

2011

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Recommended Citation

Ari L. Tran, *Gubernatorial Discretion Not Advised: The Case for Special Elections to Fill Senate Vacancies*, 76 Brook. L. Rev. (2011).

Available at: <https://brooklynworks.brooklaw.edu/blr/vol76/iss3/15>

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Gubernatorial Discretion Not Advised

THE CASE FOR SPECIAL ELECTIONS TO FILL SENATE VACANCIES

With the United States at war with itself and its very existence teetering on the brink of collapse, commander-in-chief Abraham Lincoln stood before a group of soldiers at a military cemetery in Gettysburg, Pennsylvania, and declared that “government of the people, by the people, for the people, shall not perish from the earth.”¹ Inherent in this democratic ideal was the principle that “the people should choose whom they please to govern them. . . . [P]opular election, should be perfectly pure, and the most unbounded liberty allowed.”² Today, this liberty is often taken for granted. We flex our democratic muscles in voting for everything from our Presidents, congressmen, and governors, to our corporate directors, local school boards, reality show winners, and top plays of the day in the world of sports. Yet the ability to choose our leaders, a staple of our democratic society and republican government, has only received the benefit of constitutional protection for a relatively short span of time. The Fifteenth Amendment, which precluded states from denying the right to vote on the basis of race, was not made a part of our Constitution until 1870.³ Women would have to wait another fifty years for the Nineteenth Amendment to guarantee that the government could not restrict the right to vote on the basis of sex.⁴ The democratic impediment of a poll tax was not removed from the voting booths until passage of the Twenty-Fourth Amendment in 1964.⁵ And it wasn’t until 1971, with ratification of the Twenty-Sixth Amendment, that young men and women old enough to go to war were permitted to choose their representatives responsible for sending them there.⁶ It has taken

¹ President Abraham Lincoln, Gettysburg Address (Nov. 19, 1863).

² U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 795 (1995) (quoting Alexander Hamilton).

³ U.S. CONST. amend. XV.

⁴ *Id.* amend. XIX.

⁵ *Id.* amend. XXIV.

⁶ *Id.* amend. XXVI.

Congress and the States the better part of the past two hundred years to recognize, as the Supreme Court has, that suffrage is a fundamental right, and a crucial linchpin of our democracy.

The right to elect our representatives in the Senate was not established until 1913, with ratification of the Seventeenth Amendment. Prior to 1913, senators were constitutionally required to be appointed by the legislatures of their respective states.⁷ Beginning in the early nineteenth century, a movement was underway, comprised of reformers who believed that “the direct vote was the inalienable right of every citizen,” to remove the choice of senator from the discretion of the state lawmakers.⁸ What emerged from this nearly century-long effort was an amendment with a crystal clear democratic purpose to put into the hands of the people the right to choose their leaders.⁹ However, in the years since ratification, an inherent flaw has come to light that has served to undermine the original purpose of the amendment.

Immediately after vesting in the people the right to elect their senators, the drafters of the Seventeenth Amendment set forth the procedures by which vacancies should be filled. This section of the amendment reads:

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.¹⁰

In one swift action, the drafters took the power of appointment, originally granted to the state legislatures, and conveyed it to the state executives in instances where a Senate seat becomes vacant.¹¹ However, the amendment does not grant appointment powers to the governors directly. Rather, it is in the discretion of each state legislature to decide whether to grant appointment power to the governor, or to require the

⁷ *Id.* art. I, § 3, cl. 1.

⁸ C.H. HOEBEKE, *THE ROAD TO MASS DEMOCRACY* 50 (Transaction Publishers 1995).

⁹ Laura E. Little, *An Excursion into the Uncharted Waters of the Seventeenth Amendment*, 64 *TEMP. L. REV.* 629, 637 (1991).

¹⁰ U.S. CONST. amend. XVII.

¹¹ See, e.g., Vikram David Amar, *Are Statutes Constraining Gubernatorial Power to Make Temporary Appointments to the United States Senate Constitutional Under the Seventeenth Amendment?*, 35 *HASTINGS CONST. L.Q.* 727, 729-30 (2008).

governor instead to order that special elections take place.¹² Thus, while the Seventeenth Amendment produced a uniform method for the election of senators throughout the country, it also created an inconsistent framework for their replacement upon early departures from Capitol Hill. In turn, the vacancy mechanism of the Seventeenth Amendment has produced a slate of chaotic and often antidemocratic results.

Part I of this note documents recent events that have brought this previously obscure issue into the national spotlight. Part II provides a historical background of the Seventeenth Amendment, detailing the movement that led to its ratification and the three central concerns motivating its supporters. Part III focuses on the evils confronted by the framers of the Seventeenth Amendment and uses current examples to show that these same issues remain prevalent today. Finally, Part IV details the need for a constitutional amendment to remedy the current flaws in our democracy. This note ultimately concludes that in order to resolve the current democratic crisis surrounding gubernatorial appointments, special elections must be constitutionally mandated whenever a vacancy in the U.S. Senate arises.

I. THE CURRENT DEMOCRATIC CRISIS

In recent years, a string of infamous events have occurred that have undermined the modern democratic principles established by the Seventeenth Amendment. Antidemocratic forces in our national politics have wrested away the people's right to choose their leaders and have subsequently eroded the public's trust in its own government. One must look no further than to recent events in Massachusetts, where the death of Senator Edward M. Kennedy reignited age-old debates that surrounded the passage of the Seventeenth Amendment. After Senator Kennedy's death on August 25, 2009, arguments ensued over how to fill his vacant Massachusetts Senate seat.¹³ Existing law in the state prescribed that:

[T]he governor shall immediately cause precepts to be issued to the aldermen in every city and the selectmen in every town in the district, directing them to call an election on the day appointed . . .

¹² See, e.g., *id.*

¹³ *Kennedy's Seat May Remain Empty for Months*, CNN.COM (Aug. 26, 2009), <http://www.cnn.com/2009/POLITICS/08/26/kennedy.replacement/index.html>.

[which] shall not be more than 160 nor less than 145 days after the date that a vacancy is created¹⁴

State law therefore mandated that the seat remain empty until a replacement could be chosen by the people in a special election that was to be held no sooner than 145 days after August 25, the date of the Senator's death. However, the timing of the vacancy and the national political climate served to transform the issue into a partisan tug-of-war. The loss of Senator Kennedy dropped Democratic representation in the Senate from sixty to fifty-nine, thereby denying Democrats the ability to block a Republican filibuster.¹⁵ Furthermore, the vacancy arrived at a time when the debate over national health care reform had reached a crescendo, with television screens rolling footage of town hall protestors spewing angry barbs at elected officials.¹⁶ In a posthumous letter addressed to both Massachusetts Governor Deval Patrick and the state legislature, Senator Kennedy made a public request to have his successor appointed by the governor.¹⁷ With critical legislation hanging in the balance and their supermajority in the Senate in jeopardy, President Obama's administration exerted its own pressure on the state legislature to change its procedures to allow Governor Patrick to fill the empty seat before a special election could be held.¹⁸

This put Massachusetts Democrats in the awkward position of amending a law that they were responsible for having created just five years earlier. While Massachusetts Senator John Kerry was campaigning for the Presidency in 2004, state Democrats feared Republican Governor Mitt Romney would appoint a member of his own party to succeed the candidate.¹⁹ To prevent this scenario from taking place, the Democrats amended the statute to require that special elections be held whenever Senate vacancies arise.²⁰ Any notion that this change was motivated by democratic ideals in the spirit of the Seventeenth

¹⁴ MASS. GEN. LAWS ANN. ch. 54, § 140 (2004).

¹⁵ Glen Johnson, *Kennedy Loyalist Tapped as Senate Replacement*, HUFFINGTON POST (Sept. 24, 2009), http://www.huffingtonpost.com/wires/2009/09/24/mass-governor-set-to-name_ws_297986.html.

¹⁶ Philip Rucker & Dan Eggen, *Protests at Democrats' Health-Care Events Spark Political Tug of War*, WASH. POST, Aug. 6, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/08/05/AR2009080502780.html>.

¹⁷ James Oliphant, *Kennedy Asks Massachusetts to Change Successor Rules*, L.A. TIMES, Aug. 21, 2009.

¹⁸ Johnson, *supra* note 15.

¹⁹ Michael Falcone, *Massachusetts Democrats Wary of Kennedy Law Change*, POLITICO.COM (Sep. 12, 2009), <http://www.politico.com/news/stories/0909/27066.html>.

²⁰ *Id.*

Amendment was refuted in 2009, when the Democrats once again changed the law to allow for temporary gubernatorial appointments, thereby clearing the way for Governor Patrick to name Democrat Paul Kirk Jr. as Kennedy's successor.²¹

Less than a year earlier, Illinois's vacancy procedures were the focus of national attention as a replacement was sought to fill the seat left by Barack Obama's ascendency to the White House. According to state law, the seat was to be filled by "the Governor [who] shall make [a] temporary appointment to fill such vacancy until the next election of representatives in Congress, at which time such vacancy shall be filled by election"²² Thus, the ability to choose the people's representative was left exclusively to the discretion of Governor Rod Blagojevich.²³ As part of a wide-ranging investigation into allegations of corruption against the governor, federal wiretaps revealed Blagojevich leveraging the seat to secure future campaign donations and postpolitical employment opportunities.²⁴ Fearing that he would exercise his statutory duty to appoint a senator, federal authorities ended the sting and arrested the governor before the country could find out what a seat in the Senate was actually worth.²⁵ Incredibly, amid federal indictment and public outcry, Blagojevich sent a letter to the President of the Senate of the United States certifying his selection of Roland Burris to fill the vacant seat.²⁶ After the Illinois Supreme Court deemed the appointment valid, Senate Democrats backed down from their initial threats to blockade Burris and allowed him to be seated.²⁷ Not

²¹ Johnson, *supra* note 15. On January 19, 2010, the people finally had their say. To the nation's shock, they elected Republican Scott Brown to fill what had been a Democratic seat for the previous forty-seven years. Matt Viser & Andrea Estes, *Big Win for Brown*, BOS. GLOBE (Jan. 20, 2010), http://www.boston.com/news/local/massachusetts/articles/2010/01/20/republican_trounces_coakley_for_senate_imperils_obama_health_plan.

²² 10 ILL. COMP. STAT. ANN. 5/25-8 (2009).

²³ Brian Ross, *FBI: Illinois Governor Sought to "Sell" Obama's Seat*, ABC NEWS.COM (Dec. 9, 2008), <http://abcnews.go.com/Blotter/ConductUnbecoming/story?id=6424985&page=1>.

²⁴ Michael Scherer, *Governor Gone Wild: The Blagojevich Scandal*, TIME.COM (Dec. 11, 2008), <http://www.time.com/time/nation/article/0,8599,1865781-1,00.html>. Governor Blagojevich was caught on tape stating "I'm just not giving it up for . . . nothing" and lamenting the fact that President Obama's allies were "not willing to give me anything except appreciation." *Id.*

²⁵ *Id.*

²⁶ *Burris v. White*, 901 N.E.2d 895, 896 (Ill. 2009).

²⁷ Z. Byron Wolf, Jonathan Karl & Kate Barrett, *U.S. Senate Will Seat Roland Burris*, ABCNEWS.COM (Jan. 12, 2009), <http://abcnews.go.com/Politics/story?id=6631014&page=1>.

surprisingly, a poll released months after his term began revealed Burris to have a pathetic 17% approval rating, the lowest of any sitting U.S. Senator.²⁸ While the scandal surrounding his appointment must have been a substantial factor in the apparent lack of faith on the part of his constituents, the democratically flawed method by which he was chosen could not be overlooked either.

The gubernatorial appointment of Senator Lisa Murkowski of Alaska in 2002 provides another outrageous example of the Seventeenth Amendment's flawed vacancy provision. Senator Frank Murkowski, having served as Alaska's senator for twenty-two years, resigned his post to become the governor of the state.²⁹ Murkowski, "to the disgust of many Alaskans," chose his own daughter to fill his seat in the Senate.³⁰ Underscoring the inherent faults with this nepotistic selection, the newly appointed senator held divergent views from her father on two major political issues: abortion and tax reform.³¹ Gubernatorial appointments that keep the seat within the same political party are justified by some on grounds that they are consistent with the wishes of the constituents and thereby replicate their will until they can vote in the next election.³² In the case of the Murkowski family, although father and daughter were members of the same party, their political views were arguably too incongruous to construe the selection as an adequate reflection of the will of the people. Outrage over the appointment spilled over to the next election in 2004, when a ballot initiative was put forth to require special elections when a vacancy in the Senate occurs.³³ After the ballot initiative passed, it was interpreted by the Alaska

²⁸ *Senate Approval Ratings*, POLITICO.COM (May 22, 2009), http://www.politico.com/blogs/scorecard/0509/Senate_approval_ratings.html.

²⁹ Katharine Q. Seelye, *New Alaska Governor Gives Daughter His Seat in Senate*, N.Y. TIMES, Dec. 21, 2002, available at <http://www.nytimes.com/2002/12/21/us/new-alaska-governor-gives-daughter-his-seat-in-senate.html>.

³⁰ Sanford Levinson, *Political Party and Senatorial Succession: A Response to Vikram Amar on How Best to Interpret the Seventeenth Amendment*, 35 HASTINGS CONST. L.Q. 713, 720 (2008) (quoting Blaine Harden, *Senator Murkowski's Big Problem: Dad the Governor*, WASH. POST, Aug. 10, 2004, available at <http://www.washingtonpost.com/wp-dyn/articles/A52838-2004Aug9.html>).

³¹ Seelye, *supra* note 29.

³² Amar, *supra* note 11, at 753-58 (discussing Arizona's statute that requires the governor to choose a member of the departed senator's party to fill the Senate vacancy until the next election).

³³ *Alaska Judge Orders 500,000 Ballots Reprinted, Redistributed for Nov. 2 Election*, USATODAY.COM (Sep. 29, 2004), http://www.usatoday.com/news/politicselections/state/alaska/2004-09-29-ballots_x.htm.

Supreme Court to have “eliminat[ed] gubernatorial appointments from the process of filling [S]enate vacancies.”³⁴

In New York, the appointment made by Governor David Patterson to fill the vacant Senate seat of Secretary of State Hillary Clinton was likewise tarnished by “its share of acrimony.”³⁵ While there were no allegations of political misplay, the process to find a successor took weeks and was seen by critics as “a careful political calculation” by a governor who was presumed to be running for re-election in 2010.³⁶ Not only did Governor Patterson’s selection offer New Yorkers the unsavory scenario of having a loosely elected governor appoint an unelected senator,³⁷ but it also reflected the danger posed by the mixture of state and national politics. When the two are combined, government roles and accountability become confused, leaving the people misrepresented on both levels of government.³⁸ This issue was a major impetus that led to ratification of the Seventeenth Amendment.³⁹

Though unseemly gubernatorial appointments may have damaging political repercussions for the parties involved,⁴⁰ they have, with the potential exception of Governor Blagojevich,⁴¹ not

³⁴ State v. Trust the People, 113 P.3d 613, 614 (Alaska 2005). Interestingly, Senator Lisa Murkowski won a surprise re-election bid as a write-in candidate in 2010. William Yardley, *Murkowski Wins Alaska Senate Race*, N.Y. TIMES (Nov. 17, 2010), <http://www.nytimes.com/2010/11/18/us/politics/18alaska.html>. Thus, it appears the voters’ anger had little to do with the choice of senator, but rather the method by which she was chosen.

³⁵ Emily Friedman, *Feingold Seeks Change in Empty Senate Seat Protocol*, ABCNEWS.COM (Jan. 27, 2009), <http://abcnews.go.com/Politics/story?id=6734789&page=1>.

³⁶ Javier C. Hernandez, Danny Hakim & Nicholas Confessore, *Patterson Announces Choice of Gillebrand for Senate Seat*, N.Y. TIMES, Jan. 23, 2009, available at <http://www.nytimes.com/2009/01/24/nyregion/24choice.html>. Ultimately, Governor Patterson decided not to seek a second term. Danny Hakim & Jeremy W. Peters, *Under Fire, Patterson Ends His Campaign for Governor*, N.Y. TIMES, Feb. 26, 2010, available at <http://www.nytimes.com/2010/02/27/nyregion/27pateron.html>.

³⁷ Governor Patterson was elected as New York’s Lieutenant Governor, and ascended to the Governor’s mansion upon the downfall of Governor Elliot Spitzer, who resigned amid scandal surrounding his involvement in a prostitution ring. Michael M. Grynbaum, *Spitzer Resigns, Citing Personal Failings*, N.Y. TIMES, Mar. 12, 2008, available at <http://www.nytimes.com/2008/03/12/nyregion/12cnd-resign.html>.

³⁸ Roger G. Brooks, Note, Garcia, *the Seventeenth Amendment, and the Role of the Supreme Court in Defending Federalism*, 10 HARV. J.L. & PUB. POL’Y 189, 200 (1987).

³⁹ See Virginia M. McInerney, *Federalism and the Seventeenth Amendment*, 7 J. CHRISTIAN JURISPRUDENCE 153, 169 (1988); see also Brooks, *supra* note 38, at 207.

⁴⁰ See *infra* notes 163-67 and accompanying text.

⁴¹ Blagojevich’s trial for attempting to sell President Obama’s Senate seat ended in a mistrial, though federal prosecutors have announced their intention to retry the former governor. Monica Davey & Susan Saulny, *Blagojevich, Guilty on 1 of 24 Counts, Faces Retrial*, N.Y. TIMES, Aug. 17, 2010, available at <http://www.nytimes.com/2010/08/18/us/18jury.html>.

run afoul of the law. In fact, the Supreme Court affirmed and upheld one of the more egregious uses of the appointment power against a Seventeenth Amendment challenge brought by voters in the state of New York.⁴² With the legality of gubernatorial appointments largely a settled issue, the door remains open for the types of scandals and political chicanery which have been commonplace in recent years. Therefore, a state like Massachusetts can choose to have the governor appoint a successor in years where the executive and legislative branch are controlled by the same party, and subsequently amend the law to require special elections in years where no such alignment exists. Vacancies can continue to be filled according to political loyalties and special interests rather than as an accurate reflection of the will of the people. However, while these practices may not be in violation of the law, they are at odds with the goals and spirit of the Seventeenth Amendment, discussed in the next Part of this note.

II. HISTORICAL BACKGROUND OF THE SEVENTEENTH AMENDMENT

Although the Seventeenth Amendment was not enacted until 1913, the campaign to remove the power of appointment from the state legislature and open the Senate to direct elections began nearly a century earlier. Reformers intended the Seventeenth Amendment to tackle three main obstacles that were threatening the legitimacy and efficacy of the democratic system.

A. *Road to the Seventeenth Amendment*

The campaign to make the Senate directly accountable to the people spanned nearly an entire century, beginning with an initial proposal in 1826 and continuing through the ultimate ratification of the Seventeenth Amendment in 1913.⁴³ The proposed reform was first introduced into the public debate just two years after the presidential election of 1824, the first of its kind to utilize the popular vote.⁴⁴ Yet it would take another

⁴² See *Valenti v. Rockefeller*, 292 F. Supp. 851, 853 (W.D.N.Y. 1968), *aff'd*, 393 U.S. 405 (1969); see *infra* notes 224-35 and accompanying text.

⁴³ RALPH A. ROSSUM, *FEDERALISM, THE SUPREME COURT, AND THE SEVENTEENTH AMENDMENT: THE IRONY OF CONSTITUTIONAL DEMOCRACY* 183 (Lexington Books 2001); Little, *supra* note 9, at 636.

⁴⁴ See HOEBEKE, *supra* note 8, at 85.

eighty-six years of debate and 187 resolutions in Congress to produce an amendment that would extend direct elections to senatorial contests.⁴⁵ Throughout the nineteenth and early twentieth centuries, there was a steady drumbeat of democratic fervor sweeping the country, and the direct election of senators would become the crowning achievement of the broader movement for direct democracy. By 1912, the Senate could no longer drag its feet against the momentum of the people.

The shift towards direct democracy was already underway in the mid-nineteenth century, when states removed property qualifications from the right to suffrage, thereby opening the vote to all white males above the age of twenty-one.⁴⁶ Later that century, in an effort to make their governments more “responsive” to the people, some states began to implement popular referendums and ballot initiatives designed to ease the process by which their constitutions could be amended.⁴⁷ According to Senate historian George Haynes, the expansion of suffrage, the widespread use of the referendum, and the addition of elective offices formed a larger movement to “democratize American government,” a movement that would later spawn the Seventeenth Amendment.⁴⁸

The end of the nineteenth century produced two events that would serve as important triumphs for the direct democracy movement and ultimately break the will of those senators resistant to constitutional change. First was the advent of the senatorial primary election system, introduced by Nebraska in 1875.⁴⁹ However, these initial primaries proved to be little more than recommendations, as the state legislatures were not legally bound to honor the wishes of their constituents by appointing the election winner.⁵⁰ Thus, in 1904, the people of Oregon invented the “Oregon System,” whereby candidates for state

⁴⁵ ROSSUM, *supra* note 43, at 183. Measures for direct elections were far better received in the House of Representatives, where its members had always been elected directly by the people, than in the Senate, where resolutions rarely made their way out of committee. *See generally id.* at 194-214; *see also* HOEBEKE, *supra* note 8, at 141 (“[I]n five out of six congresses, the resolution had been mostly smooth sailing through the House. This was certainly not the case in the Senate, where the resolution was routinely rejected without ever coming to the floor for a vote.”).

⁴⁶ *See* HOEBEKE, *supra* note 8, at 56.

⁴⁷ *See id.* at 69; *see also* GEORGE H. HAYNES, *THE SENATE OF THE UNITED STATES, ITS HISTORY AND PRACTICE* 1041 (Russell & Russell 1960) (1938).

⁴⁸ HAYNES, *supra* note 47, at 1041.

⁴⁹ HOEBEKE, *supra* note 8, at 88.

⁵⁰ ROSSUM, *supra* note 43, at 192.

legislature could be pressured to disclose in their campaign platforms whether they would “abide by the results of the general election . . . regardless of party affiliation”⁵¹ This modified primary system added teeth to its predecessor and held state legislators accountable for implementing the will of the people. By 1912, the year the Seventeenth Amendment secured passage in both houses of Congress, twelve states were adhering to the “Oregon System” and its de facto direct election regime, while thirty-three states were using other forms of a primary election system.⁵² Having already “abdicated their federal [appointment] responsibilities in favor of the popular expedient,” the state legislatures put enormous pressure on Congress to heed the public’s calls for democracy.⁵³

In addition to delegating to the people their constitutional duty of choosing senators, state legislatures were also calling for a constitutional convention to consider an amendment that would open up senatorial elections to the popular vote.⁵⁴ The Constitution requires Congress to organize a convention for proposing amendments upon the application of two-thirds of the states.⁵⁵ By 1908, acting on the belief that the Senate would not change its electoral procedures on its own, twenty-eight states had joined a coordinated effort to call a constitutional convention to force the Senate’s hand.⁵⁶ The fear of a constitutional convention, combined with “the fact that most senators represented states whose legislatures were on record as favoring direct election” proved to be more pressure than the Senate could bear.⁵⁷ On June 12, 1911, after an eighty-six-year battle, the Senate finally relented, passing the amendment by a sixty-four to fourteen vote.⁵⁸ Passage in the House followed shortly thereafter.⁵⁹ Finally, on April 8, 1913, the Seventeenth Amendment was ratified by the states, becoming the second-quickest amendment to attain ratification.⁶⁰

⁵¹ *Id.*

⁵² *Id.*

⁵³ HOEBEKE, *supra* note 8, at 109.

⁵⁴ ROSSUM, *supra* note 43, at 192.

⁵⁵ U.S. CONST. art. V.

⁵⁶ ROSSUM, *supra* note 43, at 193-94.

⁵⁷ *Id.* at 194.

⁵⁸ *Id.* at 211-12.

⁵⁹ *Id.* at 213-14.

⁶⁰ *Id.* at 214.

B. *Aims of the Seventeenth Amendment*

While the success in bringing about direct elections was aided by a larger movement intent on spreading democracy to the people, progressive reformers made their pitch for constitutional change by taking aim at the inherent defects plaguing the existing appointment system. Specifically, reformers pointed to (1) corruption permeating the appointment process; (2) the negative influence of the “political machines”; and (3) the power of special interests as support for their argument that removal of the appointment power from the state legislatures was necessary.⁶¹ A review of these defects underscores the spirit of the Seventeenth Amendment and provides a crucial context in which to assess the current proposal to remove the appointment power from state executives.⁶²

1. Ending Corruption and Bribery

In rallying the public behind an amendment for direct senatorial elections, perhaps no issue had as dramatic an impact as the tales of corruption and bribery taking place in the state legislative halls throughout the country. There is little question that some of these sinister storylines were overexaggerated by the “yellow journalists” of the era.⁶³ The pure statistics reveal that corruption was far from being as endemic or widespread as reformers would have liked the public to believe. In the years between 1789 and 1909, there were 1180 senators sent to Capitol Hill by the state legislatures. Out of this pool, only fifteen faced allegations of corruption, and only seven were precluded from serving out their terms.⁶⁴ Only one of the fifteen alleged incidents of corruption took place prior to 1866.⁶⁵ Thus, the remaining fourteen charges were levied, not coincidentally, at the same time that the movement towards democratizing elections began to gain traction and find its voice.⁶⁶ Nevertheless,

⁶¹ See, e.g., McInerney, *supra* note 39, at 168-69; see also Amar, *supra* note 11, at 744-45; Brooks, *supra* note 38, at 200.

⁶² See *infra* Part III.

⁶³ See HOEBEKE, *supra* note 8, at 97-98. “Yellow journalism” is a term used to describe newspapers that used “lurid features and sensationalized news . . . to attract readers and increase circulation.” *Yellow Journalism*, ENCYCLOPEDIA BRITANNICA.COM, <http://www.britannica.com/EBchecked/topic/652632/yellow-journalism> (last visited Feb. 1, 2011).

⁶⁴ ROSSUM, *supra* note 43, at 191.

⁶⁵ *Id.* at 190.

⁶⁶ See *id.*

perception trumped reality as these stories became “much publicized and . . . crucial [to] undermining support for the original mode of electing senators.”⁶⁷

A review of some of the more sensational headline stories illustrates the nexus between the corruption scandals of the era and the fight for direct elections that was simultaneously being waged in Congress. The first infamous bribery case occurred in 1899 with the election of Senator William Clark from Montana. Having failed in his bid to attain office in 1890, a determined Clark devoted his impressive resources to mount a successful campaign in 1899.⁶⁸ On December 4, 1899, the same day that Clark was to be admitted to the Senate, a petition was filed by members of the Montana legislature challenging the “validity of the pretended election” on grounds of bribery.⁶⁹ The complaint alleged that Clark appropriated \$35,000 for the votes of four state lawmakers, with another \$175,000 being offered to others for their “votes or influence.”⁷⁰ On May 15, 1900, with overwhelming evidence of both Clark’s guilt and “corruption [which] totally pervaded Montana politics,” the Senate voted to strip him of his seat.⁷¹ Just four days after being ousted, Montana’s acting governor selected none other than embattled ex-Senator William Clark to fill the vacant Senate seat.⁷² Though this action was reversed three days later by the absentee governor, Clark was later appointed to the Senate in 1901 by a state legislature comprised of many of the same lawmakers who had received financial support from Clark in the past. This time, he was allowed to retain his seat in the Senate.⁷³

A decade later in 1910, Senator William Lorimer of Illinois faced “the most sensationalized, politicized, and humiliating investigation in the history of the Senate up to that time”⁷⁴ The Illinois senator, already one year into his term, found himself the subject of a *Chicago Tribune* article containing admissions from state lawmakers that they had

⁶⁷ *Id.* at 191.

⁶⁸ *The Election Case of William A. Clark of Montana (1900)*, U.S. SENATE, http://www.senate.gov/artandhistory/history/common/contested_elections/089William_Clark.htm [hereinafter *Election of Clark*] (last visited Feb. 1, 2011).

⁶⁹ *Charges in the Clark Case*, N.Y. TIMES, Dec. 4, 1899.

⁷⁰ *Id.*

⁷¹ *Election of Clark*, *supra* note 68.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ HOEBEKE, *supra* note 8, at 92.

been bribed with cash and portions of a “jackpot” slush fund to appoint Lorimer to the Senate.⁷⁵ Lorimer was cleared of any wrongdoing by the Senate based on inconsistent testimony among the parties involved and a lack of adequate proof necessary to unseat him.⁷⁶ However, it was the rhetoric of dissenting Senator Beveridge of Indiana, a member of Lorimer’s own party, which placed the scandal squarely in the middle of the ongoing Seventeenth Amendment debate. Beveridge blasted the appointment system, stating, “The candidate is not on trial. The election is on trial,” and just one instance of bribery “makes the whole election foul.”⁷⁷ By linking the corruption scandal with an outmoded method of electing senators, progressive reformers came to view the case against Lorimer “as a holy crusade.”⁷⁸

Adding fuel to the fire, on the eve of the Senate’s decision on whether to unseat Lorimer, charges were filed against Senator Isaac Stephenson of Wisconsin, alleging that his seat had been obtained through corruption.⁷⁹ Stephenson was accused of violating primary campaign finance laws, making illegal contributions, and offering bribes to assist in the procurement of his appointment.⁸⁰ Like Lorimer, Stephenson was exonerated by a majority of senators who believed that violations of state primary election laws should not preclude a senator from being seated, since the primary system was not a part of the constitutional process by which one becomes a senator.⁸¹ The dissenting senators felt that although state legislatures were not legally bound to appoint the winner of a primary election, the primary vote did reflect the will of the people, and therefore, any corruption in the primary process would taint the appointment.⁸²

⁷⁵ See *Tells of Bribes to Elect Lorimer*, N.Y. TIMES, Apr. 30, 1910; see also HOEBEKE, *supra* note 8, at 94.

⁷⁶ See HOEBEKE, *supra* note 8, at 94; *The Election Case of William Lorimer of Illinois (1910; 1912)*, U.S. SENATE, http://www.senate.gov/artandhistory/history/common/contested_elections/095William_Lorimer.htm [hereinafter *Election of Lorimer*] (last visited Feb. 1, 2011).

⁷⁷ *Owen and Beveridge Say Put Lorimer Out*, N.Y. TIMES, Jan. 9, 1911.

⁷⁸ *Election of Lorimer*, *supra* note 76.

⁷⁹ *Senator Stephenson Under Bribe Charge*, N.Y. TIMES, Jan. 11, 1911.

⁸⁰ *Id.*

⁸¹ *The Election Case of Isaac Stephenson of Wisconsin (1912)*, U.S. SENATE, http://www.senate.gov/artandhistory/history/common/contested_elections/096Isaac_Stephenson.htm [hereinafter *Case of Stephenson*] (last visited Feb. 1, 2011).

⁸² *Id.* Wisconsin was one of the states using a direct primary system that allowed voters to express their choice for senator, thereby exerting political pressure on the state legislators to honor their wishes. See *id.*; see also ROSSUM, *supra* note 43, at 192 n.49.

Though Lorimer and Stephenson were both able to retain their Senate seats, the debate surrounding their stories served as a major impetus for the change in senatorial election procedures. Both scandals took place as “public sentiment was running high against the use of money and questionable practices during state legislatures’ election of senators and while Congress was debating the Seventeenth Amendment”⁸³ The tales of scandal, the perception of corruption, and the push for direct elections were inextricably linked. Indeed, William Lorimer managed to escape expulsion during the 61st Congress (which had rebuffed a direct elections resolution).⁸⁴ However, the 62nd Congress, boasting new members who had used the scandal to gain political support in the previous election cycle, retried the issue and ousted Senator Lorimer, marking the only time in history a Senate seat had been upheld by one Congress and repealed in the next.⁸⁵ Fair or not, the perception of abuse and corruption “aroused suspicion that Senators elected by legislators . . . could not be trusted to safeguard the public interest.”⁸⁶ The timing of the scandals alongside the ongoing debate over direct elections meant one subject would rarely be discussed without mention of the other.⁸⁷ These headlines helped progressive reformers rally the public and pressure Congress into passing the Seventeenth Amendment.

Even where Senate seats were not directly paid for, some appointments were nonetheless tainted by the appearance of impropriety. Candidates fearful of arousing public suspicion through direct bribes could still purchase a seat years in advance by “contributing funds in every party contest, [and] paying the campaign expenses of [state] legislators who would respond to the call in senatorial elections.”⁸⁸

For example, the nomination of William Sheehan for the New York Senate seat in 1911 was properly condemned for this brand of corruption. Sheehan had helped the Tammany machine take control of the state legislature through his campaign contributions and political endorsements, which

⁸³ *Case of Stephenson*, *supra* note 81.

⁸⁴ *See* HOEBEKE, *supra* note 8, at 95.

⁸⁵ *See id.* at 96.

⁸⁶ HAYNES, *supra* note 47, at 1041.

⁸⁷ HOEBEKE, *supra* note 8, at 92.

⁸⁸ *Id.* at 99.

carried great weight due to his personal celebrity.⁸⁹ When the machine returned the favor by nominating him for the Senate, one legislator remarked that “Mr. Sheehan may not be exactly the kind of man we believe should be sent to the United States Senate, but he has done a lot for the party by turning control of the Legislature over to us, and I believe he is entitled to his reward.”⁹⁰ These “rewards,” like the transparent corruption present in the Lorimer and Stephenson escapades, motivated the framers of the Seventeenth Amendment to put an end to the “buying of seats” for good.⁹¹

2. Curbing the Power of the Political Machines

In the lead-up to the passage of the Seventeenth Amendment, senators were increasingly viewed less as the independent and deliberative choice of the state legislature, and more as the selection of “party bosses who ruled the legislative ‘machines.’”⁹² There was a pervading “skepticism of government officials It was the era of the professional politician, the hey-day of the boss.”⁹³ The parliamentary practices of the “bosses” fueled the growing distrust of government officials and gave rise to a number of concerns regarding the existing electoral process.⁹⁴ One primary concern, which rarely goes unmentioned with any discussion of political machines, was corruption, an issue that directly led to the ratification of the Seventeenth Amendment.⁹⁵ Two other issues that served to embolden the movement for direct elections were closely linked to the influence of the political machines: (1) the blending of state and national politics, and (2) legislative deadlocks.

Prior to passage of the Seventeenth Amendment, party leaders discovered that nominating a senator before a state election, who would in turn campaign alongside the state nominee, could help secure votes for their party.⁹⁶ This widely

⁸⁹ *Id.* at 100. The “Tammany machine” perpetuated political control over New York City through a “blend of charity and patronage,” and became “synonymous with urban political corruption.” *Tammany Hall*, ENCYCLOPEDIA BRITANNICA.COM, <http://www.britannica.com/EBchecked/topic/582027/Tammany-Hall> (last visited Feb. 1, 2011).

⁹⁰ HOEBEKE, *supra* note 8, at 100 (quoting a *New York Times* article).

⁹¹ HAYNES, *supra* note 47, at 1047.

⁹² HOEBEKE, *supra* note 8, at 17.

⁹³ McInerney, *supra* note 39, at 166.

⁹⁴ Amar, *supra* note 11, at 741.

⁹⁵ *See supra* Part II.B.1.

⁹⁶ HOEBEKE, *supra* note 8, at 86.

used practice, known as “public canvass[ing],”⁹⁷ was first employed during the Lincoln-Douglas debates for Illinois’s Senate seat in 1858. For the state legislators, their decision on whether to endorse Lincoln or Douglas was to be “the biggest popular issue in the upcoming state elections.”⁹⁸ As the use of canvassing increased throughout the country, many feared that the mixture of state and national politics was “overwhelm[ing] local issues” and “effecting the state’s legislative business.”⁹⁹

Canvassing remained popular until 1913 because it allowed a senatorial candidate to “drag a majority of the legislators on his coattails,” thereby perpetuating the power of the machines.¹⁰⁰ However, as a consequence, state officials were primarily being chosen for their choice of U.S. Senator, rather than their local accomplishments and agenda.¹⁰¹ Voters in local elections were “forced to consider both national and state issues”¹⁰² at the polls, resulting in misrepresentation on both the state and national levels.¹⁰³ Summing up the growing frustrations over machine influence, Senator Beveridge stated on the Senate floor that “it [has] come[] to pass that Senators actually have been . . . selected by the ‘party managers’ The party boss has become more potent than the legislature, or even the people themselves, in selecting United States Senators”¹⁰⁴ Two years later, direct elections would “put an end to the blurring of issues in the election of members of the legislatures”¹⁰⁵

Legislative deadlock was the other major issue attributed to the political machines that served as an impetus for direct elections.¹⁰⁶ Often times, where one political party controlled the state’s assembly and its rival party controlled the state senate, the legislative apparatus of the state would come to a

⁹⁷ See Brooks, *supra* note 38, at 207; see also Todd J. Zywicki, *Senators and Special Interests: A Public Choice Analysis of the Seventeenth Amendment*, 73 OR. L. REV. 1007, 1025 (1994).

⁹⁸ HOEBEKE, *supra* note 8, at 87.

⁹⁹ Todd J. Zywicki, *Beyond the Shell and Husk of History: The History of the Seventeenth Amendment and Its Implications for Current Reform Proposals*, 45 CLEV. ST. L. REV. 165, 200-01 (1997).

¹⁰⁰ HOEBEKE, *supra* note 8, at 89.

¹⁰¹ McInerney, *supra* note 39, at 169.

¹⁰² *Id.*

¹⁰³ Brooks, *supra* note 38, at 200. See McInerney, *supra* note 39, at 169 (“The people are electing [state] officials, not for their abilities, but for their choice of United States Senator.”).

¹⁰⁴ Little, *supra* note 9, at 641 (quoting Senator Beveridge).

¹⁰⁵ HAYNES, *supra* note 47, at 1070.

¹⁰⁶ See Amar, *supra* note 11, at 741.

standstill.¹⁰⁷ Partisan bickering between legislative bodies would sometimes leave the citizenry without any representation at all. In fact, between 1885 and 1912, there were seventy-one legislative deadlocks.¹⁰⁸ Of these partisan battles, seventeen resulted in a Senate seat remaining unfilled for an entire legislative session.¹⁰⁹ For example, in Delaware, the people were left with only one senator in three different Congresses and with none at all from 1901 through 1903.¹¹⁰ At other times, the impasse in the state legislative halls led to outbreaks of violence.¹¹¹ As a result of these deadlocks, state legislatures were rendered ineffective and Congress suffered from “the absence of various state Senators.”¹¹² Thus, legislative deadlocks helped bolster support for direct senatorial elections.¹¹³

The candidacy of William Sheehan provides an illustration of the corrosive effect that political machines had on the levers of government in the years prior to the Seventeenth Amendment.¹¹⁴ Sheehan had been nominated by Tammany boss Charles Murphy as a reward for his efforts in helping a majority of Democrats secure election to the state legislature.¹¹⁵ In turn, the state Democrats, pressured by Tammany Hall, pledged to cast their votes to send Sheehan to Capitol Hill.¹¹⁶ However, “insurgents” from upstate that were not loyal to the Tammany machine were ready to break rank and desert Sheehan’s candidacy.¹¹⁷ When Republican lawmakers refused to choose sides, a six-week deadlock ensued.¹¹⁸ The controversy was only brought to an end after Tammany Democrats and the insurgents compromised on a different candidate.¹¹⁹

¹⁰⁷ See ROSSUM, *supra* note 43, at 183.

¹⁰⁸ *Id.* at 187.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ See HOEBEKE, *supra* note 8, at 90. In 1896, Kentucky’s governor was forced to declare martial law in order to quell public outrage over the Senate contest. *Id.* In 1905, Colorado’s Republican governor called in troops to confront Denver police who supported the Democratic candidate for Senate. *Id.* And in Missouri in 1905, a fist fight broke out on the floor of the assembly when tensions boiled over during a legislative stalemate. See Zywicki, *supra* note 99, at 200.

¹¹² McNerney, *supra* note 39, at 168-69.

¹¹³ See, e.g., *id.*

¹¹⁴ See *supra* notes 89-90 and accompanying text.

¹¹⁵ HOEBEKE, *supra* note 8, at 100.

¹¹⁶ *Dix, Worried, Hopes for Another Caucus*, N.Y. TIMES, Mar. 1, 1911.

¹¹⁷ HOEBEKE, *supra* note 8, at 100.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

The Sheehan case demonstrates the litany of problems associated with party-machine involvement in senatorial appointments. First, his nomination was acknowledged as a reward for “canvassing,” a practice that resulted in voters electing state officials based on their choice of national political figures rather than on their local records. Second, the rift between Democrats loyal to the Tammany machine and the “insurgents” produced a prolonged stalemate that brought the state’s legislative process to a standstill. Third, the episode could only be settled by compromise on a lesser known candidate. Often, legislative deadlocks were broken only by nominating “the darkest of the dark horse” candidates, ultimately to the detriment of the people.¹²⁰ Other times, deadlocks led to states being completely unrepresented in the Senate. Even when seats were eventually filled, the protracted battles between the parties “always consumed a great deal of state legislative time that was therefore not spent on other important state matters”¹²¹ Thus, political-machine influence and meddling proved to be another compelling issue utilized by reformers to rally the nation behind direct elections.

3. Reducing the Influence of the Special Interests

Closely related to the suspicions surrounding political machine control over the appointment of senators was the alleged influence of big business. Large corporations contributed substantial amounts of money to the political parties in each state, with donations usually increasing during the years in which a federal election was held.¹²² These funds would then be used by the parties to finance their public canvass and mass-advertising campaigns, and to help elect the state legislators who had already pledged their vote for the party’s choice of senator.¹²³ The Senate as a whole, with at least some members having been put into power through the bankrolls of the corporations, became labeled by progressive reformers as a “millionaire’s club,’ beholden to corporate and machine interests.”¹²⁴

¹²⁰ ROSSUM, *supra* note 43, at 187.

¹²¹ *Id.*

¹²² HOEBEKE, *supra* note 8, at 103.

¹²³ *Id.* at 105.

¹²⁴ Zywicki, *supra* note 97, at 1018 (citation omitted); *see also* McInerney, *supra* note 39, at 169.

Like the issue of corruption, however, the influence of interest lobbying seems to have been overstated. Many corporations donated money not to exercise control over senatorial appointments, but merely to compete with their business rivals who were simultaneously forking over large amounts of money to the machines in an attempt to influence local legislation.¹²⁵ Their only real strategy, therefore, was to be seen on the winning team when all was said and done. The corporations implemented this strategy by hedging their bets and donating to both parties when the election appeared too close to call, or by simply withholding funds until a winner was all but certain.¹²⁶ In addition to the lack of real power and control over the appointment process, Professor Todd Zywicki points out that, contrary to the allegations of the reformers, corporate influence over national lawmakers was actually at a low point in the late-nineteenth century due to the high transactional costs associated with forming a special interest contract with the federal government.¹²⁷ This theory runs counter to the characterization of the Senate as a conglomerate of individuals indebted and subservient to the corporate interests that sent them to Capitol Hill.

Still, as was true of the corruption issue, perception overwhelmed reality and special interest influence helped progressive reformers realize their goal of direct elections. There was no disputing that special interests were contributing to state and local governments, a fact that surely could have eroded the public's confidence in the legislature's ability to appoint the most qualified candidate to represent the state in the Senate. In addition, the lack of uniformity in senatorial election procedures, along with a disparity in political stability between regions, created Senate "Stalwarts" in the East, and a constant changeover of senators in the West.¹²⁸ The stark contrast in seniority between the regions provided special

¹²⁵ HOEBEKE, *supra* note 8, at 104.

¹²⁶ *Id.*

¹²⁷ Zywicki, *supra* note 97, at 1038 (arguing that the Seventeenth Amendment was passed at the behest of special interest groups). Before 1913, the transaction costs of lobbying were "extremely high," since interest groups were forced to persuade not just Congress but also the state legislatures, who could remove a senator who did not vote in the "desired manner." *Id.* The fact that each house of Congress was accountable to a different constituency also "made it more difficult for special-interest 'factions' to divert the powers of government toward private ends." *Id.* at 1034 (citation omitted).

¹²⁸ Zywicki, *supra* note 99, at 205. These disparities meant that eastern states held distinct seniority advantages in Congress, and led to the declining influence of western states. *Id.*

interests exercising influence over eastern senators, such as the railroad industry, with the ability to procure federal funding at a disproportionate level to the detriment of the western agrarian interests.¹²⁹ Thus, it was the western states that most actively championed the direct election of senators in order to even the special interest playing field.¹³⁰ Ultimately, regardless of whether the special interests truly possessed substantial control over the appointment process and subsequent policy decisions of the senators, passage of the Seventeenth Amendment was hailed as a “hard-earned and much-needed triumph of ‘the people’ over special interests.”¹³¹ However, the reformers’ victory was not as complete and thorough as was once believed. As will be seen in Part III of this note, corruption, political influence, and special-interest control continue to plague the electoral process of the U.S. Senate.

III. CONCERNS SURROUNDING GUBERNATORIAL APPOINTMENTS

Ratification of the Seventeenth Amendment extended democracy to the people by allowing them to choose their senators directly, rather than leaving the decision to the discretion of state legislatures perceived as incapable of handling the responsibility. Still, the framers of the amendment left some vestiges of pure representative government intact by granting the state executive the power to make an appointment when a vacancy arises.¹³² Since ratification in 1913, there have been 188 gubernatorial appointments to fill vacant Senate seats.¹³³ Over this time, “the process of awarding the [Senate] office has become fraught

¹²⁹ *Id.* at 205-06; cf. Kris W. Kobach, *Rethinking Article V: Term Limits and the Seventeenth and Nineteenth Amendments*, 103 YALE L.J. 1971, 1977 (1994) (“In the Midwest, agrarian interests became convinced that only popular election could weaken the power that railroads and other corporate interests had over the Senate and end the economic discrimination against the region.”).

¹³⁰ Zywicki, *supra* note 99, at 205-06. Zywicki is careful to note that “western politicians did not favor direct election purely because of an ideological commitment to democracy and popular government. Rather, westerners favored popular election primarily because they saw it as an instrument for increasing their influence in Washington and to enact policies designed to further their economic interests.” *Id.* at 206.

¹³¹ Zywicki, *supra* note 97, at 1010 (citation omitted).

¹³² See *supra* note 11 and accompanying text.

¹³³ *Appointed Senators*, U.S. SENATE, http://www.senate.gov/artandhistory/history/common/briefing/senators_appointed.htm (last visited Feb. 11, 2011).

with malfeasance and political peril.”¹³⁴ The same issues that progressives exploited to remove appointment power from the state legislatures—namely, corruption of the appointers,¹³⁵ political party manipulation,¹³⁶ and special interest influence¹³⁷—are the same issues that have plagued gubernatorial Senate appointments since ratification. As a consequence, the credibility of both the governors and their appointees has been undermined, while public trust in the government has eroded. In keeping with the spirit of the Seventeenth Amendment, if the response to these evils in 1913 was “more democracy,”¹³⁸ then the power to choose our senators must once again be removed from politicians and granted directly to the people. This part examines the three primary issues motivating the Seventeenth Amendment in our modern day political context, and demonstrates that the current gubernatorial appointment scheme suffers from the same fatal flaws that sabotaged the pre-Seventeenth Amendment electoral process.

A. *Gubernatorial Corruption*

It is unknown whether the framers of the Seventeenth Amendment believed that state executives were a more-trusted source of authority than their colleagues in the legislative branch, though this may be presumed based on the appointment power having been taken from the legislators and granted to the governors.¹³⁹ Events in the past decade, however, reveal that any ethical credit afforded to the state executives was likely unwarranted and undeserved. For example, in 2003, Governor Edwin Edwards of Louisiana was sentenced to ten years in prison after being found guilty on charges of corruption.¹⁴⁰ The following year, Governor John Rowland of Connecticut was forced to step down after pleading guilty to a federal conspiracy

¹³⁴ Carl Hulse, *Senate Vacancies Leave a String of Sordid Tales*, N.Y. TIMES, Dec. 11, 2008, <http://www.nytimes.com/2008/12/11/us/politics/11senate.html>.

¹³⁵ See *supra* Part II.B.1.

¹³⁶ See *supra* Part II.B.2.

¹³⁷ See *supra* Part II.B.3.

¹³⁸ HOEBEKE, *supra* note 8, at 79.

¹³⁹ See Amar, *supra* note 11, at 743-44 (arguing that governors were given the right to make vacancy appointments because they share a common electorate with the senators themselves, rather than state legislators who, like candidates for seats in the House of Representatives, are subject to election in gerrymandered districts).

¹⁴⁰ Lauren Johnston, *Ex-Governor Talks From Prison*, CBSNEWS.COM (Oct. 16, 2003), <http://www.cbsnews.com/stories/2003/10/16/eveningnews/main578506.shtml>.

charge.¹⁴¹ In 2005, Governor Bob Taft of Ohio, great-grandson of former President William Howard Taft, pled no contest to misdemeanor ethics violations.¹⁴² In 2006, Governor Don Siegelman of Alabama was convicted on bribery and corruption charges,¹⁴³ and Governor George Ryan of Illinois was sentenced to prison for racketeering, fraud, and lying under oath.¹⁴⁴ In 2008, Governor Rod Blagojevich of Illinois was ousted from office after he allegedly attempted to sell then-President-elect Barack Obama's vacant Senate seat.¹⁴⁵ Also in 2008, Governor Elliot Spitzer of New York was forced to resign after being implicated in a prostitution ring.¹⁴⁶ Finally, in 2009, Governor Mark Sanford of South Carolina disappeared to Argentina to carry on an extramarital affair, allegedly using taxpayer money and campaign donations to finance the excursion.¹⁴⁷ Sanford faced thirty-seven ethics violations that were ultimately settled, thereby allowing him to escape impeachment.¹⁴⁸ This rundown of general gubernatorial corruption within the past decade is not meant to characterize all state executives as inherently corrupt. Rather, it illustrates that the office of the governor, like the state legislative halls at the turn of the century, has been tainted by a steady barrage of media reports detailing episodes of corruption and ethics violations. It is through this prism that gubernatorial appointments to fill vacant Senate seats are now being viewed by the public.

Since ratification, Senate vacancy appointments have rarely involved the type of transparent bribery made infamous in the cases of William Clark¹⁴⁹ and William Lorimer.¹⁵⁰ Governor Rod Blagojevich's claim that he wasn't "giving it up for [expletive] nothing," in reference to then-President-elect

¹⁴¹ Jarrett Murphy, *Guilty Plea for Ex-Conn. Governor*, CBSNEWS.COM (Dec. 23, 2004), <http://www.cbsnews.com/stories/2004/06/21/politics/main625031.shtml>.

¹⁴² Dan Balz, *Taft Admits Ethics Violations*, WASH. POST, Aug. 19, 2005, <http://www.washingtonpost.com/wp-dyn/content/article/2005/08/18/AR2005081800319.html>.

¹⁴³ John Schwartz & Charlie Savage, *Review of Governor's Conviction Sought*, N.Y. TIMES, Apr. 22, 2009, <http://www.nytimes.com/2009/04/22/us/22justice.html>.

¹⁴⁴ Peter Slevin, *Ex-Governor Is Sentenced to Prison*, WASH. POST, Sept. 7, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/09/06/AR2006090600512.html>.

¹⁴⁵ See *supra* notes 23-26 and accompanying text.

¹⁴⁶ See *supra* note 37.

¹⁴⁷ Robbie Brown, *Gov. Sanford Accepts Fine in Ethics Case*, N.Y. TIMES, Mar. 18, 2010, <http://www.nytimes.com/2010/03/19/us/19sanford.html>.

¹⁴⁸ *Id.* Governor Sanford paid \$74,000 to avoid hearings on the ethics allegations. *Id.*

¹⁴⁹ See *supra* text accompanying notes 68-73.

¹⁵⁰ See *supra* text accompanying notes 74-78.

Obama's vacated Senate seat, provided a rare example of such blatant corruption.¹⁵¹ Rather, most of the appointment scandals occurring after 1913 have borne a stronger resemblance to the type of indirect "rewards" for political favors that were the hallmark of the political machine, exemplified in the case of William Sheehan.¹⁵² For instance, in 1929, Pennsylvania Governor John Fisher appointed Senator Joseph Grundy, a textile manufacturer who was "an influential backer of campaigns, [and] who had contributed heavily to Fisher's campaign."¹⁵³ In more recent years, gubernatorial appointments have come to be seen as a choice to "reward patrons, install relatives, [or to] put in placeholders"¹⁵⁴

Unmerited appointments have become ever more frequent, increasing the urgency to remove the appointment power from the state executives. For example, in 2009, Florida Governor Charlie Crist selected his "former chief of staff and campaign 'maestro' George LeMieux," marking the first time the newly appointed senator would hold a public office.¹⁵⁵ Critics of the appointment, blasting it as an example of "cronyism," quickly responded with a bill that would require special elections when a Senate seat is vacated.¹⁵⁶ Appointments by Louisiana's Governor Edwin Edwards of his wife in 1972,¹⁵⁷ and Alaska's Governor Frank Murkowski of his daughter in 2002,¹⁵⁸ implicate cronyism's closely related cousin—nepotism. Alaskan

¹⁵¹ Monica Davey & Jack Healy, *Illinois Governor Charged in Scheme to Sell Obama's Seat*, N.Y. TIMES, Dec. 9, 2008, <http://www.nytimes.com/2008/12/09/us/politics/10Illinois.html>.

¹⁵² See *supra* notes 89-90 and accompanying text.

¹⁵³ *The Election Case of William B. Wilson v. William S. Vare of Pennsylvania (1929)*, U.S. SENATE, http://www.senate.gov/artandhistory/history/common/contested_elections/109Wilson_Vare.htm (last visited Feb. 1, 2011). The seat had been vacant due to the Senate's determination that Senator Vare, who was victorious in the election, had gained his seat through fraud and corruption. *Id.*

¹⁵⁴ Hulse, *supra* note 134.

¹⁵⁵ Catherine Dolinski, *Bills Seek Vote for Senate Vacancies*, TAMPA TRIB., Oct. 13, 2009. Crist would later seem apologetic for the appointment, saying, "I was happy to carry out my duty but I think it's preferable always to have the people weigh in." Lloyd Dunkelberger, *Crist's Popularity Dips Below 50 Percent in Poll*, SARASOTA HERALD TRIB., Oct. 18, 2009, <http://www.allbusiness.com/government/elections-politics-politics-political-parties/14761561-1.html>.

¹⁵⁶ Alex Leary, *Kriseman: End 'Cronyism' and Hold Special Elections for U.S. Senate Vacancies*, BUZZ BLOG OF ST. PETERSBURG TIMES (Oct. 13, 2009), <http://www.tampabay.com/blogs/the-buzz-florida-politics/content/kriseman-end-cronyism-and-hold-special-elections-us-senate-vacancies>.

¹⁵⁷ Jacob Weisberg, *Political Corruption Smackdown: Which State Is the Most Crooked—Illinois or Louisiana?*, SLATE (Dec. 13, 2008), <http://www.slate.com/id/2206523>.

¹⁵⁸ See *supra* text accompanying note 29.

voters, like critics in Florida, responded swiftly with a ballot initiative to require special elections when a vacancy arises in the Senate.¹⁵⁹ In Delaware, the appointment of Edward Kaufman to fill Vice President-elect Joseph Biden's Senate seat was widely viewed as a mere "placeholder" for Beau Biden, until the Vice President's son returned from military service.¹⁶⁰ Ultimately, both the son and the place-holding Senator declined the opportunity to fill the father's seat by the time the special election did occur.¹⁶¹ Nevertheless, the treatment of a Senate seat as "a family heirloom" gave ample ammunition for critics of vacancy appointments to renew the call for special elections.¹⁶²

Polling in the most recent states to incur a Senate vacancy suggests immediate dissatisfaction and distrust among the electorate after an appointment is made by the governor. In New York, according to a poll conducted in September 2009, just months after her appointment, Senator Kirsten Gillibrand retained a 26% approval rating, while Governor Patterson's approval rating hovered around 17%.¹⁶³ Newly appointed Colorado Senator Michael Bennet, who was controversially chosen to replace Senator Ken Salazar, enjoyed an approval rating of just 31% according to an August 2009 poll,¹⁶⁴ while the governor who appointed him held a mere 40% approval rating.¹⁶⁵

¹⁵⁹ See *supra* text accompanying note 33.

¹⁶⁰ See Perry Bacon, Jr., *GOP Eyes Seats of Appointed Senators*, WASH. POST, Jan. 28, 2009; Bill Schneider, *Senate Appointments Highlight Messy Process*, CNN.COM (Feb. 5, 2009), <http://www.cnn.com/2009/POLITICS/02/05/schneider.senate.appoint/index.html>. Similarly, in Florida, Governor Charlie Crist's appointment of George Lemieux was widely seen as a placeholder for Crist himself to make a run at the Senate in 2010. See Michael Muskal, *Marco Rubio Defeats Gov. Charlie Crist in Florida Senate Race*, L.A. TIMES, Nov. 2, 2010, <http://articles.latimes.com/2010/nov/02/news/la-pn-crist-rubio-final>.

¹⁶¹ *GOP Encouraged to Pick Up Senate Seat as Beau Biden Decides Not to Follow Dad*, FOXNEWS.COM (Jan. 25, 2010), <http://www.foxnews.com/politics/2010/01/25/bidens-son-beau-announces-run-senate>.

¹⁶² *How Not to Pick a Senator: Three Examples Show Why Vacancies Should Be Filled by Special Election*, WASH. POST, Jan. 24, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/01/23/AR2009012303379.html>.

¹⁶³ *Marist Poll: NYS Voters on White House Involvement in NYS Politics*, MARIST COLL. INST. FOR PUB. OP. (Sep. 24, 2009), <http://maristpoll.marist.edu/wp-content/misc/nyspolls/ny090922/Complete%20September%202009,%202009%20NYS%20Poll%20Release%20and%20Tables.pdf>. Gillibrand would overcome the initial backlash surrounding her appointment and win the special election held in 2010. See *Appointee No More: NY's Gillibrand Wins Sen. Seat*, WASH. POST.COM (Nov. 2, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/11/02/AR2010110206914.html>. Governor Patterson, on the other hand, never recovered politically and did not seek another term. See Hakim & Peters, *supra* note 36.

¹⁶⁴ *Colorado Senate Pretty Wide Open*, PUBLIC POLICY POLLING (Aug. 18, 2009), <http://publicpolicypolling.blogspot.com/2009/08/colorado-senate-pretty-wide-open.html>.

¹⁶⁵ *Ritter Still Vulnerable*, PUBLIC POLICY POLLING (Aug. 20, 2009), http://www.publicpolicypolling.com/pdf/PPP_Release_CO_820925.pdf. Bennet used his time

The immediate backlash against vacancy appointments in Florida and Massachusetts was felt by Florida Governor Charlie Crist, who saw a precipitous decline in his approval ratings from 60% to 48%,¹⁶⁶ and Massachusetts Governor Deval Patrick, whose ratings following his appointment were among “the lowest gubernatorial approval ratings in the country” in the Democratic stronghold of Massachusetts.¹⁶⁷ At a time when, according to a December 2010 Gallup poll, Congress’s overall approval rating stands at an all-time low of 13%, there exists a dramatic need for trust and accountability in government.¹⁶⁸ These goals can only be undermined when Senate vacancies are filled by gubernatorial appointments.

The allegations of self-serving bribery, cronyism, and nepotism surrounding the most recent Senate appointments have reinvigorated the old debates waged in the run up to passage of the Seventeenth Amendment. While introducing a constitutional amendment to require special elections for vacant Senate seats, Senator Russ Feingold drew a parallel between the reformers’ fight for direct elections in the previous century, and the current slate of appointment controversies, stating:

[The ratification of the Seventeenth Amendment] was the culmination of a nearly century-long struggle. The public’s disgust with the corruption, bribery, and political chicanery that resulted from the original constitutional provision giving State legislatures

in Washington to “establish a solid financial base,” ultimately enabling him to edge out Tea Party challenger Ken Buck in the 2010 special election. See Kevin Simpson, Allison Sherry & Michael Booth, *Bennet Wins in Senate Race*, DENVERPOST.COM (Nov. 3, 2010), http://www.denverpost.com/election2010/ci_16502977. Like his New York counterpart, Colorado Governor Bill Ritter did not seek re-election in 2010. See Steven K. Paulson, *Hickenlooper Defeats Tancredo in Colorado Governor’s Race*, HUFFINGTON POST (Nov. 2, 2010), http://www.huffingtonpost.com/2010/11/02/hickenlooper-defeats-tanc_n_778004.html.

¹⁶⁶ Dunkelberger, *supra* note 155. In 2010, Marco Rubio soundly defeated Crist as the two battled to replace Lemieux in the Senate. See Muskal, *supra* note 160.

¹⁶⁷ Eamon Javers, *Obama Tries to Energize Patrick*, POLITICO (Oct. 23, 2009), <http://www.politico.com/news/stories/1009/28661.html#>. But see Tom Jensen, *Our Governor Approval Ratings*, PUBLIC POLICY POLLING (Apr. 30, 2009), <http://publicpolicypolling.blogspot.com/2009/04/our-governor-approval-ratings.html> (showing Delaware Governor Jack Markell with a 62% job approval rating as recently in April, just months following his appointment of Edward Kaufman). Governor Patrick ultimately survived to win re-election in 2010. See Abby Goodnough, *Patrick Hangs on as Massachusetts Governor*, N.Y. TIMES, Nov. 3, 2010, available at <http://www.nytimes.com/2010/11/03/us/politics/03mass.html>. However, his appointment was rebuked by the electorate as the Senate seat of Ted Kennedy fell into Republican hands following Scott Brown’s surprise special election victory. See Viser & Estes, *supra* note 21.

¹⁶⁸ See Jeffrey M. Jones, *Congress’ Job Approval Rating Worst in Gallup History*, GALLUP.COM (Dec. 15, 2010), <http://www.gallup.com/poll/145238/congress-job-approval-rating-worst-gallup-history.aspx> (“Americans currently hold Congress in lower esteem for the job it is doing than at any point in the last 36 years.”).

the power to choose United States Senators was a big motivation for the amendment. As we have seen in recent months, gubernatorial appointments may pose the same dangers. They demand the same solution and, that is, direct elections.¹⁶⁹

The perception that governors are ethically incapable of choosing the people's representatives mirrors one of the major democratic defects that the framers of the Seventeenth Amendment sought to remedy. In keeping with the spirit of the amendment, the only solution to the recent wave of corrupt appointments is to put democracy back into the hands of the people when a vacancy in the Senate arises.

B. Party Politics in Senate Appointments

As was the case prior to the passage of the Seventeenth Amendment, party politics currently has an enormous influence on the decision of who will represent the people in the Senate. While the amendment's vacancy provision has cured the problem of legislative deadlocks by putting the appointment power into the hands of the executive, other vexatious issues that plagued the old electoral system continue to frustrate the will of the people today. First, the modern day governor is just as susceptible to political party power and influence as state legislators were to the political machines prior to 1913. Further, party influence over gubernatorial appointments and other state and local issues blurs the lines between national and local politics and engenders confusion among voters. Finally, the political chicanery that corroded the legislative appointment system continues to have a disproportionate impact on the ultimate filling of a vacant Senate seat. The political party apparatus wields more power now than ever before, and gubernatorial Senate appointments have become a purely political process under its direct purview and influence.

Professor Sanford Levinson raises the possibility that the Seventeenth Amendment reformers may have believed that removing the appointment power from the "party hacks" in the state legislature and vesting it in the executive branch would "diminish the relevance of political party identity" surrounding

¹⁶⁹ *A Constitutional Amendment Concerning Senate Vacancies: Hearing Before the Subcomm. on the Constitution of the Comm. on the Judiciary, 111th Cong. 2* (2009) [hereinafter *Hearing*] (statement of Sen. Russ Feingold, Member, Sen. Comm. on the Judiciary).

senatorial appointments.¹⁷⁰ The notion that state executives stand above the partisan fray cannot be given any sort of credence today, as governors are just as reliant on their party's warchest of campaign capital and political organization as the turn-of-the-century legislators were on their political machines. For example, in the 2009 gubernatorial elections in New Jersey and Virginia, both the Democratic and Republican parties "pour[ed] unprecedented amounts of money and muscle" behind their party candidates.¹⁷¹ In Virginia, the two parties contributed over twenty million dollars in their attempts to sway the outcome of the state's election.¹⁷² In New Jersey, the Republican National Committee spent another \$4.1 million backing Chris Christie for governor.¹⁷³

Given this reliance on the national party apparatus, it would be wishful to think that the governor, entrusted with a decision that could sway the balance of power in both the Senate and the country, would be insulated from the pressure and influence of partisan politics. The statistics refute any such idealistic notion. Of the fifty-seven Senate appointments made by governors since 1960, only two have resulted in the appointment of a senator from the governor's opposing party.¹⁷⁴ Hall Lusk, a Democrat from Oregon, was sent to Capitol Hill in 1960 by a Republican governor.¹⁷⁵ The only other time a governor has chosen a member of the opposing party was Democratic Governor Dave Freudenthal's appointment of Republican John Barrasso, a choice forced on him by a Wyoming law constraining the governor's choice to a member of the departed senator's party.¹⁷⁶ Governors are no less likely to be influenced by their political party affiliation than were the legislators of the early twentieth century. As Professor Levinson points out, "[t]he fact that modern governors may not

¹⁷⁰ Levinson, *supra* note 30, at 721.

¹⁷¹ David Chalian, *National Parties Battle in VA and NJ to Set Stage for 2010*, ABC NEWS.COM (Oct. 7, 2009), <http://abcnews.go.com/Politics/dnc-gop-battle-gubernatorial-races-virginia-jersey-setting/story?id=8768117>.

¹⁷² *Id.*

¹⁷³ Michael O'Brien, *RNC Spends over \$13 Million on Va., N.J. Gov. Races*, THE HILL (Oct. 29, 2008), <http://thehill.com/blogs/blog-briefing-room/news/65365-rnc-spends-over-13-million-on-va-nj-gov-races>.

¹⁷⁴ See Ken Rudin, *The Ever-Shrinking Democratic Field for '08*, NPR.ORG (Dec. 20, 2006), <http://www.npr.org/templates/story/story.php?storyId=6653800> (citing only one instance where a senator was appointed by a governor from the opposing party, having been written prior to Senator Barrasso's appointment in 2007).

¹⁷⁵ *Id.*

¹⁷⁶ Amar, *supra* note 11, at 727.

be ‘bosses’ does not lessen their identity one whit, by and large, as thoroughly political and partisan creatures.”¹⁷⁷

Furthermore, national party entrenchment in state and local affairs can blur the lines between national and local politics and engender confusion among voters when they elect their state officers. As evidenced by spending levels in gubernatorial elections, the national political parties and other out-of-state political action committees pump enormous amounts of money into influencing voters’ decisions regarding in-state affairs.¹⁷⁸ Aside from investments of capital, political parties now practice a modern form of “canvassing,” where national political stars invade small towns to pledge their support behind the local candidates. For instance, during the 2009 election season, President Obama and Vice President Biden appeared in New Jersey to stump for incumbent governor Jon Corzine,¹⁷⁹ while big-name Republicans Sarah Palin and Newt Gingrich interjected themselves into an obscure upstate New York congressional race, hoping to change their party’s national profile.¹⁸⁰ Attack ads produced and paid for by the political parties tying the state candidate to the unpopular policies of national political figures are a common sight each fall, as are ads attempting to exploit the popularity of a national figure in the candidate’s same party. As a result, modern state elections are often viewed as a referendum on national party policies rather than a vote on pressing local issues.¹⁸¹

This convergence of state and national party politics makes a governor’s appointment decision inherently political, as an unpopular appointment could become a determinative issue in the next gubernatorial campaign. In 2008, Alaska voters ousted incumbent Governor Frank Murkowski in favor of Sarah Palin, due in part to the former’s nepotistic

¹⁷⁷ Levinson, *supra* note 30, at 722.

¹⁷⁸ See *supra* notes 171-73 and accompanying text; see also Olympia Meola, *Out-of-State Groups Pump \$6 Million into Va. Gubernatorial Race*, RICHMOND TIMES-DISPATCH, July 19, 2009, http://www2.timesdispatch.com/news/2009/jul/19/cash19_20090718-222406-ar-36842.

¹⁷⁹ Paul Steinhauser, *Clinton Stumps for Corzine*, CNN POLITICS (Oct. 20, 2009), <http://politicalticker.blogs.cnn.com/2009/10/20/clinton-stumps-for-corzine>.

¹⁸⁰ See Janet Hook, *New York Race at Epicenter of GOP a Mutiny*, L.A. TIMES, Oct. 27, 2009, <http://articles.latimes.com/2009/oct/27/nation/na-gop-identity-crisis27>.

¹⁸¹ See Dana Milbank, *Referendum on Obama? Depends on Who Wins*, WASH. POST, Nov. 3, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/11/02/AR2009110202873.html>.

appointment of his daughter to the Senate.¹⁸² Governor Patterson's appointment of Kirsten Gillebrand, on the other hand, was portrayed by the *New York Times* as "a careful political calculation by the governor, who will run for his second term as governor in 2010"¹⁸³ The controversies surrounding Senate appointments have the potential to overwhelm critical local issues that are at stake during a gubernatorial campaign and can lead to misrepresentation in state government. The blending of national politics in the state process was one of the primary reasons for the constitutional change to direct elections.¹⁸⁴

Finally, the political stunts and tricks that reformers sought to eliminate with passage of the Seventeenth Amendment remain a plague on the vacancy system. Though the power to fill a vacant Senate seat by appointment is the exclusive domain of the governor, it is the state legislatures that make the initial determination of whether the seat will be filled by a special election or a gubernatorial appointment.¹⁸⁵ Therefore, the process of naming a successor remains vulnerable to the same influences and political tricks that were prevalent before the implementation of direct elections. This was acutely demonstrated in Massachusetts, where state Democrats in control of the legislature stripped Republican Governor Mitt Romney of his appointment powers in 2004,¹⁸⁶ only to reinstitute gubernatorial appointments in 2009 with a Democratic governor in charge and a sixty-seat Senate supermajority hanging in the balance.¹⁸⁷ This brand of political manipulation, similar to the practice of "gerrymandering," where state and congressional district lines are redrawn by the party in power, is designed to perpetuate party control and undermine the will of the people.¹⁸⁸ Thus, the party in control of

¹⁸² *Alaska Gov. Murkowski Concedes Defeat in GOP Gubernatorial Primary*, FOXNEWS.COM (Aug. 23, 2006), <http://www.foxnews.com/story/0,2933,209918,00.html> ("His approval ratings have skidded over the past four years because of much-criticized decisions such as appointing his daughter to his U.S. Senate seat").

¹⁸³ Hernandez, Hakim & Confessore, *supra* note 36.

¹⁸⁴ See *supra* notes 96-105 and accompanying text.

¹⁸⁵ U.S. CONST. amend. XVII ("[T]he executive authority of such State shall issue writs of election . . . [p]rovided, That the legislature of any State may empower the executive thereof to make temporary appointments").

¹⁸⁶ See *supra* notes 19-20 and accompanying text.

¹⁸⁷ See *supra* note 21 and accompanying text.

¹⁸⁸ See Amar, *supra* note 11, at 746. Amar argues that gerrymandered districts caused misrepresentation in state legislative halls and led to the appointment of senators

the state legislature can still exercise direct and undue influence over the choice of the new senator.¹⁸⁹

In 2007, Hawaii recognized these dangers and changed its laws to require the governor to select the new senator from “the same political party as the prior incumbent.”¹⁹⁰ The goal in Hawaii was to create an appointment process “free of political gamesmanship or controversy” and “ensure the integrity of the legislative process.”¹⁹¹ Only Arizona, Utah, and Wyoming¹⁹² have followed Hawaii’s lead in an attempt to reduce the “potential for partisan shenanigans.”¹⁹³ It is doubtful this potential can ever be completely eradicated so long as the modern-day political machines continue to exercise enormous influence and control over state politics and the replacement of senators.

C. *Special Interest Influence on the Political Process*

Contrary to the aspirations of the Seventeenth Amendment reformers, special interests are more active today than ever before in Washington, D.C., and throughout the country on the state and local levels. Though campaigns are often filled with promises to “change the culture in politics,” a coded phrase for eliminating special interest influence over legislation,¹⁹⁴ Washington remains “a city dominated by influence-

who would have otherwise been defeated in state-wide popular elections. *Id.* Thus, gerrymandering was a “largely unnoticed” cause of the change to direct elections. *Id.*

¹⁸⁹ See *id.* at 754 (“[A] legislature could still decide . . . depending on the party identity of the governor and the current U.S. Senators, to enact or repeal such a law requiring party continuity.”).

¹⁹⁰ HAW. REV. STAT. § 17-1 (2009).

¹⁹¹ Haw. Sess. Laws, Act 57, § 1 (2007).

¹⁹² ARIZ. REV. STAT. ANN. § 16-222(C) (2008); UTAH CODE ANN. § 20A-1-502(b) (LexisNexis 2009); WYO. STAT. ANN. § 22-18-111(a)(i) (2009).

¹⁹³ Amar, *supra* note 11, at 754. Still, these statutes do not go far enough, since they fail to recognize the will of the independent voter who votes for a person and not a party. See *infra* text accompanying notes 242-44.

¹⁹⁴ For instance, throughout the course of the 2008 presidential debates, both Senator McCain and President Obama made numerous mentions of their records on fighting the special interests. President Obama told the country that “we’re going to have to change the culture in Washington so that lobbyists and special interests aren’t driving the process The key is whether . . . we’ve got priorities that are working for you as opposed to those who have been dictating the policy in Washington lately, and that’s mostly lobbyists and special interests.” *Transcript of Second McCain, Obama Debate*, <http://www.cnn.com/2008/POLITICS/10/07/presidential.debate.transcript> (last visited Feb. 1, 2011). Senator McCain, during the course of the debates, stated, “I think if we get rid of cronyism and special interest influence in Washington . . . we can act more effectively.” *Id.* McCain also touted his record on the issue, telling the country that he had “advocated and taken on the special interests.” *Id.*

seeking money and special-interest lobbyists.”¹⁹⁵ In fact, as Professor Zywicki argues, the advent of direct elections has made special interest lobbying prohibitively easier by allowing corporations to lobby Congress directly, rather than going through the middle-man—the state legislature.¹⁹⁶ This theory is borne out in the level of influence that big business exerts over seemingly every major policy issue on all levels of government today. Still, this unintended benefit bestowed on special interest groups does not counsel leaving the authority to choose a senator in the hands of one person, who in many instances has herself been the recipient of corporate and special interest funds. Rather, in keeping with the spirit of the Seventeenth Amendment, the decision should remain in the hands of the people.

In the years immediately following passage of the Seventeenth Amendment, numerous elections were challenged on grounds that the victor had used excessive campaign funds, often provided by special interest lobbyists. For instance, the 1926 senatorial election of Thomas Schall in Minnesota, viewed as a conflict “between agrarian and industrial interests,” was contested on such grounds.¹⁹⁷ In 1928, Governor Lennington Small of Illinois was forced to make an appointment following the Senate’s refusal to seat Colonel Frank L. Smith, the winner of the election who stood accused of accepting excessive contributions from public utility companies.¹⁹⁸ Though Smith was ousted due to special interest meddling that had tainted his campaign, Governor Small’s subsequent appointment to fill the vacant seat was characterized as the product of heavy pressure exerted by “large business and agricultural interests.”¹⁹⁹

Supreme Court decisions in the past one hundred years have allowed special interest influence to fester and expand throughout the country. In *Newberry v. United States*,

¹⁹⁵ Albert R. Hunt, *Some Holdouts to Obama’s Vow to Change Washington*, BLOOMBERG.COM (Oct. 26, 2009), <http://www.bloomberg.com/apps/news?pid=20601070&sid=aFAPkVN34Kpw> (quoting Fred Wertheimer, an advocate for campaign finance reform).

¹⁹⁶ Zywicki, *supra* note 99, at 216; *see also* HOEBEKE, *supra* note 8, at 106 (“In short, the historical trend toward greater popularization of Senate elections, by transferring direct responsibility from the legislators to the electorate en masse, had given rise to the very conditions which reformers hoped to end with even more popularization.”).

¹⁹⁷ *The Election Case of Magnus Johnson v. Thomas D. Schall of Minnesota (1926)*, U.S. SENATE, http://www.senate.gov/artandhistory/history/common/contested_elections/106Johnson_Schall.htm (last visited Feb. 1, 2011).

¹⁹⁸ *The Election Case of Frank L. Smith of Illinois (1928)*, U.S. SENATE, http://www.senate.gov/artandhistory/history/common/contested_elections/110Frank_Smith.htm (last visited Feb. 1, 2011).

¹⁹⁹ *Gov. Small Asked to Name Senator*, N.Y. TIMES, Apr. 15, 1928.

automobile magnate Henry Ford challenged the 1918 election of Senator Truman Newberry on grounds that his excessive campaign expenditures violated federal law.²⁰⁰ The Court struck down the statute, which attempted to regulate campaign financing in primary elections.²⁰¹ Since that decision, the Court has undercut similar attempts to regulate the influx of special interest capital into the electoral process. In *Buckley v. Valeo*, the Court struck down portions of the Federal Election Campaign Act that attempted to place a ceiling on campaign expenditures by individuals and groups, as an infringement of First Amendment political expression.²⁰² Though the Court has upheld caps on campaign contributions,²⁰³ its attempt to balance the “problem of large campaign contributions . . . where the actuality and potential for corruption have been identified” while simultaneously allowing for “free . . . independent political expression”²⁰⁴ has left an open window for special interest groups to influence public policy. This window was blown open in *Citizens United v. Federal Election Commission*, where the Supreme Court struck down a portion of the McCain-Feingold Act that prohibited corporations and unions from making independent expenditures to advocate for the election or defeat of a particular candidate.²⁰⁵ The landmark decision was immediately criticized by President Obama as “a major victory for big oil, Wall Street banks, health insurance companies and the other powerful interests that marshal their power every day in Washington to drown out the voices of everyday Americans.”²⁰⁶

²⁰⁰ *Newberry v. United States*, 256 U.S. 232, 245 (1921).

²⁰¹ *Id.* at 258.

²⁰² *Buckley v. Valeo*, 424 U.S. 1, 45 (1976) (holding that the prevention of the “appearance of corruption” was not a sufficient justification for expenditure limits); see also *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 617-18 (1996) (where a plurality held that the Republican party’s expenditure on radio attack ads was an independent expenditure and thus not subject to federal contribution limits). The absence of coordination between the party and its candidate regarding the advertising campaign rendered the expenditure “independent” and took it out of the realm of a regulated “contribution.” *Id.* at 614. The expenditure was therefore guaranteed First Amendment protection. *Id.*

²⁰³ See *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 392-93 (2000) (distinguishing limits on expenditures from contribution caps on the grounds that “limitations on independent expenditures are less directly related to preventing corruption’ than contributions are”) (quoting *Colo. Republican Fed. Campaign Comm.*, 518 U.S. at 615).

²⁰⁴ *Buckley*, 424 U.S. at 28.

²⁰⁵ 130 S. Ct. 876, 913 (“Government may not suppress political speech on the basis of the speaker’s corporate identity.”).

²⁰⁶ Adam Liptak, *Justices, 5-4, Reject Corporate Spending Limit*, N.Y. TIMES, Jan. 21, 2010, available at <http://www.nytimes.com/2010/01/22/us/politics/22scotus.html>.

The presidential criticism of the Supreme Court represented the growing distrust on the part of an American public that has witnessed the disproportionate influence that special interest groups have exerted over its representatives in recent years. For example, in 2009, the website *Politico* reported that companies and financial institutions that had received TARP (Troubled Asset Relief Program) funds from the federal government were using portions of the taxpayers' money to lobby the same politicians who had given them the money in the first instance.²⁰⁷ In defense of this practice, a spokesperson for General Motors said, "[W]e have an obligation to remain engaged at the federal and state levels and to have our voice heard in the policymaking process."²⁰⁸ Just as potential changes in the regulation of the financial system attracted the attention and money of special interests, so too did the debates surrounding reform of the nation's health care system. The war over health care legislation, which played out publicly as a debate between Democrats and Republicans, was being waged behind the scenes by pharmaceutical companies and labor unions against health insurance companies and business groups.²⁰⁹ The White House reportedly sided with the former, reaching a deal with the pharmaceutical companies whereby it would veto any act of Congress that would extract any more than the \$80 billion in cost reductions over ten years already promised by the pharmaceutical industry.²¹⁰ In exchange, the Democrats would receive industry support and \$150 million in advertising contributions to support the health care initiative.²¹¹ Despite yearly campaign promises, the quid-pro-quo business of Washington politics has not changed. Echoing the words of Abraham Lincoln, Representative Dennis Kucinich of Ohio bemoaned special interest control over the health care debate and other policy issues in the nation's capital, stating:

Is this the best we can do . . . guaranteeing at least \$50 billion in new business for the insurance companies . . . but the government won't negotiate with the pharmaceutical companies which will drive

²⁰⁷ Jeanne Cummings, *From Under TARP, Banks Add Lobbying*, POLITICO (July 28, 2009), <http://www.politico.com/news/stories/0709/25497.html>.

²⁰⁸ *Id.*

²⁰⁹ Associated Press, *'Special Interests' on Both Sides in Health Fight*, MSNBC.COM (Aug. 19, 2009), http://rss.msnbc.msn.com/id/32479506/ns/politics-health_care_reform.

²¹⁰ David D. Kirkpatrick, *White House Affirms Deal on Drug Cost*, N.Y. TIMES, Aug. 6, 2009, <http://www.nytimes.com/2009/08/06/health/policy/06insure.html>.

²¹¹ Associated Press, *supra* note 209.

up pharmaceutical costs. Is this the best we can do . . . [Then] we have to ask some hard questions about our political system . . . Government of the people, or government by the corporations?²¹²

While special interest influence has expanded in the federal arena since passage of the Seventeenth Amendment,²¹³ it remains endemic on the state and local level as well. For instance, in the 2009 New Jersey gubernatorial race, challenger Chris Christie took in \$401,700 from business groups, with nearly \$60,000 coming from medical device companies.²¹⁴ His opponent, incumbent governor Jon Corzine, received money from a variety of interests, including business groups, law firms, and state employees.²¹⁵ In Florida, Governor Charlie Crist, who had appointed George LeMieux to fill a vacant Senate seat,²¹⁶ took in a record \$4 million in the first fifty days after announcing his own bid to run for the Senate.²¹⁷ Although federal and state laws limit contributions to a candidate, lobbyists and politicians like Crist have been able to circumvent the laws by using a practice known as “bundling.”²¹⁸ It was LeMieux who defended the practice of bundling contributions in 2008 before he was appointed senator, even where it would “sweep[] in donations from troubled businesses or the money of out-of-staters with no apparent interest in the election.”²¹⁹ And in Massachusetts, Governor Deval Patrick stood accused of using a conduit known as the “Seventy-First” fund to evade state campaign contribution laws.²²⁰ The scandal

²¹² 111 Cong. Rec. H3962 (Oct. 29, 2009) (statement of Rep. Dennis Kucinich), available at http://www.youtube.com/watch?v=dzzVppah_mg.

²¹³ See *supra* note 127 and accompanying text.

²¹⁴ Ted Sherman, *N.J. Gubernatorial Candidates Gov. Corzine, Christie Get Campaign Funds from Special Interests*, STAR LEDGER, Oct. 11, 2009, http://www.nj.com/news/index.ssf/2009/10/nj_gubernatorial_candidates_go_1.html.

²¹⁵ *Id.*

²¹⁶ See *supra* note 155 and accompanying text.

²¹⁷ Beth Reinhard, *Governor Charlie Crist's Senate Campaign Reaps Benefits from Bundling of Donations*, MIAMIHERALD.COM (July 22, 2009), <http://www.tampabay.com/news/politics/gubernatorial/article1020488.ece>.

²¹⁸ *Id.* “Bundling” allows lobbyists constrained by state law caps on contributions to exceed the threshold by pooling together contributions from different sources. *Id.* For instance, in Florida, state law caps a lobbyist’s contributions to a political campaign at \$2400. However, a Jacksonville lobbyist was able to contribute \$139,250 to Governor Crist by pooling contributions from his corporate clients. *Id.*

²¹⁹ Jennifer Liberto & Rob Farley, *Donations for McCain and Crist Bundled Far from Florida*, ST. PETERSBURG TIMES, Aug. 21, 2008, <http://www.tampabay.com/news/politics/state/article778639.ece>.

²²⁰ See Frank Phillips, *Patrick Fund-Raising Arrangement Skirts Law: Donations Channeled Through Democratic Party*, BOS. GLOBE, Jan. 23, 2008, http://www.boston.com/news/local/articles/2008/01/23/patrick_fund_raising_arrangement_skirts_law. This ethically

forced the governor's own party to pass a new state ethics law to close loopholes that had allowed him to circumvent the contribution caps,²²¹ just three months before his senatorial appointment at the height of the national health care debate.²²²

Despite modest attempts at limiting the ability of special interest groups to influence public policy, there is still ample opportunity for massive corporate donations on both the federal and state levels. Prior to passage of the Seventeenth Amendment, it was the state legislators who were accused of being under the influence of special interest lobbyists.²²³ Today, all politicians, including governors, have proven to be equally incapable of resisting the expansive war chests of big business. Thus, there is legitimate concern that lobbyists can exercise undue influence over a governor's senatorial appointment. This is added reason, in keeping with the intent of the framers of the Seventeenth Amendment, to transfer the power of replacing a vacant Senate seat back into the hands of the people.

IV. THE NEED FOR CONSTITUTIONAL REFORM

The Supreme Court, by affirming a particularly egregious use of the gubernatorial appointment power in *Valenti v. Rockefeller*, has upheld its validity against constitutional challenge.²²⁴ In *Valenti*, voters brought an action against Governor Nelson Rockefeller of New York, challenging his authority to appoint a successor for Senator Robert F. Kennedy following the assassination of the Senator.²²⁵ New York's election law required that a vacancy be filled by a special election to occur at the annual November elections, so long as sixty days had passed between the vacancy and the primary election.²²⁶ However, since Robert Kennedy died on June 6, 1968, and New York held its primary elections within the same month, a replacement could not be named until the

questionable practice allowed the governor to accept up to \$5500 in political contributions, well in excess of a state law that provided for a \$500 contribution ceiling. *Id.*

²²¹ See Matt Viser, *Leaders Approve Ethics Revamp: House, Senate to Vote Today; Bill Would Bar Most Gifts*, BOS. GLOBE, June 25, 2009, http://www.boston.com/news/local/massachusetts/articles/2009/06/25/legislative_leaders_approve_bill_to_overhaul_ethics_laws/?page=2.

²²² See *supra* text accompanying note 16.

²²³ See *supra* Part II.B.3.

²²⁴ 393 U.S. 405 (1969).

²²⁵ *Valenti v. Rockefeller*, 292 F. Supp. 851, 853 (W.D.N.Y. 1968), *aff'd*, 393 U.S. 405 (1969).

²²⁶ *Id.* at 854.

elections of November 1969.²²⁷ To add insult to the voters' injury, New York election law required that special elections for Senate seats take place in even-numbered years.²²⁸ Therefore, voters would have to wait until November 1970, a full twenty-nine months after the vacancy was created, to democratically elect their representative in the Senate.²²⁹ Construing the two-year appointment of a senator as merely "temporary," and therefore compliant with the Seventeenth Amendment, the district court held the delay was justified by the legitimate government interests in maximizing voter turnout,²³⁰ allowing the parties and candidates proper time to finance a campaign,²³¹ and retaining a primary election system.²³² In reaching its conclusions, the court found there to be "no fundamental imperfection in the functioning of democracy."²³³ The dissent found these justifications to be "exaggerated" and "too remote and unsubstantial to warrant the resulting denial of the popular will."²³⁴ To the dissent, the Seventeenth Amendment's unmistakable command for popular sovereignty rendered the twenty-nine month period that voters would have to wait to choose their senator a betrayal of "the revered principle of government 'by the people.'"²³⁵

The justifying interests identified in *Valenti* and accepted by the Supreme Court become even less compelling in the current political environment. Voter turnout is far easier to promote today with advancements in communication technology and grassroots "get out the vote" campaigns, not to mention the twenty-four hour cable news cycle which covers elections like horse races and brings heightened awareness to key issues throughout the country.²³⁶ Nor is the expense of financing a campaign a compelling justification for depriving the people of their right to vote. The reach of the national party

²²⁷ *Id.* at 855.

²²⁸ *Id.* at 854.

²²⁹ *Id.* at 855.

²³⁰ *Id.* at 859.

²³¹ *Id.* at 859-60.

²³² *Id.* at 861.

²³³ *Id.* at 867.

²³⁴ *Id.* at 888 (Frankel, J., dissenting).

²³⁵ *Id.* at 875-76 (majority opinion).

²³⁶ See Liz Sidoti, *Races an Early Test of Obama Influence*, SEATTLE TIMES, Nov. 3, 2009, http://seattletimes.nwsourc.com/html/localnews/2010192606_apuselectionrdp4thldwritethru.html (President Obama has "deployed the Democratic National Committee and his own political campaign arm, Organizing for America, to ensure the swarms of new voters he attracted in 2008 turn out even if he's not on the ballot.").

apparatus, political action committees, and the internet have helped place viable candidates before the public in rapid turnaround time.²³⁷ Furthermore, the interest in retaining special election primaries stands in contradiction to the goal of controlling expense to the candidates and the parties.²³⁸ If mere expense is sufficient reason to forestall the right to vote, then conducting a special election without a primary would reduce this burden and still provide for popular sovereignty. Promptly filling vacancies and saving taxpayer money have also been identified by other courts as legitimate government interests that are sufficient to remove the right to vote from the people.²³⁹ Yet time spent giving the people the right to choose their leaders has not been an impediment to the House of Representatives, where special elections are required when a vacancy arises.²⁴⁰ Taxpayer expense should also not be sufficient reason to burden the right to vote and deprive those same taxpayers of a basic democratic tenet.²⁴¹

²³⁷ For instance, in a special election to replace a vacant House seat in New York's twenty-third district, conservative political groups and the Republican National committee pumped large amounts of money in just a matter of weeks behind out-of-state conservative Doug Hoffman, propelling him from an obscure, out-of-state third party candidate to the top of the polls. See Justin Blum, *Republican Scozzafava Backs Democrat in New York Congress Race*, BLOOMBERG.COM (Nov. 2, 2009) <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=afQoujAldk.U>; see also Rachel Weiner, *Palin Endorses Hoffman, Snubs GOP Candidate in New York House Race*, HUFFINGTON POST (Oct. 23, 2009), http://www.huffingtonpost.com/2009/10/23/palin-endorses-hoffman-sn_n_331279.html.

²³⁸ See *Trinsey v. Pennsylvania*, 941 F.2d 224, 235 (3d Cir. 1991) ("The legislature is free to decide that it is not in the interests of the state to require that a special primary, with its attendant expense for the state and the candidates, be held before the special election when . . . the vacancy occurs too late to be filled in the usual spring primary."). The interest in promptly filling a vacant Senate seat is also undermined by the *Valenti* interest in retaining party primaries. *Id.*

²³⁹ See *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 12 (1982) (upholding temporary appointments to the legislature in the Commonwealth of Puerto Rico); see also Amar, *supra* note 11, at 751-52.

²⁴⁰ U.S. CONST. art. I, § 2, cl. 4 ("When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies."); see also Paul Taylor, *Proposals to Prevent Discontinuity in Government and Preserve the Right to Elected Representation*, 54 SYRACUSE L. REV. 435, 438 (2004) ("Indeed, the House of Representatives is constitutionally unique in that it is the only part of the federal government whose legitimacy is based exclusively on democratic elections."); *Hearing, supra* note 169, at 2 (statement of Rep. Russ Feingold) ("No one can represent the people in the House of Representatives without the approval of the voters. The same should be true for the Senate.").

²⁴¹ See *Statement of U.S. Senator Russ Feingold on Introduction of a Constitutional Amendment Concerning Senate Vacancies*, U.S. SENATE (Jan. 29, 2009), <http://feingold.senate.gov/record.cfm?id=307525> [hereinafter *Feingold Statement*] ("But the cost to our democracy of continuing the anachronism of gubernatorial Senate appointments is far greater than the cost of infrequent special elections . . . I find the cost argument wholly unconvincing.").

Four states have attempted to strike a balance between the state's interests and the people's right to vote by allowing gubernatorial appointments, but constraining the choice to a member of the departed senator's political party.²⁴² These statutes make the questionable assumption that retaining party continuity is an accurate reflection of the will of the people. However, they do not take into account the possibility that the vacant Senate seat may have been created due to a scandal implicating the political party as a whole.²⁴³ Further, they ignore the will of the independent voter who votes for a person rather than for a party.²⁴⁴ In short, these statutes are quick-fix solutions that miss the major issue with gubernatorial appointments: they deprive people of the right to choose, an essential component of popular sovereignty. Perhaps nothing illustrates the importance of the right to choose better than the "American Rule," applied by a majority of courts, which upholds votes for a deceased candidate on grounds that it reflects the people's choice to disavow another candidate in favor of creating a vacancy.²⁴⁵ Whether a voter's motivation is to send a preferred candidate to Washington, or simply to choose to prevent a less desired candidate from getting there, the element of choice has been fundamental to our form of government since passage of the Seventeenth Amendment.

As the "[j]udge of the Elections, Returns, and Qualifications of its own Members,"²⁴⁶ the onus to reform a broken system falls exclusively to Congress. Senator Russ Feingold, leading the charge for a constitutional amendment, invoked the struggle of the Seventeenth Amendment reformers, stating, "it seems obvious to us that the Senate should be elected by the people, [but] the struggle for that right was not easy or fast. But the cause was just and in the end the call for direct elections was too strong to be ignored."²⁴⁷ If the cause was just in the early

²⁴² See *supra* notes 190-93 and accompanying text.

²⁴³ See Amar, *supra* note 11, at 756.

²⁴⁴ A July 2009 poll from the *Washington Post* and *ABC News* identified independent voters as 41% of the overall electorate. John Avlon, *Commentary: Obama Losing Independent Voters*, CNN.COM (Aug. 27, 2009), <http://www.cnn.com/2009/POLITICS/08/27/avlon.obama.independents/index.html>.

²⁴⁵ See Michael G. Adams, *Missouri Compromise: Did the Posthumous Senatorial Election of Mel Carnahan and Subsequent Appointment of Jean Carnahan Compromise Federal or State Law?*, 29 N. KY. L. REV. 433, 439 (2002). The American rule allows votes for a deceased candidate to count, and was invoked in Mel Carnahan's posthumous victory over John Ashcroft for a Missouri Senate seat. *Id.* at 435.

²⁴⁶ U.S. CONST. art. I, § 5, cl. 1.

²⁴⁷ *Feingold Statement*, *supra* note 241.

twentieth century, then it is certainly a just cause today. Corruption, or at least strong appearances of impropriety in gubernatorial appointments, remain prevalent and undermine faith and trust in the government.²⁴⁸ Political chicanery and gamesmanship continue to disproportionately influence who will represent the people in the Senate.²⁴⁹ Special interests, often chided as the enemy of democracy, are stronger and more powerful now than they ever were prior to direct elections.²⁵⁰

At a time when the country is so sharply and evenly divided over a range of critical issues, the notion of unelected senators deciding matters of national importance violates the spirit of the Seventeenth Amendment and offends our democratic principles. The time has come for Congress to put an end to gubernatorial Senate appointments and ensure once again a government of the people, by the people, and for the people.

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²⁴⁸ See *supra* Part III.A.

²⁴⁹ See *supra* Part III.B.

²⁵⁰ See *supra* Part III.C.

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