

Bad Motivation With Good Results: The Merit Of Filling Statewide Executive Vacancies With Same-Party Appointments

T. Quinn Yeargain*

INTRODUCTION

In 2016, Pat McCrory, the Republican Governor of North Carolina, narrowly lost re-election.¹ In 2018, Democrats picked up gubernatorial seats in, among other states, Kansas, Michigan, and Wisconsin.² And, in 2019, Kentucky's Republican Governor, Matt Bevin, also lost re-election.³ Of these races, three were quite close; a recanvass took place in Kentucky,⁴ a partial recount was conducted in North Carolina,⁵ and the official margin in Wisconsin just barely fell out of recount territory.⁶ In many of these

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1. Amber Phillips, *North Carolina Gov. Pat McCrory (R) Concedes Closely Contested Governor's Race*, WASH. POST (Dec. 5, 2016, 11:21 AM), <https://www.washingtonpost.com/news/the-fix/wp/2016/12/05/north-carolina-gov-pat-mccrory-r-concedes-closely-contested-governor-s-race/> [https://perma.cc/X3J3-EG48].

2. Tim Craig, *Scott Walker, Wisconsin Governor and Former GOP Presidential Candidate, Loses Reelection Bid*, WASH. POST (Nov. 7, 2018, 3:28 AM), https://www.washingtonpost.com/politics/democrats-expected-to-pick-up-governorships-but-many-races-are-too-close-to-call/2018/11/06/ed07bf48-dfa7-11e8-b3f0-62607289efee_story.html [https://perma.cc/R8LE-BFEP].

3. Campbell Robertson, *In Kentucky, a Governor Who Picked Fights Loses a Big One*, N.Y. TIMES (Nov. 15, 2019), <https://www.nytimes.com/2019/11/14/us/kentucky-governor-race-matt-bevin.html> [https://perma.cc/B47T-WWKZ].

4. *Id.* (“As it happened, Mr. Beshear’s margin of victory remained unchanged after the recanvass, according to the secretary of state: 5,136 votes out of more than 1.4 million cast.”).

5. Colin Campbell, *Pat McCrory Concedes; Roy Cooper Next NC Governor*, NEWS & OBSERVER (Raleigh, N.C.) (Dec. 6, 2016, 2:13 PM), <https://www.newsobserver.com/news/politics-government/election/article118942758.html> (“McCrory made the concession in a video message posted around noon Monday as a recount he requested in Durham County entered its final hours.”); Adam Levy & Kate Sullivan, *Republican Matt Bevin Concedes Defeat in Kentucky Governor's Race*, CNN (Nov. 14, 2019, 4:08 PM), <https://www.cnn.com/2019/11/14/politics/kentucky-governor-recanvas-begins/index.html> [https://perma.cc/ULS3-UBVR] (“[His] concession comes after Bevin requested all 120 counties in the state recheck the results from last week’s gubernatorial election.”).

6. Caitlin O’Kane, *Scott Walker Narrowly Loses Wisconsin Governor's Race – and He Can't Ask for a Recount Because of a Law He Put in Place*, CBS NEWS (Nov. 7, 2018, 5:15 PM),

states, the defeated Republican candidates didn't handle their defeats well. Many alleged, without evidence, that voter fraud decisively tipped the elections to their opponents.⁷ Others sought to delegitimize votes cast in cities and metropolitan areas.⁸

In each of these states, once the reality that Democrats would occupy the governors' mansions set in, the Republican-dominated legislatures got to work. They immediately began passing legislation seeking to strip the newly elected Democratic governors—along with other statewide Democrats—of their power. The specifics in each state were different, but the themes were the same: under the proposed reforms, the new governors would face new limits on their appointment power and their ability to unilaterally set state policy.⁹ Most of the lame-duck Republican governors in each state had no difficulty signing off on the legislation,¹⁰ though Michigan Governor Rick Snyder vetoed some of the proposals.¹¹ The

<https://www.cbsnews.com/news/scott-walker-narrowly-loses-wisconsin-governors-race-and-he-cant-ask-for-a-recount-because-of-a-law-he-put-in-place/> [<https://perma.cc/C222-8SZQ>] (“If a candidate in Wisconsin is losing by less than 1 percent, they can ask for a recount — but Walker lost by 1.2 percent.”).

7. Miles Parks, *Skeptics Urge Bevin to Show Proof of Fraud Claims, Warning of Corrosive Effects*, NPR (Nov. 10, 2019, 7:01 AM), <https://www.npr.org/2019/11/10/777300611/skeptics-urge-bevin-to-show-proof-of-fraud-claims-warning-of-corrosive-effects> [<https://perma.cc/C95T-FUTJ>]; Elena Schneider, *North Carolina Governor Alleges Voter Fraud in Bid to Hang On*, POLITICO (Nov. 21, 2016, 7:03 PM), <https://www.politico.com/story/2016/11/north-carolina-governor-alleges-voter-fraud-in-bid-to-hang-on-231728> [<https://perma.cc/L3SL-L28K>].

8. E.g., Emily Badger, *Are Rural Voters the 'Real' Voters? Wisconsin Republicans Seem to Think So*, N.Y. TIMES (Dec. 6, 2018), <https://www.nytimes.com/2018/12/06/upshot/wisconsin-republicans-rural-urban-voters.html> [<https://perma.cc/8CDG-D99W>]; Ben Tobin, *Bevin, Still Claiming Election Fraud, Says Liberals Are 'Good at Harvesting' Urban Votes*, COURIER J. (Louisville, Ky.) (Dec. 5, 2019, 11:25 AM), <https://www.courier-journal.com/story/news/politics/elections/kentucky/2019/12/04/kentucky-election-bevin-said-he-lost-because-liberals-harvest-votes/2606486001/> [<https://perma.cc/5VDE-JDUW>].

9. David A. Graham, *North Carolina Republicans Try to Curtail the New Democratic Governor's Power*, ATL. (Dec. 14, 2016), <https://www.theatlantic.com/politics/archive/2016/12/north-carolina-special-session-republicans-roy-cooper/510731/> [<https://perma.cc/Y3Z2-JJFJ>]; Marcus Green, *Bill Would Strip Kentucky Governor's Power to Name State Transportation Secretary*, WDRB (Nov. 25, 2019), https://www.wdrb.com/in-depth/bill-would-strip-kentucky-governor-s-power-to-name-state/article_792d0f44-0fa1-11ea-b858-8f5001b2d491.html [<https://perma.cc/7LC7-8H3F>]; Kris Maher, *Michigan Gov.-Elect Says Lame-Duck Session Trying to Weaken Her Power*, WALL ST. J. (Dec. 6, 2018, 10:35 AM), <https://www.wsj.com/articles/michigan-gov-elect-says-lame-duck-session-trying-to-weaken-her-power-1544109591> [<https://perma.cc/52ZV-6TVY>]; Mitch Smith, *Last-Minute Laws Took Democrats' Power. Court Says That's Fine.*, N.Y. TIMES (June 21, 2019), <https://www.nytimes.com/2019/06/21/us/wisconsin-lame-duck-laws-upheld.html> [<https://perma.cc/W899-HRP3>].

10. E.g., Rebecca Hersher, *North Carolina Governor Signs Law Limiting Power of His Successor*, NPR (Dec. 16, 2016, 4:47 PM), <https://www.npr.org/sections/the-two-way/2016/12/16/505872501/north-carolina-governor-signs-law-limiting-power-of-his-successor> [<https://perma.cc/6NPE-JSSF>].

11. Jonathan Oosting, *Snyder Veto Spree Takes Down GOP Power Play Proposal, 40 Other Bills*, DET. NEWS (Dec. 28, 2018, 11:25 PM), <https://www.detroitnews.com/story/news/politics/2018/12/28/snyder-vetoes-lame-duck-bills/2435826002/> [<https://perma.cc/GWR9-REFR>].

merits of these proposals notwithstanding, they operated as attempted—and in most cases, successful—power grabs by lame-duck legislators seeking to knee-cap the new Democratic governors.

Some of these proposals carried over into the next legislative session. Two of these items, a resolution proposing an amendment to the Kansas Constitution and a proposed amendment to state statutes, sought to limit Democratic Governor Laura Kelly's appointment power.¹² Under the current law, Governor Kelly is entitled to fill vacancies that arise in the state's executive offices: Secretary of State, Attorney General, Treasurer, and Insurance Commissioner.¹³ But under these two proposals, Kelly's appointment power would be much more limited. If she were to fill a vacancy in a statewide office, Kelly would be required to make a same-party appointment.¹⁴

The rationale behind the proposals was relatively straightforward: at the time, Kelly and her lieutenant governor were the only statewide elected Democrats.¹⁵ Kansas's senior U.S. Senator, Pat Roberts, announced that he would not seek another term in 2020, and several statewide Republican officials—like Attorney General Derek Schmidt, Secretary of State Scott Schwab, and former State Treasurer Jake LaTurner—were publicly considering campaigns.¹⁶ If any of them won, they would vacate their state offices, and Kelly would likely appoint a Democrat to replace them. The political motivation behind the proposals was widely understood¹⁷ and condemned. Newspaper editorials came out in force against both measures, and the proposals ultimately died in committee.¹⁸

Notwithstanding their obviously cynical purpose, does the idea of a same-party requirement—as specifically applied in the context of statewide elected offices—make sense? A significant number of states, including Kansas, use same-party appointments to fill legislative

12. H.R. Con. Res. 5013, 2019 Leg., 1st Reg. Sess. (Kan. 2019); H.B. 2410, 2019 Leg., 1st Reg. Sess. (Kan. 2019).

13. KAN. CONST. art. I, § 11.

14. H.R. Con. Res. 5013; H.B. 2410.

15. See Lara Korte, *GOP Legislation Would Curtail Kelly's Power to Fill Vacancies That Could Be Upcoming*, KAN. CITY STAR (Apr. 16, 2019, 8:43 PM), <https://www.kansascity.com/news/politics-government/article229304834.html> [<https://perma.cc/VJT6-LYJU>].

16. Tim Carpenter, *U.S. Sen. Pat Roberts Mulling Re-Election Bid or Ignition of Wide Open Senate Race*, TOPEKA CAP.-J. (Dec. 26, 2018, 5:29 PM), <https://www.cjonline.com/news/20181226/us-sen-pat-roberts-mulling-re-election-bid-or-ignition-of-wide-open-senaterace> [<https://perma.cc/4VNC-PNXS>].

17. Korte, *supra* note 15.

18. E.g., Editorial, *Kansas Republicans Want to Change the Rules, Pry Appointment Power from Gov. Laura Kelly*, KAN. CITY STAR (Apr. 17, 2019, 4:20 PM), <https://www.kansascity.com/opinion/editorials/article229343709.html> [<https://perma.cc/4UWR-DE3Y>]; H.R. Con. Res. 5013; H.B. 2410.

vacancies.¹⁹ Kansas is one of a handful of states that also imposes a same-party requirement on gubernatorial appointments to fill vacancies in county elected offices, like sheriff and coroner.²⁰ And perhaps the most familiar (and controversial), same-party requirement occurs in filling U.S. Senate vacancies in a handful of states.²¹ The idea of requiring same-party appointments existed, and has been embraced, long before Republican legislators in Kansas suggested it for statewide offices.²²

This Article explores the Kansas proposal in detail and ultimately concludes that, while its partisan intent is awry, it should ultimately be adopted—with a significant modification. It proceeds in three main parts. First, Part I conducts a fifty-state (and seven-territory) survey of state constitutional and statutory law to lay out the legal landscape of how vacancies in statewide offices are filled. Part II then zooms in on the states that currently impose same-party requirements in filling statewide offices and considers how and why these provisions were adopted, along with how they function in practice. Finally, Part III argues that same-party appointment requirements should exist for statewide offices and that the Kansas proposals ought to be adopted. However, it tempers that recommendation by noting that the circumstances in which the proposals were developed caution against their implementation as is. It ultimately recommends that the proposals be implemented with a delayed effective date to ensure that state policymakers and voters are ignorant to the partisan effects of the changes.

I. HOW ARE VACANCIES IN STATEWIDE OFFICES FILLED?

In most states, governors are endowed with broad and far-reaching appointment powers—including to fill statewide vacancies. However, in a significant number of states, things aren't so simple. Some states, for example, put constraints on the governor's power to appoint, either by mandating the appointment of a specific person or by establishing threshold requirements for any gubernatorial appointee. Others give the legislature a role in the appointment process, usually in the form of

19. KAN. STAT. ANN. § 25-3903 (2021); KAN. STAT. ANN. § 25-321 (2021).

20. KAN. STAT. ANN. § 25-3905(a) (2021).

21. Seven states require a same-party appointment for U.S. Senate vacancies: Arizona, Hawai'i, Maryland, Montana, North Carolina, Utah, and Wyoming. Louis Jacobson, *Gubernatorial Appointment Powers for U.S. Senate Seats: Which Vacancies Could Prompt a Party Switch?*, UVA CTR. FOR POL. (Apr. 30, 2020), <https://centerforpolitics.org/crystalball/articles/gubernatorial-appointment-powers-for-u-s-senate-seats-which-vacancies-could-prompt-a-party-switch/> [https://perma.cc/6JXY-9NC4].

22. See Tyler Yeargain, *The Legal History of State Legislative Vacancies and Temporary Appointments*, 28 J.L. & POL'Y 564, 593 (2020).

confirmation, but in some cases, by empowering the *legislature*, not the governor, to fill the vacancy. A handful of states empower no one with appointment and instead lay out a method of automatic succession. And in many of these states, notwithstanding whatever appointment is made, a special election may be triggered at the next general election to fill the remainder of the term.

This Part breaks down the state-by-state (and territory-by-territory) legal landscape by asking three interrelated questions, each of which is answered in a separate section. Section A sets the scene by asking, “Which statewide officials?” Specifically, it gives a brief overview of the different systems of state government and considers which states have the sort of statewide elected officials implicated by this Article. Next, Section B focuses on answering the practical question: “Who makes the appointment?” It outlines which state (and occasionally non-state) actors are empowered to fill vacancies. Section C then asks, “What constraints are placed on the appointment?,” either by narrowing the universe of eligible appointees or limiting how long the appointee serves.

A. *Which Statewide Elected Officials?*

This Part begins by defining the scope of “statewide elected officials.” Of course, every state²³ has statewide elected officials—every state elects a governor and at least one member of Congress who represents the entire state. Most states elect statewide officers beyond just their governor and representative in Congress, but Alaska, Hawai‘i, Maine, New Hampshire, New Jersey, Puerto Rico, American Samoa, Tennessee, and the U.S. Virgin Islands don’t.²⁴ In those states, to the extent that their constitution or statutes provide for offices that are elected by the voters in other states—like secretary of state, treasurer, or attorney general—they’re either appointed directly by the governor or elected by the legislature, not the voters directly.

At the beginning of the twentieth century, a long-term trend toward democratization in state constitutional law meant that voters in each state elected *a lot* of statewide officials. But in large part due to the success of the short-ballot movement, a subset of the Progressive movement, the

23. This Article includes the five territories and the District of Columbia in this discussion. For the sake of convenience—and to avoid the clunky phrase “states, territories, and the District of Columbia”—the word “state” is used to encompass all fifty-six subdivisions of the United States.

24. COUNCIL OF STATE GOV'TS, *THE BOOK OF THE STATES* 122–23 tbl. 4.10 (2019), <http://knowledgecenter.csg.org/kc/system/files/4.10.2019.pdf> [<https://perma.cc/55MH-X2JU>].

number of statewide elected officials has been considerably reduced.²⁵ Today, most states elect a handful of officials beyond the governor who serve in the state executive branch. In most states, this includes a lieutenant governor, treasurer, secretary of state, attorney general, and perhaps an agriculture commissioner, auditor or comptroller, insurance commissioner, or superintendent of public instruction.²⁶ Some states continue to select unusual offices by statewide election—like the State Mine Inspector in Arizona.²⁷ And in some states, state boards, like boards of equalization, corporation commissions, executive councils, or public service commissions, are publicly elected, with members either running statewide or in individual districts.

This Article sticks to the prototypical statewide elected officials—which, in many states, form an executive cabinet with collective constitutional powers—and excludes from the conversation members of Congress, lieutenant governors, and members of multi-member boards or commissions. These exclusions are both purposeful and practical. First, to the extent that members of Congress, either in the House or Senate, are statewide elected officials, their replacement procedures are largely governed by the U.S. Constitution, not state constitutions or statutes.

Second, lieutenant-gubernatorial vacancies are unusual among vacancies in statewide elected offices for several reasons. In most states, governors and lieutenant governors are elected together, which makes the position structurally different than other state officials.²⁸ More to the point, however, owing to an archaic view of gubernatorial succession—which held that, upon ascending to the governorship, lieutenant governors were merely *de facto*, not *de jure*, governors—many states have no procedure for filling lieutenant-gubernatorial vacancies.²⁹ In the states that do, the procedure largely follows in the steps of the Twenty-Fifth Amendment, requiring gubernatorial nomination and legislative confirmation by *both* chambers of the state legislature, which is a process quite different than is used to fill other statewide vacancies.³⁰

And third, state boards and commissions lack uniformity among the states. Most states have no boards or commissions elected statewide.

25. See Arthur Ludington, *Short Ballot Movement*, *Progress of*, 5 AM. POL. SCI. REV. 79, 79–83 (1911).

26. *See id.*

27. ARIZ. CONST. art. XIX.

28. T. Quinn Yeagain, *One Vote, Two Winners: Team-Ticket Gubernatorial Elections and the Need for Further Reform*, 75 U. MIAMI L. REV. (forthcoming Spring 2021).

29. T. Quinn Yeagain, *Recasting the Second Fiddle: The Need for a Clear Line of Lieutenant-Gubernatorial Succession*, 84 ALBANY L. REV. (forthcoming Summer 2021).

30. *Id.*

Those that do frequently have different procedures for filling vacancies in their boards or commissions than they do for other, more prototypical, statewide vacancies. Accordingly, including boards and commissions in this discussion would require footnotes, asterisks, and sidebars to explain how they fit. These are certainly interesting questions, and worthy of discussion, but their inclusion in this context would prove too distracting and irrelevant to the subject at hand.

Accordingly, when discussing “statewide elected officials,” this Article excludes the nine aforementioned states without any statewide elected officials other than their governors and members of Congress; lieutenant governors; and statewide elected boards and commissions. It focuses instead on officials like attorneys general, secretaries of state, treasurers, and so on.

B. Who Makes the Appointment?

The most common state actor vested with appointment power is the governor, who can fill vacancies in statewide offices in 38 states.³¹ In most of these cases, the governor’s power is unchecked and absolute—whomever the governor nominates assumes the office. Four states—California, Colorado, Idaho, and Pennsylvania—require state senate confirmation for any gubernatorial nominee to a statewide office.³² And

31. ALA. CONST. art. V, § 136; ARIZ. CONST. art. V, § 6; ARK. CONST. amend. XXIX § 1; CAL. CONST. art. V, § 5; COLO. CONST. art. IV, § 6(2); DEL. CONST. art. III, § 9; FLA. CONST. art. IV, § 1(f); FLA. STAT. ANN. § 114.04 (West, Westlaw through 2020 2d Reg. Sess. of 26th Leg.); GA. CONST. art. V, § 2, ¶ 8(b); 5 GUAM CODE ANN. § 30101(c)(1) (Westlaw through Pub. L. No. 35-074); 1 GUAM CODE ANN. § 1902 (Westlaw through Pub. L. No. 34-046); IDAHO CODE ANN. § 59-904(b) (West, Westlaw through Ch. 1–90, 92, 110, 27 & 137 of 1st Reg. Sess. of the 66th Idaho Leg.); ILL. CONST. art. V, § 7; IND. CODE ANN. § 3-13-4-3(e) (West, Westlaw through 2021 1st Reg. Sess. of the 122d Gen. Assemb.); IOWA CODE ANN. § 69.8(2) (West, Westlaw through 2021 Reg. Sess.); KAN. CONST. art. I, § 11; KAN. STAT. ANN. § 25-101b (2021); KAN. STAT. ANN. § 40-106 (2021); KY. CONST. § 76; MD. CONST. art. V, § 5; MD. CONST. art. VI, § 1; MICH. CONST. art. V, § 21; MINN. CONST. art. V, § 3; MISS. CODE ANN. § 23-15-831 (West, Westlaw through 2021 Reg. Sess.); MO. CONST. art. IV, § 4; MO. ANN. STAT. § 105.030(1) (West, Westlaw through 2020 2d Reg. Sess. and the 1st and 2d Extraordinary Sess. of 100th Gen. Assemb.); MONT. CONST. art. VI, § 6(2); NEB. CONST. art. IV, § 11; NEV. CONST. art. V, § 8; N.M. CONST. art. V, § 5; N.C. CONST. art. III, § 7(3); N.D. CENT. CODE ANN. § 44-02-03 (West, Westlaw through 2021 Reg. Sess. of the 67th Leg. Assemb.); OHIO CONST. art. III, § 18; OKLA. CONST. art. VI, § 13; OR. REV. STAT. ANN. § 180.040 (West, Westlaw through 2020 Reg. Sess. of the 80th Leg. Assemb.); PA. CONST. art. IV, § 8(b); S.D. CODIFIED LAWS § 3-4-3 (Westlaw through 2021 Reg. Sess.) (amended by 2021 S.D. Sess. Laws S.B. 112 § 3-4-3); TEX. CONST. art. IV, § 12(a); UTAH CONST. art. VII, § 10; VT. CONST. ch. 2, §§ 20, 24; WASH. CONST. art. III, § 13; W. VA. CODE ANN. § 3-10-3(a) (West, Westlaw through 2021 Reg. Sess.); WIS. STAT. ANN. § 17.19(4) (West, Westlaw through 2019 Act. 186); WYO. STAT. ANN. § 22-18-111(a)(i) (West, Westlaw through Ch. 1–3 of the 2020 Spec. Sess. of the Wyo. Leg.)

32. CAL. CONST. art. V, § 5(b); COLO. CONST. art. IV, § 6(2); IDAHO CODE § 59-904(b) (West, Westlaw through Ch. 1–90, 92, 110, 127, and 137 of the 1st Reg. Sess. of the 66th Idaho Leg.); PA. CONST. art. IV, § 8(b).

in Guam, the governor can fill a vacancy in the state attorney general's office by appointment, but to fill a vacancy in the state auditor's office, senate confirmation is required.³³ Connecticut, like Guam, applies a different procedure depending on the vacant office in question. But there, the split is much more dramatic; the governor can appoint replacement attorneys general, but not secretaries of state, comptrollers, or treasurers.³⁴ In Maryland, West Virginia, and Wyoming, the party with which the previous incumbent was affiliated³⁵ nominates a slate of candidates to the governor, who then selects one, thereby ensuring same-party replacement.³⁶

In most states, the vacancy-filling procedure for statewide offices is spelled out in the state constitution or statutes. In a handful of states, there's no explicit procedure. Instead, the governor's power to fill statewide vacancies is derived from their inherent power to fill vacancies.³⁷ This inherent power is usually limited to filling vacancies in offices where state law doesn't set out an explicit replacement procedure—so if the state legislatures wanted to, they could modify state law to grant themselves, or another actor altogether, the power to fill vacancies in statewide offices.

The only other state actor given the power to fill vacancies in statewide offices is the state legislature. This procedure is used in Connecticut, Massachusetts, New York, Rhode Island, South Carolina, and Virginia,³⁸ all of which were among the original thirteen colonies. Colonial skepticism of powerful state executives led to early state constitutions that provided for extremely powerful legislatures and significantly weaker

33. 5 GUAM CODE ANN. § 30101(c)(1) (Westlaw through Pub. L. 35-074); 1 GUAM CODE ANN. § 1902 (Westlaw through Pub. L. 34-046).

34. CONN. GEN. STAT. ANN. § 9-213 (West, Westlaw through 2021 Reg. Sess.). However, if the General Assembly is not in session, the Governor can fill vacancies in the Comptroller's, Secretary of State's, and Treasurer's offices. *See id.* at § 9-213(c).

35. In the event that the previous incumbent was elected as a member of one party and switched to another while in office, state courts are split on which party nominates the slate of replacements. *See generally* Tyler Yeagain, *Same-Party Legislative Appointments and the Problem of Party Switching*, 8 TEX. A&M L. REV. 163 (2020).

36. MD. CONST. art. VI, § 1; W. VA. CODE ANN. § 3-10-3(a) (West, Westlaw through 2021 Reg. Sess.); WYO. STAT. ANN. § 22-18-111(a)(i) (West, Westlaw through Ch. 1-3 of the 2020 Spec. Sess. of the Wyo. Leg.).

37. *E.g.*, ARIZ. CONST. art. V, § 8; KY. CONST. § 76; MO. CONST. art. IV, § 4; MO. REV. STAT. ANN. § 105.030 (West, Westlaw through 2nd Reg. Sess. and 1st and 2d Extraordinary Sess. of the 100th Gen. Assemb.); OKLA. CONST. art. VI, § 13; TEX. CONST. art. IV, § 12(a). This is not meant to be an exclusive list of states in which the governor's power to fill vacancies in statewide offices is derived from their inherent power to appoint.

38. CONN. GEN. STAT. ANN. § 9-213 (West, Westlaw through 2021 Reg. Sess.); MASS. CONST. amend. art. LXXIX; N.Y. PUB. OFF. LAW § 41 (McKinney through 2021); R.I. CONST. art. IV, § 4; S.C. CODE ANN. § 1-1-120 (Westlaw through 2021 Act No. 7); VA. CODE ANN. § 24.2-213 (West, Westlaw through 2021 Reg. Sess. and 1st Spec. Sess. of the Va. Gen. Assemb.).

governors, which explains the origins of these provisions. In most of these states, each chamber votes separately, with the vote totals aggregated and a winner declared,³⁹ but in Rhode Island, the chambers convene “in grand committee.”⁴⁰ In each of these states, if the vacancy occurs during a legislative recess, the governor is granted the provisional power to fill the vacancy until the legislature convenes next.

Finally, the third method of filling vacancies in statewide offices is automatic succession, which is only used in Louisiana and the District of Columbia.⁴¹ Upon assuming office, statewide officers in Louisiana “shall appoint a first assistant,” who is then confirmed by the State Senate.⁴² In the District of Columbia, the only citywide official other than the Mayor and members of the City Council is the Attorney General, who has the discretionary power to name their chief deputy.⁴³ In the event of a vacancy in either state, the officer is automatically succeeded by their deputy or first assistant, with no intervening act by the state executive or legislature.⁴⁴

C. *What Constraints Are on the Appointment?*

For the most part, few constraints or limitations are placed on the appointing party’s power to fill a statewide vacancy. Any appointment obviously must comply with the general eligibility requirements for the office, which usually just relate to age and length of residency in the state,⁴⁵ though most states impose practice requirements on attorneys general.⁴⁶

39. See CONN. GEN. STAT. ANN. § 9-213 (West, Westlaw through 2021 Reg. Sess.) MASS. CONST. amend. art. LXXIX; N.Y. PUB. OFF. LAW § 41 (McKinney through 2021); S.C. CODE ANN. § 1-1-120 (Westlaw through 2021 Act No. 7); VA. CODE ANN. § 24.2-213 (West, Westlaw through 2021 Reg. Sess. and 1st Spec. Sess. of the Va. Gen. Assemb.).

40. R.I. CONST. art. IV, § 4.

41. LA. CONST. art. IV, § 16; D.C. CODE ANN. § 1-204.35(b)(2) (West, Westlaw through Mar. 16, 2021).

42. LA. CONST. art. IV, § 13.

43. D.C. CODE ANN. § 1-301.87(a) (West, Westlaw through Mar. 16, 2021). See also, e.g., Press Release, D.C. Att’y Gen., *AG Racine Appoints Jason Downs as Chief Deputy Attorney General* (Mar. 9, 2020), <https://oag.dc.gov/release/ag-racine-appoints-jason-downs-chief-deputy> [<https://perma.cc/N58R-2JME>].

44. LA. CONST. art. IV, § 16; D.C. CODE § 1-204.35(b) (West, Westlaw through Mar. 16, 2021).

45. E.g., ALA. CONST. art. V, § 132 (“No person shall be eligible to the office of attorney-general, state auditor, secretary of state, state treasurer, superintendent of education, or commissioner of agriculture and industries unless he shall have been a citizen of the United States at least seven years, and shall have resided in this state at least five years next preceding his election, and shall be at least twenty-five years old when elected.”).

46. E.g., KRISTIN SULLIVAN, OFFICE LEG. RSCH., 2010-R-0253, STATES’ QUALIFICATIONS FOR ATTORNEY GENERAL (Conn. 2010).

Outside of these technical qualifications, few states add on more requirements. Only Indiana, Maryland, Oregon, Utah, West Virginia, and Wyoming impose a same-party requirement, for example.⁴⁷ In the Northern Mariana Islands, the governor is constitutionally obligated to pick the runner-up from the most recent election—but if the runner-up refuses the role or is otherwise ineligible for it, the governor can appoint anyone.⁴⁸ Guam appears to be the only state that contemplates a period of time with a continuing vacancy in its state offices, because its governor's power to fill attorney general and auditor vacancies is only triggered if the vacancy occurs within six months of the next election.⁴⁹

The most significant limitation that exists on an appointment serves not to determine *who* can be selected, but *how long* the appointee can serve. Though some states allow the appointee to serve for the remainder of the term, many others limit the appointee's service until the next general election—and require that a special election be held to permanently fill the vacancy at that time.⁵⁰

II. SAME-PARTY REQUIREMENTS: ADOPTION, USAGE, AND (LACK OF) CONTROVERSY

Only six states impose a same-party requirement for filling vacancies in statewide offices. Three of these states' requirements have been adopted in the last ten years, while the other three occurred in the mid-to-late twentieth century. This Part reviews the adoption and implementation of these same-party requirements in each of the six states that have done so. Section A begins by briefly discussing the adoption of same-party appointment requirements in each state, both generally and as applied to vacancies in statewide offices. It then discusses the circumstances in which each requirement was adopted, exploring both the explicit and implicit motivations. Then, Section B reviews the usage of same-party requirements in each state, including the frequency of usage and any controversies that have arisen.

47. IND. CODE ANN. § 3-13-4-3(e) (West, Westlaw through 2021 1st Reg. Sess. of the 122nd Gen. Assemb.); MD. CONST. art. V, § 5(B); OR. REV. STAT. ANN. §§ 180.040, 236.100 (West, Westlaw through 2020 Reg. Sess. and 1–3 Spec. Sess. of the 80th Leg. Assemb.); UTAH CONST. art. VII, § 10(2); W. VA. CODE ANN. § 3-10-3(a) (through 2021 Reg. Sess.); WYO. STAT. ANN. § 22-18-111(a)(i) (West, Westlaw through Ch. 1–3 of the 2020 Spec. Sess. of the Wyo. Leg.).

48. N. MAR. I. CONST. art III, § 11(i).

49. 48 U.S.C. § 1421g(d).

50. The special election requirement only comes into play if the vacancy exists in advance of the election, but each state sets the time limit differently. The operation of the time limit is mechanical, differs by state, and is wholly uninteresting, and this Article discusses it no further. For a comprehensive report on how state legislature vacancies are filled and how long the temporary legislator serves, see Yeargain, *supra* note 22, at 588–98.

A. *The Adoption*

This Section comprehensively reviews the adoption of each state's same-party appointment requirement for filling statewide vacancies. It begins by providing relevant background information—namely, the adoption of same-party requirements in filling state legislative vacancies. Then, it briefly discusses the adoption of these requirements for vacancies in statewide offices, focusing on the motivation behind each requirement. Finally, synthesizing the previous two points, it addresses a nagging question in the adoption of these requirements: Given that same-party requirements were adopted for *state legislative* vacancies so much earlier in the twentieth century, why did it take so long for most of these states to adopt similar requirements for statewide offices—and why haven't more states adopted these requirements?

Around the time that the Seventeenth Amendment to the U.S. Constitution was ratified, which provided for the direct election of Senators, states began altering the method of how they filled state legislative vacancies.⁵¹ Though these vacancies had historically been filled with special elections, states began to fill them with temporary appointments instead, which usually lasted only until the next election.⁵² These changes were frequently brought with broad constitutional amendments, which allowed the legislature to dictate how its vacancies were filled, and then later allowed for enabling acts, specifically providing for temporary appointments.⁵³ Though some states originally adopted appointment systems *without* any same-party requirement, most added this requirement shortly afterwards.⁵⁴

Relevant to this discussion, each of the six states mentioned above, adopted same-party appointment requirements for filling state legislative vacancies. In Indiana, state voters approved a constitutional amendment granting the legislature the power to determine how to fill state legislative vacancies in 1972.⁵⁵ In 1973, the state legislature responded by requiring that legislative vacancies be filled by the local party committee with which the previous incumbent was affiliated.⁵⁶ In Maryland, voters approved a constitutional amendment in 1936 that required the political party of the previous incumbent to nominate a slate of candidates to the governor, who

51. *Id.*

52. *See id.*

53. *Id.* at 623–30.

54. *See id.* at 588–601.

55. *See* S.J. Res. 15, 97th Gen. Ass., 1st Reg. Sess. (Ind. 1972).

56. Act of Apr. 10, 1973, Pub. L. No. 2-1973, I 1973 Ind. Acts 1st Reg. Sess. 2, 3 (1973).

would, in turn, select one to fill the vacancy.⁵⁷

The process in Oregon was somewhat disjointed. Voters approved a constitutional amendment in 1930 that gave the legislature the power to determine how to fill vacancies, but the legislature didn't do so, prompting the state attorney general to issue an advisory opinion clarifying that, under existing state law, a special election would be held.⁵⁸ The legislature finally adopted a different procedure in 1935,⁵⁹ when it allowed county commissions to make temporary appointments—but the same-party requirement was added later in 1953.⁶⁰

In Utah, the same year that the Oregon amendment was approved, voters approved a nearly identical amendment;⁶¹ in 1933, the legislature passed enabling legislation that allowed the governor to fill legislative vacancies following candidate nominations by the previous incumbent's party.⁶² West Virginia adopted a similar procedure, though without a constitutional amendment, in 1925.⁶³ Originally, West Virginia's procedure only applied to legislative vacancies caused by death,⁶⁴ but in 1963, it was expanded to include all such vacancies.⁶⁵ Finally, in Wyoming, voters in 1948 approved a constitutional amendment similar to those adopted in Oregon and Utah.⁶⁶ The legislature ultimately adopted a procedure like Oregon's, with county commissions filling the vacancies, but unlike Oregon's original codification, Wyoming simultaneously imposed a same-party requirement.⁶⁷

In every state but Oregon, decades elapsed between the adoption of same-party appointments for *legislative* vacancies and the adoption of the same procedure for vacancies in statewide offices. Oregon implemented both simultaneously in 1953.⁶⁸ The legislation was apparently motivated by a desire to modify the procedure for filling legislative vacancies after a county commission appointed a Democrat to fill a state house seat last held

57. Act of May 17, 1935, ch. 584, sec. 1, § 13, 1935 Md. Laws 1216, 1216–17 (1935).

58. *In Re Method of Filling Vacancy in Office of State Senator*, 16 Op. Att'y Gen. 63 (1930).

59. Act of Mar. 5, 1935, ch. 190, § 1, 1935 Or. Laws 38th Reg. Sess. 281 (1935).

60. Act of Apr. 27, 1953, ch. 473, § 1, 1953 Or. Laws 47th Reg. Sess. 828 (1953).

61. S.J. Res. 6, 18th Leg., 1st Spec. Sess. (Utah 1930).

62. Act of Mar. 9, 1933, ch. 18, § 1, 1933 Utah Laws 20th Reg. Sess. 33 (1933).

63. Act of Apr. 24, 1925, ch. 56, § 1, 1925 W. Va. Acts Reg. Sess. 175–76 (1925).

64. *Id.*

65. Act of Mar. 9, 1963, ch. 64, § 5, 1963 W. Va. Acts Reg. Sess. 221, 377–78 (1963).

66. Yeargain, *supra* note 22, at 593–95.

67. Act of Feb. 19, 1951, ch. 127, § 8, 1951 Wyo. Laws 197, 200 (1951).

68. Act of Apr. 27, 1953, ch. 473, § 1, 1953 Or. Laws 47th Reg. Sess. 828 (1953); *see also Partisan Basis for Vacancies Sought in Bill*, BEND BULL., Jan. 29, 1953, at 3 (“... when a vacancy occurs in an elective office of Oregon which is filled on a partisan basis, the successor appointed must be of the same party, whether he is county dog catcher or United States senator.”).

by a Republican.⁶⁹ But though that was the legislation's impetus, the specific remedy went far beyond legislative vacancies. The legislature enacted a broad same-party requirement for filling "a vacancy occur[ring] in *any* partisan elective office in this state [that] is to be filled by appointment[.]"⁷⁰

The next state to add a same-party requirement to appointments made to fill vacancies in statewide offices was Utah. In 1979, state legislators drafted a wholesale rewrite of the state constitution's executive article, which added an elected lieutenant governor, removed term limits for the state treasurer and auditor, and imposed a same-party requirement in statewide appointments.⁷¹ At the 1980 election, the amendment proved largely uncontroversial, with opposition "aimed chiefly at the lieutenant governor provisions."⁷²

Republican legislators in Wyoming tried several times to impose a same-party appointment requirement before they succeeded in 1993. In 1985, Republican state legislators first introduced the proposal⁷³—perhaps out of concern that Democratic Governor Edgar Herschler would, in the event of a vacancy, be able to flip one of the state's U.S. Senate seats or state executive offices. However, Herschler vetoed the measure, arguing in his veto message that the legislation would disrupt the line of succession.⁷⁴ Because the statute ostensibly set out the appointment procedure for "any . . . elective office in the state, except representative in congress or the board of trustees of a school or community college district,"⁷⁵ it plausibly affected *gubernatorial* vacancies, as well.⁷⁶ Republicans tried again in 1987, but their bill had the same perceived defects as the 1985 proposal,⁷⁷ and Democratic Governor Mike Sullivan vetoed it for the same reason.⁷⁸

The proposal was amended in 1989 to reflect Herschler's and

69. *Partisan Basis*, *supra* note 68, at 3.

70. Act of Apr. 27, 1953, ch. 473, § 1, 1953 Or. Laws 47th Reg. Sess. 828 (1953) (emphasis added).

71. S.J. Res. 7, 43d Leg., 1st Reg. Sess., (Utah 1979).

72. *Pros and Cons of Executive Article Revision*, SALT LAKE TRIB., Oct. 5, 1980, at 1B.

73. Act of May 23, 1985, ch. 204, § 1, 1985 Wyo. Laws 337 (1985).

74. Joan Barron, *Herschler Vetoes State Vacancies Bill*, CASPER STAR-TRIB., Feb. 13, 1985, at A4.

75. S. File 26, 48th Leg. (Wyo. 1985).

76. *See* Barron, *supra* note 74, at A4.

77. *Compare* S. File 234, 49th Leg. (Wyo. 1987), with S. File 26, 48th Leg. (Wyo. 1985).

78. Daniel H. Neal, *Sullivan's Ax Hits Succession Measure*, CASPER STAR-TRIB., Feb. 21, 1987, at A5 (noting he based his decision off arguments voiced by former Governor Herschler).

Sullivan's opposition,⁷⁹ and once again passed the legislature. This time, the connection between the partisan motivation and the proposed change were much clearer: Republicans were specifically advocating for the changes because they were concerned that, had either of their U.S. Senators left office, they would be replaced by Democrats.⁸⁰ Sullivan vetoed the proposal again.⁸¹ In 1993, when Republicans had veto-proof majorities in both chambers of the legislature, they tried again, and successfully overrode Sullivan's veto.⁸²

No state adopted a similar requirement until Indiana in 2011. That year, Republican Secretary of State Charlie White was indicted on seven felony counts, including a count of voter fraud.⁸³ The state Democratic Party subsequently filed a lawsuit challenging White's eligibility to run for Secretary of State in the 2010 election.⁸⁴ Had White been found ineligible, and his 2010 election nullified as a result, then the 2010 Democratic nominee, Vop Osili, would've automatically been named as the replacement Secretary of State.⁸⁵ However, if White was entitled to his position on the ballot, but was convicted on any of the felony charges, he would've been automatically removed from office and Governor Mitch Daniels, a fellow Republican, would be entitled to replace him.⁸⁶ But while the lawsuit was ongoing, Republicans in the state legislature pushed for a statutory modification that would've allow the governor to fill all vacancies in statewide offices—and to impose same-party requirements in making those appointments⁸⁷—though White's situation was excluded from the final version of the legislation.⁸⁸

79. Compare H.B. 45, 50th Leg. (Wyo. 1989) (adding the language "or in the office of Governor" for clarification), with S. File 234, 49th Leg. (Wyo. 1987), and S. File 26, 48th Leg. (Wyo. 1985).

80. Matt Winters, *GOP Solons Want Change in Way U.S. Senate Vacancies Filled*, CASPER STAR-TRIB., Dec. 8, 1988, at A3. Apparently, Senator Malcolm Wallop was considered a potential candidate for Secretary of the Interior during the Reagan administration and Senator Alan Simpson was a potential running mate for George Bush in the 1988 presidential election. *Id.*

81. Joan Barron, *Sullivan Vetoes Appointment Bill*, CASPER STAR-TRIB., Feb. 17, 1989, at A1, A18.

82. Charles Pelkey, *House Overrides Sullivan Veto*, CASPER STAR-TRIB., Feb. 24, 1993, at A3.

83. Charles Wilson, *Elections Official Indicted*, REPUBLIC (Columbus, Ind.), Mar. 4, 2011, at A1, A10.

84. Charles Wilson, *Accused Indiana Election Chief Appeals Fraud Case Ruling*, S. BEND TRIB., Apr. 22, 2011, at B5.

85. Editorial, *Recount Commission Must Move Swiftly*, TIMES (Munster, Ind.), May 10, 2011, at A6.

86. *Id.*; Mary Beth Schneider, *Bill to Let Daniels Replace White Hits Snag*, INDIANAPOLIS STAR, Apr. 28, 2011, at B5.

87. *Id.*; see also Act of May 13, 2011, Pub. L. No. 225, § 84(e), 2011 Ind. Laws 3211, 3280.

88. Act of May 13, 2011, Pub. L. No. 225-2011, § 78(b) 200 I Ind. Laws 1st Reg. Sess. 3211, 3276-77 (2011).

In 2016, the Maryland legislature approved two-in-one legislation that both statutorily imposed same-party requirements for filling U.S. Senate vacancies and proposed a constitutional amendment requiring that vacancies in statewide elective offices—namely, attorney general and comptroller—be filled similarly.⁸⁹ Legislative Republicans opposed the measure out of concern that it would unfairly limit Republican Governor Larry Hogan’s appointment power, but the sponsor of the legislation penned an editorial arguing that the amendment “would obviously limit the appointment powers of every Democratic Governor to come.”⁹⁰ Ultimately, the measure was largely uncontroversial and passed in a landslide.⁹¹

Finally, in 2018, the West Virginia Legislature passed legislation revising the state’s vacancy-filling procedure.⁹² The change was largely motivated by ambiguity over the implementation of the same-party requirement in 2016 when a state legislator switched parties while in office,⁹³ but in the scope of the rewrite, the legislature extended the same-party requirement to all statewide offices. Democratic-turned-Republican Governor Jim Justice allowed the statutory modification to come into effect without his signature in 2018 after vetoing the same legislation in 2017—when he was a Democrat.⁹⁴

While this aggregated legislative history certainly demonstrates the extent to which cynical party politics motivated these constitutional and statutory modifications, a basic question is left unanswered: With the exception of Oregon, why have all of these changes occurred decades after each state implemented same-party requirements for filling legislative vacancies?

Little in the legislative record squarely answers this question. However, there are two likely explanations. First, one of the chief motivating factors behind the adoption of legislative appointments was

89. Act of May 10, 2016, ch. 511, § 1, VII 2016 Md. Laws 6178, 6179 (2016).

90. David Moon, Opinion, *Sponsor Says Vote for Question 1, Respect the Will of Voters*, MD. REP. (Nov. 7, 2016), <https://marylandreporter.com/2016/11/07/opinion-sponsor-says-vote-for-question-1-respect-the-will-of-voters/> [https://perma.cc/C783-AMFN].

91. *Official 2016 Presidential General Election Results for All State Questions*, MD. BD. OF ELECTIONS (Dec. 9, 2016, 10:56 AM), https://elections.maryland.gov/elections/2016/results/general/gen_qresults_2016_4_00_1.html [https://perma.cc/UF7C-K44V] (noting that Question 1 passed with 72.6% of the vote).

92. H.B. 3004, 83d Leg., 1st Reg. Sess. (W. Va. 2018).

93. See Yeagain, *supra* note 35, at 172 (discussing how the vacancy of party-switching State Senator Daniel Hall was filled in 2016).

94. Jake Zuckerman, *Justice Allows Election Vacancy Bill He Vetoed in 2017 to Become Law*, CHARLESTON GAZETTE-MAIL (Mar. 13, 2018), https://www.wvgazette.com/news/politics/justice-allows-election-vacancy-bill-he-vetoed-in-2017-to-become-law/article_ebe0a380-1e2b-5411-bb7a-c052b8d895c3.html [https://perma.cc/TT4G-QHH6].

avoiding special elections.⁹⁵ As understood by politicians at the time, special elections were costly, and if a vacancy occurred at an unlucky time, requiring that the vacancy be filled by a special election could result in a district left unrepresented for an entire legislative session.⁹⁶ The primary concern—which is emphasized in the delay with which many states added the “same-party” element to legislative appointments—was more rooted in avoiding non-representation, not in avoiding *mis*-representation.⁹⁷ These concerns are entirely foreign to statewide offices, which were generally already filled by some form of appointment.

But another compelling reason for the asymmetry is likely derived from the fact that statewide offices—like attorney general or treasurer—necessarily contemplate some sort of specific skill or expertise in expertly executing the position’s responsibilities. Though state attorneys general are usually the only statewide official to have any sort of formal qualifications, like admission to the state bar and a designated number of years practicing law,⁹⁸ most other officials have unofficial job requirements. State treasurers or auditors may not be required to be certified public accountants, but most qualified candidates have some sort of business or financial background.⁹⁹ State legislators, on the other hand, come from a variety of backgrounds—though almost always business or law—and are generalists, with individual areas of expertise culled out through committee assignments.¹⁰⁰ Accordingly, state parties may not have been seen as having the type of skill to select *qualified* candidates for the job.

Moreover, even if a party loses one of its statewide officers because of an untimely vacancy, they suffer relatively little cost. Though most statewide officers obviously have very real policymaking authority, they’re necessarily constrained by both the legislature and their co-executives. If, on the other hand, a state legislative seat fell to the opposing party by virtue of an untimely vacancy, control of the state legislature could be altered, which could result in a dramatic reshaping of the state’s balance of power and the implementation of far-reaching policies.

95. Yeargain, *supra* note 22, at 618–19.

96. *Id.* at 619–22.

97. *See id.* at 622–23.

98. SULLIVAN, *supra* note 46.

99. *See* NAT’L ASS’N OF STATE TREASURERS, *State Treasurers: Managing the Public’s Purse & Promoting Fiscal Responsibility*, in THE BOOK OF THE STATES 2013, 217–18 (2013) (“While the task of investing state funds may seem fairly straightforward, the process is actually quite complex and requires specialized knowledge and skill.”).

100. *See, e.g.*, Keith E. Hamm, Ronald D. Hedlund & Stephanie Shirley Post, *Committee Specialization in U.S. State Legislatures During the 20th Century: Do Legislatures Tap the Talents of Their Members?*, 11 ST. POL. & POL’Y Q. 299, 318–19 (2011).

B. *Experiences with Same-Party Appointments*

The relatively recent adoption of same-party appointment requirements—except in Oregon, where the requirements have been in place since 1953—mean that they have affected the appointment process for relatively few vacancies. Based on the available historical record, at least eighteen vacancies in statewide offices have been filled by same-party appointment.¹⁰¹ The process for filling these vacancies produced appointees who were generally well-regarded and uncontroversial, though there were a handful of exceptions. This Section reviews these seventeen appointments, both by outlining the frequency of the vacancies and common characteristics of the appointees.

Oregon has, by far, seen the most vacancies in statewide office filled by same-party appointment. So far, thirteen of the eighteen vacancies have occurred here, including six Secretary of State vacancies, three Attorney

101. Jeff Mapes, *Governor Ted Kulongoski Names Ted Wheeler as Next Oregon Treasurer*, OREGONIAN (Mar. 9, 2010), https://www.oregonlive.com/politics/2010/03/ted_wheeler_to_become_oregon_t.html [<https://perma.cc/AAH7-EQUB>]; Charles E. Beggs, *Meeker Named State Treasurer*, ALB. DEMOCRAT-HERALD, July 10, 1987, at 8; Charles E. Beggs, *Keisling Ready to Take Roberts' Job*, ALB. DEMOCRAT-HERALD, Dec. 26, 1990, at 5; Doug Chapin, *All's Well That Ends Well? New Indiana SoS Has Long Background in Elections*, ELECTION ACAD. (Mar. 23, 2012), <https://editions.lib.umn.edu/electionacademy/2012/03/23/all-s-well-that-ends-well-new-i/> [<https://perma.cc/QZA5-WVTU>]; Michelle Cole, *Oregon Gov. John Kitzhaber Names Ellen Rosenblum as Interim Attorney General*, OREGONIAN (June 6, 2012), https://www.oregonlive.com/politics/2012/06/oregon_gov_john_kitzhaber_name_2.html [<https://perma.cc/VX6M-Q38U>] (last updated Jan. 10, 2019); Robert Gehrke, *Herbert Names Damschen as New Utah Treasurer*, SALT LAKE TRIB. (Dec. 11, 2015, 6:49 PM), <https://archive.sltrib.com/article.php?id=3297260&itype=CMSID> [<https://perma.cc/CV43-EZCP>]; Robert Gehrke, *Herbert Picks Reyes as Utah's Next Attorney General*, SALT LAKE TRIB. (Dec. 24, 2013, 10:44 AM), <https://archive.sltrib.com/article.php?id=57302416&itype=cmsid> [<https://perma.cc/L5RH-5ZQ4>]; *Hatfield Appoints Howell Appling as Secretary of State*, MEDFORD MAIL TRIB., Jan. 12, 1959, at 1 [hereinafter *Appling*]; Richard Hughes, *Rutherford Named Treasurer*, STATESMAN J. (Salem, Or.), Mar. 3, 1984, at 1A; *James Brown Picked to Fill Redden's Post*, CAP. J. (Salem, Or.), Feb. 21, 1980, at 1A [hereinafter *Brown*]; Steve Law, *Governor Picks Bradbury*, STATESMAN J. (Salem, Or.), Nov. 7, 1999, at 1A; Jeff Mapes, *Kate Brown Finds a Caretaker by Appointing Jeanne Atkins as Oregon Secretary of State*, OREGONIAN (Mar. 6, 2015), https://www.oregonlive.com/mapes/2015/03/kate_brown_finds_a_caretaker_i.html [<https://perma.cc/Q5JQ-C3ZY>] (last updated Jan. 9, 2019); Kyle Roerink, *Wyoming Gov. Mead to Appoint New Treasurer by Friday*, CASPER STAR-TRIB. (Oct. 22, 2012), https://trib.com/news/state-and-regional/govt-and-politics/wyoming-gov-mead-to-appoint-new-treasurer-by-friday/article_15592396-8e73-5c88-8f33-c3cf11c184ff.html [<https://perma.cc/QY98-9LD4>]; Douglas Seymour, *McCall Names Myers Successor*, CAP. J. (Salem, Or.), Nov. 11, 1966, at 1; David Steves, *Attorney General Takes Oath*, STATESMAN J. (Salem, Or.), Jan. 3, 1992, at 2D; Charity Stewart, *Mead Selects New Secretary of State*, CTY. 17 (Mar. 2, 2018), <https://county17.com/2018/03/02/mead-selects-new-secretary-of-state/> [<https://perma.cc/43MP-FQYK>]; Dirk VanderHart, *Bev Clarno, Former House Speaker, Will Be Oregon's Next Secretary of State*, OR. PUB. BROAD. (Mar. 29, 2019, 5:30 PM), <https://www.opb.org/news/article/oregon-secretary-of-state-bev-clarno-dennis-richardson/> [<https://perma.cc/BRX3-T93H>]; *Veteran Oregon Politician Named State Treasurer*, NEWS-REV. (Roseburg, Or.), Jan. 4, 1960, at 1.

General vacancies, and four Treasurer vacancies.¹⁰² The amount of statewide vacancies in Oregon isn't terribly surprising, given that the state adopted the requirement in 1953, well before any other state. But there's another reason why Oregon has had so many vacancies: so many of its secretaries of state have become governor. This has occurred both because the state has no lieutenant governor, instead naming its secretary of state as the built-in gubernatorial successor,¹⁰³ and because governors and secretaries of state are elected in different years¹⁰⁴—meaning that if a secretary of state is elected governor at a regularly scheduled election, a vacancy will necessarily follow.

Outside of Oregon, only five vacancies in statewide offices have occurred following the adoption of same-party appointment requirements: Indiana Secretary of State (2012), Wyoming State Treasurer (2012), Utah Attorney General (2013), Utah State Treasurer (2015), and Wyoming Secretary of State (2018).¹⁰⁵ No such vacancies have occurred in Maryland or West Virginia following the adoption of their same-party requirements in 2016 and 2018, respectively.

Of these eighteen appointments, most of them didn't involve a cross-party appointment—that is to say, the governor and the previous incumbent were of the same party. However, in four cases, because of differences in party affiliation, the governor was required to appoint a member of the other party.¹⁰⁶ All of these cases occurred in Oregon, which simply requires the governor to make a same-party appointment without any involvement from the state party. Three out of four times, the governor chose a caretaker who pledged to not seek re-election—two of whom were retired state politicians, and one of whom was a deputy in the office.¹⁰⁷ Only Democratic Governor Neil Goldschmidt deviated from this practice when he appointed Republican State Representative Tony Meeker as State Treasurer. As one newspaper editorial put it, though

102. *Appling*, *supra* note 101, at 1; *Beggs*, *Meeker Named State Treasurer*, *supra* note 101, at 8; *Beggs*, *Keisling Ready to Take Roberts' Job*, *supra* note 101, at 5; *Belton New State Treasurer*, *MEDFORD MAIL TRIB.*, Jan. 4, 1960, at 1; *Brown*, *supra* note 101, at 1A; *Cole*, *supra* note 101; *Hughes*, *supra* note 101, at 1A; *Law*, *supra* note 101, at 1A; *Mapes*, *supra* note 101; *Seymour*, *supra* note 101, at 1; *Steves*, *supra* note 101, at 2D; *VanderHart*, *supra* note 101.

103. OR. CONST. art. V, § 8a.

104. *Id.* at art. II, § 14.

105. *Chapin*, *supra* note 101; *Gehrke*, *Herbert Names Damschen*, *supra* note 101; *Gehrke*, *Herbert Picks Reyes*, *supra* note 101; *Roerink*, *supra* note 101; *Stewart*, *supra* note 101.

106. *Beggs*, *Meeker Named State Treasurer*, *supra* note 101, at 8 (discussing Governor Goldschmidt's appointment of Meeker as state treasurer); *Brown*, *supra* note 101, at 1A (discussing Governor Atiyeh's appointment of Brown as attorney general); *Steves*, *supra* note 101, at 2D (discussing Governor Roberts's appointment of Crookham as attorney general); *VanderHart*, *supra* note 101 (discussing Governor Brown's appointment of Clarno as secretary of state).

107. *Brown*, *supra* note 101, at 1A; *Steves*, *supra* note 101, at 2D; *VanderHart*, *supra* note 101.

“Goldschmidt had no choice but to appoint a Republican, . . . he didn’t have to do such a good job of it,” lauding Meeker as a “successful businessman and a successful state legislator” who “will do a good job.”¹⁰⁸

The remaining choices were largely made without significant controversy. Many governors showed a preference for candidates who had sought the office before or who had experience working in the office. In two cases, governors chose candidates who were actively running for the office. In 2012, Oregon Attorney General John Kroger, who wasn’t seeking re-election, decided to leave office early.¹⁰⁹ Governor John Kitzhaber appointed Ellen Rosenblum, the Democratic nominee for attorney general, to serve out the remainder of Kroger’s term.¹¹⁰ The reverse happened in 1984, when Clay Myers opted against seeking another term as state treasurer and resigned early—but here, Governor Vic Atiyeh appointed Bill Rutherford, a candidate for treasurer, to the office *before* the Republican primary.¹¹¹ Many governors embraced the idea of appointing a caretaker, especially one with relevant experience or a retired state politician to the office, with a pledge on the appointee’s part to not seek re-election.¹¹²

Most of the appointees were considered to be solid, experienced choices—even if their experience wasn’t directly in the same area of policy as the position to which they were appointed.¹¹³ Only in 1991, when newly elected Oregon Governor Barbara Roberts selected freshman State Representative Phil Keisling as her replacement as Secretary of State, did any appointee generate any meaningful opposition. Keisling’s selection attracted some criticism for his lack of experience, but the main critic

108. Editorial, *Choice for State Treasurer: Governor Earns Points*, STATESMAN J. (Salem, Or.), July 14, 1987, at 6A [hereinafter *Meeker*].

109. Jeff Manning, *Oregon Attorney General John Kroger Bids Farewell This Friday*, OREGONIAN (June 28, 2012), https://www.oregonlive.com/politics/2012/06/oregon_attorney_general_john_k_4.html [<https://perma.cc/4TS6-89BV>] (last updated Jan. 10, 2019).

110. Cole, *supra* note 101.

111. *Treasurer Candidates Decry Interim Choice*, ALBANY DEMOCRAT-HERALD, Mar. 3, 1984, at 1.

112. *Brown*, *supra* note 101, at 1A (discussing Governor Atiyeh’s appointment of Brown as attorney general); *Mapes*, *supra* note 101 (discussing Governor Brown’s appointment of Atkins as secretary of state); *Steves*, *supra* note 101, at 2D (discussing Governor Roberts’s appointment of Crookham as attorney general); *VanderHart*, *supra* note 101 (discussing Governor Brown’s appointment of Clarno as secretary of state).

113. *E.g.*, *Chapin*, *supra* note 101 (noting that Secretary of State-designate Lawson was majority floor leader and chair of the state senate elections committee); *Meeker*, *supra* note 108, at 6A (noting State Treasurer-designate was a former businessman and state legislator); *Oregon Gets New Attorney General*, CORVALLIS GAZETTE-TIMES, Jan. 3, 1992, at A5 (noting that the outgoing attorney general said that Governor Roberts “has pleased immensely the professional cadre of the Department of Justice by making this distinguished appointment”); *Senate Confirms Redden; Brown Named AG Fill-in*, STATESMAN J. (Salem, Or.), Feb. 21, 1980, at A1 (noting that Attorney General-designate Brown was “highly respected by legal colleagues”).

noted that “[t]he last two appointees to the office didn’t have much [experience,]” either.¹¹⁴

Most of these selection processes took place behind closed doors, with each governor employing their own methodology in generating a short list of potential appointees and selecting one. While that was certainly the case in Indiana and Oregon, the processes used in Utah and Wyoming (which were the only ones to formally include the political parties in the appointment process) took place in the open. While the involvement of a political party in the appointment process might be assumed to result in a shadowy process dominated by insiders, the opposite appears to be true. After the vacancies occurred, the state parties opened applications to all who were interested.¹¹⁵ Once the application period closed, the party scheduled conventions, where they held public forums and allowed the applicants to make a case for their nomination and to answer questions.¹¹⁶ In 2013, when filling a vacancy in the state Attorney General’s office, the Utah Republican Party even scheduled a debate among the applicants.¹¹⁷ The party committee then selected three nominees, which they advanced to the governor, who subsequently interviewed the candidates and then announced his choice.¹¹⁸

114. See, e.g., Ron Blankenbaker, Opinion, *Roberts Picks Inexperienced Successor*, STATESMAN J. (Salem, Or.), Dec. 25, 1990, at 14A.

115. See Mori Kessler, *Nine Vie to Be Next State Attorney General*, ST. GEORGE NEWS (Dec. 9, 2013), <https://www.stgeorgeutah.com/news/archive/2013/12/09/mgk-nine-vie-next-state-attorney-general/> [<https://perma.cc/T3S4-LF5X>]; Katie Kull, *GOP Selects Finalists for Secretary of State Position*, N. WYO. NEWS (Feb. 27, 2018), <https://www.wyodaily.com/story/2018/02/27/news/gop-selects-finalists-for-secretary-of-state-position/6571.html> [<https://perma.cc/Z6ZM-XE25>]; Ben Lockhart, *Richard Ellis, Utah Treasurer, Resigns to Take Post at College Savings Nonprofit*, KSL NEWS (Oct. 17, 2015, 5:24 PM), <https://www.ksl.com/article/36982826/richard-ellis-utah-treasurer-resigns-to-take-post-at-college-savings-nonprofit> [<https://perma.cc/CP6H-9HNU>]; Roerink, *supra* note 101.

116. Brian Grimmett, *GOP Candidates for Attorney General Debate, Campaign for Votes*, KUER (Dec. 11, 2013, 9:32 PM), <https://www.kuer.org/post/gop-candidates-attorney-general-debate-campaign-votes> [<https://perma.cc/34PC-SQ99>]; Katie Roenigk, *State Treasurer Finalists Picked in Riverton*, LANDER J. (Oct. 23, 2012), <https://thelanderjournal.com/story.php?id=4083&headline=state-treasurer-finalists-picked-in-riverton> [<https://perma.cc/8JXL-2748>]; *Torrington Man One of Eight Vying for Appointment*, TORRINGTON TELEGRAM (Feb. 23, 2018), <https://torringtontelegam.com/article/torrington-man-one-of-eight-vying-for-appointment> [<https://perma.cc/7VCW-22QK>]; Daniel Woodruff, *Republicans Pick 3 Finalists for State Treasurer*, 2KUTV (Nov. 21, 2015), <https://kutv.com/news/local/republicans-pick-3-finalists-for-state-treasurer> [<https://perma.cc/92X6-MXK9>].

117. Grimmett, *supra* note 116.

118. Joan Barron, *Wyoming Supreme Court Justice Swears in Gordon as State Treasurer*, CASPER STAR-TRIB. (Nov. 2, 2012), https://trib.com/news/state-and-regional/govt-and-politics/wyoming-supreme-court-justice-swears-in-gordon-as-state-treasurer/article_21eea1aa-6668-569f-9c2b-f3f614c81756.html [<https://perma.cc/F4LW-7QHZ>]; Gehrke, *Herbert Names Damschen*, *supra* note 101; Gehrke, *Herbert Picks Reyes*, *supra* note 101; Stewart, *supra* note 101.

III. ADOPT SAME-PARTY REQUIREMENTS WITH MODIFICATIONS

As the foregoing history demonstrates, the constitutional and statutory provisions requiring same-party appointments today were primarily grounded in partisan motivations. In some cases, these modifications occurred following, or in anticipation of, specific vacancies and reflected a desire to either right the perceived “wrong” or to prevent an undesirable situation from coming to pass.¹¹⁹ In others, even where that motivation wasn’t apparent, lurking in the background is the cynical desire by the party in control of the state legislature to affect how a vacancy would be filled by changing the rules.¹²⁰

But the mere fact that partisan motivations drove the changes didn’t render them meritless. In 2011, as Republicans were hurriedly moving to amend Indiana’s statutes so that their doomed Secretary of State, Charlie White, could be replaced by another Republican, an editorial by the *Lafayette Journal and Courier* noted that “[t]he timing of the bill reeks of the majority party—Republicans—shoring up its power base by blocking Democrats from the office.” But though the bill was “politics at its wors[t], . . . it isn’t necessarily bad policy.”¹²¹ The editorial board noted that the then-operative provisions of state law, which would automatically allow the runner-up to assume the office, removes any way to screen for qualifications or experience and could allow an unqualified candidate to serve in an important state office.¹²² The better path, the board reasoned, was “to have the governor appoint a replacement, then hold a statewide election to fill the vacancy at the earliest opportunity.”¹²³

The use of same-party appointment requirements in filling statewide office vacancies has proved efficient and effective. Few of the nominees have been controversial.¹²⁴ And perhaps most reassuringly, most governors haven’t used their power manipulatively. In cases in which the governor is filling a vacancy with a member of the opposite party, they’ve selected experienced appointees—though perhaps not the other party’s rising stars.¹²⁵ And even when choosing candidates of their own party, governors have usually stayed out of partisan squabbles and haven’t been

119. See *supra* notes 95–100 and accompanying text.

120. See *supra* notes 89–91 and accompanying text (discussing motivations of 2016 Maryland constitutional amendment).

121. Editorial, *Bill Reeks of Politics But Is Good Policy*, J. & COURIER (Lafayette, Ind.), Apr. 23, 2011, at A7.

122. *Id.*

123. *Id.*

124. *Supra* Part II.B (discussing the lack of controversy surrounding same-party appointments).

125. See *supra* notes 106–114 and accompanying text.

afraid to occasionally select a caretaker appointee, as opposed to elevating one of their party's top-tier candidates for the role.¹²⁶

The argument in favor of adopting same-party requirements to fill vacancies in statewide offices is fairly straightforward. In casting their ballots for any statewide office, voters chose the nominee of a political party (or an independent, unlikely as that may be) to hold the office and execute its powers. Whatever the specific policy portfolio of the office is, voters entrusted one candidate to make that policy. Following a vacancy, that decision should be respected. It may well be the case that the citizens of a state elected a candidate not because of their party, but because of the nonpartisan, ideologically neutral way that they would administer the office or because of their objective credentials. In relatively specialized positions, such an expectation might certainly be grounded in reality.¹²⁷

But in the event of a vacancy, the person elected by the voters—either on the basis of their party or their skills—can no longer hold the office. Another officeholder needs to be selected. It certainly makes sense that a special election to fill the remainder of the term should be held at the next statewide election, but how should the vacancy be filled in the interim? The practical consequences of leaving the office vacant dictate that someone should hold the role, if even in an acting capacity. The method used by Louisiana and the District of Columbia, in which the office's deputy assumes the role until a special election can be held,¹²⁸ is certainly commendable. But most states opt for alternative approaches, tasking either their governor or legislature with the responsibility of making an appointment.

Most states don't impose same-party requirements on these sorts of appointments. In most states, so long as the appointee is otherwise qualified for the job—that is, they've been a resident of the state for the requisite amount of time and are of constitutional age—the governor can make an appointment of their choice. If that happens to flip an office from red to blue, so be it; if the appointment runs counter to the will of the electorate, it can be remedied at the next election.

But it's bizarre to suggest that the occurrence of an untimely, unexpected vacancy should undermine the electorate's intent based on the random nature of the incumbent governor's party. The ideology of an officeholder—however nonpartisan the core aspects of the job are—shouldn't be treated as immaterial in the process through which they're

126. See *supra* notes 107–108, 112 and accompanying text.

127. See, e.g., Fred Monardi, “*Divided Government*” in *State Executive Branches*, 31 *POL. & POL'Y* 232, 234–36 (2003) (discussing the “professionalism” of state legislatures).

128. See *supra* notes 41–42 and accompanying text.

replaced. In voting for a candidate in a partisan election, voters are voting for both the candidate, on an individual level, and for the party that nominated them. If the corporeal person for whom they voted is unavailable, either because they've died, resigned, been removed from office, or were elected to another office, they should at *least* be guaranteed someone of the same party as a replacement.¹²⁹

Admittedly, the puzzle piece produced by the same-party appointment process might be slightly incongruous with the hole caused by the vacancy. But it's not rational to think that the average same-party appointee would be *more* incongruous than the average nominee selected by the governor with total discretion—indeed, it's rational to conclude that the former would be a *better* fit than the latter. A replacement officeholder of the same party as the previous incumbent seems likelier than a replacement officeholder of the *opposite* party to keep the office's political appointees in place and the day-to-day operations running smoothly.

So should Kansas—and other states—adopt same-party requirements for vacancies in statewide offices? In a word, yes. These changes would ensure that all executive officers are serving with some modicum of democratic legitimacy. Voters would be able to have their decision to split their tickets respected. It also imposes a meaningful check on governors and prevents state officials from wielding power that they weren't elected to.

But if the concern motivating these changes is democratic legitimacy, the process by which they should be adopted must reflect democratic legitimacy, too. If the intent is for Republican legislatures to deprive Democratic governors of their powers simply because they're Democrats, then these changes are illegitimate and shouldn't be enacted in their present form. Though it is undoubtedly the case that an idea's merits, not its disproportionate effects on one political party, should ultimately determine whether it should be adopted, that doesn't mean that the disproportionate effects shouldn't be considered.

The sort of change contemplated by Kansas Republicans, however, isn't the sort of thing that would disproportionately affect all Democrats—or benefit all Republicans—all of the time. Instead, because it's a neutral change, its partisan effects would be felt more acutely at different times. It isn't unreasonable to expect that Kansas might elect a Republican as governor and, say, a Democrat as attorney general. Long-term voting trends are suggestive that, as suburban America becomes more reliably Democratic, as southwest Kansas's Hispanic population continues to grow, and as the divide grows wider between moderate and conservative

129. See Yeagain, *supra* note 22, at 633–35.

Republicans in the state, the state might become even more favorable to Democratic candidates.¹³⁰

But here, the present intent is to deprive Governor Kelly of her inherent appointment power.¹³¹ The partisan effects of this change, felt in the short-term, would fall disproportionately on Democrats. For example, former State Treasurer Jake LaTurner, a Republican, was elected to Congress in 2020, creating a vacancy in his office.¹³² Governor Kelly appointed Lieutenant Governor Lynn Rogers, a Democrat, as LaTurner's replacement.¹³³ But had the proposed constitutional amendment and statutory change been enacted, she would've been required to choose a Republican candidate. For the aforementioned reasons, that's a fair enough requirement—but one that would've been adopted to guarantee that particular political outcome.

To that end, because there is so much to recommend in the proposal and because the idea is objectively respectful of democratic legitimacy and voter intent—even if the subjective intent isn't—it should be adopted with a delayed effective date. If it were to come into play ten years from now, beyond the period of time when Governor Kelly could be in office, it could be considered by legislators and voters with a Rawlsian veil of ignorance. The partisan effects at that point would be anyone's guess; accordingly, it could be evaluated by the voters on its merits, not on how it might affect the short-term political balance.¹³⁴

130. See, e.g., Stuart Rothenberg, *Toto, I've a Feeling We're Not in Kansas Politics Anymore*, ROLL CALL (May 4, 2020, 3:35 PM), <https://www.rollcall.com/2020/05/04/toto-ive-a-feeling-were-not-in-kansas-politics-anymore/> [<https://perma.cc/S25K-RC23>]; Jonathan Shorman & Bryan Lowry, *What Could an Urban-Rural Divide Mean in Kansas Politics in the Future?*, WICHITA EAGLE (Nov. 26, 2018, 2:13 PM), <https://www.kansas.com/news/politics-government/article221645010.html> [perma.cc/S25K-RC23]; Tessa Stuart, *Could Kansas Become a Swing State in 2020?*, ROLLING STONE (Jan. 4, 2019, 4:01 PM), <https://www.rollingstone.com/politics/politics-news/kansas-2020-774625/> [<https://perma.cc/F5J6-7DJ8>].

131. *Supra* notes 15–18 and accompanying text.

132. Tod Palmer, *Jake LaTurner Wins Kansas 2nd District Congressional Seat*, 41 KSHB KAN. CITY (Nov. 3, 2020, 10:26 PM), <https://www.kshb.com/news/election-2020/jake-laturner-wins-kansas-2nd-district-congressional-seat> [<https://perma.cc/5WN4-HKDF>].

133. Jonathan Shorman & Dion Lefler, *Lt. Gov. Lynn Rogers Will Take Over as Kansas State Treasurer, Gov. Kelly Announces*, WICHITA EAGLE (Dec. 10, 2020, 3:13 PM), <https://www.kansas.com/news/politics-government/article247753530.html> [<https://perma.cc/LJZ5-KSEK>].

134. See, e.g., Michael Herz, *Abandoning Recess Appointments?: A Comment on Hartnett (and Others)*, 26 CARDOZO L. REV. 443, 443 (2005) (“In considering the scope of the [Recess Appointments Clause], . . . one is perforce behind a sort of Rawlsian veil of ignorance. A given interpretation may be good for your team at one point in history and bad at another. Therefore, ideology and the appeal of desired outcomes in the short-term can more easily be set aside here than when considering many substantive constitutional issues.”).

CONCLUSION

Same-party requirements have been imposed in the context of legislative vacancies for largely high-minded reasons: efficiency, ensuring representation, and avoiding the cost and unrepresentative nature of special elections. Yet the exact same requirements, imposed in the context of vacancies in statewide elected offices, have been imposed with a significantly more cynical motive: changing the rules to maximize the current partisan advantage.

This does not mean, however, that the cynical motivation behind the requirements ought to justify their rejection—in Kansas or any other state. Instead, same-party appointments should be embraced in states without them, even Kansas, and even if the requirement they impose is meant to limit the current governor's power to make appointments. The arguments in favor of their adoption are strong enough, and the stakes high enough, that they ought to be adopted. However, as this Article ultimately concludes, the underlying merit doesn't justify willful naïveté as to their cynical motivation. Rather, this cynical motivation should be neutralized outright, with a delayed effective date such that the partisan effects of the newly imposed requirements cannot be anticipated now.