–23.

160. *See, e.g.*, Op. Tenn. Att'y Gen. 81-163 (Mar. 13, 1981) (advising that a same-party requirement for legislative appointments may be an unconstitutional addition to legislators' qualifications).

161. *E.g.*, Chris W. Bonneau & Damon M. Cann, *Party Identification and Vote Choice in Partisan and Nonpartisan Elections*, 37 POL. BEHAV. 43, 44 (2015).

162. *Id.* at 61–62.

163. BARRY C. BURDEN & DAVID C. KIMBALL, WHY AMERICANS SPLIT THEIR TICKETS: CAMPAIGNS, COMPETITION, AND DIVIDED GOVERNMENT 163 (2002); David C. Kimball, *A Decline in Ticket Splitting and the Increasing Salience of Party Labels*, in MODELS OF VOTING IN PRESIDENTIAL ELECTIONS: THE 2000 U.S. ELECTION 161, 161 (Herbert F. Weisberg & Clyde Wilcox eds., 2004).

164. *E.g.*, Drew Desilver, *Split-Ticket Districts, Once Common, Are Now Rare*, PEW RSCH. CTR. (Aug. 8, 2016), <https://www.pewresearch.org/fact-tank/2016/08/08/split-ticket-districts-once-common-are-now-rare/> [<https://perma.cc/T2YN-RFYD>]; Geoffrey Skelley, *Split-Ticket Voting Hit a New Low in 2018 Senate and Governor Races*, FIVETHIRTYEIGHT (Nov. 19, 2018, 6:00 AM), <https://fivethirtyeight.com/features/split-ticket-voting-hit-a-new-low-in-2018-senate-and-governor-races/> [<https://perma.cc/V4Q7-X9L7>].

165. *See* Bonneau & Cann, *supra* note 161, at 44.

representative turnout and therefore frequently see results that are inconsistent with the desires of the broader electorate. With that in mind, it's difficult to conclude that special elections are "democratic" in the ways that matter most. Same-party replacements don't suffer from this infirmity. They instead base legislative representation on the most important metrics of voter choice—party choice and ideology¹⁶⁶—as expressed by the broader electorate at the most recent high-turnout election.

Moreover, these schemes maximize accurate *and efficient* representation. While special elections can take months to occur¹⁶⁷—and even then are sometimes delayed for more than a year—replacement schemes waste little time in filling vacancies. In a state with special elections, an untimely state legislative vacancy can leave a district entirely unrepresented in one chamber of a legislature during an entire legislative session. In short, same-party legislative appointment schemes prevent both *mis-* and *non-*representations in all practical senses.

But it is worth noting here that replacement schemes, by themselves, accomplish only the second goal: efficient representation. It is the presence of the same-party requirement that accomplishes the first. When a state lacks a same-party requirement in filling legislative vacancies by appointment—as a handful of states do today—the practical result is a mismatch between voter intent and representation.¹⁶⁸ Several early American examples, like Kentucky, Maine, Maryland, Massachusetts, and New Hampshire, which employed these schemes in the eighteenth and nineteenth centuries, are cautionary tales of what can go wrong.¹⁶⁹ In those states, legislatures filled vacancies themselves and frequently engaged in machinations to *cause* vacancies where they did not otherwise exist so that they could fill them and further cement their power.¹⁷⁰ The chief advantage of legislative ap-

166. See Seth Masket & Boris Shor, Primary Electorates vs. Party Elites: Who Are the Polarizers? 11 (May 8, 2013) (unpublished article) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2262076) (concluding that there is no ideological difference between elected and appointed legislators in Colorado and Illinois).

167. Most concerningly, special elections can delay effective representation *even when they are uncontested elections*. For example, State Representative Dan Daley won a special election to fill a vacancy in the Florida House by default when he was the only candidate to file at the February filing deadline. But because the "election" didn't occur until June 18—despite the fact that, under Florida law, uncontested elections don't appear on the ballot *at all*, FLA. STAT. ANN. § 101.151(7) (West 2020)—Daley was not sworn in until June. Ryan Nicol, *Dan Daley Ready to Be Seated Months After Securing House Seat*, FLA. POL. (June 18, 2019), <https://floridapolitics.com/archives/299094-daley-ready-seated-hd-97> [<https://perma.cc/VB72-78AV>]; see FLA. CONST. art. III, § 15(d) ("Members of the legislature shall take office upon election.").

168. Yeargain, *supra* note 41, at 619–23.

169. Tyler Yeargain, *New England State Senates: Case Studies for Revisiting the Indirect Election of Legislators*, 19 U.N.H. L. REV. (forthcoming Spring 2021).

170. *Id.*

pointment schemes—that is, ensuring as close a match between voter intent and representation as possible—is not only nonexistent in such states, but it is actively undermined.

B. *The Operation*

As explained, same-party replacement schemes preserve the status quo between elections. Rather than forcing parties to defend their majorities at low-turnout special elections—which could determine control of the entire state government¹⁷¹—or endure a partial or total loss of power following an untimely vacancy,¹⁷² they ultimately allow individual legislators greater freedom in making individual choices.

A legislative majority shouldn't depend on a single person continuing to hold office. This produces perverse incentives for both parties and politicians. Individual legislators may be *strongly* encouraged to run for re-election, even when they would rather retire.¹⁷³ Parties may encourage lawmakers in ill health to remain in office despite medical recommendations to the contrary so that the other party doesn't get to fill their seat¹⁷⁴—or, at least, to time their resignations to avoid an untimely special election.¹⁷⁵

171. *E.g.*, O'Sullivan, *supra* note 58 (discussing Washington state senate special election that determined control of the state government).

172. *E.g.*, Vozzella, *supra* note 59 (discussing Virginia state senate vacancy that shifted control of the chamber to Republicans).

173. In Virginia, for example, Democratic State Senator Chuck Colgan, the then longest-serving member of the Senate, was strongly encouraged to run for re-election in 2011 by the state party following a cancer diagnosis to avoid the party losing the seat. Rosalind S. Helderman, *Colgan, Key Va. Senate Democrat, to Run Again in November*, WASH. POST (May 31, 2011), https://www.washingtonpost.com/blogs/virginia-politics//colgan-key-va-senate-democrat-again-november/2011/05/31/_blog.html [<https://perma.cc/2VB4-TE7V>]. “It is the third time party leaders have coaxed Colgan into a reelection campaign—in 2003 and 2007 he had indicated that he would step down, before being convinced to run again by Govs. Mark Warner and Tim Kaine.” *Id.*

174. For example, shortly after Democrats won control of the U.S. Senate in the 2006 midterm elections, Senator Tim Johnson, a Democrat from South Dakota, suffered a stroke. Kate Zernike, *Ill Senator Is Called Responsive; Capital Is Riveted*, N.Y. TIMES (Dec. 15, 2006), <https://www.nytimes.com/2006/12/15/washington/> [<https://perma.cc/AGP5-EKW6>]. Had Johnson died or resigned prior to the expiration of his term, he would have, in all likelihood, been replaced by a Republican. *See id.*

175. For example, the late Senator John McCain deliberately timed his resignation to avoid a 2018 special election to fill his seat. Burgess Everett, *GOP Hopes of Holding Senate Rise After Arizona Deadline*, POLITICO (May 30, 2018, 4:28 PM), <https://www.politico.com//2018//30/arizona-senate-special-election-deadline-gop-614165> [<https://perma.cc/H4H9-Q5S8>]. Similarly, former Congressman Duncan Hunter delayed his resignation following his indictment, likely to avoid a special election. *See* Melanie Zanona, *Rep. Duncan Hunter Resigns from Congress*, POLITICO, <https://www.politico.com/news/2020/01/07/rep-duncan-hunter-resigns-from-congress-095> [<https://perma.cc/U8AW-2WZM>] (noting that Governor Gavin Newsom “does not have to call a special election because the nomination period has closed and it’s an election year, raising the prospect that the seat could remain vacant for the rest of 2020”).

And perhaps more concerningly, the method by which a state will fill its legislators' seats frequently deters them from running for higher office. U.S. Senator Sherrod Brown was considered as a potential running mate for Hillary Clinton in 2016 and as a potential presidential candidate in 2020, but ultimately declined both opportunities—perhaps in part because, if he vacated his seat, Ohio's Republican Governor would have replaced him with a Republican.¹⁷⁶ Bernie Sanders and Elizabeth Warren faced similar problems but opted to run for president anyway, perhaps comforted by the knowledge that though their states are led by Republican Governors, Democrats have a supermajority in each chamber and could require the governor to make a same-party appointment.¹⁷⁷

A similar type of fear may discourage governors from appointing state legislators to their cabinets. Following their 2018 elections, Connecticut Governor Ned Lamont and Minnesota Governor Tim Walz, both Democrats, appointed state legislators of their parties to their cabinets.¹⁷⁸ In both cases, subsequent special elections to fill the vacancies resulted in Republicans winning the seats.¹⁷⁹ Though this may have been of little concern to Lamont, where Connecticut Democrats have a solid majority in the legislature,¹⁸⁰ in Walz's case, it meant that Minnesota Republicans' one-seat majority in the State Senate became a two-seat majority, making it that much harder to win control of the

176. Eric Ostermeier, *The Potential Pitfall of Selecting Sherrod Brown as Clinton's VP*, SMART POL. (May 13, 2016), <https://editions.lib.umn.edu/smartpolitics///the-potential-pitfall-of-selecting-sherrod-brown-as-clintons-vp/> [<https://perma.cc/RPP3-XWJ4>]; Andrew J. Tobias, *So If Sherrod Brown Becomes President, Who Would Be Ohio's Next Senator? A Way-too-Early List of Candidates.*, CLEV.COM, <https://www.cleveland.com///11/a442bf5a981844/so-if-sherrod-brown-becomes-pr.html> (last updated Sept. 19, 2019) [<https://perma.cc/5QUW-VH4R>].

177. Geoffrey Skelley, *How Winning the White House Could Cost Democrats the Senate (at Least Temporarily)*, FIVETHIRTYEIGHT (May 22, 2019, 6:30 AM), <https://fivethirtyeight.com//the-white-house-could-cost-democrats-the-senate-at-least-temporarily/> [<https://perma.cc/7MV6-WZ9S>]; Stephen Wolf, *How Democrats Can Avoid Handing Senate Seats to the GOP If Warren or Sanders Win the Presidency*, DAILY KOS (Jan. 15, 2020, 12:11 PM), <https://www.dailykos.com//1911306> [<https://perma.cc/EHW6-XYU2>].

178. Christopher Magan, *Tim Walz Announces New Cabinet Picks, Including State Sen. Tony Lourey to Head Human Services*, TWIN CITIES PIONEER PRESS, <https://www.twincities.com//01/03/tim-walz-tony-lourey-mn-human-services/> [<https://perma.cc/R8MQ-Z2M6>]; Mark Pazniokas, *Lamont Hiring Three Senators, Two House Members*, CONN. MIRROR (Jan. 7, 2019), <https://ctmirror.org//07/lamont-hiring-three-senators-two-house-members/> [<https://perma.cc/5A9P-CB3B>].

179. Peter Callaghan, *The 2020 Fight to Control the Minnesota Senate Will Focus on Just a Few Seats. And It's Already Started.*, MINN. POST (Oct. 9, 2019), <https://www.minnpost.com/state-government/2019/10/the-2020-fight-to-control-the-minnesota-senate-will-focus-on-just-a-few-seats-and-its-already-started/> [<https://perma.cc/8HNY-HQF2>]; Mark Pazniokas, *GOP Flips Two Legislative Seats in Five Special Elections*, CONN. MIRROR (Feb. 26, 2019), <https://ctmirror.org/2019/02/26/gop-flip-two-legislative-five-special-elections/> [<https://perma.cc/YW8E-V4T9>].

180. Pazniokas, *supra* note 179 (“Even with the losses, Democrats retained solid majorities of 91–60 in the House and 22–14 in the Senate.”).

chamber in 2020.¹⁸¹ Though the practical response to this may be that governors should pragmatically avoid this sort of outcome by not appointing state legislators to their administrations,¹⁸² it seems bizarre to argue that any governor should forego merit and competence¹⁸³ out of fear of what may happen in an unrepresentative and undemocratic special election.¹⁸⁴

Moreover, the presence of a same-party appointment requirement is especially important in states where one party democratically and legitimately wins large legislative majorities. In these states, because the other party's voters are at such a clear disadvantage, the legislators that they do manage to elect are that much more valuable to them, and sometimes serve as the difference between the other party having a veto-proof majority or a supermajority that can amend the constitution with no support from the minority. For example, in 2002, Democratic State Senator Dick Hagen died before the election but was nevertheless re-elected.¹⁸⁵ In 2003, Republican Governor Mike Rounds appointed Michael LaPointe,¹⁸⁶ who *overwhelmingly* lost reelection, 69–31%, to Democrat Theresa Two Bulls in 2004.¹⁸⁷ LaPointe's loss is no surprise—the district that he represented included Oglala Lakota County, which is home to the Pine Ridge Indian Reservation and is the county in which Barack Obama received the highest

181. Callaghan, *supra* note 179.

182. David Nir, *Why Democratic Governors Shouldn't Tap Democratic Legislators in At-Risk Seats for Government Jobs*, DAILY KOS (Feb. 6, 2019, 6:25 PM), <https://www.dailykos.com/6/1832854/-Why-Democratic-governors-shouldn-t-tap-Democratic-legislators-in-at-risk-seats-for-government-jobs> [<https://perma.cc/6VD2-HH3W>].

183. Ironically, several months after Democrats lost the special election to replace Tony Lourey in the Minnesota State Senate, Lourey resigned from his cabinet post. Steve Karnowski, *Minnesota's Human Resources Chief Abruptly Quits Amid Turmoil*, ASSOCIATED PRESS (July 15, 2019), <https://apnews.com/13fa3685b87949d491017ceb08431b9e> [<https://perma.cc/4RC5-94TQ>].

184. This concern also arises when vacancies are filled by means other than special elections or same-party appointments. For example, in states where governors and their next-in-lines are elected separately, the governors have a strong incentive to remain in office when their next-in-line is a member of the opposing party. *See, e.g., State of Fear*, Editorial, N.Y. TIMES (Dec. 8, 2008), <https://www.nytimes.com/2008/12/08/opinion/08mon2.html> [<https://perma.cc/AMG2-DB5V>] (discussing that Arizona Governor Janet Napolitano, a Democrat, would be succeeded by Republican Secretary of State Jan Brewer after Napolitano was appointed by President Barack Obama to be Secretary of Homeland Security).

185. Bob Mercer, *Nelson Resignation Gives Governor a Sixth Vacancy in Legislature to Fill This Year*, KELO-TV, <https://www.keloland.com/news/capitol-news-bureau/nelson-resignation-gives-governor-a-sixth-vacancy-in-legislature-to-fill-this-year/> [<https://perma.cc/5GAL-ZRYN>].

186. *Id.*

187. *2004 Legislature Official Returns*, S.D. SEC'Y OF STATE, https://sdsos.gov/elections-voting/election-history/2004/2004_legislature_official>Returns.aspx [<https://perma.cc/R3H2-ZXMS>].

percentage of the vote nationwide in 2012.¹⁸⁸ It's little surprise that in South Dakota, which has the country's longest streak of electing Republican governors—it hasn't elected a Democrat since 1974¹⁸⁹—Democratic legislators “joke amongst themselves ‘to drive safely, because remember, the governor has the power to appoint.’”¹⁹⁰

This single mismatch—that is, an appointee whose ideology and party affiliation are inconsistent with the district that she is appointed to represent—results in more than just ideological mismatch. In largely white, conservative states, a mismatch can also mean the deprivation of a racial minority's ability to be represented by a “candidate[] of their choice.”¹⁹¹ Even though mismatches may not last more than a year or two—though some states allow legislative appointees to serve the *remainder* of the term, rather than just until the next election—these mismatches are just another way, beyond the Electoral College,¹⁹² national and state legislatures,¹⁹³ and federal and state judiciaries,¹⁹⁴ that voters of color are underrepresented. While same-

188. Joshua Green, *Guess Which U.S. County Most Loves Obama*, BLOOMBERG (Jan. 23, 2013, 3:06 PM), <https://www.bloomberg.com/news/articles/2013-01-23/guess-which-u-dot-s-dot-county—obama> [https://perma.cc/KD68-A6ET].

189. Eric Ostermeier, *Can Billie Sutton End the Nation's Longest Democratic Gubernatorial Drought?*, SMART POL. (Oct. 9, 2018), <https://editions.lib.umn.edu//10/09/can-billie-sutton-end-the-nations-longest-democratic-gubernatorial-drought/> [https://perma.cc/9D7B-LEHL].

190. Tim Anderson, *Midwest's States Take Different Approaches to Filling Legislative Vacancies*, COUNCIL OF ST. GOV'TS (Sept. 18, 2018, 12:16 PM), <https://knowledgecenter.csg.org/content/midwests-states-take-different-approaches-filling-legislative-vacancies> [https://perma.cc/QR6T-83Q3].

191. See *Thornburg v. Gingles*, 478 U.S. 30, 39–40 (1986) (noting that, in majority-minority districts, one of the relevant metrics is determining whether the district's racial minority has the opportunity “to participate effectively in the political processes and to elect candidates of their choice”). Some scholars have noted that “[t]his theory only holds true, however, if the minority vote is monolithic; in other words, the standard works only in the absence of healthy competition and multiple viable minority-preferred candidates.” Janai S. Nelson, *White Challengers, Black Majorities: Reconciling Competition in Majority-Minority Districts with the Promise of the Voting Rights Act*, 95 GEO. L.J. 1287, 1299 (2007).

192. See generally Matthew M. Hoffman, *The Illegitimate President: Minority Vote Dilution and the Electoral College*, 105 YALE L.J. 935 (1996) (arguing that the Electoral College deprives voters of color of the ability to elect candidates of their choice so persistently as to be a *Gingles* violation).

193. See generally, e.g., David Leonhardt, Opinion, *The Senate: Affirmative Action for White People*, N.Y. TIMES (Oct. 14, 2018), <https://www.nytimes.com/2018/10/14/opinion/dc-puerto-rico-statehood-senate.html> [https://perma.cc/WVM3-9VYP] (arguing that voters of color are underrepresented in the U.S. Senate); Kim Soffen, *How Racial Gerrymandering Deprives Black People of Political Power*, WASH. POST (June 9, 2016, 12:01 PM), <https://www.washingtonpost.com/news/wp/06/09-widespread-practice-to-politically-empower-african-americans-might-actually-harm-them/> [https://perma.cc/EK6M-83HJ] (arguing that voters of color are underrepresented in Congress and state legislatures because of gerrymandering).

194. Tracey E. George & Albert H. Yoon, *The Gavel Gap: Who Sits in Judgment on State Courts?*, AM. CONST. SOC'Y FOR L. & POL'Y 8–9 (2016), <https://gavelgap.org/pdf/gavel-gap-report.pdf> [https://perma.cc/CGCG-D7KR]; Danielle Root et al., *Building a More Inclusive Federal Judiciary*, CTR. FOR AM. PROGRESS (Oct. 3, 2019, 8:15 AM),

party requirements don't *explicitly* incorporate protections that ensure that voters of color are represented by candidates of their choice, most same-party replacement states incorporate local input in the selection process¹⁹⁵ such that concerns of a mismatch are likely to be less pronounced.

C. *The Argument*

The argument in favor of filling legislative vacancies based on the results of the most recent election, *not* based on the legislator's most recent partisan affiliation, is simple: Voters should get what they voted for. Both party-switching and vacancies result in some degree of misrepresentation. Though party-switchers are far from doomed electorally,¹⁹⁶ they were elected into office with the support of people who voted for them with the expectation that they were a member of a particular party, and that they would support that party's agenda. Few voters, if any, vote for someone with the expectation that she will switch parties. And regardless of how a state or territory chooses to fill its vacancies, no one filling a vacancy will be *identical* to her successor.

Given the mismatch inherent in the problem—even under the best circumstances—the goal should be reducing the mismatch as much as possible. Put another way, in a partisan election, voters are selecting two things when they vote for a particular person: the individual person and the person's party.¹⁹⁷ A vacancy occurring makes voters having *both* of those things impossible—so if voters can't have both, they should at least have one. (And short of raising a deceased legislator from the dead, or un-electing a state legislator from another office, guaranteeing voters the same party is the only way to give voters one of those two things.) When a legislator switches parties and *then* leaves office, replacing her with a member of her new party would frustrate expectations in more ways than one. If people voted for West Virginia State Senate candidate Daniel Hall—a member of the Democratic Party who then switches to the Republican Party—it would

<https://www.americanprogress.org/courts/reports/10/03/475359/> [https://perma.cc/5S87-AH4S]; see generally Alwyn Barr, *The Impact of Race in Shaping Judicial Districts, 1876–1907*, 108 SW. HIST. Q. 423 (2005) (noting that state judicial districts were deliberately drawn to prevent black representation in the South).

195. See Yeargain, *supra* note 41, at 604–08.

196. It is the case, however, that party-switchers “fare worse in general elections following their party switches when compared to elections before their switches and when compared to incumbent non-switchers,” but that these “negative electoral outcomes after a party switch are generally avoided when the legislator has defected to the majority party.” Christian R. Grose, *Is It Better to Join the Majority? The Electoral Effects of Party Switching by Incumbent Southern State Legislators, 1972 to 2000*, 25 AM. REV. POL. 79, 80 (2004).

197. As mentioned previously, the dominant political science literature suggests that voters are much more strongly motivated by the candidate's party than her individual identity. See *supra* notes 161–65.

make little sense to fill Hall's vacancy in a way that deprives voters of *both* their choice of legislator (which, in the case of a vacancy, is inevitable) *and* their choice of party (which is far from inevitable).

Though the four state supreme courts to have addressed these questions have done so inconsistently, the statutory text, combined with the available intent and the clear absurdity that would flow with a contrary interpretation, would strongly support judicial determinations that favor an election-based approach.

Turning first to the text of most of the statutes¹⁹⁸—that is, the provisions that refer to the “same party”—the text is plainly ambiguous.¹⁹⁹ As this Article argued earlier, though most of the statutes or constitutional provisions use the phrase “same party,” very few make clear what the party is meant to be the “same” *as*.²⁰⁰ In the case of party-switching, there are two viable options: the same party as the incumbent at the prior election or the same party as the incumbent at resignation. There are viable arguments in support of either interpretation—and so the provisions are ambiguous. With that determination in hand, we would ordinarily turn to gauging legislative intent.²⁰¹

Admittedly, the legislative history of legislative appointment schemes does not reveal a specific intent to avoid this sort of outcome. But the available intent, though thin, is strongly suggestive that these schemes were adopted to ensure a seamless transition—both temporally and in terms of representation—following a vacancy.²⁰² Idaho, for example, adopted an appointment scheme in 1923 but lacked a same-party requirement until 1971.²⁰³ Though the State's governors adopted an informal custom of making same-party appointments, Governor Cecil D. Andrus advocated for the formalization of this custom, arguing that “accidents of death or resignation should not be al-

198. *E.g.*, *Duncan v. Walker*, 533 U.S. 167, 172 (2001) (“We begin, as always, with the language of the statute.”).

199. *Wilson v. Sebelius*, 72 P.3d 553, 556–59 (Kan. 2003) (finding the Kansas statute ambiguous); *Richard v. Bd of Cty. Comm’rs*, 6 P.3d 1251, 1253 (Wyo. 2000) (“Finding the statute does not address or anticipate the situation presented in this case, we hold the statute is ambiguous.”); *State ex rel. Herman v. Klopfleisch*, 651 N.E.2d 995, 998 (Ohio 1995) (“Applying the usual, normal and customary meaning of ‘affiliated,’ it is evident that [the statute] is ambiguous, in that it is unclear whether it refers to the party which the ex-mayor was affiliated with at the time he was elected or at the time he left office, and if it is the latter, what test to apply to determine party affiliation.”). *But see State ex rel. Biafore v. Tomblin*, 782 S.E.2d 223, 228 (W. Va. 2016) (“Upon this Court’s review, we find [the statute] clear and unambiguous.”).

200. *See supra* Part III.A.

201. *E.g.*, *United States v. Article of Drug Bacto-Unidisk*, 394 U.S. 784, 799 (1969) (“[W]here the statute’s language seemed insufficiently precise, the ‘natural way’ to draw the line ‘is in light of the statutory purpose.’”) (citation omitted).

202. *See* Yeargain, *supra* note 41, at 620–23.

203. *Id.*

lowed to thwart the political preferences of the electorate.”²⁰⁴ Similarly, at the Sixth Illinois Constitutional Convention in 1970, the author of the constitutional amendment that eventually provided for same-party appointments noted that the purpose was to “protect the representation of that district and . . . protect the political party that achieved the seat in the [last] election.”²⁰⁵ And, of course, the Supreme Court, in evaluating the constitutionality of Puerto Rico’s same-party appointment statute, noted that the intent of the statute was “to protect the mandate of the preceding election and to preserve the ‘legislative balance’ until the next general election is held.”²⁰⁶ The Court concluded that this interest in “continuity of party representation” was reasonable.²⁰⁷

But given the inconsistency with which courts have addressed these questions, a constitutional or statutory solution that avoids this mismatch is desirable. And in crafting such a solution, there are plenty of good sources to choose from. The ideal scheme should pull from the states that measure partisan affiliation by the most recent election, like most states (seem to) do.²⁰⁸ Moreover, the scheme should also recognize the unusual situations that can develop if someone was elected as a write-in candidate or as an independent, but is practically affiliated with a party²⁰⁹—it can pull from Alaska and Illinois in including a legislator’s partisan membership in the first session in which she served.²¹⁰ And, most importantly, the scheme should either *explicitly* proscribe a procedure for filling a vacancy caused by a party-switcher, as Arizona has done,²¹¹ or be phrased in a manner that makes clear the procedure for filling such a vacancy.

This Article’s goal isn’t to proscribe a specific legislative appointment scheme—it instead recognizes that states have rightfully acted as laboratories of democracy in developing different appointment procedures with different appointing actors.²¹² Nonetheless, any scheme should include a definition for “party” roughly tracking with Arizona’s definition, for example:

204. H.R. Journal, 41st Legis. of Idaho, 1st Reg. Sess. 19 (1917) (statement of Gov. Cecil D. Andrus).

205. 4 Record of Proceedings, Sixth Illinois Constitutional Convention, Verbatim Transcripts: July 10, 1970 to August 5, 1970, 2667 (1970) [hereinafter Sixth Illinois Constitutional Convention Proceedings].

206. *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 13 (1982).

207. *Id.*

208. *See supra* Part III.A.2.

209. *See supra* notes 87–88 and accompanying text.

210. ALASKA STAT. ANN. § 15.40.330(b) (West 2020); 10 ILL. COMP. STAT. ANN. § 5/25-6(b) (West 2019).

211. *E.g.*, ARIZ. REV. STAT. ANN. § 41-1202(C) (West 2018).

212. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

For the purposes of this section, “party” means the same political party of which the person who was elected to or appointed to the office was a member when the vacating officeholder was most recently elected or appointed to that office. In the event that the vacating officeholder was elected as a write-in or unaffiliated candidate, “party” means the same political party with which the person who was elected to the office affiliated while a member of the legislature, if any; if the vacating officeholder was not affiliated with any such party, the [appointing actor] may fill the vacancy with any otherwise-eligible candidate.

But given how rare both legislative vacancies *and* party-switching are,²¹³ much less the interaction between the two, why is this worth addressing? First, it’s not clear exactly how often this phenomenon occurs—though there are only a handful of cases in which this question has presented itself, there *are* other instances of this question arising that ultimately did not result in litigation.²¹⁴ Second, answering these questions implicates far more than just state legislative vacancies. As several of the cases discussed in this Article make clear, many states apply same-party replacement requirements to other offices. Though same-party requirements are most commonly imposed in filling state legislative vacancies, they are also imposed in some states for filling vacancies for statewide elected officials,²¹⁵ district attorneys,²¹⁶ county officials,²¹⁷ municipal officials,²¹⁸ and—most controversially of

213. See *supra* Part II.B.

214. See, e.g., Jesse Paul, *Rep. Steve Lebsock Became a Republican Minutes Before Being Expelled from the Legislature, Meaning GOP Could Get His Seat*, DENVER POST, <https://www.denverpost.com/2018/03/02/steve-lebsock-republican-colorado-legislature-expulsion/> [<https://perma.cc/5RKK-JHJV>] (noting that Colorado State Representative Steve Lebsock, a Democrat, switched to the Republican Party shortly before he was expelled from the State House, enabling the local Republican Party to replace him).

215. MD. CONST. art. V, § 5 (attorney general vacancy); *id.* art. VI, § 1(c) (comptroller vacancy); UTAH CONST. art. VII, § 10(2) (vacancy in state auditor, state treasurer, or attorney general); IND. CODE ANN. § 3-13-4-3 (“vacancy that occurs in a state office other than governor, lieutenant governor, or a judicial office”); OR. REV. STAT. § 236.100 (“any partisan elective office in this state”); W. VA. CODE § 3-10-3(a) (vacancy in secretary of state, auditor, treasurer, attorney general, and commissioner of agriculture); WYO. STAT. § 22-18-111(a)(i) (“any state office other than the governor”).

216. E.g., IND. CODE ANN. § 3-13-6-2(b); W. VA. CODE ANN. § 3-10-8.

217. E.g., 10 ILL. COMP. STAT. ANN. § 5/25-11 (county officers); IND. CODE ANN. § 3-13-7-1 (county officers); KAN. STAT. ANN. §§ 19-203 (county commissioner), 19-303 (county clerk), 19-504 (county treasurer), 19-715 (county attorney), 19-804 (county sheriff), 19-1203 (county register of deeds); MD. CODE ANN. § 9-402(c); MONT. CODE ANN. § 7-4-2106 (county commissioner); N.C. GEN. STAT. ANN. §§ 153A-27, 153A-27.1 (county commissioner); OHIO REV. CODE ANN. § 305.02 (“county commissioner, prosecuting attorney, county auditor, county treasurer, clerk of the court of common pleas, sheriff, county recorder, county engineer, or coroner”); W. VA. CODE ANN. §§ 3-10-6 (circuit court clerk), 3-10-7 (county commissioner and clerk of county commission), 3-10-8 (“sheriff, assessor or county surveyor”).

218. E.g., IND. CODE ANN. §§ 3-13-8-1 (“city office” other than city-court judge), 3-13-9-1 (“town office”); 3-13-10-1 (“township office”); OHIO REV. CODE ANN. § 733.08

all—U.S. Senators.²¹⁹ Though data is generally limited on the frequency of party-switching at the local or county level,²²⁰ it certainly happens. Accordingly, the legal questions presented by party-switching in states that employ same-party replacement schemes are likely to present in other contexts, so answering this question correctly matters beyond the scope of legislative appointments.

But third, in any event, the unlikelihood of an event shouldn't alter the need to codify what happens if it *does* occur. For example, most states have emergency-succession provisions that allow for the immediate filling of vacancies if a mass casualty event occurs and a substantial portion of the legislature is wiped out.²²¹ The United States Constitution allowed Congress to provide a procedure in the unlikely event of a dual vacancy in the offices of President *and* Vice President,²²² which Congress did shortly after the Constitution was ratified.²²³ Some states have followed the federal government's lead and have similarly adopted procedures for filling dual vacancies in the offices of Governor and Lieutenant Governor.²²⁴

More importantly, however, the resolution of this dual-vacancy question has intrinsic value because of what it represents. Regardless of our position on *what* the ideal outcome is, it's obvious that there should be one. Many state legislative chambers are governed by parties with slim majorities.²²⁵ Though it's rare for special elections or

(mayor). Because this Article is chiefly focused on state legislative vacancies, the state-level examples identified in notes 216, 217, and 218, *supra*, of how the same-party requirement is applied to other offices are meant to be representative but not exclusive.

219. ARIZ. REV. STAT. ANN. § 16-222(C); HAW. REV. STAT. § 17-1; MD. CODE ANN., ELEC. LAW § 8-6023(a); N.C. GEN. STAT. § 163-12; UTAH CODE ANN. § 20A-1-502(4)(a); WYO. REV. STAT. ANN. § 22-18-111(i).

220. *E.g.*, Glaser, *supra* note 51, at 69 (“Hundreds of state and local officeholders also have [switched from the Democratic to Republican Party in the South], though it is difficult to gauge exactly how many since such decentralized information is so hard to come by.”).

221. Eric R. Daleo, *State Constitutions and Legislative Continuity in a 9/11 World: Surviving an “Enemy Attack”*, 58 DEPAUL L. REV. 919, 936–38 (2009).

222. U.S. CONST. art. II, § 1, cl. 6 (“[T]he Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.”).

223. AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 170 (2005).

224. *E.g.*, MD. CONST. art. II, § 6 (“If vacancies in the offices of Governor and Lieutenant Governor exist at the same time, the General Assembly shall convene forthwith, and the office of Governor shall be filled for the remainder of the term by the affirmative vote of a majority of all members of the General Assembly in joint session.”); ALASKA STAT. ANN. § 44.19.046 (West 2019) (“If vacancies in the office of governor and the office of lieutenant governor occur simultaneously, the person appointed under [section] 44.19.040 succeeds directly to the office of acting governor until successors to the respective offices are elected in a special election.”).

225. *E.g.*, *Post Election 2019 State & Legislative Partisan Composition*, NAT’L CONF. ST. LEGISLATURES, https://www.ncsl.org/Portals/1/Documents//Legis_Control__%20Nov%2022nd.pdf [https://perma.cc/ACF9-EH6B].

party-switching to change control of a chamber,²²⁶ it has happened frequently enough that states must have answers to these questions. In the abstract, in a state like South Dakota or Wyoming, where Republicans have virtually insurmountable legislative majorities,²²⁷ or in a state like Maryland or Vermont, where the same is true of Democrats,²²⁸ it may make little sense to agonize over how to replace a single legislator. But for many of the other states that employ legislative appointments, the chambers are more evenly divided.²²⁹ And even for states with consistently large majorities for one party, *one* legislator could be the difference between a veto-proof majority (or a supermajority to amend the state's constitution) or not.²³⁰

Finally, making a same-party appointment based on a legislator's registration or affiliation at the time of the vacancy creates perverse incentives for legislators. In Colorado, for example, the Democratic majority in the House of Representatives moved to expel Democratic State Representative Steve Lebsock following serious sexual harassment allegations.²³¹ But right before the expulsion vote, Lebsock switched parties and became a Republican, thereby enabling Republicans to fill his seat.²³² The Colorado Democratic Party considered filing a lawsuit to stop the vacancy from being filled with a Republican appointee²³³ but ultimately didn't. Getting legislative leaders to act to

226. See, e.g., Ralph Jimenez, *With Election Defeat, N.H. Democrats Lose Majority in Senate*, BOS. GLOBE, Dec. 9, 1999, at B19 (noting that a special election for the New Hampshire State Senate resulted in Democrats losing control of the chamber); O'Sullivan, *supra* note 58 (discussing Washington State Senate special election that determined control of the state government); Vozzella, *supra* note 59 (discussing Virginia State Senate vacancy that shifted control of the chamber to Republicans).

227. For example, following the most recent elections, Republicans have a 30–5 majority in the South Dakota State Senate and a 59–11 majority in the State House, and a 27–3 majority in the Wyoming State Senate and a 50–9 majority in the State House. *Post Election 2019 State & Legislative Partisan Composition*, *supra* note 225.

228. Democrats have a 32–15 majority in the Maryland State Senate and a 99–42 majority in the State House, and a 22–6–2 majority in the Vermont State Senate and a 95–43–12 majority in the State House. *Id.*

229. See *Filling Legislative Vacancies*, NAT'L CONF. ST. LEGISLATURES, <https://www.ncsl.org/research/elections-and-campaigns/filling-legislative-vacancies.aspx> [<https://perma.cc/66TN-LURY>].

230. See, e.g., Karen Shanton, *Half the States Will Have Veto-Proof Majorities*, NAT'L CONF. ST. LEGISLATURES: THE THICKET AT ST. LEGISLATURES, (NOV. 27, 2012), https://ncsl.typepad.com/the_thicket/2012/11/half-the-states-will-have-veto-proof-majorities.html [<https://perma.cc/KVJ9-ZZKW>] (discussing how vetoes are overridden and the effect of vacancies on building veto-proof majorities).

231. Paul, *supra* note 214.

232. *Id.*

233. *Lebsock Expelled from Colorado House Following Marathon Harassment Debate*, COLO. PUB. RADIO, <https://www.cpr.org/2018/03/02/lebsock-expelled-from-colorado-house-following-marathon-harassment-debate/> [<https://perma.cc/9YUV-L2YQ>] (“‘As far as Lebsock goes, the Republicans can have him,’ a Colorado Democratic Party spokesman said in a statement. ‘As far as the seat, we’re looking into it. Either way, we’re confident the district will be represented by a Democrat by the time the next session begins.’”).

expel members of their own party is difficult as it stands, but forcing them to pay that sort of political price leaves open the possibility that an unethical lawmaker could effectively blackmail her colleagues into not expelling her by threatening to switch parties prior to her expulsion.

Even putting those practical concerns aside, addressing this dual-vacancy question matters for the simple fact that voters deserve accurate representation. A single misrepresented voter—much less a single misrepresented district—is deplorable in a democracy that seeks to match voter intent to legislative representation.²³⁴ A legislator switching parties and then creating a vacancy, even just *once*, presents a problem worthy of a solution.²³⁵ This Article proposes one.

V. CONCLUSION

Half of the states in the United States—along with virtually every territory—use some form of temporary appointments to fill legislative vacancies. Though most of those systems require same-party appointments, few states have confronted an unlikely problem: What happens when the vacancy is caused by a party-switcher? As this Article demonstrates, this is a problem that warrants a solution. Drawing on the principles underlying the adoption of same-party appointments in the first place, this Article proposes the amendment of existing schemes in a way that defines party membership or affiliation at the time of the most recent election.

As the Supreme Court announced more than a century ago, the right to vote is “a fundamental political right” because it is “preservative of all rights.”²³⁶ The right to vote carries consequences—and the voters’ choice, as expressed at the most recent high-turnout election, should have consequences in the realm of same-party legislative appointments.

234. See, e.g., Jordan J. Paust, *The Human Right to Participate in Armed Revolution and Related Forms of Social Violence: Testing the Limits of Permissibility*, 32 EMORY L.J. 545, 566 (1983) (discussing the human right to democratic governance).

235. See, e.g., *Jones v. Governor of Fla.*, 950 F.3d 795, 828 (11th Cir. 2020) (“Casting a vote has no monetary value. It is nothing other than the opportunity to participate in the collective decisionmaking of a democratic society and to add one’s own perspective to that of [her] fellow citizens. Each vote provides a unique opportunity to do that. No compensation a court can offer could undo that loss. The denial of the opportunity to cast a vote that a person may otherwise be entitled to cast—even once—is an irreparable harm.”).

236. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).