NOTE

Money for Senate Seats and Other Seventeenth Amendment Politicking: How to Amend the Constitution to Prevent Political Scandal During the Filling of Senate Vacancies

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INTRODUCTION

In 2004, Massachusetts state law enabled the Governor to fill a vacant United States Senate seat by appointment.[1] At the time, Republican Mitt Romney was the Governor of Massachusetts, and Democrat John Kerry, the state's junior Senator, was running for President of the United States.[2] The Massachusetts State Legislature, which was dominated by a Democratic majority, realized that if Kerry won the 2004 presidential election, the Republican Governor likely would appoint a Republican to replace him in the United States Senate.[3]

To avoid this outcome, the Massachusetts legislature voted to change the state law and strip the Governor of his power to appoint a

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1 Scott S. Greenberger, *Romney Veto Overridden*, BOS. GLOBE, July 31, 2004, at B1.

2 *Id.*

3 *Id.*

replacement to the United States Senate.[4] The new law, which was vetoed by Governor Romney and subsequently passed by a two-thirds vote in both houses of the Massachusetts General Court, required that a special election be held in order to fill a vacancy in the United States Senate.[5] Senator Kerry did not win the 2004 presidential election,[6] so the issue ultimately became moot, but the state law in Massachusetts remained on the books.[7]

In 2009, a new situation faced the Massachusetts legislature. The State Governor was now a Democrat, Deval Patrick, and Democratic Senator Edward Kennedy was diagnosed with terminal brain cancer.[8] Upon Senator Kennedy's death, Massachusetts would have only one Senator until the required special election could be held approximately five months later,[9] leaving Massachusetts underrepresented during debate on federal legislation concerning a national healthcare plan.[10] Knowing that Governor Patrick would fill Senator Kennedy's seat with a Democrat, the Democratically controlled legislature changed the law again by granting the Governor the power to temporarily fill a vacant Senate seat by appointment.[11]

Over half of the legislators who were present for both votes switched positions from one vote to the other. Of the 105 members present for both votes,[12] 58 members in the Massachusetts House of Representatives switched positions.[13] All 13 Republicans who were

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4 *Id.*

5 *Id.* The Democrats have long held supermajorities in both houses of the state legislature, known as the General Court of Massachusetts, enough to override any Governor's veto. As of March 23, 2011, the Democrats held ninety percent of the seats in the Senate (36 Democrats and 4 Republicans) and eighty percent of the seats in the House of Representatives (128 Democrats, 31 Republicans, and 1 vacancy). THE 187TH GENERAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS, http://www.mass.gov/legis/ (last visited Mar. 23, 2011).

6 Adam Nagourney, *Bush Celebrates Victory*, N.Y. TIMES, Nov. 4, 2004, at A1.

7 Louis Jacobson, *Massachusetts Legislature Flip-Flops on Governor's Senatorial Appointment Power*, POLITIFACT.COM (Sept. 24, 2009, 3:44 PM), http://www.politifact.com/truth-o-meter/statements/2009/sep/24/massachusetts-legislature/massachusetts-legislature-flip-flops-governors-sen/.

8 *Id.*

9 The 2004 law required that elections to fill the Senate vacancy to be held between 145 and 160 days after the vacancy occurred. Greenberger, s*upra* note 1.

10 Jacobson, *supra* note 7.

11 *Id.*

12 *How Your Current Mass. State Senators and State Representatives Voted in 2004—On Bill to Take Away the Governor's Power to Appoint a US Senator in Case of a Vacancy*, MASSRESISTANCE.ORG (Sept. 7, 2009), http://www.massresistance.org/docs/gen/09c/kennedy_bill/2004_votes.html (showing that 105 of the current state representatives voted on the 2004 law).

13 Matt Viser & Andrew Ryan, *58 Flip-Flops on Senate Succession*, BOSTON.COM (Sept. 18, 2009), http://www.boston.com/news/local/breaking_news/2009/09/58_flip_flops_o.html.

seated for both votes switched positions.[14] In 2004, they voted to grant the Republican Governor the power of appointment; in 2009, they voted to deny the same power of appointment to the Democratic Governor.[15] On the other side of the aisle, 45 Democrats switched positions on the issue; those who voted to deny Republican Mitt Romney the power of appointment in 2004 gladly granted the power of appointment to Democrat Deval Patrick in 2009.[16] These two votes show that the decision regarding how to fill an important federal government position was decided not on the principles of how the process should be undertaken, but instead by partisan politics.[17] As one lawmaker put it, "If this institution supports the change, it is clearly a corrupt institution. It's not making judgments based on what's best for the whole Commonwealth, but based on what's best for one political party."[18]

In 2008, a more egregious political scandal occurred with the filling of a vacant United States Senate seat. Then-Senator Barack Obama of Illinois won the 2008 presidential election and vacated his Senate seat on November 16, 2008.[19] Illinois state law permits the Governor to appoint a replacement to fill the vacancy.[20] In this instance, Governor Rod Blagojevich abused the appointment power, leading to his arrest by federal agents in December 2008 on charges of conspiracy and soliciting bribes.[21] Taped conversations indicated that the Governor was seeking to sell the open Senate seat.[22] In January 2009, the Illinois State Legislature impeached Governor Blagojevich and removed him from office for soliciting bribes in exchange for an appointment to the United States Senate.[23]

The Seventeenth Amendment lays the groundwork that allowed the Massachusetts legislative debacle and the Blagojevich scandal to

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14 *Id.*

15 *Id.*

16 *Id.* (noting that one Democrat voted against his party both times).

17 Jacobson, *supra* note 7.

18 Frank Phillips & Matt Viser, *Leaders Cool to Kennedy Request*, BOS. GLOBE, Aug. 21, 2009, at A1 (quoting Massachusetts legislator Bradley H. Jones Jr.) (internal quotation marks omitted).

19 Lori Montgomery, *Auto Bill Would Add Oversight*, WASH. POST, Nov. 17, 2008, at A9.

20 10 ILL. COMP. STAT. ANN. 5/25-8 (West 2010).

21 Jeff Coen et al., *Feds Arrest Gov. Blagojevich to Stop a Political 'Crime Spree,'* CHI. TRIB., Dec. 10, 2008, at 1.

22 Monica Davey, *Governor Accused in Scheme to Sell Obama's Seat*, N.Y. TIMES, Dec. 10, 2008, at A1.

23 Rick Pearson & Ray Long, *Blagojevich's Political Career Ends in Senate's Unanimous Vote*, CHI. TRIB., Jan. 30, 2009, at 1.

occur. Ratified in 1913, the Amendment changed how Senators were selected by stripping the state legislatures of their power to appoint Senators and requiring that Senators be elected by the people of the states.[24] The Amendment also details how vacancies in the United States Senate are filled.[25] Surprisingly, although the first clause of the Seventeenth Amendment—which requires the popular election of Senators—provides for a more democratic means of selecting Senators,[26] the second clause permits vacancies to be filled by a completely unchecked and undemocratic process.[27] According to the Amendment, 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."[28] Therefore, when a vacancy arises in the United States Senate, state law determines how the vacancy will be filled. State governors, with permission from their state legislatures, are permitted to appoint replacements to fill those vacancies.[29]

Currently, thirty-three states permit their governors to appoint replacements to the United States Senate without any checks on the appointment procedure.[30] As the previous two anecdotes illustrate, this practice can lead to political gamesmanship and political scandals that decrease public trust in the national government. The Constitution should not leave the door open to political corruption. In fact, the Seventeenth Amendment was enacted to prevent political scandals from occurring when selecting United States Senators.[31] In order to enable the Seventeenth Amendment to fulfill its purpose of preventing such scandals, and to promote democratic values and good governance, this practice must change, and the Constitution must be amended to provide proper safeguards for filling vacancies in the United States Senate.

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24 U.S. CONST. amend. XVII.

25 *Id.*

26 *See id.* cl. 1.

27 *See id.* cl. 2.

28 *Id.*

29 *Id.*

30 THOMAS H. NEALE, CONG. RESEARCH SERV., R40421, FILLING U.S. SENATE VACANCIES: PERSPECTIVES AND CONTEMPORARY DEVELOPMENTS 8–10 (2009). The thirty-three states referred to are states that permit gubernatorial appointment without the requirement of a quick special election to fill the seat or without "same party" limitations, which require the governor to select an appointee from the same party as the vacating Senator. *Id.* Massachusetts changed its law regarding Senate vacancies after the publishing of this report. *See* Jacobson, *supra* note 7.

31 *See infra* Part I.B.

The constitutional safeguards that this Note proposes are threefold. First, this Note's proposal limits state legislatures' abilities to manipulate the appointment process by setting the procedure to fill Senate vacancies in constitutional stone. Second, it checks governors' abilities to engage in political scandals by enabling state legislatures to check gubernatorial appointments. Finally, it checks the potential for scandal and ensures a fair election process by limiting the duration that interim appointees can remain seated in the United States Senate.

Part I of this Note provides a brief history of the procedures used for selecting United States Senators. It discusses how Senators were not always popularly elected and the ratification of the Seventeenth Amendment. More specifically, it details the history of Senate appointments, analyzes the problems associated with gubernatorial appointment powers, and shows that the potential for abuse is large. Part II of this Note discusses various proposals that have been suggested to remedy this problem and demonstrates why they fail to provide an adequate solution. Part III proposes amending the Constitution to place checks and balances on the gubernatorial appointment power. It explains how the new Amendment solves the current problems that are associated with the gubernatorial appointment process and how it avoids the pitfalls that are associated with other proposed solutions. Part III also shows how this proposal considers the timing, costs, effects on subsequent elections, and emergency situations better than other proposed solutions.

I. THE SENATE AND THE SEVENTEENTH AMENDMENT

The United States Senate is a powerful branch of the United States government; it is often referred to as "the world's greatest deliberative body."[32] Senators wield substantial political power.[33] It is therefore important that Senators are selected in a manner free from corruption or scandal.

A. The Significance of the Senate

The Framers of the Constitution created the Senate to represent the interests of the state governments[34] and provided the states with equal representation in the Senate in order to protect their individual

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32 *Introduction to the Historical Minutes*, U.S. SENATE, http://www.senate.gov/pagelayout/history/b_three_sections_with_teasers/essays.htm (last visited Oct. 24, 2010).

33 *See infra* Part I.A.

34 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 392 (Max Farrand ed., rev. ed. 1937) (showing that James Madison believed that the Senate was to represent the states).

sovereignty.[35] In an effort to protect federalism and to ensure that the states' interests were properly represented, the Framers gave the Senate tremendous power.[36] The Founding Fathers ensured that the states, through the Senate, would have a voice in almost all federal policymaking.[37] Indeed, the Senate's approval is required to form treaties with foreign nations, to ratify amendments to the Constitution, and to create federal laws.[38]

The men and women who make up this house of Congress each have significant power to shape and control the federal government. Senators are involved in approving presidential appointments of ambassadors, the cabinet, heads of agencies, and federal judges.[39] Senators also serve terms of six years, longer than any other elected position provided for in the Constitution.[40] Furthermore, because the Senate is a relatively small legislative body, with each state sending only two members,[41] each individual Senator wields considerable power during floor votes. Senate filibuster rules, which empower any individual Senator to prevent or delay votes on any measure on the Senate floor, further give each individual Senator a tool with which he can greatly shape the outcome of federal policy.[42] Senators are powerful individuals; it is therefore important that they are properly selected.

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35 THE FEDERALIST NO. 43, at 279 (James Madison) (Clinton Rossiter ed., 1961) ("The exception in favor of the equality of suffrage in the Senate was probably meant as a palladium to the residuary sovereignty of the States, implied and secured by that principle of representation in one branch of the legislature."); *see* Bradford R. Clark, *Constitutional Compromise and the Supremacy Clause*, 83 NOTRE DAME L. REV. 1421, 1422–23 (2008). Professor Clark notes that by giving states equal representation in the Senate, states are better able to protect their sovereignty from majorities in the federal government. *Id.* Otherwise, if proportional representation existed in the Senate, larger states could impose their will in the federal government and undermine the sovereignty of the smaller states. *Id.*

36 *See* Clark, *supra* note 35, at 1422–23.

37 *Id.*

38 *Id.* When framing the Constitution, the states wanted to ensure that they would retain power and be able to prevent the federal government from taking additional power without their consent. The Constitution provides that the Senate, which represents the interests of the state governments, be the *only* part of the federal government that is required to be involved in every form of federal lawmaking: passing laws, accepting treaties, and enacting amendments to the Constitution. By keeping the states involved in all of these processes, the Constitution sets up procedural safeguards for the structure of federalism. *Id.*

39 U.S. CONST. art. II, § 2.

40 *Id.* art. I, § 3 (amended 1913).

41 *Id.*

42 SENATE COMM. ON RULES AND ADMIN., 110TH CONG., SENATE MANUAL 21–22 (Comm. Print 2008). Any individual Senator can prevent a vote on any measure from occurring until three-fifths of the Senate votes to invoke cloture. *Id.*

Under the original text of the Constitution, the people did not elect their Senators by popular vote.[43] Instead, the state legislatures selected their Senators.[44] This practice was another safeguard of federalism, as Senators responded directly to the state governments that they were selected to represent.[45] Over the second half of the nineteenth century, however, the selection process became corrupt.[46] In response, the American people amended the Constitution to close the door on this corruption.[47]

B. A Brief History of the Seventeenth Amendment

Ratified in 1913, the Seventeenth Amendment provided for the popular election of Senators from each state; the state legislatures would no longer decide who would sit in the United States Senate.[48] An increase in corruption, scandal, and bribery during the selection of Senators by state legislatures led to the proposal and ratification of the Seventeenth Amendment.[49] Prior to the adoption of the Amendment, local and regional businesses and industry heavily influenced and pressured state legislators to appoint specific individuals to the Senate; "[i]n the most egregious cases, wealthy and powerful men were able to buy Senate seats for themselves or their friends."[50] In the 1890s, the Senate became known as a corrupt "millionaires club," serving the wishes of corporate sponsors rather than citizens.[51] The Senate investigated six different bribery cases from 1866 to 1906.[52] For example, in 1899, W.G. Conrad and William Clark, rival mine owners, paid more than $1 million trying to bribe Montana legislators for an appointment to the United States Senate.[53] Furthermore, disagreement among state legislators often led to long-term vacancies in the Senate. Between 1891 and 1905, state legislatures failed to fill

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43 *See* U.S. CONST. art. I, § 3 (amended 1913).

44 *Id.*

45 *See* THE FEDERALIST NO. 58 (James Madison).

46 *See infra* Part I.B.

47 *See infra* Part I.B.

48 U.S. CONST. amend. XVII.

49 ELIZABETH V. BURT, THE PROGRESSIVE ERA 327–30 (2004).

50 *Id.* at 327.

51 DAVID E. KYVIG, EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776–1995, at 209 (1996).

52 David G. Savage, *Blagojevich Under Siege: Century Ago, Illinois Was in Same Boat*, CHI. TRIB., Dec. 11, 2008, at 14.

53 *Id.*

Senate seats forty-five times.[54] At one point, Delaware went completely unrepresented in the United States Senate for seven years.[55]

After years of corruption, the people called for change—they wanted to elect their Senators directly to avoid further corruption and political scandals.[56] Coincidently, like the Blagojevich scandal, it was a bribery scandal in the State of Illinois that finally pushed the nation to reform. The story broke when Illinois state representative Charles A. White announced that other state legislators bribed him to vote for Senate candidate William Lorimer.[57] In total, four legislators accepted payments from a general corporate corruption fund that was used to secure votes for Lorimer.[58] The *Chicago Tribune* ran an article detailing the scandal, and the story spread around the country.[59] Universal contempt for scandals such as this one finally culminated with the proposal of the Seventeenth Amendment. Only a few years after the Lorimer story, Congress and the requisite thirty-six states passed the Seventeenth Amendment, establishing the direct election of Senators.[60]

The Seventeenth Amendment enjoyed widespread support. It was ratified in less than one year, and all but one state that voted on ratification approved the Amendment.[61] The Amendment sought to eliminate political corruption that could occur with so few people involved in the selection of Senators.[62] The first clause, which deals with the general selection of Senators,[63] accomplishes this goal. By taking the power to elect Senators out of the relatively few hands of the state legislators and putting it into the hands of the people, the Amendment substantially truncated opportunities for political corruption.[64] Although the first clause of the Amendment served to accomplish this

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54 KYVIG, *supra* note 51, at 209.

55 *Id.*

56 *See* BURT, *supra* note 49, at 327–28.

57 *Id.* at 329.

58 *Id.*; KYVIG, *supra* note 51, at 211.

59 BURT, *supra* note 49, at 329.

60 *Id.* at 330.

61 *Ratification of Constitutional Amendments*, U.S. CONST. ONLINE, http://www.usconstitution.net/constamrat.html#Am17 (last visited Oct. 22, 2010). Utah is the lone state that specifically voted to reject the Amendment. *Id.*

62 *See* BURT, *supra* note 49, at 328.

63 U.S. CONST. amend. XVII, cl. 1.

64 *See* BURT, *supra* note 49, at 328 (noting that allowing for the direct election of Senators was thought to be the best way to prevent corruption).

goal, the second clause of the Amendment, which deals with the filling of vacancies,[65] still left the door open for political scandals.

The second clause of the Seventeenth Amendment allows state governors, if they get permission from the state legislature, to appoint replacements to the United States Senate in the event of a vacancy.[66] Most state legislatures have elected to give this power to their governors.[67] Although the framers of the Amendment were concerned with the political corruption involved in the initial selection of Senators, there was surprisingly little concern regarding the potential for political corruption in the appointment of Senators to fill vacancies.[68] The original text of the Constitution gave governors the power to appoint temporary replacements to the Senate if their respective state legislatures were not in session.[69] Members of the Senate voting on the proposed Amendment apparently had little concern regarding the continuation of this practice.[70] The anecdotes that introduce this Note illustrate, however, that the corruption the Seventeenth Amendment sought to prevent is still alive in the field of appointing replacements to fill Senate vacancies. Although the United States ratified the Seventeenth Amendment to end corruption in the selection process, the job is unfinished; the Amendment must be further amended in order to eradicate corruption in the process of filling vacancies.

C. Current State of the Law

As previously discussed, the Seventeenth Amendment empowers the state legislatures to decide whether to give state executives the power to appoint replacements.[71] Only 3 states do not permit any kind of gubernatorial appointment;[72] 46 states provide for some form

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65 U.S. CONST. amend. XVII, cl. 2.

66 *Id.*

67 NEALE, *supra* note 30, at 8–10. Forty-six states (Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, and Wyoming) all allow for some form of gubernatorial appointment. *Id.*

68 *See id.*

69 U.S. CONST. art. I, § 3 (amended 1913).

70 NEALE, *supra* note 30, at 6 ("What is perhaps most remarkable about deliberations over the 17th Amendment in both chambers is how little was said of the vacancies clause.").

71 U.S. CONST. amend. XVII, cl. 2.

72 NEALE, *supra* note 30, at 8. Oklahoma, Oregon, and Wisconsin are the three remaining states to provide for no form of gubernatorial appointment to fill Senate vacancies after Massachusetts changed its law in 2009. *Id.*; Jacobson, *supra* note 7.

of gubernatorial appointment.[73] Within the 46 states that permit a gubernatorial appointment, there are variations in the state laws for appointing a replacement Senator.[74] A few states require that the appointed interim Senator be of the same party as the Senator that vacated the seat or be chosen from a list prepared by members of that party.[75] Nine states require a fast special election but permit the governor to make an appointment for the interim period before the special election.[76] Most troubling is that 33 states provide for a gubernatorial appointment without any further restrictions, checks, or special elections.[77] In 33 states, therefore, governors may appoint a Senator to serve until the next general election or, sometimes, even longer.[78]

Generally, the 33 states that permit the governor to make appointments with no further restrictions hold elections to permanently fill the vacancy in November of an even year[79]—the next general election.[80] Courts have determined, however, that the Constitution gives the states considerable discretion in determining when and how those elections occur.[81] Although the Constitution states that the executive "shall issue writs of election," the elections are to be held as the "leg-

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73 NEALE, *supra* note 30, at 9. In one state, Alaska, the law is currently unclear. In 2004, the Alaska Legislature adopted a statute that permits a gubernatorial appointment followed by a quick special election. However, Alaska voters passed a referendum to go into effect on the same day that called for a quick special election but did not expressly permit the Governor to make such an interim appointment. *Id.* at 8.

74 *See id*. at 8–10.

75 *Id.* at 10 (Arizona, Hawaii, Utah, and Wyoming).

76 *Id.* at 9 (Alabama, Arkansas, California, Louisiana, Massachusetts, Mississippi, New Jersey, Vermont, and Washington). Massachusetts, after recently changing its state law, now falls into this category. Jacobson, *supra* note 7.

77 NEALE, *supra* note 30, at 10. These are Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Ohio, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Virginia, and West Virginia. *See id.* at 10 n.49.

78 *Id.* at 10.

79 *See* KRISTIN SULLIVAN, CONN. GEN. ASSEMBLY, 2009-R-0018, LAWS GOVERNING U.S. SENATE VACANCIES (2009), http://www.cga.ct.gov/2009/rpt/2009-R-0018.htm (In the states that allow gubernatorial appointments, "the governor makes an appointment to fill a Senate vacancy until the next regularly-scheduled general election. At that point, a candidate is elected and serves for the remainder of the unexpired term, if any."). At the time of this report, Massachusetts had yet to change its law; the Massachusetts Governor is now permitted to appoint an interim Senator while the special election is held. *See* Jacobson, *supra* note 7.

80 *See* 11 C.F.R. § 100.2(b) (2010) (defining a "general election" to include elections that are "held in even numbered years on the Tuesday following the first Monday in November").

81 *See infra* text accompanying notes 84–89.

islature may direct."[82] This discretion given to the state legislatures sometimes can permit an interim Senator to remain in office for an extended period of time.[83]

Although governors likely are prohibited from refusing to issue writs of election to fill the Senate vacancy when the legislature directs them to do so,[84] those seats can still be filled by interim appointments for, in some cases, two years.[85] In New York, the statute that provides for filling Senate vacancies permits the Governor to appoint a replacement Senator until the next election is held in November of an even year, in other words, the next general election.[86] The election cannot, however, be held during that next general election if the vacancy occurs less than sixty days before the state's primary elections.[87] As noted in *Valenti v. Rockefeller*,[88] this means that if the timing is right, New York law permits appointed interim Senators to remain in office for up to thirty months.[89] The amount of time that appointed Senators can remain in office is thus significant, and, as previously stated, the amount of power Senators wield is substantial. Given that the potential for abuse of these appointment powers is large,[90] it is important that the means for selecting replacement Senators are tailored to provide protection against illegitimate appointments.

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82 U.S. CONST. amend. XVII, cl. 2.

83 *See supra* text accompanying note 78.

84 *See* Jackson v. Ogilvie, 426 F.2d 1333, 1336 (7th Cir. 1970). In that case, the Seventh Circuit held that the governor may not refuse to issue a writ for election to fill a vacancy in the United States House of Representatives. *Id.* The court relied on the language in Article I of the Constitution, which provides that "[w]hen vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Elections to fill such Vacancies." *Id.* at 1334 (quoting U.S. CONST. art. 1, § 2, cl. 4). It is reasonable to assume that governors cannot refuse to issue writs of election to fill a vacancy in the Senate because the Seventeenth Amendment similarly uses the words "shall issue writs of election to fill such vacancies." *See* U.S. CONST. amend. XVII, cl. 2; *see also* Valenti v. Rockefeller, 292 F. Supp. 851, 856 (W.D.N.Y. 1968) ("[W]e do agree with plaintiffs that the Amendment's drafters did intend to place some limit on the discretion of the states concerning timing of vacancy elections by specifying that a Governor may make only a 'temporary' appointment until an election is held. We would have difficulty, for example, squaring the word 'temporary' with a statute providing that the Governor's appointee is to serve out the remainder of a term regardless of its length."), *aff'd*, 393 U.S. 405 (1969) (per curiam).

85 *See Valenti*, 292 F. Supp. at 864.

86 *See id.* at 853. New York's law remains the same today. N.Y. PUB. OFF. LAW § 42(4-a) (McKinney 1998).

87 PUB. OFF. § 42(4-a).

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

89 *See id.* at 855.

90 *See infra* Part II.D.

D. The Potential for Abuse Is Large

Appointments to the United States Senate happen regularly. Since the ratification of the Seventeenth Amendment, almost one quarter of Senators who first took office obtained the position from gubernatorial appointment.[91] Senators vacate their seats for myriad reasons: health, death, appointment to cabinet positions, and political scandal, to name a few.[92] In 2009 alone, six Senators were appointed to their seats, mostly to fill the seats of cabinet appointees.[93] Senate vacancies occur with regularity, providing frequent opportunities for the vacancy procedures to be abused.

The room for political scandal is abundant and has been made clear on numerous occasions. In addition to the recent Illinois and Massachusetts incidents discussed in the Introduction, other sneaky political gamesmanship has taken place during the filling of vacancies. In 1962, Governor Edwin Mechem of New Mexico had a United States Senate seat to fill during his term.[94] The Governor resigned from his position upon striking a deal with his successor so that he could receive the appointment to the Senate.[95] In 1963, the Governor of Oklahoma, J. Howard Edmondson, made the same deal and took his seat in the Senate by appointment from his successor as Governor.[96] Although these Governors and the Massachusetts legislature, discussed in the Introduction, did not act illegally, their actions abused the process of selecting Senators.[97] The current wording of the Seventeenth Amendment leaves the door open for this type of abuse, and governors and legislatures likely will continue to take advantage of and abuse this process until it is changed.

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91 *Senate Vacancies: A FairVote Policy Perspective*, FAIRVOTE (Jan. 29, 2009), http://archive.fairvote.org/?page=27&pressmode=showspecific&showarticle=232.

92 *Id.*

93 *See* Paul Kane, *With LeMieux Pick, the Dawn of a New Era of Appointed Senators*, WASH. POST (Aug. 28, 2009), http://voices.washingtonpost.com/capitol-briefing/2009/08/with_lemieux_the_dawn_new_era.html (discussing the large number of Senators appointed by governors; in 2009, 6 were appointed; between 1945 and 1946, 13 were appointed; between 1953 and 1954, 10 were appointed); Joan Vennochi, *Kirk Pick a Test of Camelot's Clout, Patrick's Loyalties*, BOSTON.COM (Sept. 24, 2009), http://www.boston.com/news/local/massachusetts/articles/2009/09/24/09_24_09_kirk/.

94 Alan L. Clem, *Popular Representation and Senate Vacancies*, 10 MIDWEST J. POL. SCI. 52, 74 (1966).

95 *Id.*

96 *Id.*

97 Governors have also appointed their spouses or daughters to fill vacancies in the Senate. NEALE, *supra* note 30, at 7.

Gubernatorial appointment of interim Senators is also troubling because of its potential to produce an unfair advantage for the appointed Senator in the subsequent election to fill the seat. Incumbent candidates have a significant advantage in elections due to the increased visibility and name recognition associated with holding office.[98] Reelection rates for Senators over the years show that since 1964, incumbent success rates have never dipped below 55%, have dropped below 75% only five times, and were 85% or greater in twelve out of the twenty-three measured elections.[99]

Success rates in the subsequent general election for appointed Senators are not as high as the rates for true incumbents,[100] but they are still worth noting. Since the adoption of the Seventeenth Amendment, over half of the appointed Senators who sought election to retain their seats won their elections.[101] Furthermore, around eighty percent of the appointed Senators seeking election obtained their party's nomination.[102] When running for a Senate election, the nominees from the major parties must first win primaries or be selected by their party.[103] This is not an easy task because numerous people routinely seek to earn their party's nomination for an election.[104] This data may indicate that interim Senators obtain an electoral advantage because they regularly earn their party's nomination despite the fact that appointees are often individuals whose previous careers are "relatively undistinguished politically."[105]

This potential electoral advantage may create an incentive to obtain Senate appointments through bribery or scandal. When Senator Kennedy made his request to the Massachusetts legislature to reinstate the Governor's appointment power, he carefully noted that the

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98 *See* WILLIAM H. FLANIGAN & NANCY H. ZINGALE, POLITICAL BEHAVIOR OF THE AMERICAN ELECTORATE 198 (10th ed. 2002) (noting that voters are twice as likely to recognize the incumbent than they are the challenger and that "almost all defections from partisanship are in favor of the more familiar incumbent").

99 *Reelection Rates over the Years*, OPENSECRETS.ORG, http://www.opensecrets.org/bigpicture/reelect.php (last visited Dec. 15, 2010).

100 Peter Tuckel, Research Note, *The Initial Re-election Chances of Appointed & Elected United States Senators*, 16 POLITY 138, 140 (1983) (noting that appointed Senators do not have as high a retention rate as popularly elected Senators).

101 *Appointed Senators*, U.S. SENATE, http://www.senate.gov/artandhistory/history/common/briefing/senators_appointed.htm (last visited Dec. 15, 2010).

102 *Id.*

103 SULA P. RICHARDSON & THOMAS H. NEALE, CONG. RESEARCH SERV., 97-1009 GOV, HOUSE AND SENATE VACANCIES: HOW ARE THEY FILLED? 2–3 (2003).

104 CONG. QUARTERLY, CONGRESSIONAL ELECTIONS, 1946–1996, at 103–63 (1998).

105 *See* Tuckel, *supra* note 100, at 142 (noting that only thirty-nine percent of appointed Senators had previously held an elected public office).

appointee should make an "explicit personal commitment" not to run in the subsequent election in order to ensure that the special election remained fair.[106] Any solution to the current problem should properly take into account potential effects on subsequent elections.

II. Other Potential Solutions and Their Inadequacies

Scholars and politicians alike have acknowledged the current problems surrounding gubernatorial appointments. To remedy these problems, some commentators suggest filling vacancies exclusively by election,[107] some suggest leaving the current system in place,[108] and still others suggest repealing the Seventeenth Amendment altogether.[109] All of these proposals, however, have significant drawbacks.

A. Special Elections with No Gubernatorial Appointment Power

Three states currently have laws that require a special election to replace a Senator without permitting the Governor to appoint an interim replacement.[110] Recently, Senator Russ Feingold of Wisconsin proposed an amendment to the United States Constitution that would require all Senate seats to be filled by an election, thereby removing any potential for governors to appoint interim replacements.[111] Senator Feingold's proposed amendment reads, in relevant part: "No person shall be a Senator from a State unless such person has been elected by the people thereof. 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."[112] This would change the Seventeenth Amendment by removing the phrase that permits gubernatorial appointment and requiring all states to fill vacancies in the Senate by holding elections—mirroring how Senator Feingold's state currently operates when it seeks to fill a vacancy.[113]

The approach that Oklahoma, Oregon, and Wisconsin take, and that Senator Feingold argues the entire country should take, is an ad-

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106 Frank Phillips, *Kennedy, Looking Ahead, Urges that Senate Seat Be Filled Quickly*, Bos. Globe, Aug. 20, 2009, at A1.

107 *See infra* Part II.A.

108 *See infra* Part II.B.

109 *See infra* Part II.C.

110 These are Oklahoma, Oregon, and Wisconsin. *See supra* note 72 and accompanying text.

111 *See* S.J. Res. 7, 111th Cong. (2009).

112 *Id.*

113 *See supra* note 72 and accompanying text.

mirable proposal that is on the right track. By removing the appointment power, soliciting bribes is not possible, thus realizing the true purpose behind the Seventeenth Amendment's ratification.[114] The proposed amendment also thwarts other political gamesmanship tactics that this Note discusses, such as legislatures granting and removing appointment powers based on political party affiliation and governors resigning in order to accept appointments to the Senate.[115] Furthermore, Senator Feingold's amendment promotes democracy in its true form, which is largely recognized as the lynchpin of the American system of government.[116] There are, however, many drawbacks to requiring that all vacancies be filled by election.

First, Senator Feingold's proposed solution does not provide for any relief to the states that will go underrepresented in the United States Senate while these special elections are being organized and held. Running special elections takes a considerable amount of time;[117] political parties must select their candidates, governments must allocate resources to run the elections, votes must be counted, and the results, which candidates could challenge through litigation, must be confirmed. In Massachusetts, the General Court provides for a special election to be held between 145 and 160 days after the vacancy occurs, a period of approximately five months.[118] This is a significant amount of time to be underrepresented in the national legislature's more important house. As stated previously, Senators are extremely powerful; they are political players with powers to filibuster legislation, approve presidential appointments, and ratify treaties.[119] Each individual Senator wields great political power and can change the balance within the Senate.[120] Requiring vacancies to be filled by election could force a state to go unrepresented in the Senate

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114 *See* BURT, *supra* note 49.

115 *See supra* notes 1–23, 93–96 and accompanying text.

116 *See* Powell v. McCormack, 395 U.S. 486, 547 (1969) ("A fundamental principle of our representative democracy is, in Hamilton's words, 'that the people should choose whom they please to govern them.'" (quoting The Debates in the Convention of the State of New York on the Adoption of the Federal Constitution, *reprinted in* 2 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 257 (Jonathan Elliot ed., 2d ed., J. B. Lippincott & Co. 1941) (1836))).

117 *See Hearing on the Continuity of Congress: Special Elections in Extraordinary Circumstances: Hearing Before the H. Comm. on H. Admin.*, 108th Cong. 2 (2003) (statement of Rep. Robert W. Ney, Chairman, H. Comm. on H. Admin.) (stating that special elections to fill vacancies in the House of Representatives could be too time-consuming in the event that there were mass vacancies in the House of Representatives).

118 MASS. ANN. LAWS ch. 54, §§ 140, 152 (LexisNexis 2006).

119 *See supra* Part I.D.

120 *See supra* Part I.D.

during important policy debates that could significantly shape the laws of the nation.

An absence in the Senate is a legitimate concern for many states and is one reason why states give the appointment power to the state executive. Recently, during his struggle with cancer, Senator Kennedy requested that the state legislature change the state law to permit the Governor to appoint an interim replacement pending the special elections.[121] Senator Kennedy made his request because he did not want Massachusetts to be underrepresented during the important and pending debate on national healthcare reform.[122] In his request, Senator Kennedy stated, "I . . . believe it is vital for this Commonwealth to have two voices speaking for the needs of its citizens and two votes in the Senate during the approximately five months between a vacancy and an election."[123] This is a significant reason why state legislatures give the governors power to appoint a replacement. Even Governor Blagojevich, when appointing Roland Burris to the Senate seat vacated by President Obama, noted:

> The people of Illinois are entitled to have two United States senators represent them in Washington, D.C. As governor, I am required to make this appointment. If I don't make this appointment, then the people of Illinois will be deprived of their appropriate voice and vote in the United States Senate.[124]

Although a few months may not seem like a long time to be underrepresented, it can have a major effect on the outcome of votes, especially when the partisan balance is close;[125] since the ninety-sixth Congress, which was in session from 1979–1981, the partisan balance in the Senate has been within five votes for twelve out of the sixteen Congresses.[126]

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121 Phillips & Viser, *supra* note 18.

122 *Id.*

123 Phillips, *supra* note 106.

124 Ed Hornick, *Obama Chides Illinois Governor's Decision to Fill Senate Seat*, CNN.COM, Dec. 31, 2008, http://www.cnn.com/2008/POLITICS/12/30/illinois.senate/index.html.

125 *A Constitutional Amendment Concerning Senate Vacancies: Hearing on S.J. Res. 7 & H.J. Res. 21 Before the Subcomm. on the Const. of the S. Comm. on the Judiciary & the Subcomm. on the Const., Civil Rights & Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. 25 (2009) [hereinafter *Hearing on S.J. Res. 7 & H.J. Res. 21*] (statement of Vikram Amar, Associate Dean for Academic Affairs and Professor of Law, University of California Davis School of Law).

126 *Party Division in the Senate, 1789–Present*, U.S. SENATE, http://senate.gov/pagelayout/history/one_item_and_teasers/partydiv.htm (last visited Dec. 20, 2010).

Furthermore, most states have elected to grant an appointment power to their governors.[127] Suddenly denying all forty-six states their ability to appoint replacement Senators is extreme. In his testimony before Congress regarding Senator Feingold's proposed amendment, Professor Vikram Amar stated that "[i]t is in the best tradition of federalism to recognize wisdom in the common practice of states."[128] The state laws reflect the idea that a vast majority of states want to quickly fill vacancies in the Senate. Requiring special elections and forcing states to completely alter their current practices would be unwise in the face of this vast consensus.

Also, most states that hold special elections (with or without an interim appointment) select their nominees through primary elections.[129] Primary elections ensure that the people of the state have a say in who gets nominated to run in the special or general election; they provide a democratic means for selecting party nominations. Running primaries takes a substantial amount of time.[130] Not wanting to be underrepresented in the Senate any longer than necessary, states may be coerced into eliminating their democratic primary process and instating a nondemocratic process of selection, such as having party officials select their candidates to enable the possibility of a speedy special election. This would force states to select Senators in a way contrary to their traditions and preferences and, again, would go against the common practice of the states.

Senator Feingold's proposed amendment also fails to take into account the potential for a massive number of vacancies in the Senate.[131] Since September 11, 2001, terrorism has become more than a hypothetical threat to our government.[132] If a catastrophe were to strike the Senate, leaving many Senators unable to perform their duties, there would be no quick remedy to ensure that the federal gov-

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127 *See supra* note 73 and accompanying text.

128 *Hearing on S.J. Res. 7 & H.J. Res. 21*, *supra* note 125, at 99.

129 NEALE, *supra* note 30, at 2 ("Nomination procedures for Senate special elections vary widely among the states. The majority require a special primary election to determine the major party nominees.").

130 By holding a primary election, states must necessarily take time to prepare for the primary election and allocate necessary resources. *See, e.g.*, Kat Zambon, *Penny Pinching at the Polling Place*, STATELINE.ORG (Aug. 27, 2010), http://www.stateline.org/live/details/story?contentId=508929 (explaining that holding a primary election for recently deceased Robert Byrd's Senate seat not only constituted an "unanticipated expense" for local governments in West Virginia, but also required finding a suitable date and identifying available voting sites).

131 *Hearing on S.J. Res. 7 & H.J. Res. 21*, *supra* note 125, at 25.

132 *Id.*

ernment would be able to recover quickly and respond.[133] Requiring special elections to fill vacancies could present a problem if the Senate did not have enough members to constitute a quorum in the wake of a catastrophe.[134]

In the event of a massive number of vacancies, the federal government would need to be able to take action, perhaps quickly, to deal with the threat. If all vacancies were to be filled by special elections, there would be a temporary shutdown of lawmaking and war declaration powers, as well as the general functioning of the legislative branch, while elections were held to fill those seats. Any solution that does not take the potential for mass vacancies into account is undesirable. One commentator has even declared such proposals "out-and-out dangerous."[135]

Finally, Senator Feingold's proposed amendment also fails to consider the expenses associated with running special elections. Establishing a special election to fill the seat vacated by Barack Obama would have cost Illinois approximately $31 million.[136] Requiring all vacant seats to be filled by election could lead costs to run rampant as nearly twenty-five percent of all Senators who have taken their seats since the adoption of the Seventeenth Amendment have done so by filling vacancies.[137]

Many states hold their elections to fill the seat permanently on the next regularly scheduled general election; by doing so, they avoid the costs of having an additional election day in the middle of the year.[138] If a state were to choose not to hold a special election to avoid the associated costs, the state would be underrepresented in the Senate until the next regularly scheduled general election, up to two

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133 SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) 69–75 (2006) (discussing the need for assured continuity in government following catastrophic attack).

134 *See id.* at 71–72. The Constitution requires that a majority of the United States Senate (i.e., fifty-one Senators) be present to constitute a quorum. *See* U.S. CONST. art. I, § 5.

135 Sanford Levinson, *Still Complacent After All These Years: Some Rumination on the Continuing Need for a "New Political Science" (Not to Mention a New Way of Teaching Law Students About What Is Truly Most Important About the Constitution)*, 89 B.U. L. REV. 409, 420 n.53 (2009); *see also Hearing on S.J. Res. 7 & H.J. Res. 21*, *supra* note 125, at 25.

136 Jennifer Skalka, *An Updated IL Special Senate Election Estimate: $31M*, HOTLINE ON CALL (Dec. 10, 2008, 5:28 PM), http://hotlineoncall.nationaljournal.com/archives/2008/12/an_updated_il_s.php.

137 *See supra* note 91 and accompanying text.

138 Election costs are related to, among other things, "printing ballots, programming and testing machines, paying election judges, [and] renting . . . polling places . . . ." Skalka, *supra* note 136. Some of these expenses can be consolidated if these elections are held on days on which a regularly scheduled November election would have occurred.

years away. From another perspective, under Senator Feingold's proposed amendment, the federal government could be viewed as forcing the states into spending money on special elections in order to avoid being underrepresented in the Senate. Providing for an interim Senator while the elections are scheduled relieves states from unwanted expenses while still permitting them to be represented in the United States Senate.

B. Maintaining the Current Law

This is the "no solution" solution. Some argue that the current system is not broken enough to warrant wrestling with the potential problems of running special elections or changing the Constitution. Representative Louis Gohmert, a Republican from Texas, when questioned about amending the Constitution to provide for special elections for all Senate replacements, stated, "Should we let one bad governor in Illinois make us change everything?"[139]

Representative Gohmert apparently believes that the Blagojevich scandal has been the only occurrence of corruption to take place under the Seventeenth Amendment. The quick response to this argument is that, although there is only one known case of bribery, there is the possibility that other bribes have occurred without public knowledge. Acts of bribery were perpetrated before the Seventeenth Amendment was adopted,[140] so it is difficult to imagine that the problem has since entirely disappeared. Even assuming that there has only been one case of bribery since the ratification of the Seventeenth Amendment, however, there is still cause for changing the current system.

This Note's proposed solution does not aim to fix only the problems associated with bribery. Instead, it aims to solve the problems associated with permitting an undemocratic and unchecked process to infiltrate our representative system of government. As noted earlier, behavior has occurred under the sanction of the Seventeenth Amendment that, although not illegal, is questionable and certainly undesirable. The Massachusetts legislature's flip-flop to prevent the Republican Party from being able to make appointments is one example.[141] Cases where governors have resigned from their position in order to get themselves appointed to the Senate are an-

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139 Ben Pershing, *Should All Senators Be Elected?*, WASH. POST (Mar. 11, 2009), http://voices.washingtonpost.com/capitol-briefing/2009/03/should_all_senators_be_elected.html.

140 BURT, *supra* note 49, at 327.

141 *See supra* notes 1–18 and accompanying text.

other.[142] Also, as previously discussed, the current law has the potential to provide an unfair advantage to interim appointed Senators in the subsequent general elections.[143] These examples of political maneuvering undermine democratic principles and good governance. If there is a problem in our system for selecting government representatives, it should be fixed.

It is also important to consider that when a governor has the ability to make this appointment, he has the potential to alter the balance of the party structure in the federal government and in his own state.

> When circumstances have put such power into the hands of a governor, he has almost invariably appointed a person of his own political party, irrespective of the party affiliation of the former senator. A measurable element of national as well as state political power is controlled by the governor in such cases; his use of that power will affect not only the partisan composition of the U.S. Senate but the balance of power within his own party in the state.[144]

This is a substantial amount of authority to keep in the hands of one person; there must be checks on that authority to ensure that it is used wisely, carefully, and democratically.

Finally, the Seventeenth Amendment was ratified with the purpose of preventing scandals and political maneuvering;[145] it should therefore be updated to ensure that it performs its job completely. The Constitution should not leave the door open to political abuse and gamesmanship. Maintaining the status quo will only permit this to continue unchecked.

C. Repealing the Seventeenth Amendment

Some argue that the best thing to do is to simply repeal the Seventeenth Amendment. John W. Truslow, III, director of the Campaign to Restore Federalism, argues that the Seventeenth Amendment is a blight on the Founding Fathers' carefully architected structure of federalism.[146] The Framers of the Constitution called for the state legislatures to appoint the Senators from their states in order to represent the state governments' interests.[147] Proponents of this

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142 *See supra* text accompanying notes 95–96.

143 *See supra* text accompanying note 101.

144 Clem, *supra* note 94, at 73–74.

145 *See* BURT, *supra* note 49, at 327–28.

146 John W. Truslow III, *Senate Vacancies Raise Questions of Framers' Intentions*, ROLL CALL (Oct. 5, 2009), http://www.rollcall.com/issues/55_35/guest/39156-1.html.

147 *Id.*

view believe that the current system has not only left the door open for corruption when appointing Senate vacancies,[148] but that the departure from the original system of choosing Senators has led to the explosion in the size of the federal government and an increase in special interest control over the United States Senate.[149] Although repealing the Seventeenth Amendment would reestablish the framework and federalism protections that the Constitution originally provided, it would also reestablish the structure that enabled the political corruption that led to the ratification of the Seventeenth Amendment in the first place.

This solution does provide certain relief to some of the difficulties associated with requiring every Senator to be elected by the people. Truslow notes that, following the death of Senator Kennedy, "the democratically elected Massachusetts Legislature could have met on the day following Sen. Edward Kennedy's (D) death and selected his replacement at very little cost to the taxpayers of Massachusetts."[150] This would eliminate the extra costs that are associated with running special elections—for that matter, it would eliminate the costs of running *any* elections for the position. At first glance, this proposal also appears to allow states to quickly fill vacancies and avoid being underrepresented in the Senate for extended periods of time. History, however, has shown that this is not necessarily true.

Under this proposal, it would be possible for state legislatures to quickly fill a vacancy, but prompt action would not be guaranteed. In a state like Massachusetts, where the legislature is dominated by one party,[151] the selection process likely would be smooth. There would be relatively little contention within the legislature regarding who it should appoint; it obviously would be a member of the dominant political party, and any disagreements about which particular individual to select likely would be relatively minor.

In states with a more evenly divided partisan balance, however, the debate could be heated and prolonged. Filling Senate seats often

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148 *Id.*

149 Todd J. Zywicki, *Senators and Special Interests: A Public Choice Analysis of the Seventeenth Amendment*, 73 OR. L. REV. 1007, 1009, 1033–34 (1994). Zywicki argues that the Seventeenth Amendment has led to more special interest control over the United States Senate because of campaign contributions. *Id.* Also, by placing the selection of Senators in the hands of the people instead of the state legislatures, the Seventeenth Amendment limited the state governments' abilities to control the size of the federal government because state governments can no longer effectively control Senators' voting behaviors. *Id.* at 1033, 1041.

150 Truslow, *supra* note 146.

151 *See supra* note 5.

proved to be a difficult task for state legislatures prior to the adoption of the Seventeenth Amendment.[152] Disagreement between state legislators often led to long-term vacancies in the Senate; twenty states between 1891 and 1905 left Senate seats empty at least forty-five times.[153] At one point, Delaware went completely unrepresented from 1901 to 1908.[154] Therefore, under this proposal, the quick filling of Senate vacancies would not be guaranteed. States would potentially go underrepresented for extended periods of time. This, as previously stated, is undesirable,[155] and again raises the question whether vacancies could be filled quickly in the wake of a terror attack that leads to mass vacancies in the Senate.[156] Although it is reasonable to believe that legislatures would act quickly to fill the void in the Senate during a time of crisis, it would be more certain that governors could quickly appoint replacements.

Furthermore, the country already overwhelmingly rejected Truslow's plan in 1913 when it ratified the Seventeenth Amendment.[157] Trusting state legislatures to make Senate appointments did not work because of the corruption that state legislatures introduced into the process of selecting Senators.[158] The Seventeenth Amendment was ratified because people were essentially buying appointments to the United States Senate—special interests, such as regional industries, were bribing state legislatures to make certain appointments.[159] Truslow's proposal would not close the door on corruption that is left open by the Seventeenth Amendment; instead, it would open the door to a greater possibility for bribery and corruption not only during the filling of vacancies, but also every time a Senator must be selected to start a term of office. A reversion back to a system that fails to put a check on this type of corruption is not desirable.

It is true that the Framers of the Constitution intended Senators to be selected in the manner proposed by Truslow;[160] however, it is equally true that the Framers intended the people of the United States to amend the Constitution if any provision of it were deemed unwork-

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152 *See supra* text accompanying notes 54–55.

153 *See supra* text accompanying notes 54–55.

154 *See supra* text accompanying notes 54–55.

155 *See supra* text accompanying note 126.

156 *See supra* text accompanying note 133.

157 *See supra* note 61 and accompanying text.

158 *See* BURT, *supra* note 49, at 327–28.

159 *Id.* at 327.

160 U.S. CONST. art. I, § 3.

able.[161] The states overwhelmingly decided to pass the Seventeenth Amendment.[162] This widespread support shows that the people and the states believed that direct elections were a better way of selecting Senators.

Reverting back to a less democratic means of selecting Senators likely would not be met with much enthusiasm; the quick rejection of prior proposals for repeal of the Seventeenth Amendment illustrate the desire to maintain the direct election of Senators. In 2004, Senator Zell Miller of Georgia introduced a resolution calling for the repeal of the Seventeenth Amendment.[163] Miller's proposal failed when it died in committee.[164] Legislative proposals in the states to urge Congress to repeal the Seventeenth Amendment have also stalled due to lack of support.[165] These examples illustrate the country's lack of desire to eliminate the popular election of Senators.[166]

Putting the power to appoint Senators back into the relatively few hands of the state legislators without establishing checks on this power would not successfully decrease the potential for bribery and scandal. In response to this argument, Truslow merely declares that "[c]orruption will always be a part of politics," and states that the Seventeenth Amendment has failed to prevent corruption from occurring.[167] The Seventeenth Amendment, however, has succeeded in preventing corruption by requiring Senators to be elected; only when vacancies arise can corruption and bribery penetrate the selection process. The proper way to fix this problem is to close the door on corruption where it is still ajar. The Constitution should provide further safeguards to ensure that the Seventeenth Amendment does the job it was intended to do; the Amendment should not be repealed.

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161 *See id.* art. V.

162 *See supra* note 61 and accompanying text.

163 S.J. Res. 35, 108th Cong. (2004).

164 *See Bill Summary & Status: 108th Congress (2003–2004), S.J. Res. 35*, LIBR. CONGRESS—THOMAS, http://thomas.loc.gov/cgi-bin/bdquery/D?d108:35:./list/bss/d108SJ.lst: (last visited Dec. 26, 2010).

165 *See, e.g.*, S.J. Res. 10, 58th Leg. (Mont. 2003). The Montana bill urging Congressional action to repeal the Seventeenth Amendment passed the Montana Senate Judiciary Committee 6–3 but was struck down by a state senate vote of 9–40. *Detailed Bill Information*, MONT. LEGIS. BRANCH, http://laws.leg.mt.gov/laws03/LAW0210W$BSIV.ActionQuery?P_BILL_NO1=10&P_BLTP_BILL_TYP_CD=SJ&Z_ACTION=Find (last visited Dec. 26, 2010).

166 Interestingly, the Seventeenth Amendment has recently received more support. The Delaware Legislature, ninety-eight years later, officially showed its support when it ratified the Seventeenth Amendment on June 25, 2010. Amy Cherry, *DE Ratifies 17th Amendment—98 Years Later*, WDEL.COM (June 25, 2010), http://www.wdel.com/story.php?id=715306276514.

167 Truslow, *supra* note 146.

III. Proposed Amendment to the Constitution

In order to close the door on political corruption during the filling of Senate vacancies, the Constitution should be amended to establish certain checks and balances on the gubernatorial appointment power. By doing so, political scandal and the pitfalls associated with other proposals can be avoided.

A. Solution by Constitutional Amendment Is Appropriate

The appropriate way to correct a constitutional problem is to amend the Constitution. A model code for the states' Senate election laws regarding Senate vacancies could alleviate some concern,[168] but would not solve the problem at its source. States would still be free to change their laws and permit illegitimate practices to permeate the procedure of filling Senate vacancies. By amending the Constitution, the problem would have a more dependable solution. Furthermore, because this problem affects the federal government, it is appropriate for federal action to resolve the issue. This is more desirable than depending on the states to take action themselves.

A constitutional solution is also superior to an option that would involve constructing a federal statute that fits within the provisions of the Seventeenth Amendment. For example, in the most recent Congress, Representative Aaron Schock introduced H.R. 899, the Ethical and Legal Elections for Congressional Transitions Act ("ELECT Act").[169] The ELECT Act is a proposed bill that would require states to hold special elections within ninety days of the occurrence of a vacancy, while permitting the governor to make temporary appointments for that ninety-day period.[170] Again, the spirit and intention of this bill are proper; Representative Schock is trying to eliminate the corruption and bribery that can enter into the current system. This proposal, however, is less desirable than an amendment to the Constitution.

First, it is debatable whether this proposed legislation is constitutional.[171] Although some commentators have noted that the bill may pass constitutional muster, the answer is not certain because the Sev-

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168 *See* Clem, *supra* note 94, at 76 (arguing that legislation should be enacted at the state level to deal with the problems associated with the gubernatorial appointment power).

169 Ethical and Legal Elections for Congressional Transitions (ELECT) Act, H.R. 899, 111th Cong. (1st Sess. 2009).

170 *Id.*

171 *See* Neale, *supra* note 30, at 14 (noting that the bill may infringe on the Seventeenth Amendment's clause that gives discretion to the states to "fill the vacancies by election as the legislature may direct").

enteenth Amendment appears to grant the states tremendous discretion as to how they run their elections to fill vacancies.[172] This proposed statute would restrict a state's legislature by requiring it to hold elections on a specific time schedule; however, the Seventeenth Amendment specifically states that elections to fill vacancies should be held "as the [state] legislature may direct."[173] Therefore, the proposed statute could unconstitutionally infringe on the states' discretion to hold elections when and how they see fit. It would be undesirable for Congress to pass a statute like this and then have it struck down by the Supreme Court, as this would only reinstate the problem and provide a lack of stability in the selection process. Second, as with a potential proposal for a model code, a federal statute is not as dependable as an amendment to the Constitution because federal laws are more easily repealed or amended. A constitutional amendment is the preferred method of addressing therefore the problems raised by the Seventeenth Amendment. When attempting to fix a problem in the Constitution, the best answer is to fix the problem at its source.

The United States ratified the Seventeenth Amendment with the intent to eliminate bribery and political scandal; therefore, it is fitting to amend the Constitution in order to improve the Amendment and make the Senate vacancy-filling procedure safe from potential bribery or political scandal in the future. At least one member of Congress, who is admittedly reluctant to amend the Constitution, is nevertheless willing to amend the Seventeenth Amendment to make the necessary changes. Representative David Dreier of California typically opposes attempts to alter the Constitution, but he is willing to support a change in the Seventeenth Amendment because he sees this as "perfecting [the] amendment" rather than changing the structure of government.[174] The Amendment proposed by this Note only fixes the Seventeenth Amendment; it does not drastically change the structure of the Senate, and is therefore potentially amenable to ratification.

B. Proposed Amendment to the Constitution

Congress and the several states should ratify the following Amendment to the United States Constitution:

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172 *Cf. Hearing on S.J. Res. 7 & H.J. Res. 21*, *supra* note 125, at 102–04 (claiming the bill is likely constitutional but that there could be an issue because the Seventeenth Amendment declares that vacancies must be filled "by election as the legislature may direct").

173 U.S. CONST. amend. XVII.

174 Pershing, *supra* note 139.

> *Article—*
> *Section 1.* When vacancies occur in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies. The executive may make temporary appointments, with the advice and consent of the state legislature, until the people fill the vacancies by election as the legislature may direct. No temporary appointee shall be permitted to seek election in the subsequent election to fill the vacant seat, and the election to fill such vacant seat shall be held no later than the next general election.
> *Section 2.* This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

This Amendment would solve the problems associated with maintaining the status quo and avoid the problems that other proposed solutions entail.

C. The Benefits of the Proposed Amendment

1. Solve Current Problems Associated with Filling Senate Vacancies

The proposed Amendment would eliminate the problems associated with the current practice for filling Senate vacancies. The checks and balances contained in the Amendment would prevent bribery, political gamesmanship, and any perceived or actual unfair electoral advantage in subsequent elections.

a. Prevent Bribery Scandals

The proposed Amendment would close the door on potential bribery scandals in three ways. First, as is current practice, the full-time replacement to be seated in the United States Senate would be elected by the people. No one would be able to bribe a governor to gain appointment for the full remaining Senate term. Senators would be held directly accountable to the people of their respective states, in compliance with the spirit of Seventeenth Amendment.

Second, the state governor would only be able to appoint an interim replacement with the advice and consent of the state legislature, creating a two-way check on corruption. No longer would there be only one person involved in the selection of a temporary replacement. Under this Amendment, a governor would nominate someone to fill a Senate vacancy. The state legislature would then vote either to accept or reject this nomination. Accordingly, the state legislature would

have a check on any potential corruption from the governor, and the governor would have a check on any corruption from the state legislature.[175] By taking the power to appoint out of one pair of hands and placing it in many more, the possibility of bribery becomes less likely. Although Governor Blagojevich was able to solicit bribes in exchange for an appointment as Senator, governors under this Amendment would be thwarted from this type of action because any appointment they would make would have to earn the approval of the state legislature. Bribes would be less likely to occur because legislative approval would not be guaranteed; legislatures would be able to ensure that appointments are made in good faith.[176]

Finally, the appointed interim Senator would only be allowed to serve in that position temporarily. The Amendment provides that "[n]o temporary appointee shall be permitted to seek election in the subsequent election to fill the vacant seat, and the election to fill such vacant seat shall be held no later than the next general election."[177] The interim Senator would be barred from seeking election for the remainder of the Senate term, or, if the Senate seat's term expires at the time of the next general election, the interim Senator would be barred from seeking election for the next term. By making an appointment to the United States Senate truly a temporary position, there is less incentive to buy the seat, as the person would only be permitted to remain a Senator for a period of no more than two years. This, along with the requirement that the governor get approval from the state legislature, would sharply curb any incentive to buy an appointment to the Senate.

Barring the interim Senator from running for election would not make the position unduly difficult to fill. In the past, many interim Senators voluntarily declined to seek reelection for the remainder of that Senate term (or for the subsequent Senate term, if the term expired while they were filling in).[178] Although a majority of interim

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175 By repealing the Seventeenth Amendment, a governor would not be able to have this check over the state legislatures.

176 Similarly, the legislature would be prevented from soliciting bribes, a common problem prior to the Seventeenth Amendment, *see supra* text accompanying notes 57–60, because the governor would select the potential nominees.

177 The "next general election" refers to the next set of congressional elections that occur in November of even-numbered years. It is not necessarily the next time that the particular Senate seat would be up for a new election.

178 *See* Tuckel, *supra* note 100, at 140–41 (noting that many appointed Senators retire without seeking election because many are just serving to fill the position without ambition to maintain the seat); *see also Appointed Senators*, *supra* note 101 (showing that many appointed Senators did not seek election after their appointment).

replacements did seek election, thirty-six percent of appointees did not.[179] This shows that plenty of interim replacements have been appointed in the past with the appointee having no intent on seeking a full-time position in the Senate. Accordingly, it is not unrealistic to assume that people will be willing to temporarily fill a vacant seat. Most recently, Senator Paul Kirk, Jr., the interim replacement for Senator Kennedy, accepted the "profound honor"[180] of being an interim replacement while declaring that he would not be a candidate in the special election to fill the remainder of Senator Kennedy's term.[181] Furthermore, the prohibition would not be an unfair imposition on the interim appointee, because he would go into the position knowing that he would not be eligible to run in the subsequent election. If that person were to have ambitions to serve as the full-time replacement or to seek election for the subsequent term, then she should focus on a campaign for the special election to be elected in the proper democratic manner rather than seek an appointment.

b. Prevent Political Gamesmanship

This Note's proposed Amendment would also curtail the political gamesmanship that occurs under the Seventeenth Amendment. The terms for how replacements are made would be set in constitutional stone. A uniform process subject to state election laws would be in place. Therefore, state legislatures would not be able to permit governors of one party to make appointments to the Senate while preventing other parties from making those same appointments. The Constitution would permanently empower the governors to make the appointment; governors would not have to rely on permission from their state legislature. The proposed Amendment would prevent state legislatures from reducing the important selection process to mere partisan politics, as the Massachusetts legislature's flip-flop votes recently have done.[182] The Amendment, however, still vests states with ample discretion in running their elections. The state legislatures would retain authority to establish the process for nominations, where and how the votes will be held,[183] and, to some degree, the timing of

179 NEALE, *supra* note 30, at 7, 8–10.

180 Press Release, Governor Deval Patrick, Governor Patrick Names Paul Kirk as Interim U.S. Senator (Sept. 24, 2009), http://www.mass.gov/?pageID=gov3pressrelease&L=1&LO=Home&sid=Agov3&b=pressrelease&f=092409_kirk&csid=Agov3.

181 Mark Silva, *Kennedy Ally to Hold Senate Seat*, L.A. TIMES, Sept. 25, 2009, at A1.

182 *See supra* notes 1–18 and accompanying text.

183 Note that this Amendment does not restrict the means for electing Senators. The varying ways of running elections would still be determined by the state legislatures.

the elections.[184] The Amendment would thus prevent state governments from playing games with the important appointment power without stripping them of all their autonomy.

This Note's proposal would also prevent political gamesmanship on the behalf of the governors themselves. One of the problems with the current system is that governors may take advantage of their powers by essentially appointing themselves to the Senate position by striking a deal with the successor governor.[185] In order to successfully self-appoint under the proposed Amendment, however, the governor would not only have to strike a deal with the successor governor, but the state legislature would have to approve of the action as well. The state legislature could provide another check on the governor in this way. Furthermore, because the proposed Amendment would bar the interim Senator from seeking that Senate seat in any subsequent election, there would be less temptation for governors to resign their current position in order to seek a higher federal office via the shortcut of self-appointment. Self-appointment, although admittedly still possible, would not be as problematic; governors would only be able to serve in the Senate for a short period of time before having to relinquish the position.

c. Prevent Any Electoral Advantage in Subsequent Elections.

This proposed Amendment would also prevent the potential for any unfair electoral advantages in subsequent elections.[186] Because the temporary appointee would not be eligible to run for the Senate seat in the subsequent election, the voters of each state would be promised a fair race for the candidates seeking the office. While the appointed Senator is working to represent his state during the interim in Washington, the potential candidates for taking over the remainder of the Senate term (or for serving as the full-term Senator if the term expires upon the next general election) can prepare their campaign platforms without having to compete with the name recognition garnered by a person who received an appointment to the Senate.

When Senator Kennedy requested that the State of Massachusetts change its law to allow for the temporary appointment of a re-

184 State legislatures would still be permitted to run special elections to fill a Senate position, but the Governor would have the power, with the advice and consent of the state legislature, to appoint a replacement while those special elections were being organized.

185 *See* Clem, *supra* note 94, at 74–75.

186 *Cf. supra* text accompanying notes 98–100 (noting that appointed Senators have a potential electoral advantage).

placement Senator, he stated that, in order to keep the special election fair, the Governor should seek "explicit personal commitment" from the appointee *not* to run in the subsequent special election.[187] Under this new Amendment, such personal commitments would not be necessary; the election would already proceed on a level playing field.

2. Avoid Problems Associated with Other Potential Solutions

This Amendment would prevent the potential problems associated with the other proposed solutions discussed in this Note.[188] It would ensure quick replacements to the Senate, would properly balance the costs of running elections while maintaining democratic principles, and would curtail bribery and scandal while respecting the states' desire to maintain gubernatorial appointments.

a. Curtail Bribery and Scandal While Respecting the Common Practice of the States

Truslow's and Senator Feingold's proposals are too extreme because they ignore the wisdom of the states by revoking the tool nearly all states have selected to choose their interim Senators: gubernatorial appointment.[189] The entire system of selecting Senators to fill vacancies does not need to be overhauled; it merely needs to be checked to ensure that political scandal is prevented. This Note's proposal, as discussed above, would curtail the potential for political scandal and use less drastic means to do so by respecting the common practice of the states.

This Note's proposed Amendment would properly account for the role of federalism by not unduly restricting the states in the available means for selecting replacement Senators. As Professor Amar notes, "[i]t is in the best tradition of federalism to recognize wisdom in the common practice of [the] states."[190] Currently, the states almost unanimously believe that replacing Senators through gubernatorial appointment is an appropriate means for filling vacancies.[191] This Note's proposed Amendment would not tread on the states' preference for gubernatorial appointment,[192] nor would it tread on their

187 Phillips, *supra* note 106.

188 *See supra* Part III.

189 *See* NEALE, *supra* note 30, at 8.

190 *Hearing on S.J. Res. 7 & H.J. Res. 21*, *supra* note 125, at 99.

191 *See* NEALE, *supra* note 30, at 8.

192 Arguably, it does tread on the views of the three states that do not permit any kind of gubernatorial appointment, but this view can hardly be regarded as a "common practice of the states."

ability to run the elections in conformance with their current state election laws.[193] It merely provides a uniform series of checks that would protect the United States Senate from receiving any Senators, appointed or otherwise, tainted by political scandal. This Note's proposal is more desirable than the other proposals because it would curtail the potential for political scandal and bribery without taking extreme measures to completely overhaul the common practice of the states.

b. Provide States with Quick Representation in the Senate

This Note's proposed Amendment maintains the gubernatorial appointment power and would therefore adequately provide for the states' need for quick representation. The Amendment permits states to be represented in the Senate while they seek a full-time replacement for the vacated seat. Therefore, states would be properly represented during important votes and debates that occur soon after the vacancy arises.[194] This solution is undoubtedly desired by the states, as evidenced by the fact that a large majority currently permit their governors to appoint interim replacements to the United States Senate.[195]

In the same vein, the Note's proposed Amendment would steer clear of any dangers that may arise if there are mass vacancies in the Senate. By permitting governors to appoint replacements, any vacancy in the Senate could be quickly filled. Governors, with the advice and consent of the state legislatures, would be able to expeditiously appoint Senators to ensure that the federal government is never crippled while considering an appropriate response to any such catastrophe.

Admittedly, there is more potential for a gridlock in the appointment process under the proposed solution than there is under a system that simply allows for a seat to be filled by the sole discretion of a governor. The dangers of political scandal and bribery already discussed, however, show the undesirability of permitting governors to maintain that unchecked power. Furthermore, under a system where the legislature alone must appoint a replacement, it can be difficult for a large state legislature to agree upon a single nominee.[196] Under the

193 *See supra* notes 127–29 and accompanying text.

194 Senator Feingold's Amendment would leave a state underrepresented until the state holds a special election to fill the seat. *See supra* Part II.A. Repealing the Seventeenth Amendment could lead to an extended vacancy if the state legislature cannot agree on an appointment. *See supra* Part II.C.

195 *See* NEALE, *supra* note 30, at 8.

196 *See supra* text accompanying notes 54–55.

Note's proposed solution, this potential for gridlock would be avoided because a governor would simply select a nominee and send it to the state legislature for a yes or no vote.

It is possible that a majority in the state legislature could consistently prevent a governor from the minority party from successfully installing the nominee of his choice; however, this process is used in filling myriad political positions and it has not been impossible for executives to fill those positions in the past. Compromising on filling a vacant seat also would not be too difficult because of the temporary nature of the appointment. Finally, if there is such a gridlock, a state would still be permitted to call for a quick special election and would otherwise be forced to fill the vacant seat during the next general election.

c. Properly Consider the Costs of Elections While Maintaining Democratic Principles

The Note's proposed Amendment would allow states to consider the costs of running a special election while maintaining the democratic principles that are established by the Seventeenth Amendment. Other proposals either require states to balance the costs of special elections against their maintained representation in the Senate[197] or go against the democratic principles of the Seventeenth Amendment by abolishing the popular election of Senators.[198] Under this Note's proposed Amendment, although the states would have to pay for elections, costs would be mitigated, states' representation would be maintained during the process, and the popular election of Senators would continue.

Truslow's proposal to repeal the Amendment would leave the states free from the burdens of paying for elections;[199] however, this would come at a cost to the democratic principles that have been established in the Senate since the adoption of the Seventeenth Amendment. The overwhelming support for ratifying the Seventeenth Amendment[200] and the futile calls that have been made for its repeal[201] show that the people of the United States believe they should control who represents them in the legislature's most powerful house. Therefore, the costs associated with the running of elections to fill

197 *See supra* note 138 and accompanying text.

198 *See supra* Part II.C.

199 *See supra* Part II.C.

200 *See supra* text accompanying note 61.

201 *See supra* text accompanying notes 163–65.

Senate vacancies are worth every penny. The price of democracy should be a cost that any true democratic government is willing to pay.

Imposing unnecessary and excessive financial burdens on a state to maintain representation in the Senate, however, should also be avoided. The Note's proposal, while maintaining popular elections, would avoid the excess costs that would be imposed if states were required to fill all vacancies exclusively by election. As previously stated, running special elections is not cheap.[202] Under the proposed Amendment, states would be able to avoid certain excess costs associated with holding special elections while still maintaining their representation in the Senate. The state could quickly appoint an interim Senator to ensure that it is fully represented and then wait until the next general election, if it so chose, to elect a full-time replacement. By waiting until the general election, for which it has already purchased resources, the state could avoid excess expenses that running a special election would incur. The Note's proposed Amendment would allow the states to maintain full representation in the Senate while avoiding some unnecessary costs.

Finally, democratic principles would ultimately be maintained by the proposed Amendment. Though it permits appointments to the Senate, these are checked by the democratically elected state legislature and governor. Furthermore, those appointments are temporary replacements—as elections are required to be held by the next general election—thereby ensuring that the remainder of a Senate term will be filled by a popularly elected official. Additionally, special elections are not forbidden. If a state legislature wishes to hold a special election to permanently fill the vacancy prior to the next regularly scheduled general election, it would be free to do so. Therefore, the Note's proposed Amendment properly maintains the democratic principles established by the Seventeenth Amendment without imposing unnecessary costs on the states.

Conclusion

The current system of filling Senate vacancies leaves room for political scandals, bribery, gamesmanship, and unfair advantage in the electoral process. The Constitution promises representative government; it should not leave such ample room for political corruption in the procedures for choosing our representatives.

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202 Holding a special election to fill the seat vacated by President Obama would have cost Illinois $31 million. Skalka, *supra* note 136.

To solve this constitutional problem, the Constitution must be amended to foreclose such potential corruption. This Note's proposed constitutional Amendment would do just that. By providing for temporary appointments to be made by governors with the advice and consent of state legislatures, the Amendment would eliminate opportunities for bribery scandals and leave little wiggle room for state legislatures or governors to manipulate the democratic system with political gamesmanship. Forcing those interim appointments to remain temporary would further limit the potential for bribery and ensure that the voting process is maintained on a level playing field for candidates seeking to serve the remaining time on vacated Senate seats. Adopting the proposed Amendment would close the door on political corruption and ensure that a seat in the United States Senate will never be up for sale.