

**RECASTING THE SECOND FIDDLE: THE NEED FOR A CLEAR LINE OF  
LIEUTENANT GUBERNATORIAL SUCCESSION**

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*Lieutenant governorships originally did not exist in the United States in significant numbers. But as states were faced with the unsatisfactory results of their gubernatorial succession provisions, state constitutions were amended to provide the Governor with a built-in successor. However, despite these changes, state constitutions generally did not provide for filling lieutenant-gubernatorial vacancies. Following the ratification of the Twenty-fifth Amendment, this began to change, as states adopted lieutenant-gubernatorial succession provisions—which echoed the Twenty-fifth Amendment’s provisions for vice-presidential vacancies—in a flurry of activity.*

*This Article focuses on the history and current reality of lieutenant-gubernatorial vacancies, exploring the absence of explicit succession provisions and the adoption of these provisions following the Twenty-fifth Amendment, and surveys how lieutenant-gubernatorial vacancies are currently filled. It then argues that states without explicit succession provisions should adopt them and discusses what factors might be considered in drafting these provisions.*

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*Whatever became of Hubert?  
Has anyone heard a thing?  
Once he shone on his own,  
Now he sits home alone,  
And waits for the phone to ring.*

*Once a fiery liberal spirit,  
Ah, but now when he speaks, he must clear it.  
Second fiddle's a hard part, I know,  
When they don't even give you a bow.*

—Tom Lehrer, “Whatever Became of Hubert?”<sup>1</sup>

## I. INTRODUCTION

Rapid turnover in the identity of elected officials is a relatively rare occurrence today—but before the modern era, it was much more common. From March 16–17, 1905, Colorado had “three governors in one day.”<sup>2</sup> And in 1947, the “Three Governors” controversy unfolded in Georgia, in which three different men each claimed a right to serve as Governor.<sup>3</sup> For a modern equivalent, perhaps the fact that three different people served as Lieutenant Governor of New York from 2021 to 2022, with no intervening election in

1. TOM LEHRER, *Whatever Became of Hubert?, on THAT WAS THE YEAR THAT WAS* (Reprise/Warner Bros. Records 1965).

2. See generally RICHARD B. COLLINS & DALE A. OESTERLE, *THE COLORADO STATE CONSTITUTION 22–24* (2d ed. 2020); Marjorie Hornbein, *Three Governors in a Day*, *COLO. MAG.*, Summer 1968, at 243.

3. See CHARLES S. BULLOCK III ET AL., *THE THREE GOVERNORS CONTROVERSY: SKULLDUGGERY, MACHINATIONS, AND THE DECLINE OF GEORGIA'S PROGRESSIVE POLITICS* 153–65, 172–03 (2015).

between, might one day be dubbed “The Year of Three Lieutenant Governors in New York.”

But perhaps not. The controversies in Colorado and Georgia took place under much more unusual circumstances—a contentious gubernatorial election in Colorado that the legislature ultimately overturned<sup>4</sup> and the untimely death of the Governor-elect in Georgia followed by the application of ambiguous state constitutional provisions.<sup>5</sup> In New York, however, three different people came to serve as Lieutenant Governor because of resignations brought on by unrelated political scandal.

First, Lieutenant Governor Kathy Hochul was elected with then-Governor Andrew Cuomo in the 2014 election and re-elected in 2018. When Cuomo resigned following a series of sexual harassment allegations in August 2021,<sup>6</sup> Hochul became Governor. She then appointed State Senator Brian Benjamin as Lieutenant Governor.<sup>7</sup> Then, in April 2022, Benjamin resigned following his indictment on a host of federal charges, including conspiracy to commit wire and honest services fraud.<sup>8</sup> Though it seemed too late for Benjamin to withdraw from the 2022 Democratic primary ballot given New York’s onerous ballot-access laws,<sup>9</sup> the New York General Assembly changed the law to allow Benjamin to withdraw,<sup>10</sup> and Hochul named Congressman

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4. See COLLINS & OESTERLE, *supra* note 2, at 22–24.

5. See generally *Thompson v. Talmadge*, 41 S.E.2d 883, 900 (Ga. 1947) (ruling on dueling claims of legitimacy to the governorship).

6. Luis Ferré-Sadurní & J. David Goodman, *Cuomo Resigns Amid Scandals, Ending Decade-Long Run in Disgrace*, N.Y. TIMES (Aug. 10, 2021), <https://www.nytimes.com/2021/08/10/nyregion/andrew-cuomo-resigns.html> [<https://perma.cc/Z9AB-6US4>]; STATE OF N.Y. OFF. OF THE ATT’Y GEN., REPORT OF INVESTIGATION INTO ALLEGATIONS OF SEXUAL HARASSMENT BY GOVERNOR ANDREW M. CUOMO 13 (2021) (“[Cuomo] sexually harassed a number of State employees. . .”).

7. Precious Fondren, *Hochul Officially Announces Brian Benjamin as Lieutenant Governor*, N.Y. TIMES (Aug. 30, 2021), <https://www.nytimes.com/2021/08/27/nyregion/brian-benjamin-lieutenant-governor.html> [<https://perma.cc/3SM9-WESL>].

8. Zach Williams, *Lt. Gov. Brian Benjamin Resigns Following Federal Indictment*, CITY & ST. N.Y. (Apr. 12, 2022), <https://www.cityandstateny.com/politics/2022/04/lt-gov-brian-benjamin-resigns-following-federal-indictment/365582/> [<https://perma.cc/AE7L-PADC>]; Press Release, U.S. Dep’t of Just., *New York Lieutenant Governor Brian Benjamin Charged With Bribery And Related Offenses* (Apr. 12, 2022), <https://www.justice.gov/usao-sdny/pr/new-york-lieutenant-governor-brian-benjamin-charged-bribery-and-related-offenses> [<https://perma.cc/NV3P-JSLL>].

9. See, e.g., *Yang v. Kosinski*, 960 F.3d 119, 132 n.58 (2d Cir. 2020) (“Within New York’s election law, it is all but impossible to get *off* the ballot, however reasonable the request for removal might appear.”) (quotation omitted).

10. Grace Ashford, *Brian Benjamin Won’t Be on the New York Ballot After All*, N.Y. TIMES (May 2, 2022), <https://www.nytimes.com/2022/05/02/nyregion/brian-benjamin-ballot-removal.html> [<https://perma.cc/74N7-29KQ>].

Antonio Delgado as Benjamin’s replacement and as her *de facto* running mate in the election.<sup>11</sup>

The swapping and trading of offices among politicians can sometimes seem meaningless,<sup>12</sup> but underpinning New York’s constant barrage of Lieutenant Governors is a clear reality—the identity of the Lieutenant Governor matters, as Hochul herself can attest. Ensuring that the Lieutenant Governor—regardless of how they were selected—can credibly assume power if needed following a scandal or death is a vital matter of governance. And ensuring that the Lieutenant Governor’s claim to power—regardless of the reason they’re assuming power—is respected by voters is an *equally* vital matter of democratic legitimacy.

It is in that light that New York’s system of filling lieutenant-gubernatorial vacancies stands out—primarily because it doesn’t really have one. The Governor of New York *can* fill lieutenant-gubernatorial vacancies, yes, but only because of a legal technicality. The New York Constitution lays out a clear process for filling gubernatorial vacancies<sup>13</sup> but sets out an ambiguous process for filling lieutenant-gubernatorial vacancies. The state senate president “shall perform all the duties of lieutenant-governor” during a vacancy,<sup>14</sup> but designating an official to *act* as another is not the same thing as designating that officer *as* the other.<sup>15</sup>

In many states, the constitution grants the Governor an inherent power to fill vacancies where both the constitution and state law provide no method<sup>16</sup>—but the New York Constitution grants the Governor no such power.<sup>17</sup> Instead, the Governor’s inherent power of appointment is nested in the state’s Public Officers Law.<sup>18</sup> Article 3 of the Public Officers Law lays out in detail how to

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11. Bill Mahoney & Anna Gronewold, *Hochul Picks Delgado to Be New York Lieutenant Governor, Taking Him out of House Race*, POLITICO (May 3, 2022), <https://www.politico.com/news/2022/05/03/hochul-delgado-new-york-lieutenant-governor-00029559> [<https://perma.cc/V88L-F468>].

12. See, e.g., Rebecca C. Lewis, *What Does New York’s Lieutenant Governor Actually Do?*, CITY & ST. N.Y. (May 5, 2022), <https://www.cityandstateny.com/politics/2022/05/what-does-new-yorks-lieutenant-governor-actually-do/366565/> [<https://perma.cc/LED6-H8VS>].

13. See N.Y. CONST. art. IV, § 5.

14. *Id.* § 6.

15. Richard Briffault, *Skelos v. Paterson: The Surprisingly Strong Case for the Governor’s Surprising Power to Appoint a Lieutenant Governor*, 73 ALA. L. REV. 675, 682–87 (2010).

16. *Infra* Part III.B, III.C.

17. See N.Y. CONST. art. IV, § 3 (identifying Governor’s constitutional powers).

18. Briffault, *supra* note 15, at 682–83 (explaining vacancy provisions in Public Officers Law).

fill vacancies in a number of offices<sup>19</sup> (but not the Lieutenant Governor<sup>20</sup>) and grants the Governor a blanket power to fill vacancies in “elective” offices where there is “no provision of law for filling the same.”<sup>21</sup>

Accordingly, in 2009, when the Republican leadership in the State Senate challenged then-Governor David Paterson’s appointment of Richard Ravitch as Lieutenant Governor, the New York Court of Appeals upheld Paterson’s appointment.<sup>22</sup> Its argument was simple: the Governor has the power to fill vacancies where no method is provided,<sup>23</sup> there’s no method provided for filling a lieutenant-gubernatorial vacancy,<sup>24</sup> and so the Governor can fill the vacancy.<sup>25</sup> The court’s conclusion is clear and likely correct,<sup>26</sup> but it ultimately rests on a gap in state law caused by legislative silence.

But New York is not alone here. Many other states have similarly opaque procedures for filling lieutenant-gubernatorial vacancies, which haven’t yet been tested in a crisis. In Virginia, for example, the controversies that ensnared the trio of Governor Ralph Northam, Lieutenant Governor Justin Fairfax, and Attorney General Mark Herring threatened a crisis that could have tested Virginia’s succession provisions.<sup>27</sup> After Northam and Herring admitted to appearing in blackface,<sup>28</sup> and after Fairfax was accused of sexual assault,<sup>29</sup> the methods by which vacancies in *all* statewide offices were filled suddenly became important. And though the method of filling Attorney General vacancies was settled under state law (the General Assembly would

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19. See, e.g., N.Y. PUB. OFF. LAW § 39 (vacancies in offices appointed by the Governor and confirmed by the State Senate); *id.* § 40 (vacancies in offices elected by the legislature); *id.* § 41 (Attorney General and Comptroller vacancies); *id.* § 42 (general requirement for filling vacancies in elected offices); *id.* § 43 (power of Governor to fill vacancies with interim appointees until an election can be held where no other provision applies).

20. See statutes cited *supra* note 19.

21. *Id.* § 43.

22. See *Skelos v. Paterson*, 915 N.E.2d 1141, 1147 (N.Y. 2009).

23. *Id.* at 1143 (citing N.Y. PUB. OFF. LAW § 43).

24. *Id.* at 1144.

25. *Id.* at 1146.

26. See Briffault, *supra* note 15, at 682–87.

27. See Sarah Mervosh, *If Justin Fairfax Is Forced out in Virginia, Who’s Next in Line?*, N.Y. TIMES (Feb. 9, 2019), <https://www.nytimes.com/2019/02/09/us/politics/line-of-succession-virginia.html> [<https://perma.cc/69ZV-22F3>]; Zach Montellaro, *Sorting Through the Mess in Virginia*, POLITICO (Feb. 6, 2019), <https://www.politico.com/story/2019/02/06/virginia-governor-northam-fairfax-herring-1152310> [<https://perma.cc/58ZJ-LYY6>].

28. Dylan Scott et al., *Ralph Northam Won’t Resign as Virginia Governor Over Blackface Scandal*, VOX (Feb. 8, 2019), <https://www.vox.com/2019/2/6/18213902/ralph-northam-resign-justin-fairfax-mark-herring-blackface-virginia-governor> [<https://perma.cc/L4KQ-3QAE>].

29. Anna North, *Justin Fairfax, In Line for Governor of Virginia, Faces Sexual Assault Allegations*, VOX (Feb. 8, 2019), <https://www.vox.com/policy-and-politics/2019/2/4/18210638/justin-fairfax-ralph-northam-virginia-sex-assault-allegation> [<https://perma.cc/8YXQ-SXD2>].

fill it under most circumstances<sup>30</sup>) and was indeed routinely used,<sup>31</sup> there was no such certainty with respect to lieutenant-gubernatorial vacancies. The legal reality—affected by the combination of a 1982 Attorney General opinion,<sup>32</sup> a catchall clause in the state constitution setting out the Governor’s inherent power to fill vacancies,<sup>33</sup> and a state statutory provision that may have obviated the Governor’s power with respect to lieutenant-gubernatorial vacancies<sup>34</sup>—was murky.

The examples of New York and Virginia are noteworthy because of the circumstances in which these questions developed, but they stand out as unrepresentative examples of the majority rule in state law. Some states have similarly ambiguous procedures, which in practice place a heavy emphasis on similar catchall provisions.<sup>35</sup> And other states make it quite plain that there is no way to fill a lieutenant-gubernatorial vacancy—instead, the line of gubernatorial succession simply skips the office and continues to the second in line.<sup>36</sup>

Most states, however, set out specific succession procedures.<sup>37</sup> Almost all of these allow the Governor to fill the vacancy; most require legislative confirmation, but some do not. And some states set out automatic succession procedures that provide no discretion in how the vacancy is filled.

In the abstract, this may seem like an academic question. The prototypical Lieutenant Governor exists solely to serve as a Governor-in-waiting and usually to break ties in the state senate. State lines of succession extend beyond Lieutenant Governors, so if there is a gubernatorial vacancy and no

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30. See VA. CODE ANN. § 24.2-213 (2022) (allowing the General Assembly to elect Attorney General in the event of a vacancy; but allowing Governor to make temporary appointment if the General Assembly is not in session).

31. See Warren Fiske, *Cuccinelli Says Virginia Is the Only State Where Attorneys General Resign to Run for Governor*, POLITIFACT (Mar. 1, 2013), <https://www.politifact.com/factchecks/2013/mar/01/ken-cuccinelli/cuccinelli-says-virginia-only-state-where-attorney/> [<https://perma.cc/FY29-48J6>] (noting that, until Attorney General Ken Cuccinelli’s refusal to resign while running for Governor in 2013, “[t]he last six attorneys general [of Virginia] have resigned to run for governor, dating back to 1985”).

32. OPINIONS OF THE ATTORNEY GENERAL AND REPORT TO THE GOVERNOR OF VIRGINIA 324–27 (1983) [hereinafter OPINIONS OF THE ATTORNEY GENERAL].

33. VA. CONST. art. V, § 7 (“The Governor shall have power to fill vacancies in all offices of the Commonwealth for the filling of which the Constitution and laws make no other provision. If such office be one filled by the election of the people, the appointee shall hold office until the next general election, and thereafter until his successor qualifies, according to law.”).

34. See VA. CODE ANN. § 24.2-212 (2022) (providing that the State Senate President pro tempore shall discharge the duties of the office of Lieutenant Governor if a vacancy occurs).

35. *Filling Vacancies in the Office of Lieutenant Governor*, CITIZENS UNION OF THE CITY OF N.Y. (May 2009), [https://citizensunion.org/wp-content/uploads/2018/06/2009IB\\_LtGovVacancies1.pdf](https://citizensunion.org/wp-content/uploads/2018/06/2009IB_LtGovVacancies1.pdf) [<https://perma.cc/BT4A-VXSV>].

36. See *id.*

37. See *id.*

Lieutenant Governor, the process seamlessly skips to the next in line without a problem. But the purpose of a Lieutenant Governor is to provide a line of gubernatorial succession that is clear and democratically legitimate. When voting for a Lieutenant Governor—either on a joint ticket with the Governor or in a separate election—voters know that they are voting for a potential successor. In the usual case, the odds are high that the Lieutenant Governor will continue the status quo. And unlike succession procedures that place another state official, like the state senate president or secretary of state, as the first in line, Lieutenant Governors ascending to the governorship avoid messy complications, constitutional ambiguities, and separation-of-powers concerns.

Accordingly, this Article endeavors to answer several related questions: First, how have lieutenant-gubernatorial vacancies historically been filled? Second, what is the current procedure for filling such vacancies? And third, how *should* such vacancies be filled, and why does this question matter? Each of these questions is addressed in a separate part.

Part II begins with a historical approach. It explores how lieutenant-gubernatorial vacancies have historically been left unfilled, based partly on an archaic theory of gubernatorial succession; it then explains how, following the Twenty-fifth Amendment's ratification, states adopted lieutenant-gubernatorial succession provisions that were similar to how the Amendment filled vice-presidential vacancies. Then, Part III conducts a survey of every state—and territory—with an elected Lieutenant Governor to determine how vacancies are filled under state law, separating the states and territories into four distinct categories. Finally, Part IV argues that, in light of the inconsistency revealed in Part III, states should adopt explicit lieutenant-gubernatorial succession provisions. While it does not argue for the adoption of one particular approach, it notes the advantages and disadvantages of each aspect of succession and suggests how different political realities in different states might justify different succession procedures.

## II. THE HISTORY OF FILLING LIEUTENANT-GUBERNATORIAL VACANCIES

Before the mid-twentieth century, lieutenant-gubernatorial vacancies were filled infrequently, inconsistently, and in the face of frequent litigation. Because lieutenant-gubernatorial vacancies arise with some degree of frequency,<sup>38</sup> these questions presented themselves every few years in at least

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38. When it comes to lieutenant-gubernatorial vacancies, there are two options: up or out. A Lieutenant Governor can vacate their office by ascending to the governorship or by otherwise leaving office for one of the normal reasons, like death, resignation, impeachment, or election to another office. No data exists for how frequently Lieutenant Governors vacate their offices.

one state in the country. But because state supreme courts adhered to an archaic, now-outdated interpretation of gubernatorial succession provisions in state constitutions, the *de facto* vacancies were kept unfilled because the courts concluded that a *de jure* vacancy did not exist.

This theory of constitutional interpretation has largely been abandoned, both because of revisions in state constitutions making it anachronistic and because contemporary supreme courts have adopted a more flexible, realistic view of vacancies. And, following the Twenty-fifth Amendment, this jurisprudential change has been accompanied by changes in state constitutions that established clear, explicit means of filling lieutenant-gubernatorial vacancies.

This Part explores these changes in two separate sections. First, Section A addresses how lieutenant-gubernatorial vacancies were filled before the mid-twentieth century. It lays out the theory that frequently prevented lieutenant-gubernatorial vacancies from being filled and briefly analyzes the rationale used by some of the state supreme courts that embraced it. Then, Section B chronicles the sudden and widespread adoption of amendments to state constitutions that laid out clear succession procedures for Lieutenant Governors, which frequently mirrored the Twenty-fifth Amendment's procedure for filling vice-presidential vacancies.

#### A. *The Era of Unfilled Lieutenant-Gubernatorial Vacancies*

In 1901, Washington Governor John Rankin Rogers died in office.<sup>39</sup> Under the state constitution—which provided that, in the event of a gubernatorial vacancy, “the duties of the office shall devolve upon the lieutenant governor”<sup>40</sup>—he was succeeded by his Lieutenant Governor, Henry

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Data from the National Lieutenant Governors Association, however, shows that gubernatorial vacancies occur at a rate of 3.2% per year—which, relative to the number of state Governors, comes out to about 1.6 Governors per year. See *Chart of Gubernatorial Successions*, NAT'L LT. GOVERNORS ASS'N (June 2018), <https://nlga.us/wp-content/uploads/Chart-of-Successions-to-Governor-since-1980-060418.pdf> [<https://perma.cc/3PLJ-DH8Y>]. In most states, because Lieutenant Governors ascend to the governorship in the event of a vacancy, we might reasonably expect the rate of lieutenant-gubernatorial vacancies to be twice as high as gubernatorial vacancies—not only do Lieutenant Governors vacate their offices every time a Governor vacates, but they also leave office for the same reasons that Governors do. Applying some back-of-the-envelope math, between 2000 and 2020, forty-nine Lieutenant Governors left office, which comes out to a rate of 5.7%, or about 2.5 Lieutenant Governors per year.

39. EDMOND S. MEANY, *GOVERNORS OF WASHINGTON: TERRITORIAL AND STATE* 91 (1915).

40. WASH. CONST. art. III, § 10 (amended 1910) (“In case of the removal, resignation, death or disability of the governor, the duties of the office shall devolve upon the lieutenant governor, and in case of a vacancy in both the offices of governor and lieutenant governor, the duties of governor shall devolve upon the secretary of state, who shall act as governor until the disability be removed or a governor be elected.”).

McBride.<sup>41</sup> Suppose that McBride wished to appoint someone as Lieutenant Governor. He has a compelling argument in favor of his doing so. Though the state constitution did not explicitly provide for the filling of any executive branch office, including the Lieutenant Governor,<sup>42</sup> it *also* granted the Governor the broad power to fill vacancies “in any other state office, for the filling of which vacancy no provision is made elsewhere in this constitution . . . .”<sup>43</sup>

But had McBride made this argument, it would have been rejected. In 1902, in *State ex rel. Murphy v. McBride*, the Washington Supreme Court rejected an application for a writ of mandamus directed at the state secretary of state, which sought to compel him to schedule a special election for Governor and Lieutenant Governor. Citing several cases from other states, the court concluded that:

[w]hen the lieutenant governor, by virtue of his office and of the command of the constitution, assumed the duties of governor on the death of Gov. Rogers, *the office of lieutenant governor did not become vacant*, but the officer remained lieutenant governor, intrusted with the powers and duties of governor.<sup>44</sup>

In other words, McBride was not the *de jure* Governor—he was still Lieutenant Governor and was merely exercising the power of the Governor—even though most modern and contemporary sources identify him as the fourth Governor of the state.<sup>45</sup>

In the early twentieth century, *Murphy* reflected the dominant view in state constitutional law.<sup>46</sup> State supreme courts, interpreting comparably phrased provisions in other states, came to the same conclusion as the *Murphy* court—which, in turn, had derived its holding from the rulings of other state supreme courts that interpreted comparable provisions.<sup>47</sup> To the extent that courts reached different conclusions, as some did, they were interpreting provisions that were similar, but materially different. For example, in *Fitzpatrick v. McAlister*, the Oklahoma Supreme Court determined that the

41. MEANY, *supra* note 39, at 91.

42. See WASH. CONST. art. III (outlining the executive branch).

43. *Id.* § 13.

44. *State ex rel. Murphy v. McBride*, 70 P. 25, 26 (Wash. 1902) (emphasis added).

45. See, e.g., MEANY, *supra* note 39, at 90; *Washington Territorial and State Governors*, WASH. ST. LIB., <https://www.sos.wa.gov/library/washingtonterritorialandstategovernors.aspx> [<https://perma.cc/B9EH-D8KH>].

46. See *State ex rel. De Concini v. Garvey*, 195 P.2d 153, 154 (Ariz. 1948); *State ex rel. Lamey v. Mitchell*, 34 P.2d 369, 372 (Mont. 1934); *State ex rel. Hardin v. Sadler*, 47 P. 450, 450 (Nev. 1897); *People ex rel. Lynch v. Budd*, 45 P. 1060, 1060 (Cal. 1896); *Chadwick v. Earhart*, 4 P. 1180, 1180–81 (Or. 1884); *State ex rel. Chatterton v. Grant*, 73 P. 470, 477 (Wyo. 1903).

47. See cases cited *supra* note 46.

Lieutenant Governor became Governor following a permanent vacancy in the office—but there, the constitutional provision at issue provided that “the said *office*, with its compensation, shall devolve upon the Lieutenant Governor.”<sup>48</sup> That provision, which explicitly provided that the *office* devolved on the Lieutenant Governor, stood in diametric opposition to the similarly worded provisions that merely provided that the emoluments and powers devolved on the Lieutenant Governor.

To some extent, this theory of constitutional interpretation is loosely derived from an argument at the federal level concerning presidential succession. The U.S. Constitution provides: “In case of the removal of the President from office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice-President . . . .”<sup>49</sup> At the time of William Henry Harrison’s death and John Tyler’s ostensible ascension to the presidency in 1841, the meaning of this provision wasn’t quite clear. Some politicians then raised a serious argument that Tyler was merely *acting* President.<sup>50</sup> Congress and the Supreme Court both tacitly recognized Tyler as *de jure* President, putting an end to any serious argument to the contrary,<sup>51</sup> which effectively created a new constitutional norm. Since then, subsequent ascensions by the Vice President to the presidency have occurred without controversy and without questions as to their legal status.

If that’s the case, however, why did the argument to the contrary survive at the state level in the nineteenth and twentieth centuries? The answer is likely rooted in the difference between an ambiguous antecedent in the federal constitution and clear language in state constitutions. The U.S. Constitution’s presidential succession provision said that “the *Same* shall devolve on the Vice-President.”<sup>52</sup> But to what does “the Same” refer? Congressional debates as to Tyler’s status ultimately concluded that “the Same” referred to “the Office,” not “the Powers and Duties,”<sup>53</sup> though it’s certainly possible to read the clause differently.

But the textual differences in state constitutional gubernatorial succession provisions led courts to a contrary decision. Virtually every court to approach the question concluded that the powers, duties, and emoluments, but not the office, devolved to the Lieutenant Governor.<sup>54</sup> As a result, in virtually all

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48. *Fitzpatrick v. McAlister*, 248 P. 569, 572 (Okla. 1926) (citing OKLA. CONST. art. VI, § 16) (emphasis added).

49. U.S. CONST. art. II, § 1.

50. Leonard Dinnerstein, *The Accession of John Tyler to the Presidency*, 70 VA. MAG. HIST. & BIOGRAPHY 447, 447–48 (1962).

51. *Id.* at 448, 451–53.

52. U.S. CONST. art. II, § 1 (emphasis added).

53. Dinnerstein, *supra* note 50, at 452–53.

54. *See* cases cited *supra* note 46.

cases, when Lieutenant Governors ascended to the governorship, they merely exercised the power of Governor and did not give up their technical, *de jure* status as Lieutenant Governor—and so no vacancy in the office existed.<sup>55</sup>

This didn't necessarily stop Lieutenant Governors who served as *de jure* "acting" Governors from trying to fill the ostensible vacancies that their ascension to the governorship created. In Michigan, for example, when Governor Frank Fitzgerald died in 1939, Lieutenant Governor Luren Dickinson became Governor—sort of. A state attorney general opinion issued at the time held that Dickinson was merely *acting* Governor, not *de jure* Governor.<sup>56</sup> Nonetheless, Dickinson quite explicitly attempted to test that conclusion, naming Matilda Dodge Wilson, the widow of Dodge Motors co-founder John Francis Dodge, as Lieutenant Governor in the final days of his term.<sup>57</sup> The state attorney general protested Wilson's appointment but ultimately declined to challenge its constitutionality in court.<sup>58</sup> In any event, Wilson ended up just serving as a lame-duck Lieutenant Governor, holding the office—legitimately or not—for just a few months.<sup>59</sup>

But the majority rule was reversed by a series of state constitutional changes. Rewrites of state executive branch articles, and newly drafted constitutions, clarified that, in the event of a vacancy, the Lieutenant Governor *becomes* Governor.<sup>60</sup> The effect has been the establishment of a new majority rule, one that makes clear that a Lieutenant Governor acting as Governor following a permanent vacancy *is* the Governor. These constitutional changes, which served to create lieutenant-gubernatorial vacancies, dovetailed with other constitutional amendments that adopted clear procedures for filling those vacancies, as will be discussed at greater length in Section B.

But the inability to fill lieutenant-gubernatorial vacancies following the ascension of the Lieutenant Governor to the governorship, whether

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55. See, e.g., Dinnerstein, *supra* note 50, at 456.

56. *Woman Is Appointed Lieutenant Governor*, BATTLE CREEK ENQUIRER, Nov. 19, 1940, at 1, 11.

57. *Id.* ("Governor Dickinson today appointed Mrs. Matilda R. Wilson, of Rochester, as lieutenant governor, announcing that the appointment would be the basis for friendly litigation to obtain a supreme court definition of Michigan's laws of succession.").

58. *State Looks Back on 1940 with Happiness and Regret*, BATTLE CREEK ENQUIRER, Dec. 30, 1940, at 3 ("[State Attorney General Thomas Read] said [Wilson's appointment] was a 'silly' thing to do, refused to start the suit, and Mrs. Wilson served unchallenged.").

59. See Laura S. Riggs, *The Responsible Philanthropy of Matilda Dodge Wilson*, 21 OAKLAND J. 142, 151–52 (2011).

60. CAL. CONST. art. V, § 10 (amended 1974) ("The Lieutenant Governor shall become Governor when a vacancy occurs in the office of Governor."); MO. CONST. OF 1875, art. IV, § 11(a) (1968) ("[T]he lieutenant governor shall become governor for the remainder of the term."); KAN. CONST. art. I, § 11 (1972) ("[T]he lieutenant governor shall become governor."); S.D. CONST. art. IV, § 6 (amended 1972) ("[T]he lieutenant governor shall succeed to the office and powers of the Governor."); COLO. CONST. art. IV, § 13 (amended 1974) ("[T]he lieutenant governor shall take the oath of office and shall become governor.").

technically recognized as vacancies or not, only covers some of the potential lieutenant-gubernatorial vacancies. Lieutenant Governors, just like Governors, can die, resign, be impeached, or otherwise prematurely leave their offices. Most state constitutions, however, did not explicitly provide for this contingency. Instead, they created a gubernatorial line of succession that nominally provided a successor for the Lieutenant Governor if a vacancy occurred while they were acting as Governor.<sup>61</sup> A handful of state constitutions established an automatic succession procedure, through which the state senate president would automatically act as Lieutenant Governor,<sup>62</sup> with the Colorado Supreme Court clarifying that if a new state senate president were elected during a lieutenant-gubernatorial vacancy, the role would then pass to them.<sup>63</sup> Otherwise, there was no explicit replacement mechanism.

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61. ALA. CONST. of 1868, art. V, § 17; ARK. CONST. of 1868, art. VI, § 10; CAL. CONST. of 1849, art. V, § 16; CONN. CONST. of 1818, art. IV, § 16; FLA. CONST. of 1868, art. V, § 14; ILL. CONST. of 1818, art. III, § 15; IND. CONST. of 1816, art. IV, § 18; IOWA CONST. art. IV, § 19 (repealed 1952); KAN. CONST. art. V, § 14 (1859); KY. CONST. of 1799, art. III, § 19; MD. CONST. of 1864, art. II, § 8; MICH. CONST. OF 1835, art. V, § 14; MISS. CONST. OF 1817, art. IV, § 21; MO. CONST. of 1820, art. IV, § 16; NEB. CONST. art. V, § 18 (repealed 1970); NEV. CONST., art. V, § 17; N.M. CONST. art. V, § 7 (amended 1948); N.Y. CONST. of 1777, § 21; N.C. CONST. of 1868, art. III, § 12; OHIO CONST. of 1851, art. III, § 17; OKLA. CONST. art. VI, § 15; S.D. CONST. art. IV, § 6 (amended 1972); TEX. CONST. of 1845, art. V, § 13; WIS. CONST. art. V, § 8 (amended 1979).

62. COLO. CONST. art. IV, § 14 (repealed 1974) (“In case of the absence, impeachment or disqualification from any cause of the Lieutenant Governor, or when he shall hold the office of Governor, then the President *pro tem.* of the Senate shall perform the duties of the Lieutenant Governor, until the vacancy is filled or the disability removed.”); IDAHO CONST. art. IV, § 13 (1890) (“In case of the absence or disqualification of the lieutenant governor from any cause which applies to the governor, or when he shall hold the office of governor, then the president pro tempore of the senate shall perform the duties of the lieutenant governor until the vacancy is filled or the disability removed.”); MINN. CONST. of 1857, art. V, § 6 (“Before the close of each session of the Senate, they shall elect a president pro tempore, who shall be Lieutenant Governor in case a vacancy should occur in that office.”); MONT. CONST. of 1889 art. VII, § 15 (“In case of the absence or disqualification of the Lieutenant-Governor, from any cause which applies to the Governor, or when he shall hold the office of Governor, then the president pro tempore of the Senate shall perform the duties of the Lieutenant-Governor until the vacancy is filled or the disability removed.”); PA. CONST. of 1874, art. VI, § 14 (“In case of a vacancy in the office of Lieutenant Governor, or when the Lieutenant Governor shall be impeached by the House of Representatives, or shall be unable to exercise the duties of his office, the powers, duties, and emoluments thereof for the remainder of the term, or until the disability be removed, shall devolve upon the President pro tempore of the Senate. . . .”); S.C. CONST. of 1865, art. II, § 9 (1865) (“[I]n case of the impeachment of the Lieutenant-Governor, or his removal from office, death, resignation, disqualification, disability, or removal from the State, the president *pro tempore* of the senate shall succeed to his office. . . .”).

63. See *People ex rel. Parks v. Cornforth*, 81 P. 871, 873 (Colo. 1905).

This widespread omission is, all things considered, strange. Though the Lieutenant Governor is, in practice, a largely powerless figure,<sup>64</sup> they are, at least theoretically, one of the most powerful and important executive officials in state government. Imagining a state constitutional or statutory framework that doesn't provide a mechanism for filling gubernatorial vacancies—or vacancies in another statewide elected office, like attorney general or secretary of state—is all but impossible. What explains the absence of a succession procedure?

The absence of such a procedure might be reflective of the aforementioned theory of gubernatorial succession. If the Lieutenant Governor didn't really become Governor, then there was no need to provide for a succession mechanism. If the Lieutenant Governor left office for another reason, the state senate president, who was second in the line of gubernatorial succession, could act as Governor, which was how most state gubernatorial succession provisions originally operated anyway. An equally persuasive rationale might be derived from the fact that Lieutenant Governors have little statutory or constitutional power, and their absence is largely unnoticed.<sup>65</sup> As a final possible explanation, it's worth noting that the original U.S. Constitution omitted any procedure for filling vice-presidential vacancies,<sup>66</sup> and that many original state constitutions—which served as models for subsequent state constitutions<sup>67</sup>—lacked lieutenant-gubernatorial replacement provisions.<sup>68</sup>

In the absence of explicit replacement provisions, some state supreme courts held that, when that a lieutenant-gubernatorial vacancy occurred—but again, *not* following a gubernatorial vacancy—the Governor had the power to fill the vacancy.<sup>69</sup> In support of this conclusion, the courts acknowledged that, while there was no express constitutional power for the Governors to do so, so-called catchall clauses in the constitutions gave the Governors the power

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64. The Lieutenant Governor's two most common duties have long been to preside over the Senate (and cast votes in the event of a tie) and to succeed to the governorship—though some Lieutenant Governors have powers beyond that. *See, e.g.*, Julia Nienaber Hurst, *Lt. Governors' Statutory Duties*, in *BOOK OF THE STATES* 201, 201–03 (Council of State Governments ed., 2017).

65. *See, e.g., id.*

66. JOHN D. FEERICK, *THE TWENTY-FIFTH AMENDMENT: ITS COMPLETE HISTORY AND APPLICATIONS* 31–32 (3d ed. 2014).

67. G. ALAN TARR, *UNDERSTANDING STATE CONSTITUTIONS* 50–55 (1998).

68. *See generally, e.g.*, MASS. CONST. pt. 2, ch. 2, § 2.

69. *See, e.g.*, *Cope v. Parson*, 570 S.W.3d 579, 585 (Mo. 2019).

to make appointments to fill vacancies where “no mode is provided by the constitution and law for filling such vacancy.”<sup>70</sup>

Assuming that this theory was correct, however, few Governors proactively made appointments to fill lieutenant-gubernatorial vacancies.<sup>71</sup> When states were confronted with lieutenant-gubernatorial vacancies, even outside the context of a gubernatorial vacancy, state officials frequently concluded that they had no power to fill the vacancies.<sup>72</sup> This conclusion, while undoubtedly weakened by the existence of catchall appointment provisions, reflected the similar conclusion at the federal level, namely, that the president had no power to appoint a replacement vice-president.<sup>73</sup> The vacancy left unfilled made for a pleasant reality—and one that, in the event of a gubernatorial vacancy, would undermine the legitimacy of the succession process. Consequently, state lawmakers throughout the country moved to amend their state constitutions.<sup>74</sup>

### B. *The Adoption of Replacement Procedures*

Before the mid-twentieth century, only a handful of states had explicit procedures for filling lieutenant-gubernatorial vacancies. But beginning in the 1960s, states began adopting different procedures *en masse*—and by the early 1980s, seventeen states and territories had done so. This Section focuses on exploring the history of, and explaining the justifications for, these sudden and widespread changes.

Prior to the ratification of the Twenty-fifth Amendment in 1967, three states implemented lieutenant-gubernatorial succession procedures. The procedures were put in place unevenly—one through constitutional amendments, two through statutory amendments—and were constrained in

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70. *People ex rel. Lynch v. Budd*, 45 P. 1060, 1062 (Cal. 1896); *see also State ex rel. Martin v. E Kern*, 280 N.W. 393, 399–400 (Wis. 1938) (interpreting statutory provision giving the Governor catchall appointment power); *State ex rel. Trauger v. Nash*, 64 N.E. 558, 560 (Ohio 1902) (issuing writ of mandamus requiring Governor to fill lieutenant-gubernatorial vacancy); Idaho Att’y Gen. Op. No. 71, at 133–35 (Oct. 17, 1929) (concluding that the Governor had power to fill lieutenant-gubernatorial vacancy).

71. Only a handful of lieutenant-gubernatorial vacancies were filled in the early- to mid-twentieth century by gubernatorial appointment. *See, e.g., Harmon to Name Nichols*, N.Y. TIMES, Jan. 7, 1911; *McCabe Fills State Post*, POST-REG. (Idaho Falls, Idaho), Mar. 20, 1946, at 1; *Oscar E. Hailey Named Lieutenant Governor*, HERALD-BULLETIN (Burley, Idaho), Oct. 31, 1929, at 12; *Stephens Appointed Lieutenant Governor*, BAKERSFIELD MORNING ECHO, July 19, 1916, at 1.

72. *No One to Succeed Lewis E. Eliason*, MORNING NEWS (Wilmington, Del.), May 5, 1919, at 2.

73. FEERICK, *supra* note 66, at 31–32.

74. *See generally, e.g., IAN BOLLAG-MILLER ET AL., CHANGING HANDS: RECOMMENDATIONS TO IMPROVE NEW YORK’S SYSTEM OF GUBERNATORIAL SUCCESSION* 18 (2022).

nature. Connecticut and Hawai‘i, for example, adopted lieutenant-gubernatorial succession procedures that automatically named the state senate president as the Lieutenant Governor.<sup>75</sup> Connecticut’s change was incorporated as a part of its 1963 constitution<sup>76</sup> and Hawai‘i’s as a statutory change in 1965.<sup>77</sup> Alaska, meanwhile, adopted a more unusual succession procedure: it required its Governor to name a member of their cabinet as successor to the Lieutenant Governor,<sup>78</sup> who automatically ascended to the role in the event of a vacancy.<sup>79</sup> Like Hawai‘i, this change was implemented statutorily.

But in 1967, the Twenty-fifth Amendment was ratified.<sup>80</sup> Though the primary purpose of the Amendment was to clarify the scope of presidential succession, it also provided an explicit procedure for filling a vice-presidential vacancy. Specifically, it allowed the President to nominate a Vice President to fill a vacancy, who would then be confirmed upon a majority vote of both houses of Congress.<sup>81</sup>

Beginning in 1968, Congress passed the Guam Elective Governor Act and the Virgin Islands Elective Governor Act, which granted the territories power to elect their Governors for the first time. Both acts also created elected Lieutenant Governors and gave the Governors the power to replace them.<sup>82</sup> At the state level, the 1970s saw a flood of state constitutional revisions that explicitly provided for lieutenant-gubernatorial vacancies. In 1970, Maryland voters ratified a constitutional amendment that created an elected Lieutenant Governor and spelled out a procedure for replacing them.<sup>83</sup> That was followed by Montana and South Dakota (1972); Colorado and Louisiana (1974); California (1976); Idaho (1977); Indiana (1978); and Wisconsin (1979).<sup>84</sup>

75. CONN. CONST. art. IV, § 19; Act of July 9, 1965, No. 262, § 2(a), 1965 Haw. Sess. Laws 439, 439.

76. CONN. CONST. art. IV, § 19.

77. § 2(a), 1965 Haw. Sess. Laws at 439.

78. Prior to 1970, the Lieutenant Governor in Alaska was called the “secretary of state,” but was nonetheless elected on a joint ticket with the Governor. To minimize confusion—and because the only real change in the office was its title—this Article refers to the designated gubernatorial successor in Alaska as the “Lieutenant Governor,” regardless of their actual title.

79. Act of May 5, 1959, ch. 174, § 2, 1959 Alaska Sess. Laws 261, 261.

80. U.S. CONST. amend. XXV, § 2 (amended 1967).

81. *Id.*

82. Guam Elective Governor Act, Pub. L. No. 90-497, § 3, 82 Stat. 842, 844 (1968); V.I. Elective Governor Act, Pub. L. No. 496, § 7, 82 Stat. 837, 839 (1968).

83. H.R. 3, 372nd Leg., Reg. Sess., 1970 Md. Laws 1298.

84. LA. CONST. art. IV, § 15; MONT. CONST. art. VI, § 6(1); Act of Mar. 17, 1977, ch. 105, 1977 Idaho Laws 222; S.J. Res. 1, 81st Leg., 1st Reg. Sess., 1979 Wis. Laws 646; S.J. Res. 1, 100th Gen. Assemb., 1st Reg. Sess., 1977 Ind. Laws 1638; S. Con. Res. 1, 49th Gen. Assemb., Reg. Sess., 1974 Colo. Laws 445; H.R.J. Res. 513, 47th Leg., Reg. Sess., 1972 S.D. Laws 15; CAL. SEC’Y OF STATE, CALIFORNIA VOTERS PAMPHLET: GENERAL ELECTION 36–38 (1976) (describing Proposition 9).

From there, the process slowed considerably, with Nebraska and Utah adopting lieutenant-gubernatorial succession procedures in 1980; Texas in 1984; Ohio in 1989; and Florida, New Jersey, New Mexico, and South Carolina in the 2000s.<sup>85</sup>

The timing of these revisions, the bulk of which happened in the decade following the ratification of the Twenty-fifth Amendment, is strongly suggestive of the Amendment's influence on state constitutional revision. To that effect, most state legislative leaders said as much.<sup>86</sup> Even more significantly, however, the vast majority of states that adopted these procedures did so in a manner that was identical to the Twenty-fifth Amendment's procedure, as will be explained in greater detail in Part III.

But the Twenty-fifth Amendment wasn't alone in motivating these changes. In some cases, the changes occurred following specific instances of lieutenant-gubernatorial vacancies. Some Governors responded to these vacancies by asserting that they had the power to fill them—and then by making appointments. In Idaho, for example, following Governor Cecil Andrus's resignation to serve as Secretary of the Interior, Lieutenant Governor John Evans, a Democrat, ascended to the governorship. Though the state attorney general issued an opinion holding that Evans was merely acting Governor, and that no vacancy had occurred in the lieutenant governorship,<sup>87</sup> Evans nonetheless appointed William Murphy as Lieutenant Governor.<sup>88</sup> The Republican-controlled legislature was initially skeptical of Murphy's appointment and suggested that it would challenge the appointment's constitutionality in court.<sup>89</sup> Ultimately, however, the legislature backed down

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85. Act of June 20, 2003, ch. 171, sec. 1, § 14.055, 2003 Fla. Laws 1123; H.R. 204, 119th Gen. Assemb., Reg. Sess. (S.C. 2012); S.J. Res. 8, 48th Leg., 2nd Reg. Sess., 2008 N.M. Laws 1556 (enacted); Amend. H.R.J. Res. 2, 117th Gen. Assemb., Reg. Sess., 1988 Ohio Laws 5578; S.J. Res. 22, 68th Leg., Reg. Sess., 1983 Tex. Laws 6692; Resol. 5, 86th Leg., 1st Reg. Sess., 1979 Neb. Laws 57; S.J. Res. 7, 43rd Leg., Reg. Sess., 1979 Utah Laws 1321; ROBERT FORREST WILLIAMS, *THE NEW JERSEY STATE CONSTITUTION: A REFERENCE GUIDE* 131–32 (2012).

86. See, e.g., Bill Lockyer & Bob Wilson, *Argument in Favor of Proposition 9*, in CALIFORNIA VOTERS PAMPHLET: GENERAL ELECTION 38 (1976); Deborah Baker, *Measure Would Bump Secretary of State to Back of Succession Line*, CARLSBAD CURRENT-ARGUS, Jan. 27, 2008, at 11; *General Assembly Airs Gripes About State in Amendment 6*, COLORADO SPRINGS GAZETTE-TEL., Oct. 30, 1974, at 14; Larry Lough, *Two Questions: Voters to Decide on Fate of State Amendments*, MUNCIE STAR PRESS, Oct. 15, 1978, at 11; *The Title for the Lieutenant Governor*, APPLETON POST-CRESCENT, Feb. 15, 1978, at 3; Jim Underwood, *House Passes Bill to Fill Second Ohio Office*, MANSFIELD NEWS-J., June 5, 1987, at 16.

87. Idaho Att'y Gen. Op. No. 77-1, at 51 (Jan. 4, 1977).

88. *Evans Will Make Appointment Despite Opinion from Atty. Gen.*, S. IDAHO PRESS, Jan. 5, 1977, at 1; *Quick Confirmation Is Seen for New Lt. Gov.*, S. IDAHO PRESS, Jan. 26, 1977, at 3.

89. See *Hassle Looms Over Lieutenant Governor*, IDAHO ST. J., Jan. 3, 1977, at 12; Chris Peck, *'Give Up the Fight,' Evans Urges Batt*, TWIN FALLS TIMES-NEWS, Jan. 7, 1977, at 1.

and confirmed Murphy unanimously.<sup>90</sup> Following the controversy, the legislature passed a statutory amendment clarifying that the Governor had the power to fill lieutenant-gubernatorial vacancies.<sup>91</sup>

A similar controversy developed in Florida in 2003. Following Lieutenant Governor Frank Brogan's resignation, Governor Jeb Bush appointed Toni Jennings as his replacement. Bush relied on the catchall appointments provision in the state constitution and didn't submit Jennings's name to the legislature for confirmation.<sup>92</sup> Democratic Party leaders argued that, under state law, a 2004 special election to fill the lieutenant-gubernatorial vacancy needed to be held and similarly threatened litigation.<sup>93</sup> However, like in Idaho, the legislature passed a statute allowing the Governor to fill lieutenant-gubernatorial vacancies with no special election,<sup>94</sup> and Democratic leaders backed down.<sup>95</sup>

Looking beyond the adoption of succession procedures as a response to specific vacancies, however, suggests that the adoption of joint elections for Governor and Lieutenant Governor was also a motivating factor. Historically, Governors and Lieutenant Governors were elected separately, and it was only in the mid- to late-twentieth century that states began joining the elections.<sup>96</sup> The context in which these state constitutional changes occurred is strongly suggestive of a link between the two. Moreover, the adoption of joint elections created a deeper parallel between presidential and gubernatorial elections, which may have, in turn, further justified adopting a vacancy-filling procedure that echoed the Twenty-fifth Amendment.

In New York, then-Governor Thomas Dewey first pushed the idea of a joint election for Governor and Lieutenant Governor in 1944.<sup>97</sup> In support of

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90. *Divisive Issues Threaten Legislative Harmony*, IDAHO ST. J., Jan. 31, 1977, at 9 [hereinafter *Murphy Confirmed as Lieutenant Governor*].

91. See *Idaho Legislature Adjourns Monday Night; Sets Record General Funds Appropriations*, S. IDAHO PRESS, Mar. 22, 1977, at 3.

92. See Lucy Morgan, *Lt. Gov. Jennings Makes History*, TAMPA BAY TIMES, Mar. 4, 2003, at 1.

93. See Brian E. Crowley, *Possible Brogan Successor May Face Vote to Keep Job*, PALM BEACH POST, Jan. 11, 2003, at 1A, 26A.

94. Act of June 20, 2003, ch. 171, sec. 1, § 14.055, 2003 Fla. Laws 1123.

95. See Bob Mahlburg, *Jennings a Disappointment to Democratic Party Leaders*, ORLANDO SENTINEL (July 24, 2003), <https://www.orlandosentinel.com/news/os-xpm-2003-07-24-0307240166-story.html> [<https://perma.cc/J4K7-X7N7>] (“Last spring, top Florida Democrats condemned the appointment of a new lieutenant governor as improper and illegal, but they decided against filing a lawsuit to demand a special election.”).

96. See Travis Lynch, *The Problem with the Lieutenant Governor: A Legislative or Executive Position Under the Separation of Powers Clause*, 84 MISS. L.J. SUPRA 87, 97 (2015).

97. See *Legislature Approves Bill for Joint Election of 2 Top Executives*, PRESS & SUN BULLETIN (Binghamton, N.Y.), Jan. 25, 1944, at 10 [hereinafter *Dewey Proposal*] (“The measure was proposed by [Governor] Dewey to prevent recurrence of last year’s special

the proposal, Dewey specifically cited a lieutenant-gubernatorial vacancy from a few years earlier—which was ultimately filled by a special election—as a reason for the proposal’s adoption.<sup>98</sup> New York voters would reject the proposed amendment in a 1945 vote, but when Dewey and the legislature tried again a decade later in 1953, voters approved the amendment.<sup>99</sup>

Dewey’s argument was rooted in both shrewd political calculus and in good governance. Dewey argued for both a constitutional change (to provide for team-ticket elections for Governor and Lieutenant Governor) and a statutory change (to exclude the Lieutenant Governor from the Public Officers Law’s special election requirement) to avoid having a split executive administration.<sup>100</sup> This likely mattered to Dewey both because he intended to run for President in 1944 and didn’t want to risk turning the state over to the opposing party if a Democratic Lieutenant Governor had been elected in the 1943 special election<sup>101</sup> and because a split administration was barely avoided in the 1942 regular election.<sup>102</sup>

Whatever Dewey’s reasoning,<sup>103</sup> filling lieutenant-gubernatorial vacancies with appointments by the Governor, a procedure most states have adopted, is admittedly more democratically legitimate if the Governor and Lieutenant Governor were elected together. In that case, the Governor and Lieutenant Governor would theoretically act as a joint governing team, which justifies the creation of gubernatorial power to fill a vacancy that may occur if their governing partner leaves office.

*Outside* of this context, giving the Governor power to fill such a vacancy might be seen as democratically illegitimate. The Lieutenant Governor’s primary role is to serve as a gubernatorial successor in waiting. If the Governor and Lieutenant Governor were elected separately, but the Governor

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election, ordered by the courts following the death of Lieut. Gov. Thomas W. Wallace, Republican.”); Joseph R. Malone, *Amendment 2 Aims to Fill Lieutenant Governor Office*, DEMOCRAT & CHRON. (Rochester, N.Y.), Oct. 8, 1945, at 29.

98. *Dewey Proposal*, *supra* note 97, at 10.

99. See Robert Conway, *State’s Voters Give Aye to All 9 Amendments*, N.Y. DAILY NEWS, Nov. 4, 1953, at 46.

100. See Briffault, *supra* note 15, at 686.

101. *Id.* at 685.

102. T. Quinn Yeagain, *One Vote, Two Winners: Team-Ticket Gubernatorial Elections and the Need for Further Reform*, 75 U. MIAMI L. REV. 751, 766–67 (2021).

103. In Dewey’s 1953 address to the state legislature, he didn’t explain in detail what motivated the proposal. THOMAS DEWEY, PUBLIC PAPERS OF THOMAS E. DEWEY 26–27 (1953) (“The reason is obvious with respect to such closely-knit offices. Good government requires responsible, cohesive administration. . . . This will conform to the method of selection of electors for President and Vice President.”). The vacancy-based argument is less persuasive with respect to the 1953 change, given that, in 1945, voters approved a constitutional amendment providing that the state senate president would act as Lieutenant Governor in the event of a vacancy and ruling out a special election to fill such a vacancy. N.Y. CONST. art. IV, § 6 (amended 1945).

were given power to fill a lieutenant-gubernatorial vacancy, the Governor would experience a windfall because of the randomness of a vacancy.

The relatively short succession with which states adopted joint elections and lieutenant-gubernatorial succession procedures strongly suggests that this motivation was at play. But even assuming the operation of randomness, it is significant that six states ratified constitutional amendments that simultaneously made both revisions in one move. Colorado (1974), Maryland (1970), Montana (1972), New Jersey (2005), South Dakota (1972), and Utah (1980) all adopted constitutional amendments that did *both*.<sup>104</sup> And as mentioned previously, the Guam and Virgin Islands Elective Governor Acts also did both.<sup>105</sup>

All told, beginning in the mid-twentieth century, twenty-three states and territories adopted lieutenant-gubernatorial succession procedures.<sup>106</sup> Nineteen of them did so after the Twenty-fifth Amendment was ratified, and nine more did so in the succeeding ten years.<sup>107</sup> With respect to joint elections, eight states and territories adopted joint elections and lieutenant-gubernatorial succession provisions together; most others adopted the latter within ten years of adopting the former.<sup>108</sup>

### III. THE CURRENT STATE OF LIEUTENANT-GUBERNATORIAL VACANCIES

Following the burst of state constitutional changes following the Twenty-fifth Amendment, most states and territories with elected<sup>109</sup> Lieutenant Governors have adopted explicit replacement procedures for their Lieutenant Governors.<sup>110</sup> In most of the states lacking an *explicit* procedure, they nonetheless have *implicit* replacement procedures—whether derivative of

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104. COLO. CONST. art. IV, § 13 (amended 1974); MD. CONST. art. II, § 1b (amended 1970); MONT. CONST. art. VI, § 2; N.J. CONST. art. V, § 1, para. 4 (amended 2006); S.D. CONST. art. IV, § 6 (amended 1972); UTAH CONST. art. VII, § 2 (amended 1980).

105. Guam Elective Governor Act, Pub. L. No. 497, § 3, 82 Stat. 842, 844 (1968); V.I. Elective Governor Act, Pub. L. No. 496, § 7, 82 Stat. 837, 839 (1968).

106. *See supra* text accompanying notes 80–85.

107. *See id.*

108. *See id.*

109. In Tennessee and West Virginia, the president of the state senate—the designated successor to the governorship—also has the title of Lieutenant Governor. In discussing the power to fill lieutenant-gubernatorial vacancies, because their Lieutenant Governors are unelected and merely serve in the role *ex officio* by virtue of their state senate presidencies, Tennessee and West Virginia are discussed no further.

110. Arizona, Oregon, and Wyoming lack a Lieutenant Governor and instead name their elected secretaries of state as gubernatorial successors. *See* T. Quinn Yeagain, *Democratizing Gubernatorial Succession*, 73 RUTGERS U. L. REV. 1145, 1173–78 (2021). Because their elected secretaries of state effectively function as elected Lieutenant Governors—albeit with more constitutional and statutory responsibilities than most Lieutenant Governors—they are included in the discussion of how to replace Lieutenant Governors.

their Governors' inherent power to appoint, as recognized by state supreme courts, or as reflected by contemporary practice. Part III categorizes states with elected Lieutenant Governors based on how their Lieutenant Governors can be replaced, if at all: explicit replacement procedures (Section A), implicit but accepted replacement procedures (Section B), ambiguous but plausible replacement procedures (Section C), and nonexistent replacement procedures (Section D).

#### A. *Explicit Replacement Procedures*

Twenty-one states have explicit lieutenant-gubernatorial replacement procedures.<sup>111</sup> This means, as a definitional matter, that their constitutions or statutes have provisions that explicitly contemplate the replacement of Lieutenant Governors and set out a procedure for doing so. There are two main categories of states with explicit replacement procedures: those that allow the Governor to make a nomination or appointment, and those that grant the legislature that power. These are addressed in separate subsections.

##### 1. *Gubernatorial Power*

Almost all states that explicitly provide for lieutenant-gubernatorial succession have implemented a procedure that follows that of the Twenty-fifth Amendment: in the event of a vacancy, the Governor nominates a replacement, who is then confirmed by both chambers of the legislature.<sup>112</sup> Six states or territories require legislative confirmation, but by just one legislative chamber: in the Northern Mariana Islands, South Carolina, Idaho, and Utah, just by the Senate; and in Guam and the U.S. Virgin Islands, by the unicameral legislature.<sup>113</sup> In these states, the adoption of this replacement

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111. Brian Lee, *NY County Lawyers Ask State Bar Association to Study Lt. Gov. Succession*, N.Y. L.J. (Apr. 29, 2022), <https://www.law.com/newyorklawjournal/2022/04/29/ny-county-lawyers-ask-state-bar-association-to-study-lt-gov-succession/?slreturn=20220631225326> [https://perma.cc/F368-A4UZ].

112. *See, e.g.*, CAL. CONST. art. V, § 5(b); COLO. CONST. art. IV, § 13; IND. CONST. art. V, § 10(b); LA. CONST. art. IV, § 15; MD. CONST. art. II, § 6(d); OHIO CONST. art. III, § 17a; S.D. CONST. art. IV, § 6; WIS. CONST. art. XIII, § 10(2). *Contra, e.g.*, N.J. CONST. art. V, § 1, para. 9.

113. *See* N. MAR. I. CONST. art. III, § 3; S.C. CONST. art. IV, § 11; UTAH CONST. art. VII, § 10(3)(c)(i); IDAHO CODE § 59-904(b) (2021); 48 U.S.C. § 1422b(d) (Guam); 48 U.S.C. § 1595(d) (V.I.).

procedure was explicitly intended to echo the Twenty-fifth Amendment's procedure<sup>114</sup> and has been largely uncontroversial.<sup>115</sup>

Since its adoption by each of these states and territories, the confirmation process has been employed just shy of twenty times. In the vast majority of these cases, the lieutenant-gubernatorial nominees were confirmed without controversy and with nearly unanimous support.<sup>116</sup> This remained true even when the Governor and Lieutenant Governor were of different parties, and even when legislative leaders had doubts about the nominee's qualifications for the post.<sup>117</sup>

The most controversial confirmation process took place in 2010, when California Governor Arnold Schwarzenegger nominated State Senator Abel Maldonado, a Republican, to replace former Lieutenant Governor John Garamendi, a Democrat. Both chambers of the California legislature were controlled by Democrats, and though the state senate unanimously confirmed Maldonado, the state assembly narrowly rejected his confirmation.<sup>118</sup> State

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114. *See supra* text accompanying note 86.

115. *But see, e.g.,* Antonovich, *Argument Against Proposition 9*, in CALIFORNIA VOTERS PAMPHLET: GENERAL ELECTION, *supra* note 84, at 39.

116. *See, e.g.,* S. JOURNAL, 60th Leg., 1st Reg. Sess., at 87 (Idaho 2009) (noting that Lieutenant Governor-designate Brad Little was confirmed unanimously); S. JOURNAL, 58th Leg., 1st Extraordinary Sess., at 523 (Idaho 2006) (noting that Lieutenant Governor-designate Mark G. Ricks was confirmed unanimously); Joey Bunch & John Frank, *Next Lieutenant Governor Confirmed*, DENVER POST, May 5, 2016, at 6A; Gemma Q. Casas, *New CNMI Lieutenant Governor Confirmed*, PAC. ISLANDS REP. (May 4, 2009), <https://www.webcitation.org/5kSJNQWJ9?url=http://archives.pireport.org/archive/2009/may/05-04-12.htm> [<https://perma.cc/5W3U-XFEG>]; *Cassidy Takes Oath of Office, Is New Lieutenant Governor*, DAILY SENTINEL (Grand Junction, Colo.), May 12, 1994, at 3; Aric Chokey, *Holcomb Sworn in as Lieutenant Governor*, PALLADIUM-ITEM (Richmond, Ind.), Mar. 4, 2016, at A3; *Cox Sworn in as Utah Lieutenant Governor*, DAILY SPECTRUM (Saint George, Utah), Oct. 17, 2013, at 5; Mandy Zatynski, *Johnson Wins OK of General Assembly as Lieutenant Governor*, DAYTON DAILY NEWS, Jan. 5, 2005, at 11; *Legislature Backs Jindal Choice for Lt. Gov Position*, NEWS-STAR (Monroe, La.), May 6, 2010, at 5; *Murphy Confirmed as Lieutenant Governor*, *supra* note 90; *Ottley to be Sworn in Today as Lt. Gov.*, V.I. DAILY NEWS, Apr. 5, 1973, at 1; *Riggs Becomes Idaho's 38th Lieutenant Governor*, TIMES-NEWS (Twin Falls, Idaho), Jan. 31, 2001, at 12; JR Ross, *Farrow's Swearing-in Makes History*, CAP. TIMES (Madison, Wis.), May 9, 2001, at 2; *Senate Confirms Maldonado as Lt. Governor*, LOMPOC REC., Apr. 27, 2010, at A3; Carter Hague, *Throng Packs Govt. House for Millin's Swearing-In*, DAILY NEWS (V.I.), Mar. 13, 1978, at 1; Brock Vergakis, *Bell Sworn in as Utah Lt. Gov.*, DAILY HERALD (Provo, Utah), Sept. 2, 2009, at 1; Lesley Stedman Weidenbener, *Legislature Unanimously Confirms Davis*, COURIER-J. (Louisville, Ky.), Oct. 21, 2003, at 5; Terry Woster, *Kirby Sworn in to Second Spot*, ARGUS-LEADER (Sioux Falls, S.D.), May 26, 1993, at 1.

117. *See, e.g.,* Bob Mercer, *Kirby Pick Seen as Political Move*, RAPID CITY J., May 21, 1993, at 9 (noting that Democratic State Senate Majority Leader Lars Herseth noted that Republican Lieutenant Governor-designate Steve Kirby was "very inexperienced" but, notwithstanding Kirby's inexperience, that he didn't "see any difficulties in confirmation").

118. Jim Sanders & Susan Ferriss, *Maldonado Renominated*, SACRAMENTO BEE, Feb. 13, 2010, at A3.

assembly Democrats cited Maldonado's perceived ideological extremism and argued that Schwarzenegger should've nominated a Democrat to replace Garamendi, not a Republican.<sup>119</sup> In light of the Assembly's rejection of Maldonado, Schwarzenegger initially indicated that he would seek to install Maldonado anyway but ultimately decided to nominate Maldonado anew.<sup>120</sup> This time, the assembly confirmed him without issue.<sup>121</sup> In the end, however, Maldonado's nomination mattered little—he was defeated for re-election later that year and only ended up serving in the job for a few months.<sup>122</sup>

Though legislative confirmation for a gubernatorial nomination is the usual requirement, not all states have adopted it. Florida, Montana, and New Jersey similarly empower their Governors to fill lieutenant-gubernatorial vacancies, but instead allow the Governor to make an unfettered appointment with no legislative confirmation required.<sup>123</sup> Since the adoption of these procedures, Florida has seen one lieutenant-gubernatorial vacancy, Montana has seen four, and New Jersey has seen none.<sup>124</sup> Each of these appointments took place without notable controversy.

Then, there are the replacement procedures in place in Oregon and Wyoming for their elected secretaries of state, who are the first in line for gubernatorial succession and act as *de facto* Lieutenant Governors.<sup>125</sup> In both states, the Governor has the explicit power to pick replacements for the secretary of state but faces a significant limitation: the replacement must be of the same party as the previous incumbent. In Oregon, this requirement is

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119. Samantha Young & Cathy Bussewitz, *Drama Bad Sign for Governor*, FRESNO BEE, Feb. 13, 2010, at A11.

120. Sanders & Ferriss, *supra* note 118, at A3.

121. *Senate Confirms Maldonado as Lt. Governor*, *supra* note 116, at A3.

122. John Coté, *Newsom Defeats Maldonado – Mayor's Job Open*, SFGATE (Nov. 3, 2010), <https://www.sfgate.com/politics/article/Newsom-defeats-Maldonado-mayor-s-job-open-3167738.php> [<https://perma.cc/VA8T-K95U>].

123. FLA. STAT. § 14.055 (2021); MONT. CONST. art. VI, § 6(1); N.J. CONST. art. V, § 1, para. 9.

124. *See, e.g.*, Bob Anez, *It's Lt. Gov. McOmber Now*, MONT. STANDARD, Jan. 12, 1988, at 3; Steve Bousquet, *Carlos Lopez-Cantera Named Florida's Lieutenant Governor*, TAMPA BAY TIMES (Jan. 14, 2014), <https://www.tampabay.com/news/politics/elections/carlos-lopez-cantera-named-floridas-lieutenant-governor/2160906> [<https://perma.cc/NSU7-SC2V>]; Charles S. Johnson, *Bullock Names Anaconda Teacher as Lieutenant Governor*, MISSOULIAN (Feb. 10, 2014), [https://missoulian.com/news/local/bullock-names-anaconda-teacher-as-lieutenant-governor/article\\_1e79b426-9270-11e3-bff3-001a4bcf887a.html](https://missoulian.com/news/local/bullock-names-anaconda-teacher-as-lieutenant-governor/article_1e79b426-9270-11e3-bff3-001a4bcf887a.html) [<https://perma.cc/WT25-92DG>]; Holly Michels, *Bullock Names Mike Cooney as New Lieutenant Governor*, MISSOULIAN (Dec. 30, 2015), [https://missoulian.com/news/local/bullock-names-mike-cooney-as-new-lieutenant-governor/article\\_affa9945-2fe5-5411-a681-3c846b109e5a.html](https://missoulian.com/news/local/bullock-names-mike-cooney-as-new-lieutenant-governor/article_affa9945-2fe5-5411-a681-3c846b109e5a.html) [<https://perma.cc/48EP-298Z>].

125. OR. CONST. art. V, § 8a; WYO. CONST. art IV, § 6.

self-executing, and the Governor can make a selection of their choice.<sup>126</sup> In Wyoming, however, the state party nominates three candidates, one of whom is selected by the Governor.<sup>127</sup> This same-party requirement is missing from every state with a lieutenant-gubernatorial succession provision, save for Utah.<sup>128</sup> Oregon makes the process more interesting by providing that, in the event of a vacancy in the office of secretary of state, the appointed secretary of state is excluded from the line of succession.<sup>129</sup> No other state has such a requirement.

Finally, Alaska's unusual method of lieutenant-gubernatorial succession combines the proactivity of picking a running mate with legislative confirmation. Under state law, the Governor appoints a designated successor to the Lieutenant Governor, who is then confirmed by the state legislature,<sup>130</sup> if the Lieutenant Governor ever leaves office, the designated successor automatically steps into the role,<sup>131</sup> and the Governor names a new designated successor.<sup>132</sup> In selecting the designated successor, the Governor is required to choose "from among the officers who head the principal departments of the state government or otherwise"<sup>133</sup>—in other words, the executive cabinet. The pre-confirmation of the designated successor is meant to ease the transition, but the connection of the designation to a cabinet position becomes unwieldy when the cabinet officer resigns. In 2009, as Governor Sarah Palin was in the process of resigning, the Lieutenant Governor's designated successor, Corrections Commissioner Joe Schmidt, *also* resigned, and with the legislature out of session, Palin's chosen designated successor couldn't be

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126. See OR. CONST. art. V, § 16 ("[W]hen at any time a vacancy occurs in any other state office . . . the governor shall fill such vacancy by appointment . . ."); OR. REV. STAT. § 236.100(1) (2021) ("[W]hen a vacancy occurs in any partisan elective office in this state and is to be filled by appointment, no person shall be eligible for such appointment unless the person is affiliated" with the same political party with which the elected predecessor was elected.); see also T. Quinn Yeagain, *Bad Motivation with Good Results: The Merit of Filling Statewide Executive Vacancies with Same-Party Appointments*, 69 U. KAN. L. REV. 575, 586 (2021) (discussing adoption of same-party appointment requirements). For an example of how this has been employed recently, in 2017, Oregon's Republican Secretary of State Dennis Richardson died. Democratic Governor Kate Brown solicited applications and ultimately nominated former State Senator Bev Clarno, a Republican, who promised to not seek re-election. Audrey Wieber, *Bev Clarno Picked for Secretary of State Position*, E. OREGONIAN (Mar. 29, 2019), [https://www.eastoregonian.com/news/northwest/bev-clarno-picked-for-secretary-of-state/article\\_6396145a-5264-11e9-bd85-63364938db9d.html](https://www.eastoregonian.com/news/northwest/bev-clarno-picked-for-secretary-of-state/article_6396145a-5264-11e9-bd85-63364938db9d.html) [https://perma.cc/D3JW-L5J3].

127. WYO. STAT. § 22-18-111(a)(i) (2022).

128. UTAH CONST. art. VII, § 10(3)(c)(ii) ("The person appointed as Lieutenant Governor under Subsection (3)(c)(i) shall be from the same political party as the Governor.")

129. OR. CONST. art. V, § 8a.

130. ALASKA STAT. ANN. § 44.19.040 (West 2022).

131. *Id.* § 44.19.042.

132. *Id.* §§ 44.19.040, .042.

133. *Id.* § 44.19.040.

immediately confirmed.<sup>134</sup> This led to the state attorney general's conclusion that Craig Campbell, Palin's nominee, could serve in the role in an acting capacity until officially confirmed by the legislature.<sup>135</sup>

## 2. *Legislative Power*

The remaining states with explicit lieutenant-gubernatorial succession procedures—Connecticut, Hawai'i, Minnesota, Pennsylvania, Texas, and the Northern Mariana Islands—task state legislatures, both directly and indirectly, with the power of selecting a Lieutenant Governor in the event of a vacancy.<sup>136</sup> The method of election is largely consistent, with state senate presidents in every state but Texas automatically ascending to the lieutenant governorship in the event of a vacancy. Meanwhile, in Texas, if a lieutenant-gubernatorial vacancy occurs, the state senate elects one of its members to simultaneously serve as state senator and as Lieutenant Governor.<sup>137</sup> Since the adoption of Texas's lieutenant-gubernatorial succession provision in 1984, this has only occurred once—in 2000, following then-Governor George W. Bush's resignation in anticipation of assuming the presidency, and then-Lieutenant Governor Rick Perry's ascension to the governorship.<sup>138</sup>

At first blush, it may seem inapposite to include the first four states with Texas, but in electing a state senate president, senators in those states are undoubtedly aware of the potentiality that their colleague could end up serving as Lieutenant Governor. After all, it has occurred no fewer than sixteen times

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134. Alaska Dep't of Law. Off. of the Att'y Gen. Opinion Letter on Succession to the Office of Lieutenant Governor 1 (July 10, 2009), [https://law.alaska.gov/pdf/opinions/opinions\\_2009/09-007\\_succession.pdf](https://law.alaska.gov/pdf/opinions/opinions_2009/09-007_succession.pdf) [<https://perma.cc/KVP9-6UGG>].

135. *Id.* at 7.

136. See CONN. CONST. art. IV, § 19; MINN. CONST. art. V, § 5; PA. CONST. art. IV, § 14; TEX. CONST. art. III, § 9(a); HAW. REV. STAT. § 26-2 (2021); N. MAR. I. CONST. art. III, § 3. The situation in the Northern Mariana Islands is slightly more complicated than this. Normally, if there is a vacancy in the lieutenant governorship, the Governor nominates a replacement, who is then confirmed by the territorial legislature. N. MAR. I. CONST. art. III, § 3. However, if the *Governor* leaves office, and the Lieutenant Governor succeeds them, the state senate president automatically ascends to the lieutenant governorship. *Id.* § 7. This last occurred in 2015, when Governor Eloy Inos died, Lieutenant Governor Ralph Torres became Governor, and State Senate President Victor Hocog became Lieutenant Governor. Cameron Miculka, *CNMI Governor Dies*, PAC. DAILY NEWS (Agana Heights, Guam), Dec. 30, 2015, at A1. Accordingly, the Northern Mariana Islands is included in both subsections.

137. TEX. CONST. art. III, § 9(a).

138. Dan McNeely, *State's Order of Succession is a Little Fuzzy*, AUSTIN AM.-STATESMAN, Dec. 28, 2000, at 19.

since the adoption of these provisions.<sup>139</sup> In these five states and territories, the office of state senate president is similarly positioned to state senate presidencies in many states before the widespread creation of lieutenant governorships.<sup>140</sup> Before then, if a state had no Lieutenant Governor, its state senate president was first in the line of gubernatorial succession, effectively operating as a built-in Governor-in-waiting. Today, in Connecticut, Hawai‘i, Minnesota, Pennsylvania, and the Northern Mariana Islands, the state senate president effectively operates as a built-in Lieutenant Governor-in-waiting.<sup>141</sup>

But while the process is automatic, the refusal of a state senate president to serve can add some amount of selection to the process. While refusal is quite uncommon, it happened in 2016 in Hawai‘i, when Lieutenant Governor Shan Tsutsui—who had, himself, served as state senate president and automatically ascended to the lieutenant governorship when Lieutenant Governor Brian Schatz was appointed to the U.S. Senate<sup>142</sup>—resigned.<sup>143</sup> State Senate President Ron Kouchi refused to serve, passing the responsibility to State House Speaker Scott Saiki, who likewise refused. The role eventually settled with state Attorney General Doug Chin.<sup>144</sup>

Similarly, though South Carolina today allows its Governor to appoint a replacement Lieutenant Governor, subject to senate confirmation,<sup>145</sup> a 1972 amendment to the constitution instead provided that the state senate president automatically became Lieutenant Governor.<sup>146</sup> South Carolina amended its constitution in 2012 to strike the 1972 provision and add the Governor’s power to fill the vacancy.<sup>147</sup> Following Governor Nikki Haley’s resignation in 2017, Lieutenant Governor Henry McMaster became Governor, triggering

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139. See, e.g., *Minnesota Lieutenant Governors, 1858-present*, MINN. LEGIS. REF. LIBR., <https://www.leg.state.mn.us/lrl/mngov/lgov> [<https://perma.cc/X2EU-F79Y>] (listing lieutenant governors, including 10 vacancies); B.J. Reyes, *Tsutsui Accepts ‘Tremendous Opportunity,’* HONOLULU STAR-ADVERTISER, Dec. 28, 2012, at A10.

140. See Yeagain, *supra* note 110, at 1155–56.

141. See CONN. CONST. art. IV, § 19; HAW. REV. STAT. § 26-2 (2021); MINN. CONST. art. V, § 5; PA. CONST. art. IV, § 14; N. MAR. I. CONST. art. III, § 7.

142. Reyes, *supra* note 139, at A10.

143. Chad Blair, *Tsutsui Stepping Down As Hawaii Lieutenant Governor*, HONOLULU CIV. BEAT (Jan. 29, 2018), <https://www.civilbeat.org/2018/01/tsutsui-stepping-down-as-hawaii-lieutenant-governor/> [<https://perma.cc/2AAZ-HG5J>].

144. Nanea Kalani, *Doug Chin Takes State’s No. 2 Post After Tsutsui’s Abrupt Departure*, HONOLULU STAR-ADVERTISER, Feb. 2, 2018, at A1.

145. S.C. CONST. art. IV, § 11.

146. *Id.* § 9 (amended 2012) (“The Senate shall as soon as practicable after the convening of the General Assembly choose a President Pro Tempore to act in the absence of the Lieutenant Governor. A member of the Senate acting as Lieutenant Governor shall thereupon vacate his seat and another person shall be elected in his stead.”); see also COLE BLEASE GRAHAM JR., *THE SOUTH CAROLINA CONSTITUTION: A REFERENCE GUIDE* 107–08 (2011).

147. Act of May 23, 2012, No. 289, sec. 1(E), § 11, 2012 S.C. Acts 2969, 2971 [hereinafter 2012 South Carolina Amendment].

a lieutenant-gubernatorial vacancy.<sup>148</sup> But the impact of the 2012 amendment was unclear. A state senator filed suit, seeking clarification from the state supreme court as to whether the 2012 amendment, which delayed the effective date of *some* changes it made until 2018,<sup>149</sup> affected the vacancy.<sup>150</sup> Though a showdown appeared to be looming before the state supreme court, a hearing on the question was ultimately canceled because the “parties [were] in agreement,” rendering the issue irrelevant.<sup>151</sup> The controversy continued, however, when State Senate President Hugh Leatherman refused to serve as Lieutenant Governor, resulting in the election of Kevin Bryant as temporary state senate president solely for the purpose of ascending to the lieutenant governorship.<sup>152</sup>

Any state senate president’s service as Lieutenant Governor theoretically triggers some separation-of-powers concerns. Though all states but Pennsylvania effectively require that state senate presidents resign from the senate before becoming Lieutenant Governor, the Pennsylvania State Senate President is entitled to hold both roles.<sup>153</sup> This used to be the case in Minnesota, with the state supreme court ruling in 1898 that a state senate president acting as Lieutenant Governor “does not cease to be a senator.”<sup>154</sup> However, revisions to the positioning of the lieutenant governorship in Minnesota’s constitution and system of government led to more contemporary

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148. Jamie Self, *McMaster Sworn in as SC Governor after Haley Resigns*, S.C. OFF. GOVERNOR (Jan. 24, 2017), <https://governor.sc.gov/news/2017-01/mcmaster-sworn-sc-governor-after-haley-resigns> [<https://perma.cc/JX32-36PW>].

149. 2012 South Carolina Amendment, *supra* note 147, at sec. 1(G), 1(B) (providing for team-ticket elections “[b]eginning with the general election of 2018” and providing for the election of a State Senate President “in 2019 and every four years thereafter”).

150. Amanda Coyne, *Senator Prepared to File Suit over Lieutenant Governor Succession, Constitutional Amendment*, GREENVILLE NEWS (Dec. 2, 2016), <https://www.greenvilleonline.com/story/news/politics/2016/12/02/senator-prepared-file-suit-over-lieutenant-governor-succession-Constitutional-amendment/94808116/> [<https://perma.cc/655C-YPHP>].

151. *Cancellation Indicates SC Lt. Gov. Can’t Pick Successor*, WIS NEWS (Jan. 7, 2017), <https://www.wistv.com/story/34282042/cancellation-indicates-sc-lt-gov-cant-pick-successor/> [<https://perma.cc/R6KB-73NQ>].

152. Tim Smith, *Kevin Bryant Becomes Lieutenant Governor After Senate Vote*, GREENVILLE NEWS (Jan. 25, 2017), <https://www.greenvilleonline.com/story/news/2017/01/25/kevin-bryant-becomes-lieutenant-governor-after-senate-vote/97030774/> [<https://perma.cc/7PPM-YHBF>].

153. *See, e.g.*, Marc Levy, *Republican Scarnati Sworn in as 31st Lieutenant Governor*, MORNING CALL (Allentown, Pa.), Dec. 4, 2008, at A3 (noting that State Senate President Joe Scarnati, who became Lieutenant Governor of Pennsylvania upon Catherine Baker Knoll’s death, “will be keeping his Senate seat and his post as the chamber’s top senator, president pro tempore”).

154. *State ex rel. Marr v. Stearns*, 75 N.W. 210, 213 (Minn. 1898), *rev’d on other grounds sub nom. Stearns v. State of Minn.*, 179 U.S. 223 (1900).

skepticism of the viability of that legal position.<sup>155</sup> Accordingly, in 2018, when Lieutenant Governor Tina Smith resigned to accept an appointment to the U.S. Senate, State Senate President Michelle Fischbach resigned her state senate seat upon advice from the state attorney general to do so.<sup>156</sup>

### 3. *Special Elections*

Finally, a brief note regarding special elections. Today, two states—Arkansas and Louisiana—require that special elections be conducted to fill lieutenant-gubernatorial vacancies.<sup>157</sup> In each of these states, Governors and Lieutenant Governors are elected separately.<sup>158</sup> As a practical and logistical matter, it would be impossible to hold a special election for Lieutenant Governor in a state where gubernatorial and lieutenant-gubernatorial elections are joined. In some states with joint-ticket elections, the state legislatures have clarified state constitutions or statutes to remove the potentiality of a special lieutenant-gubernatorial election.<sup>159</sup> Of course, in the few states that require special *gubernatorial* elections in the event of a gubernatorial vacancy *and* provide for joint-ticket elections, a special gubernatorial election necessarily encompasses a special lieutenant-gubernatorial election.<sup>160</sup>

Prior to the adoption of lieutenant-gubernatorial succession provisions, few states ever held special lieutenant-gubernatorial elections. Three special elections are worth noting: Indiana's in 1886, Nebraska's in 1938, and New York's in 1943. In 1885, Indiana Governor Isaac P. Gray sought election to the U.S. Senate but faced opposition from within his own party. Democratic

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155. See Minn. Att'y Gen. Op. No. 280k, at 1 (Dec. 21, 2017).

156. See *id.* at 1, 6.

157. See ARK. CODE ANN. § 7-7-105 (2014); LA. CONST. art. IV, §§ 15, 16(b) (requiring a special election to fill a vacancy if the unexpired term exceeds one year). Delaware and Georgia theoretically allow special elections to be called to fill lieutenant-gubernatorial vacancies, see DEL. CONST. art. III, § 9; GA. CODE ANN. § 21-2-540 (2022) (referring to special elections to fill “state office[s]”), and Georgia held a special lieutenant-gubernatorial election in 1948. Robert W. Dubay, *Marvin Griffin and the Politics of the Stump*, in *GEORGIA GOVERNORS IN AN AGE OF CHANGE: FROM ELLIS ARNALL TO GEORGE BUSBEE* 101, 104 (Harold P. Henderson & Gary L. Roberts eds., 1988). Delaware, however, has held no such special election.

158. ARK. CONST. art. VI, § 1 amended by ARK. CONST. amend. 6, §§ 2-3; LA. CONST. art. IV, § 3(A).

159. H.B. 1051, 2003 Leg., 171st Reg. Sess. (Fla. 2003).

160. For example, following Utah Governor Jon Huntsman's resignation in 2009, Lieutenant Governor Gary Herbert became Governor and appointed Greg Bell as his running mate. See Lisa Riley Roche, *Gov. Gary Herbert Defeats Peter Coroon in Special Election for Utah's Governor*, DESERET NEWS (Nov. 3, 2010), <https://www.deseret.com/2010/11/3/20150499/gov-gary-herbert-defeats-peter-coroon-in-special-election-for-utah-s-governor#governor-gary-herbert-talks-with-the-media-at-the-republican-party-gathering-at-the-salt-lake-hilton-tuesday> [https://perma.cc/W3MQ-LDAW]. A special gubernatorial election was held in 2010, with Herbert and Bell running as a team. *Id.*

Party leaders who were opposed to Gray's candidacy convinced Mahlon Manson, the Lieutenant Governor, to resign from office—deliberately triggering a succession crisis should Gray be elected to the Senate.<sup>161</sup> Gray, acting on the advice of the state attorney general,<sup>162</sup> scheduled a special election to fill the vacancy. In a surprise, Republican Robert Robertson defeated the Democratic candidate.<sup>163</sup> The Democratic majority in the state senate, however, refused to recognize Robertson's victory, and the President Pro Tempore of the state senate filed suit to enjoin Robertson from holding office.<sup>164</sup> The circuit court hearing the case issued a temporary injunction against Robertson, which the Indiana Supreme Court unanimously reversed.<sup>165</sup> The state senate continued in its refusal to recognize Robertson as Lieutenant Governor, with the majority arguing that his election was unconstitutional,<sup>166</sup> and the state supreme court declined to revisit its ruling, tossing the dispute back to the legislature.<sup>167</sup> Disaffected Robertson supporters attempted to storm the state senate to install him by force, but he quelled the threat of violence—and never ended up holding office.<sup>168</sup> The entire debacle was memorialized as the “Black Day of the Indiana General Assembly.”<sup>169</sup>

In 1938, Nebraska Lieutenant Governor Walter Jurgensen was impeached and removed from office.<sup>170</sup> Because the office was up for election later that year, the vacancy mattered little. During the candidate qualifying period for that year's elections, however, Nate Parsons attempted to file candidate paperwork for the special election to fill the remainder of Jurgensen's term.<sup>171</sup>

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161. See J. Michael Walsh et al., *Isaac P. Gray*, in *THE GOVERNORS OF INDIANA* 174, 178–79 (Linda C. Gugin & James E. St. Clair eds., 2006).

162. FRANCIS T. HORD, *BIENNIAL REPORT OF THE ATTORNEY GENERAL OF THE STATE OF INDIANA* 222, 227–28 (1886) (asserting that a vacancy in the office of lieutenant governor should be filled at the next general election).

163. Walsh et al., *supra* note 161, at 178–79.

164. *Robertson v. State*, 10 N.E. 582, 582–83 (Ind. 1887) (describing litigation before the Marion County Circuit Court).

165. *Id.* at 586 (dissolving injunction and remanding for further proceedings).

166. Walsh et al., *supra* note 161, at 179.

167. *Robertson*, 10 N.E. at 643–44. Though the court declined to fully develop its further ruling, which was in the context of deciding a petition for rehearing, Justice Preston Niblack issued an individual opinion disclaiming any authority of state courts to resolve disputes over the General Assembly's decision to recognize gubernatorial and lieutenant-gubernatorial elections, essentially concluding that it was a “political” controversy akin to *Luther v. Borden*. *Id.* at 644–47 (Niblack, J., individual op.). Niblack observed that, had the court issued a decision on the merits, it would “have been treated by [the State Senate] as an intrusion upon its exclusive authority as a co-ordinate branch of the General Assembly” and “would have needlessly connected this court with an exciting and bitter political controversy, which it had no power to control, or even to mitigate in the smallest degree.” *Id.* at 646.

168. Walsh et al., *supra* note 161, at 179.

169. See *id.*

170. See 1938-1939 NEB. ATT'Y GEN. BIENNIAL REP. 79, 82 (1938).

171. *OK Successor to Jurgensen*, BEATRICE DAILY SUN, July 11, 1938, at 2.

In an informal opinion, the state attorney general confirmed that the secretary of state could accept Parsons's paperwork—and that the Governor had the inherent power to fill the vacancy in the interim<sup>172</sup>—and a special election was scheduled largely due to Parsons's insistence. The special election that followed was bizarre. Republicans failed to nominate a candidate, with their *de facto* nominee instead running as an independent.<sup>173</sup> Parsons, a Democrat, won the election in a landslide, even as Republicans were narrowly winning the regularly-scheduled gubernatorial and lieutenant-gubernatorial elections, and ended up serving three months as Lieutenant Governor.<sup>174</sup>

In 1943, several years later, New York Lieutenant Governor Thomas Wallace died in office.<sup>175</sup> Pursuant to a commonly accepted interpretation of the state constitution, State Senate President Joe Hanley ascended to the lieutenant governorship.<sup>176</sup> The state Democratic Party filed suit, requesting that a special election be scheduled to fill the vacancy for the remainder of the term. The state trial court ordered a special election, which was affirmed by both the appellate division and the state court of appeals.<sup>177</sup> At the ensuing special election, Hanley won in a landslide, and was subsequently re-elected in 1946. The debacle, however, apparently motivated then-Governor Thomas Dewey to push for constitutional amendments that joined gubernatorial and lieutenant-gubernatorial elections and that allowed the state senate president to act as Lieutenant Governor without a special election.<sup>178</sup> The team-ticket amendment failed, but the succession amendment passed—before being eviscerated by the New York Court of Appeals in 2010.<sup>179</sup>

These two elections notwithstanding, given the rarity with which states require special elections to fill lieutenant-gubernatorial vacancies, there are few patterns here worth noting. Of some significance is the fact that, of the two states in this category, only Louisiana empowers the Governor to make an interim appointment following the vacancy and before the special election.<sup>180</sup> The Governor has no apparent authority to do so in Arkansas.<sup>181</sup>

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172. 1938–1939 NEB. ATT'Y GEN. BIENNIAL REP., *supra* note 170, at 82.

173. *See May Bar Filing by Kroh*, LINCOLN J. STAR, Sept. 27, 1938, at 2.

174. *See Nate Parsons Files Bond, Is Sworn In*, LINCOLN STAR, Nov. 14, 1938, at 1.

175. *See Hanley Prepared to Quit Leadership*, N.Y. TIMES, July 20, 1943, at 12.

176. *Id.*

177. *Ward v. Curran*, 44 N.Y.S.2d 240, 241–42 (App. Div. 1943), *aff'd mem.*, 50 N.E.2d 1023 (N.Y. 1943).

178. Douglas Dales, *Dewey Asks Speed on Joint Election*, N.Y. TIMES, Feb. 10, 1953, at 20; *see Briffault*, *supra* note 15, at 685–86.

179. *See Skelos v. Paterson*, 915 N.E.2d 1141, 1146 (N.Y. 2009).

180. *See* LA. CONST. art. IV, § 15.

181. ARK. CONST. amend. XXIX, § 1 (“Vacancies in the office of United States Senator, and in all elective state, district, circuit, county, and township offices *except those of Lieutenant Governor*, . . . shall be filled by appointment by the Governor.”) (emphasis added).

*B. Implicit, but Accepted, Succession Procedures*

In eight additional states—Arizona, Kansas, Kentucky, Missouri, Nebraska, New York, North Dakota, and Rhode Island—Governors have the power to replace Lieutenant Governors, but not through any formal procedure. Instead, Governors in these states rely on their broad, inherent power to fill vacancies under their state constitutions or statutes. In many of these states, this inherent power has been explicitly recognized by state supreme courts as applicable to filling lieutenant-gubernatorial vacancies; in others, it has simply been exercised in practice and never challenged in court. It's important to note here that the inherent gubernatorial power to appoint generally applies only where neither the state constitution nor state statutes articulate a method of filling the vacancy. Accordingly, if a state legislature *wanted* to pass a statute spelling out a different method of filling a lieutenant-gubernatorial vacancy other than gubernatorial appointment, their ability to do so seems relatively clear.<sup>182</sup>

This Section begins first by discussing the three states in which state supreme courts have recognized Governors' inherent power to fill lieutenant-gubernatorial vacancies.<sup>183</sup> In these states, the powers of the Governor to make appointments is accepted, with the imprimatur of the state supreme court on any appointments that are made. Next, this Section addresses the remaining states, where Governors have been able to fill lieutenant-gubernatorial vacancies without authorization from the state constitution, statutes, or courts—and sometimes against the advice of the state attorney general. Appointments made in these states have been widely accepted by state legislatures, and none have been challenged in court. But the absence of an explicit holding from the state supreme court renders any lieutenant-gubernatorial appointments made in these states vulnerable to a legal challenge.

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182. See Briffault, *supra* note 15, at 699–700 (confirming that changes to the method of filling a lieutenant-gubernatorial vacancy do not require a constitutional amendment but could be accomplished through legislation).

183. Perhaps conveniently, this Section omits the discussion of the Governor of Arizona's inherent power to appoint successors to the secretary of state, who operates as a *de facto* Lieutenant Governor. But this is a case where the gubernatorial successor's nominal title as secretary of state actually makes a difference in conceiving the role. Here, the Governor's power to fill a vacancy in the secretary of state's office is derived from the constitution's broad grant of appointment power. See *Londen v. Shumway*, 762 P.2d 542, 543 (Ariz. 1988) (quoting ARIZ. CONST. art. V, § 8). But so is the Governor's power to fill a vacancy in *any other statewide elected office*. See *id.* Accordingly, a vacancy in the secretary of state's office materially differs from a lieutenant-gubernatorial vacancy, in that state constitutions have broadly granted Governors the power to fill vacancies in statewide elected offices, see Yeagain, *supra* note 126, at 581–83, but have deprived them of the ability to fill lieutenant-gubernatorial vacancies.

First, states' highest courts in Missouri, New York, and Rhode Island have explicitly recognized the Governor's power to fill a lieutenant-gubernatorial vacancy.<sup>184</sup> In each of these states, the constitutions or statutes give the Governor broad powers to fill vacancies if there is no explicit procedure for doing so in state law.<sup>185</sup> And in each state, neither the constitution nor statutes outline a procedure for filling lieutenant-gubernatorial vacancies. At first glance, this seems like a relatively easy question to answer: If the Governor has power to fill vacancies when there's no procedure in the state constitution or statutes, and if there is no procedure in the state constitution or statutes for filling lieutenant-gubernatorial vacancies, then the Governor's power to fill vacancies applies to lieutenant-gubernatorial vacancies. But as the cases reveal, it is slightly more complicated than that.

In Rhode Island, Lieutenant Governor Robert Weygand resigned from office in 1997 after being elected to Congress.<sup>186</sup> Governor Lincoln Almond sought an advisory opinion from the state supreme court as to whether he could fill the vacancy.<sup>187</sup> The court, after considering the Governor's appointment power under the state constitution,<sup>188</sup> ultimately concluded that the Governor has "the power to fill a vacancy in the office of Lieutenant Governor . . . in clear and unambiguous terms."<sup>189</sup> The court noted that provision was made in the constitution "for the performance of *functions* by others '[i]f by reason of death, resignation, absence, or other cause, the lieutenant governor is not present,'" but that "no provision purports to deal with the filling of a *vacancy* in that office save the general provisions" setting out the Governor's appointment power.<sup>190</sup> The court's decision may well have been strengthened by a 2004 amendment to the Rhode Island Constitution that expanded the Governor's appointment power<sup>191</sup>—but, in the alternative, the

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184. See *Cope v. Parson*, 570 S.W.3d 579, 585 (Mo. 2019); *Skelos v. Paterson*, 915 N.E.2d 1141, 1147 (N.Y. 2009); *In re Advisory Op. to the Governor*, 688 A.2d 288, 291 (R.I. 1997).

185. See MO. CONST. art. IV, § 4; R.I. CONST. art. IX, § 5; N.Y. PUB. OFF. LAW § 43 (LexisNexis 2022).

186. *In re Advisory Op.*, 688 A.2d at 289–90.

187. *Id.* at 289.

188. *Id.* at 290 (quoting R.I. CONST. art. IX, § 5) ("The governor may fill vacancies in office not otherwise provided for by this Constitution or by law, until the same shall be filled by the general assembly, or by the people."); see also N.Y. PUB. OFF. LAW § 43 ("If a vacancy shall occur, otherwise than by expiration of term, with no provision of law for filling the same, if the office be elective, the governor shall appoint a person to execute the duties thereof until the vacancy shall be filled by an election.")

189. *In re Advisory Op.*, 688 A.2d at 291.

190. *Id.* (quoting R.I. CONST. art. VIII, § 3).

191. Compare R.I. CONST. art. IX, § 5 (amended 2004) ("The governor may fill vacancies in office not otherwise provided for by this Constitution, or by law, until the same shall be filled

amendment may have also muddied the water.<sup>192</sup> Regardless, Governor Dan McKee’s 2021 appointment of Sabina Matos as Lieutenant Governor, and her subsequent unanimous confirmation by the state senate, occurred without controversy or dispute.<sup>193</sup>

The situation was considerably more complex in New York. As mentioned in the introduction to this Article, following Governor Eliot Spitzer’s resignation and Lieutenant Governor David Paterson’s ascension to the governorship, he sought to name Richard Ravitch as his Lieutenant Governor.<sup>194</sup> But the state constitution provided the Governor with no broad or inherent power to fill vacancies; instead, “[t]he legislature shall provide for filling vacancies in office.”<sup>195</sup> And Article IV, Section 6, of the state constitution also provided that the state senate president would “perform all the duties of lieutenant-governor” during a vacancy,<sup>196</sup> but whether this amounted to a vacancy-filling provision was unclear.

The state court of appeals noted that, in the legislature’s exercise of its constitutional power, it “has enacted three comprehensive and complementary provisions,” crystallized in Public Officers Law §§ 41, 42, and 43.<sup>197</sup> Section 41 expressly related to vacancies in the offices of state attorney general or

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by the general assembly, or by the people.”), *with* R.I. CONST. art. IX, § 5 (“The governor shall, by and with the advice and consent of the senate, appoint all officers of the state whose appointment is not herein otherwise provided for . . . .”); *see also* PATRICK T. CONLEY & ROBERT G. FLANDERS, JR., *THE RHODE ISLAND STATE CONSTITUTION* 235 (Alan Tarr ed., 2011) (“The governor now has considerably more power than he did prior to the amendment, especially over appointments to executive offices and to boards and agencies exercising executive power under state law.”).

192. The amendment requires Senate confirmation of gubernatorial nominees appointed under Section 5 and allows the General Assembly to “vest the appointment of such inferior officers . . . in the governor, or within their respective departments in the other general officers, the judiciary or in the heads of departments.” R.I. CONST. art. IX, § 5. As Patrick Conley and Justice Robert Flanders note, this raises manifold questions that have yet to be answered: “Who is an ‘officer of the state’ as opposed to an ‘inferior officer?’” CONLEY & FLANDERS, *supra* note 191, at 236. Presumably a Lieutenant Governor would be an “officer of the state,” and it would be strange to allow the General Assembly to vest the appointment of Lieutenant Governors in “the judiciary,” for example. Further, “[w]hat restrictions, limitations, and qualifications, if any, may the General Assembly attach via legislation to the governor’s constitutional powers of appointment?” *Id.* Could the General Assembly require a same-party appointment requirement? And finally, does this text totally foreclose the possibility of the General Assembly developing *another* method for filling lieutenant-gubernatorial vacancies?

193. *See* Patrick Anderson, *Matos to Be Sworn in as Lieutenant Governor Wednesday Morning*, PROVIDENCE J. (Apr. 13, 2021), <https://www.providencejournal.com/story/news/politics/2021/04/13/matos-sworn-lg-wednesday-morning/7204923002/> [<https://perma.cc/V3GT-Q7BG>].

194. *See* Skelos v. Paterson, 915 N.E.2d 1141, 1142 (N.Y. 2009).

195. N.Y. CONST. art. XIII, § 3.

196. *Id.* art. IV, § 6.

197. *Skelos*, 915 N.E.2d at 1143.

comptroller, and the legislature was given the power to fill those vacancies.<sup>198</sup> Then, § 42 established a broad requirement that vacancies be filled by special election, unless they occurred “three months before the general election,” in which case, they would be filled at that election<sup>199</sup>—but § 42 “specifically excepts from its scope the elective offices of Governor and Lieutenant Governor.”<sup>200</sup> Finally, § 43 included the sort of catchall appointment power typically included in state constitutions.<sup>201</sup> The court discarded the state senate president’s duties under Article IV, Section 6, as “provid[ing] only stopgap coverage of the function of the Lieutenant Governor.”<sup>202</sup> Accordingly, it concluded that § 43 applied to the lieutenant-gubernatorial vacancy—a vacancy occurred, there was no other provision for filling it, and so Paterson had the power to fill it himself.<sup>203</sup>

Finally, the Supreme Court of Missouri reached a similar conclusion, despite arguably thinner support for the Governor’s alleged power. In 2018, Governor Eric Greitens resigned from office, elevating Lieutenant Governor Mike Parson to the governorship. Parson sought to appoint Mike Kehoe as his Lieutenant Governor, and the state Democratic Party challenged the constitutionality of Kehoe’s appointment.<sup>204</sup> The Governor’s constitutional power to fill vacancies was similar to that provided for within Rhode Island’s constitution,<sup>205</sup> and the court aptly noted that “[t]he crux of this case is resolved by interpreting what was intended by the phrase ‘unless otherwise provided by law . . . .’”<sup>206</sup>

The state party argued that the statutory implementation of the Missouri Constitution’s broad grant of power specifically excluded the Governor’s appointment of a Lieutenant Governor.<sup>207</sup> Under § 105.030 of Missouri law, the Governor has the power to fill, by appointment, any vacancy “in any state or county office originally filled by election of the people, other than in the offices of lieutenant governor, state senator or representative, sheriff, or recorder of deeds in the city of St. Louis.”<sup>208</sup> But the court noted that, for each of the exceptions *other than* Lieutenant Governor, “the law provides a way to fill” each one.<sup>209</sup> Accordingly, because there was “no alternative method” of

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198. N.Y. PUB. OFF. LAW § 41.

199. *Id.* § 42(1).

200. *Skelos*, 915 N.E.2d at 1143.

201. N.Y. PUB. OFF. LAW § 43.

202. *Skelos*, 915 N.E.2d at 1144.

203. *Id.* at 1143–44.

204. *Cope v. Parson*, 570 S.W.3d 579, 582 (Mo. 2019) (en banc).

205. *Compare* MO. CONST. art. IV, § 4 (“The governor shall fill all vacancies in public offices unless otherwise provided by law . . . .”), *with* R.I. CONST. art. IX, § 5.

206. *Cope*, 570 S.W.3d at 584.

207. *See id.* at 585.

208. MO. REV. STAT. § 105.030(1) (2016).

209. *Cope*, 570 S.W.3d at 585.

filling a lieutenant-gubernatorial vacancy, the Governor's appointment power under the constitution "controls the authority of the Governor to appoint a Lieutenant Governor, and Governor Parson was within his constitutional authority when he appointed Kehoe to the office of Lieutenant Governor."<sup>210</sup>

The context of these decisions makes clear that while these results were likely correct as a matter of law,<sup>211</sup> and correct from a public policy standpoint, there were strong arguments that the Governors didn't have the constitutional authority to make the appointments. Each decision was reached over a strongly argued dissent<sup>212</sup> and could certainly have been decided differently. In the New York and Rhode Island cases, for example, it's certainly plausible that, as the dissents argued, the state senate presidents exercising the power of Lieutenant Governor served as a means of filling the vacancy such that the Governor's inherent power to appoint was extinguished.<sup>213</sup> And each constitution could be read to allow the office of Lieutenant Governor to remain vacant, as the dissents in the Missouri and Rhode Island cases argued.<sup>214</sup> Ultimately, however, the propriety of these decisions is not the point—they were issued, have not since been undermined or abrogated, and empower the Governors in each of these states to fill lieutenant-gubernatorial vacancies.

Similar structural realities exist in Kansas, Kentucky, Nebraska, and North Dakota, where Governors have embraced broad executive powers that have enabled them to fill lieutenant-gubernatorial vacancies as a matter of practice.<sup>215</sup> The appointment of Lieutenant Governors in these four states has raised some questions as to their propriety, but in the end, no appointment elicited significant enough controversy to warrant litigation.

In Kansas, following Lieutenant Governor Sheila Frahm's appointment to the U.S. Senate in 1996, Governor Bill Graves sought to replace her with

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210. *Id.*

211. See Briffault, *supra* note 15, at 684–85 (arguing that *Skelos* was correctly decided). But see Patrick A. Woods, *Automatic Lieutenant Gubernatorial Succession: Preventing Legislative Gridlock Without Sacrificing the Elective Principle*, 76 ALB. L. REV. 2301, 2303 (2012) (arguing that *Skelos* was wrongly decided); see also Calla M. Mears, Note, "Alternative Method Required" and the Injection of Imaginary Language into the Missouri Constitution, 85 MO. L. REV. 1229, 1230 (2020) (arguing that *Cope* was wrongly decided).

212. See *Cope*, 570 S.W.3d at 586–88 (Draper, J., dissenting in part); *Skelos v. Paterson*, 915 N.E.2d 1141, 1147–57 (N.Y. 2009) (Pigott, J., dissenting); *In re Advisory Op. to the Governor*, 688 A.2d 288, 292–95 (R.I. 1997) (Lederberg, J., dissenting).

213. *Skelos*, 915 N.E.2d at 1151–52 (Pigott, J., dissenting); *In re Advisory Op.*, 688 A.2d at 294–95 (Lederberg, J., dissenting).

214. *Cope*, 570 S.W.3d at 587 (Draper, J., dissenting in part); *In re Advisory Op.*, 688 A.2d at 293 (Lederberg, J., dissenting).

215. See *infra* notes 218, 221, 228, and 229, and accompanying text.

state commerce and housing secretary Gary Sherrer.<sup>216</sup> No Governor had made a lieutenant-gubernatorial appointment before that time, and the state revisor of statutes issued a memorandum stating that Graves had no power to do so.<sup>217</sup> Though state legislative leaders of both parties expressed some skepticism about Graves's powers, they also indicated that they wouldn't challenge the appointment.<sup>218</sup> Since Graves's appointment of Sherrer, subsequent Governors have filled lieutenant-gubernatorial vacancies without a challenge: Governor Mark Parkinson appointed Troy Findley as Lieutenant Governor in 2009; Governor Jeff Colyer appointed Tracey Mann as Lieutenant Governor in 2018; and Governor Laura Kelly appointed David Toland as Lieutenant Governor in 2021.<sup>219</sup>

The story was similar in Kentucky. In 2014, Lieutenant Governor Jerry Abramson resigned to work in the Obama administration, and Governor Steve Beshear appointed former state auditor Crit Luallen to fill the vacancy.<sup>220</sup> Kentucky legal scholars tentatively concluded that Beshear had the power to do so, but no Governor had made a lieutenant-gubernatorial appointment before.<sup>221</sup> During the last lieutenant-gubernatorial vacancy, which occurred in 1974, the office remained vacant.<sup>222</sup> Any controversy surrounding Luallen's appointment was averted, however, when Republicans in the state legislature announced that they had no intention to challenge it in court.<sup>223</sup>

The situation in Nebraska is slightly more complex because the state constitution was specifically amended to ensure that the Governor *could* make a lieutenant-gubernatorial appointment—but not to provide any specific

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216. *Legal Questions Linger over Lieutenant Governor Appointment*, MANHATTAN MERCURY (Kan.), July 19, 1996, at 4.

217. See John Petterson, *Graves Says Old Friend is New No. 2*, KAN. CITY STAR, July 19, 1996, at C1.

218. See *Legal Questions Linger over Lieutenant Governor Appointment*, *supra* note 216, at 4; see also Petterson, *supra* note 217, at C1.

219. See Tim Carpenter, *Top Aide Picked as Lieutenant Governor: Parkinson Selects Former Rep. Troy Findley*, TOPEKA CAP.-J., May 15, 2009, 2009 WLNR 30877904; Tim Carpenter, *Gov. Jeff Colyer Picks Tracey Mann, Salina Businessman, as GOP Lieutenant Governor*, TOPEKA CAP.-J. (Feb. 13, 2018), <https://www.cjonline.com/news/20180213/gov-jeff-colyer-picks-tracey-mann-salina-businessman-as-gop-lieutenant-governor> [<https://perma.cc/JZ5P-7P2Q>]; Andrew Bahl, *Gov. Laura Kelly Picks Top Cabinet Member David Toland to Fill Lieutenant Governor Slot*, TOPEKA CAP.-J. (Dec. 14, 2020), <https://www.cjonline.com/story/news/politics/state/2020/12/14/gov-laura-kelly-picks-top-cabinet-member-david-toland-to-fill-lieutenant-governor-slot/43270773/> [<https://perma.cc/D8X7-2KUL>].

220. Joseph Gerth, *Beshear Appears to Have Power to Name New Lieutenant Governor*, LOUISVILLE COURIER-J., Nov. 7, 2014, at A1.

221. *Id.* at A13.

222. George H. Kerler, *Office of Lt. Gov. to Be Uninhabited*, MESSENGER-INQUIRER (Owensboro, Ky.), Nov. 17, 1974, at 42.

223. Gerth, *supra* note 220, at A13.

procedure to do so. Prior to 1980, the state constitution explicitly precluded the Governor from filling a lieutenant-gubernatorial vacancy.<sup>224</sup> A state senator proposed a constitutional amendment, which was approved at the May 1980 election, that gave the Governor the power to fill such a vacancy.<sup>225</sup> But the amendment didn't *explicitly* give the Governor the power to do so; instead, it simply removed the constitutional provision *preventing* the Governor from doing so,<sup>226</sup> but its effects were understood when it was on the ballot.<sup>227</sup> Since then, the Governor's power to fill lieutenant-gubernatorial vacancies has been further established as a matter of common practice. An attorney general opinion concluded in 1993 that legislative confirmation wasn't required, and Governors have since appointed five Lieutenant Governors, none of whom had their appointment challenged.<sup>228</sup>

Finally, in North Dakota, two lieutenant-gubernatorial appointments have been made without controversy, presumably on the basis of the Governor's inherent appointment power. In 1987, following Lieutenant Governor Ruth Meiers's death, Governor George Sinner appointed Lloyd Omdahl to fill the vacancy.<sup>229</sup> The available historical record suggests that this was the first lieutenant-gubernatorial appointment made in state history, and it was made without any legal challenge.<sup>230</sup> Similarly, in 2010, when Governor John Hoeven resigned upon his election to the U.S. Senate, and Lieutenant Governor Jack Dalrymple became Governor, he appointed Drew Wrigley as his Lieutenant Governor without any controversy.<sup>231</sup>

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224. See NEB. CONST. art. IV, § 11 ("If any elected state office created by this Constitution, except offices provided for in Article V of this Constitution, shall be vacated by death, resignation or otherwise, it shall be the duty of the Governor to fill that office by appointment . . ."); Neb. Att'y Gen. Op. No. 5, at 7–8 (Jan. 15, 1979) ("Presently, the Governor does have the authority to fill vacancies in elected state offices under this provision of the Constitution with the Lieutenant Governor and judges being excepted by its terms.").

225. S. Res. 5, 86th Leg., 1st Sess. (Neb. 1979).

226. *Id.*

227. See Kent Thomas, Editorial, *Both Amendments Worthy*, BEATRICE DAILY SUN, May 10, 1980, at 2; Editorial, *No. 1, Yes; No. 2, No*, LINCOLN J. STAR, May 1, 1980, at 10.

228. Neb. Att'y Gen. Op. No. 93076, at 6 (Sept. 24, 1993).

229. *Archives: State Agencies*, STATE HIST. SOC'Y OF N.D., <https://www.history.nd.gov/archives/stateagencies/governor.html> [<https://perma.cc/C6HZ-3ALC>].

230. The only contemporaneous discussion of the lieutenant-gubernatorial vacancy in legal literature occurred in an informal advisory opinion from the state attorney general as to who acted as Governor in the event of a temporary vacancy. See Letter from Nicholas J. Spaeth, N.D. Att'y Gen., to Governor George A. Sinner (Mar. 25, 1987), <http://library.nd.gov/statedocs/AttorneyGeneral/AdvisoryLetters/1987/032587-Sinner.pdf> [<https://perma.cc/B87H-4XEC>].

231. *Archives: State Agencies*, *supra* note 229. It's possible that Dalrymple's appointment would've been legally dicey under the state's original constitution, which merely provided that "the powers and duties of the office . . . shall devolve upon the Lieutenant Governor." N.D.

A theme common to each of these states is the rarity with which these questions have been litigated. Though there are obviously three state supreme court opinions on point, those cases represent the vast minority of instances in which a Governor made a lieutenant-gubernatorial appointment with questionable authority to do so. Most of the time, in these states, objections to a Governor's attempt to appoint a Lieutenant Governor will be raised as political, not legal, issues—and ultimately do not result in litigation. As a practical matter, this may simply be because the stakes are so low and because politicians of both parties likely want to be able to fill lieutenant-gubernatorial vacancies that occur in *their* administrations.<sup>232</sup>

### C. *Ambiguous, but Plausible, Succession Procedures*

Many other states also have ambiguous lieutenant-gubernatorial succession procedures. But unlike the states identified in Section B, these states—namely, Alabama, Georgia, Iowa, Mississippi, Nevada, Oklahoma, Vermont, Virginia, and Washington—lack sufficient clarity as to the constitutionality of lieutenant-gubernatorial appointments. Specifically, they have neither an on-point state supreme court decision endorsing the appointment of a Lieutenant Governor nor the widespread acceptance of such appointments. The ambiguity discussed in this Section could arise either from general ambiguity as to the permissibility of *any* lieutenant-gubernatorial appointment or as to confidence about the permissibility of an appointment in one type of vacancy (such as in the event of a gubernatorial succession) and ambiguity as to the other (like a vacancy for any other reason). Much could be written about the constitutionality and propriety of Governors exercising their appointive powers to fill lieutenant-gubernatorial vacancies in each of these states. The state constitutional and historical questions unique to each state could justify separate articles in which these questions are thoroughly addressed. In lieu of such comprehensive treatment, this Section instead dedicates a short explanation to each state that briefly explains the nature of the ambiguity.

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CONST. art. III, § 72. However, a 1996 amendment to the state Constitution modified the succession procedure so that “[t]he lieutenant governor shall succeed to the office of governor when a vacancy occurs.” N.D. CONST. art. V, § 11; H. CON. RES. No. 3009, 54th Leg. Assemb., ch. 646, § 11 (N.D. 1995).

232. In this way, thinking about how to fill lieutenant-gubernatorial vacancies is a question not dissimilar to whether the Senate filibuster should be maintained, to what extent the President should be able to make recess appointments, or how much local prosecutorial discretion should be respected. These questions have no overwhelmingly obvious ideological dimensions, and the answer to any of them is dependent on whether a particular actor or party is in or out of power. See, e.g., Michael Herz, *Abandoning Recess Appointments?: A Comment on Hartnett (and Others)*, 26 CARDOZO L. REV. 443, 460 (2005).

When Alabama adopted its current constitution in 1901, it became one of the first states to make clear that, in the event of a gubernatorial vacancy, “the lieutenant governor shall become governor.”<sup>233</sup> Since then, it has encountered three lieutenant-gubernatorial vacancies: in 1968, when Lieutenant Governor Albert Brewer became Governor upon Lurleen Wallace’s death; in 1993, when Lieutenant Governor Jim Folsom became Governor upon Guy Hunt’s removal from office; and in 2017, when Lieutenant Governor Kay Ivey became Governor upon Robert Bentley’s resignation.<sup>234</sup> Brewer made no apparent effort to fill the vacancy caused by his succession to the governorship, leaving the office vacant.<sup>235</sup> But in 1993, Folsom apparently attempted to fill the vacancy—and caused something of a scandal in doing so.<sup>236</sup> Soon after he became Governor, Folsom indicated that he planned on filling the vacancy and was awaiting an expected opinion from State Attorney General Jimmy Evans as to his ability to do so.<sup>237</sup> Shortly thereafter, Paul Hubbert, the head of the Alabama Education Association and a potential primary challenger for Folsom in the 1994 Democratic primary, alleged that he had been offered the lieutenant governorship in exchange for not running against Folsom, and that he had been told that Evans “would issue an advisory opinion affirming Folsom had that power.”<sup>238</sup> Folsom denied the allegations,<sup>239</sup> and that seemingly ended the matter. Evans apparently issued no public opinion as to the Governor’s power to fill the vacancy, and Folsom didn’t attempt to fill it.<sup>240</sup> More recently, following Bentley’s resignation and Ivey’s assumption of the governorship, she made no effort to fill it.<sup>241</sup> Accordingly, the question hasn’t been answered, and though common practice has dictated that lieutenant-gubernatorial vacancies can’t be filled, a Governor may well decide to attempt to fill such a vacancy in the future.

The situation is murkier in Georgia. State law is somewhat ambiguous on whether a special election is required to fill a lieutenant-gubernatorial

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233. ALA. CONST. art. V, § 127.

234. See *infra* notes 235, 236, 241, and accompanying text.

235. See *Political Roundup*, MONTGOMERY ADVERTISER, July 24, 1968, at 5 (“Now that Albert P. Brewer is governor instead of lieutenant governor . . . [t]here is no lieutenant governor. The duties of that office, which are simply to preside over meetings of the State Senate, devolve upon the president pro-tempore of the Senate.”).

236. See Phillip Rawls, *No Lieutenant Governor Now, but Will Folsom Appoint One?*, SELMA TIMES-J., May 7, 1993, at 13.

237. See *id.*

238. *Hubbert Says Lieutenant Governor Post Offered if He’d Not Run in ‘94*, ANNISTON STAR (Ala.), Aug. 16, 1993, at 8.

239. *Id.*

240. See *id.*

241. See Leada Gore, *Robert Bentley Resignation: Does Alabama Have a Lieutenant Governor? No*, BIRMINGHAM NEWS (Apr. 11, 2017), [https://www.al.com/news/2017/04/does\\_alabama\\_have\\_a\\_lieutenant.html](https://www.al.com/news/2017/04/does_alabama_have_a_lieutenant.html) [<https://perma.cc/U99Z-ANY6>].

vacancy, as discussed previously, with a special election being held in 1948 to fill the vacancy caused by Melvin Thompson's tenure as Governor.<sup>242</sup> A subsequent opinion by the Georgia Supreme Court, which held that, under the 1945 constitution, the Lieutenant Governor doesn't *become* Governor, and instead merely acts as Governor, suggests that a vacancy wouldn't exist in the event of gubernatorial succession.<sup>243</sup> That decision was reached under the 1945 constitution, and subsequent constitutions have clarified the state's gubernatorial succession provisions such that a different result may be reached today.<sup>244</sup> But the difference in how the constitution would be interpreted presents only an academic question because the constitution elsewhere provides that, "in the event the Lieutenant Governor shall become Governor," "[n]o person shall be elected or appointed to the office of Lieutenant Governor for the unexpired term."<sup>245</sup> The constitution has no provision for how a lieutenant-gubernatorial vacancy is filled, and the Governor has an extraordinarily broad power to fill vacancies,<sup>246</sup> which suggests that a lieutenant-gubernatorial vacancy *might* be something that the Governor could fill. Nonetheless, no court decision has definitively addressed the matter, and no lieutenant-gubernatorial vacancy has occurred since the adoption of the 1983 constitution, leaving the question open.

Iowa presents a strange case, where the question of filling a lieutenant-gubernatorial vacancy has been raised but not definitively resolved. Since the

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242. See BULLOCK ET AL., *supra* note 3, at 209.

243. See *Henderson v. Maddox*, 179 S.E.2d 770, 771–72 (Ga. 1971).

244. Compare GA. CONST. art. V, § 1, para. 7 (1945) (amended 1962) ("In case of the death, resignation, or disability of the Governor, the Lieutenant Governor shall exercise the executive power and receive the compensation of the Governor until the next general election for members of the General Assembly, at which a successor to the Governor shall be elected for the unexpired term . . . ."), with GA. CONST. art. V, § 1, para. 5(b) ("In case of the death, resignation, or permanent disability of the Governor or the Governor-elect, the Lieutenant Governor or the Lieutenant Governor-elect, upon becoming the Lieutenant Governor, shall become the Governor . . . .").

245. GA. CONST. art. V, § 1, para. 5(b).

246. The Governor's appointment powers are, theoretically, broader than most other Governors': "When any public office shall become vacant by death, resignation, or otherwise, the Governor shall promptly fill such vacancy unless otherwise provided by this Constitution or by law . . . ." *Id.* § 2, para. 8(a). However, the next part of the same paragraph lays out the Governor's power to fill a vacancy in a statewide office: "In case of the death or withdrawal of a person who received a majority of votes cast in an election for the office of Secretary of State, Attorney General, State School Superintendent, Commissioner of Insurance, Commissioner of Agriculture, or Commissioner of Labor, the Governor elected at the same election, upon becoming Governor, shall have the power to fill such office by appointing, subject to the confirmation of the Senate, an individual to serve until the next general election . . . ." *Id.* § 2, para. 8(b). The omission of the Lieutenant Governor from this clause suggests that the Governor can't make an appointment to fill such a vacancy. *Cf.* *Thomas v. State Bd. of Elections*, 124 S.E.2d 164, 168 (N.C. 1962) (interpreting similar provision under the 1868 North Carolina Constitution).

adoption of joint tickets in 1988, only one lieutenant-gubernatorial vacancy has occurred.<sup>247</sup> When Governor Terry Branstad resigned as Governor to become Ambassador to China, Lieutenant Governor Kim Reynolds ascended to the governorship.<sup>248</sup> She sought to appoint Adam Gregg, the statewide public defender, as her Lieutenant Governor, but state attorney general Tom Miller concluded in a lengthy opinion that Reynolds had no power to do so because she remained Lieutenant Governor.<sup>249</sup> Reynolds nonetheless appointed Gregg, but she clarified that he was merely “acting” Lieutenant Governor, that he would “‘operate’ the office of lieutenant governor but not actually ‘hold’ that office,” and that he would be exempted from the line of gubernatorial succession.<sup>250</sup> Reynolds and Gregg were re-elected in 2018, and no gubernatorial vacancy occurred in the interim, suggesting that the constitutionality of Reynolds’s MacGyvered solution didn’t need to be tested.<sup>251</sup>

Michigan presents an unusual case, too: there is an explicit provision for filling a lieutenant-gubernatorial vacancy in state statutes, but an uncontroverted state attorney general opinion establishes that the statute is unconstitutional, and it has never been executed. Following the adoption of the 1963 constitution, the state legislature enacted legislation allowing the Governor to fill a lieutenant-gubernatorial vacancy with legislative confirmation.<sup>252</sup> Shortly thereafter, Frank Kelley, the state attorney general,

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247. See Jason Noble, *Reynolds Taps Adam Gregg as Lieutenant Governor, But There’s a Catch*, DES MOINES REG. (May 25, 2017), <https://www.desmoinesregister.com/story/news/2017/05/25/reynolds-taps-adam-gregg-lieutenant-governor-but-theres-catch/344715001/> [<https://perma.cc/9V8K-BEQJ>].

248. Erin Murphy, *Adam Gregg Rides ‘Rocket Ship’ to Iowa Lieutenant Governorship*, GAZETTE (Feb. 5, 2018), <https://www.thegazette.com/subject/news/government/adam-gregg-rides-rocket-ship-to-iowa-lieutenant-governorship-20180205> [<https://perma.cc/A8C6-6SWB>].

249. Iowa Att’y Gen. Op. No. 17-4-1, 2017 WL 10820201, at 18 (May 1, 2017) (“It is our opinion that if the governor resigns and the powers and duties of the office devolve upon the lieutenant governor, that person does not have Constitutional authority to appoint a new lieutenant governor. Upon the governor’s resignation, the powers and duties of the office will devolve or fall upon the lieutenant governor—who does not ascend or rise to the office of Governor. However, under our Constitutional framework, by possessing the powers and duties of the chief magistrate, the lieutenant governor becomes governor for all intents and purposes, is entitled to use the title of Governor, and is entitled to the compensation of governor for the remainder of the term. The lieutenant governor takes on this authority because she is lieutenant governor. In other words, upon a governor’s resignation, the lieutenant governor will hold both the offices of Governor and Lieutenant Governor. There is no vacancy to be filled.”).

250. Murphy, *supra* note 248; Noble, *supra* note 247.

251. See Kim Norvell et al., *Iowa Election 2018: Kim Reynolds Wins Full Term, a Validation of the Republican Policies She Has Led*, DES MOINES REG. (Nov. 7, 2018), <https://www.desmoinesregister.com/story/news/politics/elections/2018/11/05/iowa-election-2018-results-governor-republican-kim-reynolds-democrat-fred-hubbell-jake-porter-vote/1732343002/> [<https://perma.cc/W2Q5-SSUW>].

252. Mich. Att’y Gen. Op. No. 4625, at 236 (Apr. 22, 1968).

issued an opinion asserting that, under the new constitution, the Governor had no power to fill a lieutenant-gubernatorial vacancy and that the statute was unconstitutional.<sup>253</sup> Undeterred, the state legislature attempted to enact legislation that provided for the filling of lieutenant-gubernatorial vacancies a decade later.<sup>254</sup> Under this statute, the legislature was tasked with filling the vacancy by electing “an acting lieutenant governor of the same political party as the governor who shall serve for the remainder of the term or until the disability ceases.”<sup>255</sup> In the 1990s, Kelley—who was still serving as attorney general—issued another opinion declaring that this statute was unconstitutional, too.<sup>256</sup> The statute remains on the books,<sup>257</sup> but the absence of a lieutenant-gubernatorial vacancy since its, or its predecessor’s, adoption has prevented a formal conclusion as to its constitutionality.

In Mississippi, several lieutenant-gubernatorial vacancies have occurred without any attempted appointments to fill them. In 1876, for example, as Lieutenant Governor Alexander Davis was facing impeachment, he resigned from office.<sup>258</sup> The state attorney general advised the Governor that he could fill the vacancy under state law,<sup>259</sup> but it seems that the Governor didn’t attempt to fill it. Several other vacancies have occurred since then, with the most recent taking place in 1966.<sup>260</sup> Then, the state attorney general opined that the state senate president would act as Lieutenant Governor until the office was filled at the next general election.<sup>261</sup>

Nevada presents a case in which Governors have more apparent authority to fill lieutenant-gubernatorial vacancies—at least, those vacancies that occur *beyond* the scope of gubernatorial succession.<sup>262</sup> Nevada’s constitution establishes a gubernatorial succession regime that merely devolves the Governor’s power, not the office itself, to the Lieutenant Governor,<sup>263</sup> meaning that the practical vacancy existing in the Lieutenant Governor’s

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253. *Id.* at 234–36.

254. *See* MICH. COMP. LAWS § 168.67 (2022).

255. *Id.*

256. Mich. Att’y Gen. Op. No. 6849 (May 18, 1995).

257. *See* MICH. COMP. LAWS § 168.67 (2022).

258. *See The Attorney-General and the Lieutenant-Governor’s Resignation*, CLARION-LEDGER (Jackson, Miss.), Mar. 21, 1876, at 2.

259. *Id.*

260. *See Yarbrough Takes Over as Lt. Gov.*, CLARION-LEDGER (Jackson, Miss.), Dec. 20, 1966, at 10.

261. *Id.*

262. *See* NEV. CONST. art. V, § 18.

263. *See id.* (“In case of the impeachment of the Governor, or his removal from Office, death, inability to discharge the duties of the said Office, resignation or absence from the State, the powers and duties of the Office shall devolve upon the Lieutenant Governor for the residue of the term, or until the disability shall cease.”); Mike Norris, *State’s Political Powers Shift*, RENO GAZETTE-J., Jan. 3, 1989, at 1C (“In addition to assuming the duties of governor, Miller will continue to fulfill the responsibilities of lieutenant governor.”).

office can't be filled. Outside of this context, however, the Governor appears to have the power to fill lieutenant-gubernatorial vacancies. Following Lieutenant Governor Rex Bell's death in 1962, for example, Governor Grant Sawyer intended to invoke the same-party appointment requirement that existed for filling state legislative vacancies and sought a recommendation from the local Democratic Party in Las Vegas.<sup>264</sup> But the party refused to make such a recommendation to avoid picking favorites in the upcoming lieutenant-gubernatorial primary.<sup>265</sup> Nonetheless, Sawyer appointed Maude Frazier to fill the final year of Bell's term.<sup>266</sup> Frazier's appointment occurred without noted controversy, and the Governor's power to make it wasn't challenged.<sup>267</sup> In 2021, Governor Steve Sisolak's appointment of Lisa Cano Burkhead as Lieutenant Governor was similarly uncontroversial.<sup>268</sup>

In Oklahoma, the absence of lieutenant-gubernatorial vacancies has similarly prevented adequate development of the question. In the 1920s, two Governors were removed from office, elevating their Lieutenant Governors to the governorship, neither of whom sought to appoint a replacement for themselves.<sup>269</sup> But the first Lieutenant Governor to serve as Governor, Martin Trapp, actually claimed that he was still Lieutenant Governor and that gubernatorial term limits therefore did not apply to him, so that he could run to succeed himself.<sup>270</sup> The Oklahoma Supreme Court rejected this argument, determining that Trapp *was* the Governor and therefore couldn't run in the primary in the next gubernatorial election.<sup>271</sup> And when William Holloway became Governor in 1929, he similarly didn't attempt to fill the lieutenant-gubernatorial vacancy.<sup>272</sup> A state attorney general opinion from 1965 suggests that while "[t]he office of Governor *devolves* upon the Lieutenant Governor, he does not ascend to it[,]"<sup>273</sup> but this conclusion is of dubious accuracy.<sup>274</sup>

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264. See *Clark Demos Withhold [sic] Backing*, RENO GAZETTE-J., July 13, 1962, at 24.

265. *Id.*

266. *Maude Frazier Named Lieutenant Governor*, RENO GAZETTE-J., July 13, 1962, at 1.

267. *See id.*

268. See Jannelle Calderon, *Sisolak Appoints Principal, Daughter of Immigrants as Lieutenant Governor*, NEV. INDEP. (Dec. 16, 2021), <https://thenevadaindependent.com/article/sisolak-appoints-principal-daughter-of-immigrants-as-lieutenant-governor> [<https://perma.cc/YRR3-BS8D>].

269. See *infra* notes 270, 272, and accompanying text.

270. *Fitzpatrick v. McAlister*, 248 P. 569, 571 (Okla. 1926).

271. *Id.* at 577.

272. See *Governor Johnston Is Convicted and Removed*, HARLOW'S WKLY. (Okla.), Mar. 23, 1929, at 16 ("Senator C. S. Storms, president pro tempore of the Senate, although he will not relinquish his office as Senator, becomes Acting Lieutenant Governor, and is 'heir to the throne' upon occasions when Holloway should leave the state.").

273. Okla. Att'y Gen. Op. No. 65-235, at 1-2 (May 19, 1965).

274. See Kevin M. Abel, *The Right of Succession by the Oklahoma Lieutenant Governor to the Office of the Governor and the Appointment of a Successor Lieutenant Governor*, 36 TULSA L.J. 217, 221, 223 (2000).

As to the Governor's power to fill the vacancy—whether occurring following gubernatorial succession or not—the constitution grants the Governor broad appointive power to “appoint a person to fill” a vacancy “unless otherwise provided by law.”<sup>275</sup> Even more persuasively, however, the state constitution's executive article sets out term limits for state offices, including the Lieutenant Governor, and specifies that “[a]ny years served by a person elected or appointed to serve less than a full term to fill a vacancy in any such office shall not be included in the limitations set forth herein[.]” which expressly contemplates that the Governor *could* appoint a Lieutenant Governor.<sup>276</sup>

In Vermont, the situation is comparable to that of Nevada. It appears to be the case that, in the event of a gubernatorial vacancy, the Lieutenant Governor merely acts as Governor and therefore can't fill a vacancy in the Lieutenant Governor's office.<sup>277</sup> In 1991, following Governor Richard Snelling's death, Lieutenant Governor Howard Dean ascended to the governorship and initially sought to appoint a replacement Lieutenant Governor.<sup>278</sup> However, State Attorney General Jeffrey Amestoy concluded that Dean hadn't actually become *de jure* Governor and therefore couldn't fill the vacancy.<sup>279</sup> Outside of this context, however, the Governor clearly has the power to fill vacancies in “state officers,”<sup>280</sup> so a lieutenant-gubernatorial vacancy caused by death, resignation, or removal from office could seemingly be filled.

Next, this Section addresses where this Article began: Virginia. Helpfully, the distinction between lieutenant-gubernatorial vacancies occasioned by gubernatorial succession and otherwise doesn't exist here; the state constitution makes clear that “the Lieutenant Governor shall become Governor.”<sup>281</sup> Similarly, the Governor has the broad power to “fill vacancies in all offices of the Commonwealth for the filling of which the Constitution and laws make no other provision,” with the appointee serving until the next general election, when a special election will be held.<sup>282</sup> State law tacitly echoes the special election requirement<sup>283</sup> and further provides that the

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275. OKLA. CONST. art. VI, § 13.

276. *Id.* § 4(C).

277. *See, e.g.,* Jack Hoffman, *Dean to Leave Second Spot Vacant*, RUTLAND DAILY HERALD, Sept. 5, 1991, at 1.

278. *See id.*

279. Vt. Att'y Gen. Op. No. 91-15F, at 1, 3 (Sept. 3, 1991).

280. VT. STAT. ANN. tit. 17, § 2623(a)(1) (West 2022); *see also* David Gram, *Succession Picture Is Somewhat Hazy*, BRATTLEBORO REFORMER, Aug. 15, 1991, at 2 (noting that Janet Ancel, an attorney with the state legislative council, concluded that Dean “could obviously fill” a lieutenant-gubernatorial vacancy under state law).

281. VA. CONST. art. V, § 16.

282. *Id.* § 7.

283. *See* VA. CODE ANN. § 24.2-201.

Lieutenant Governor's duties "shall be discharged by the President pro tempore of the Senate" in the event of a vacancy.<sup>284</sup> These provisions led the state attorney general to conclude in 1982 that the Governor could fill a lieutenant-gubernatorial vacancy.<sup>285</sup> The statutory provision relating to the senate president's discharge of the Lieutenant Governor's duties "does not purport to provide the method for filling the vacancy[,] just for how the duties are discharged."<sup>286</sup> This opinion was issued following the two most recent lieutenant-gubernatorial vacancies—in 1952 and 1971, respectively—both of which were filled at special elections, with no interim appointment.<sup>287</sup> Because Lieutenant Governor Justin Fairfax didn't resign from his office in 2019, the validity of the attorney general's 1982 opinion hasn't been tested in court.

Finally, we revisit Washington. As explained in Part II, the historical approach embraced by the Washington Supreme Court with respect to lieutenant-gubernatorial vacancies holds that, in the event of a gubernatorial succession, the Lieutenant Governor nominally remains Lieutenant Governor.<sup>288</sup> However, the state attorney general, in a 1974 opinion, concluded that a 1910 amendment to the state constitution effectively abrogated the court's decision in *Murphy* because it clarified that the Lieutenant Governor would "succeed[] to the office of governor[,] at least in most cases."<sup>289</sup> In these cases—and in the case of any other lieutenant-gubernatorial vacancy—the attorney general concluded that "the governor has the power to appoint a successor" to the Lieutenant Governor if he "vacates his office prior to the next general election."<sup>290</sup> However, because no lieutenant-gubernatorial vacancy has occurred since then, this conclusion has similarly not been put to the test.

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284. *Id.* § 24.2-212. That the duties are merely "discharged by the President pro tempore of the Senate" is similar to the same performance of duties by the New York State Senate President, which the Court of Appeals held in *Skelos* "can at best provide only stopgap coverage of the function of the Lieutenant Governor." *Skelos v. Paterson*, 915 N.E.2d 1141, 1144 (N.Y. 2009).

285. See OPINIONS OF THE ATTORNEY GENERAL, *supra* note 32, at 326.

286. See *id.* at 325.

287. See *Almond Says Collins' Post to Be Filled in November*, TIMES DISPATCH (Richmond, Va.), Sept. 26, 1952, at 1; John Greiff, *Both Parties Seeking 'Favorite' for Lieutenant Governor*, DAILY PRESS (Newport, Va.), June 23, 1971, at 3.

288. *State ex rel. Murphy v. McBride*, 70 P. 25, 26 (Wash. 1902).

289. Wash. Att'y Gen. Op. No. 94 (Nov. 18, 1974) (quoting WASH. CONST. art. III, § 10, amend. 6).

290. *Id.*

*D. States with No Succession Procedures*

Finally, in a handful of states—Delaware, Illinois, Massachusetts, and North Carolina—it is unequivocally the case that there is no procedure for filling a lieutenant-gubernatorial vacancy. In Delaware and Illinois, each state constitution makes clear that vacancies in the office of Lieutenant Governor can't be filled.<sup>291</sup> Delaware's constitution gives the Governor broad power to “fill all vacancies that may happen in elective offices, *except in the offices of Lieutenant-Governor* and members of the General Assembly.”<sup>292</sup> Similarly, the Illinois constitution provides that, “[i]f the Lieutenant Governor fails to qualify or if his office becomes vacant, it shall remain vacant until the end of the term.”<sup>293</sup>

In Massachusetts and North Carolina, meanwhile, the state supreme courts, in interpreting the state constitution, have concluded that there is no procedure for filling a lieutenant-gubernatorial vacancy.<sup>294</sup> In *Thomas v. State Board of Elections*, the North Carolina Supreme Court concluded that the state constitution did not allow the Governor to fill a lieutenant-gubernatorial vacancy by appointment—and that a special election to fill the vacancy could similarly not be held.<sup>295</sup> In reaching its decision, the court noted that the Lieutenant Governor was excluded from the constitutional provision allowing the Governor to make an interim appointment until a special election could be held, and therefore that no appointment could be made and no special election could be scheduled.<sup>296</sup>

The decision by the Massachusetts Supreme Court with respect to filling a lieutenant-gubernatorial vacancy came about as the result of the state senate's request for an advisory opinion on filling vacancies in the state executive council.<sup>297</sup> Perhaps in dicta, the court noted that “in case a vacancy in [the Lieutenant Governor's office] happens, no provision is made for supplying them in the constitution.”<sup>298</sup>

Both decisions are likely viable today. Though the decision in *Thomas* was reached under the provisions of North Carolina's previous constitution, the relevant constitutional provision is materially identical to its 1868

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291. See DEL. CONST. art. III, § 9; ILL. CONST. art. V, § 7.

292. DEL. CONST. art. III, § 9 (emphasis added).

293. ILL. CONST. art. V, § 7.

294. See *Thomas v. State Bd. of Elections*, 124 S.E.2d 164, 168 (N.C. 1962); *Opinion of the Justices*, 14 Mass. 470, 470–71 (1784).

295. *Thomas*, 124 S.E.2d at 168.

296. *Id.* (quoting N.C. CONST. art. III, § 13 (1868)).

297. *Opinion of the Justices*, 14 Mass. at 470.

298. *Id.* at 471.

predecessor.<sup>299</sup> And though the determination as to filling a lieutenant-gubernatorial vacancy in Massachusetts was likely reached in dicta, there has been no change in state constitutional law that meaningfully affects its holding.<sup>300</sup> But perhaps most importantly, neither state constitution grants its Governor the broad appointive powers seen in other states. Admittedly, the facial omission of the Lieutenant Governor in North Carolina's constitutional provision might plausibly draw a comparison to the Missouri statute at issue in *Cope*.<sup>301</sup> But the only reason that the omission in the Missouri statute didn't bar the Governor from appointing a Lieutenant Governor was *because* the Governor had such a broad appointment power.<sup>302</sup> In the absence of such a power in the North Carolina constitution, the similarities between the constitutional and statutory provisions are meaningless. Though Governors in either state could test the continuing viability of the decisions by making a lieutenant-gubernatorial appointment—and it's certainly possible that, in light of the broad jurisprudential move toward favoring lieutenant-gubernatorial appointments, the courts could reach different decisions today—the present reality affords Governors no power to make such an appointment.

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299. Compare N.C. CONST. OF 1868, art. III, § 13 (amended 1954) (“If the office of any of said officers [Secretary of State, auditor, Treasurer, Superintendent of Public Instruction, Attorney General, Commissioner of Agriculture, Commissioner of Labor, and Commissioner of Insurance] shall be vacated by death, resignation, or otherwise, it shall be the duty of the Governor to appoint another until the disability be removed or his successor be elected and qualified. Every such vacancy shall be filled by election at the first general election that occurs more than thirty days after the vacancy has taken place, and the person chosen shall hold the office for the remainder of the unexpired term fixed in the first section of this Article.”), and Act of Apr. 27, 1953, ch. 1033, § 1, 1953 N.C. Sess. Laws 925, 925 (“Provided, that when the unexpired term of any of the offices named in this section in which such vacancy has occurred expires on the first day of January succeeding the next general election, the Governor shall appoint to fill said vacancy for the unexpired term of said office.”) (amending Article III, Section 13 of the North Carolina Constitution of 1868), with N.C. CONST. art. III, § 7(3) (“If the office of any of these officers is vacated by death, resignation, or otherwise, it shall be the duty of the Governor to appoint another to serve until his successor is elected and qualified. Every such vacancy shall be filled by election at the first election for members of the General Assembly that occurs more than 60 days after the vacancy has taken place, and the person chosen shall hold the office for the remainder of the unexpired term fixed in this Section. When a vacancy occurs in the office of any of the officers named in this Section and the term expires on the first day of January succeeding the next election for members of the General Assembly, the Governor shall appoint to fill the vacancy for the unexpired term of the office.”).

300. See H. 84, 192nd Gen. Court, Reg. Sess. (Mass. 2021) (proposing a legislative amendment to the constitution to define the succession plan for a vacancy in the office of Lieutenant Governor).

301. See *Cope v. Parson*, 570 S.W.3d 579, 585 (Mo. 2019).

302. See *id.*

## IV. HOW LIEUTENANT-GUBERNATORIAL VACANCIES SHOULD BE FILLED

The foregoing discussion of how lieutenant-gubernatorial vacancies are filled—and have been filled over time—reveals a patchwork quilt of different state procedures. Following the ratification of the Twenty-fifth Amendment in 1967, the majority rule in states and territories has been to allow Governors to make lieutenant-gubernatorial nominations, which are then confirmed by a joint vote of both houses of the legislature, just like the procedure at the federal level for filling a vice-presidential vacancy.<sup>303</sup> But there are, of course, as Part III noted in detail, significant exceptions to this majority rule. Some states merely require state senate confirmation, others omit the legislative-confirmation requirement altogether, and others have no clear procedure in state law for filling vacancies, which has usually, though not always, resulted in implicit gubernatorial power to fill the vacancies.

The more recent constitutional amendments to provide for lieutenant-gubernatorial succession make clear that the post-Twenty-fifth Amendment flurry of state constitutional changes is not yet done, though it has slowed considerably since the 1970s.<sup>304</sup> This Part makes two interrelated arguments: First, in Section A, that lieutenant-gubernatorial vacancies should be filled. Second, in Section B, that they should be filled by gubernatorial appointment—likely with legislative confirmation, a same-party requirement, or some other external means of ensuring the integrity of the process.

*A. The Need to Replace the Replacement*

Where there is a vacancy, there ought to be someone to fill it; if an office is important enough to create, it is important enough to ensure that someone occupies it. This undoubtedly holds true in most cases. Significant legal scholarship has been dedicated to the question of vacancies—under the Seventeenth Amendment’s vacancies clause,<sup>305</sup> the Recess Appointments

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303. See *supra* notes 112–15 and accompanying discussion.

304. See *supra* notes 107–08 and accompanying discussion.

305. See generally, 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 (2008); Vikram David Amar, *Indirect Effects of Direct Election: A Structural Examination of the Seventeenth Amendment*, 49 VAND. L. REV. 1347 (1996); Laura E. Little, *An Excursion into the Uncharted Waters of the Seventeenth Amendment*, 64 TEMP. L. REV. 629 (1991).

Clause,<sup>306</sup> the Presidential Succession Act of 1947,<sup>307</sup> the Federal Vacancies Reform Act,<sup>308</sup> and beyond. Though less attention has focused on vacancies at the state level, in the form of legislative vacancies (and the temporary appointments used by most states to fill them), gubernatorial succession, and beyond, these issues nonetheless implicate important questions of state constitutional law. And, of course, the question of how to fill vacancies isn't one dealt with in the abstract; it is a practical one that affects policy development and execution. The question of who occupies which offices, and who can exercise those offices' power, matters a great deal to the people intimately affected by those policies.

As a general matter, it may be true that filling vacancies matters for the allocation of political power and responsibilities. But in the case of the Lieutenant Governor, we might reasonably doubt the importance of filling *that* vacancy. The Lieutenant Governor's constitutional responsibilities really just consist of presiding over the state senate and serving as the first-in-line gubernatorial successor. With respect to the first duty, states have increasingly done away with the Lieutenant Governor's legislative roles.<sup>309</sup> And with respect to the second, the Lieutenant Governor's absence certainly doesn't prevent gubernatorial succession because virtually every succession provision names a second-in-line official.<sup>310</sup> Beyond that, Lieutenant Governors have minimal statutory powers; any policymaking portfolio that they have usually exists at the Governor's discretion. So as a practical matter, why are lieutenant-gubernatorial vacancies worth filling at all?

The answer to this question might be painfully obvious: because the office was worth creating in the first place. Prior to the modern era, Lieutenant Governors didn't exist in most states.<sup>311</sup> It was only after states experienced gubernatorial succession *without* Lieutenant Governors—and found the

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306. See generally, e.g., David J. Arkush, *The Original Meaning of Recess*, 17 U. PA. J. CONST. L. 161 (2014); Michael B. Rappaport, *Why Non-Originalism Does Not Justify Departing from the Original Meaning of the Recess Appointments Clause*, 38 HARV. J.L. & PUB. POL'Y 889 (2015); Jonathan Turley, *Constitutional Adverse Possession: Recess Appointments and the Role of Historical Practice in Constitutional Interpretation*, 2013 WIS. L. REV. 965.

307. See generally, e.g., Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113 (1995).

308. See generally, e.g., Brannon P. Denning, *Article II, the Vacancies Act and the Appointment of "Acting" Executive Branch Officials*, 76 WASH. U. L. Q. 1039 (1998); Ben Miller-Gootnick, Note, *Boundaries of the Federal Vacancies Reform Act*, 56 HARV. J. ON LEGIS. 459 (2019).

309. See Lynch, *supra* note 96, at 92.

310. See Brian J. Gaines & Brian D. Roberts, *Gubernatorial Incapacity and Succession Provisions*, in BOOK OF THE STATES 208, 213–14 (2005) (noting how many officials are in the gubernatorial line of succession).

311. See Yeagain, *supra* note 110, at 1163–67 (describing adoption of lieutenant governors).

experience dissatisfactory—that lieutenant governorships were created *en masse*.<sup>312</sup> Delegates to state constitutional conventions that added Lieutenant Governors to their constitutions emphasized the importance of ensuring that gubernatorial power traveled along democratically legitimate lines.<sup>313</sup> The Lieutenant Governor—unlike the state senate president, another common recipient of devolved gubernatorial power—was elected by the entire state, not the residents of a single legislative district.<sup>314</sup> The influence of gerrymandering was acutely felt during these conventions, and some delegates noted that, even if a party was able to gerrymander itself into an unearned majority, there was no way to gerrymander itself into winning statewide offices.<sup>315</sup>

Moreover, there are serious separation of powers concerns with allowing a legislative leader to serve as a gubernatorial successor. Not only can a mega-executive, with roles in the executive *and* legislative branches, be created,<sup>316</sup> but if the legislative majority is of a different party than the Governor, the majority has an incentive to manipulate a gubernatorial vacancy into occurring.

It would ignore one of the most significant developments in state constitutional law—the creation of lieutenant governorships and the elimination of state senate presidents as Governors-in-waiting—to leave a lieutenant-gubernatorial vacancy unfilled simply because gubernatorial succession provisions account for such a vacancy. If this development is ignored, the lieutenant governorship might not exist at all. The abolition of the lieutenant governorship is, admittedly, an invitation that many would be happy to accept. The office has been long criticized as a “do-nothing” office with no responsibilities other than waiting for the Governor to die, and fiscal hawks have condemned the wastefulness of funding such a useless office.<sup>317</sup>

But those who argue for the office’s abolition are mistaken. Even taking them at their word that the office has no important responsibilities, and that the occupants are frequently bored and excluded from policymaking decisions, *that’s fine*. The office exists to ensure that the status quo of executive administration is uninterrupted by a gubernatorial vacancy—

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312. See Yeargain, *supra* note 110, at 1163–73.

313. See *id.*

314. Harvey Walker, *Office of the Lieutenant Governor: Authority and Responsibility*, 42 SOC. SCI. 142, 145 (1967) (“It seems far better to provide for succession by an officer elected by the voters of the whole state rather than by a president *pro tempore* of the Senate or a speaker of the House whose mandate comes originally from the voters of a single electoral district and secondarily from his colleagues, a majority of whom may even represent a different party from that of the governor.”).

315. See Yeargain, *supra* note 110, at 1162, 1168, 1187–88.

316. See *id.* at 1161.

317. See *id.* at 1186–87.

specifically, to ensure that a state doesn't undergo radical, unexpected ideological change simply because the Governor died in office.<sup>318</sup> The costs of a line of gubernatorial succession that elevates a member of the opposite party to the governorship aren't financial—they're rooted in the legitimacy of state government itself.<sup>319</sup> Accordingly, there's a strong need for a legitimate line of gubernatorial succession *and* a legitimate line of *lieutenant-gubernatorial* succession.<sup>320</sup>

To see how the absence of a succession provision for a state's Lieutenant Governor would play out illegitimately, consider a particularly galling example. Suppose that Roy Cooper, the Democratic Governor of North Carolina, vacated his office. Suppose further that the lieutenant governorship were also vacant, a vacancy that, had it occurred before Cooper prematurely left office, he would've been unable to fill. In this case, the state senate president would become Governor.<sup>321</sup> The Republican state senate president, however, won his majority on the back of a ruthlessly (and, under the state's constitution, *unconstitutionally*) gerrymandered legislative map.<sup>322</sup> Allowing him to ascend to the governorship would be a direct affront to the will of the electorate expressed in the state's 2020 gubernatorial election.

If that outcome is undesirable, the choice presented here is relatively straightforward: The first option is that the state has a procedure to replace the Lieutenant Governor. If there's a gubernatorial vacancy, the appointed Lieutenant Governor ascends to the governorship. Though the Governor, in this scenario, would not have been elected by the people—either as a candidate for Governor or Lieutenant Governor—they would nonetheless serve in the role as a democratically legitimate occupant of it. The second option is that the lieutenant governorship remains vacant, and the line of

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318. Dwight D. Gulley, *State Government and Responsible Party Succession* 24–27 (Aug. 1, 2015) (Ph.D. dissertation, Auburn University) (on file with the Auburn University Electronic Theses and Dissertations Database), [https://etd.auburn.edu/bitstream/handle/10415/4824/Dwight%20Gulley%20Dissertation%20Auburn%20University--August\\_1\\_2015.pdf?sequence=2&isAllowed=n](https://etd.auburn.edu/bitstream/handle/10415/4824/Dwight%20Gulley%20Dissertation%20Auburn%20University--August_1_2015.pdf?sequence=2&isAllowed=n) [<https://perma.cc/6HQN-YD7K>].

319. *See, e.g., id.* at 66–67.

320. *See id.*

321. N.C. CONST. art. III, § 3(1) (“The further order of succession to the office of Governor shall be prescribed by law.”); N.C. GEN. STAT. § 147-11.1(b)(1) (“If, by reason of failure to qualify, death, resignation, or removal from office, there is neither a Governor nor a Lieutenant Governor to discharge the powers and duties of the office of Governor, then the President of the Senate shall, upon his resignation as President of the Senate and as Senator, become Governor.”).

322. *See, e.g.,* *Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584, at \*3 (N.C. Sup. Ct., Dist. 10, Sept. 3, 2019) (“[T]he 2017 Enacted Maps, as drawn, do not permit voters to freely choose their representative, but rather representatives are choosing voters based upon sophisticated partisan sorting. It is not the free will of the People that is fairly ascertained through extreme partisan gerrymandering. Rather, it is the carefully crafted will of the map drawer that predominates.”).

gubernatorial succession skips to the second-in-line official, which may be a state senate president who holds their position solely because of gerrymandering.

There are, admittedly, several assumptions working here. First, we assume that the state senate president (or state house speaker) is the second-in-line successor. That's usually the case, but in some states, another statewide official serves as Governor if there's no Lieutenant Governor. In this case, gubernatorial succession plays out no differently than it would in states with split elections for Governor and Lieutenant Governor or in states where the elected secretary of state serves as *de facto* Lieutenant Governor. Placing another statewide elected official behind the Lieutenant Governor in the line of succession solves many of the problems at issue here—but in most states, rearranging the lineup would require constitutional amendments.<sup>323</sup> If the constitution is going to be amended regardless, it makes sense to *also* provide a means of filling a lieutenant-gubernatorial vacancy.

Second, we also assume that the state senate president holds their office because of gerrymandering. This may be an unfair assumption. But the growth of ideological polarization, the Supreme Court's determination that claims of partisan gerrymandering are non-justiciable political questions, and the asymmetry with which state supreme courts have been able to address gerrymandering all mean that state legislative gerrymandering is likely to remain unchecked. The risks of allowing a legislative leader to assume the governorship when gerrymandering is running rampant are too great, and the worst-case scenario is undoubtedly plausible.

Embracing those assumptions, however, the aforementioned choice should be relatively easy. There are, of course, ways to ensure that the first option isn't just the lesser of two evils but is actually a *preferable* choice in the abstract, as Section B explores in greater detail—perhaps by imposing a same-party requirement, scheduling a special election, or requiring legislative confirmation of any lieutenant-gubernatorial appointment. But avoiding the most illegitimate way of answering this question and preventing legislative leaders from gerrymandering themselves into the governorship certainly justifies the adoption of a lieutenant-gubernatorial replacement procedure. Now, we set about determining what such a procedure should look like.

### *B. Crafting a Workable Solution*

Assuming that there is a need in state constitutions for explicit provisions relating to lieutenant-gubernatorial succession, what sort of procedure should be adopted? As the state-level discussion makes clear, states have adopted a

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323. See *supra* notes 76–77, 104–05, and accompanying discussion.

wide variety of different procedures, but most have ultimately followed the procedure set forth by the Twenty-fifth Amendment, where the Governor nominates a replacement, who is then confirmed by both chambers of the legislature.

In considering the ideal procedure, the obvious place to begin is determining who should be responsible for selecting a replacement Lieutenant Governor. Under the law as it stands, most states give the Governor the power of selection.<sup>324</sup> Others place selection in the hands of the legislature, usually by automatically designating the senate president as the Lieutenant Governor, but in the case of Texas<sup>325</sup> (and possibly Michigan<sup>326</sup>), by allowing the legislature to make the selection directly. A few more require special elections and sometimes allow the Governor to make an interim appointment until the election occurs, thereby splitting the selection power between the Governor and the electorate itself.<sup>327</sup>

Majority rules aren't always objectively the *best* rules, but in this instance, positioning the Governor as the selector, or nominator, of the lieutenant-gubernatorial replacement makes sense. Though there are obvious concerns about the Governor being able to hand-pick their own replacement, it's difficult to see how this process materially differs from the routine practice in states with joint gubernatorial–lieutenant-gubernatorial elections, whereby the Governor hand-picks their own (possible) replacement. And assuming that Governors and Lieutenant Governors should operate as a team—especially, though not exclusively, in states with joint elections—it's important for the Governor to be able to select their junior governing partner.

More practically, however, the Governor is better positioned than any other political actor to nominate a Lieutenant Governor. Allowing the state legislature to select—not *confirm*, but *select*—the Lieutenant Governor could create internal division in the executive branch if it selects someone antagonistic to the Governor. These concerns are greatest in states with joint gubernatorial elections and with a Governor and a legislature of different parties. Those states specifically adopted joint elections to ensure that the Governor and Lieutenant Governor would form a governing team,<sup>328</sup> so sticking the Governor with a Lieutenant Governor of a different party harkens back to the days of split elections and internal division. History is replete with examples of Lieutenant Governors aggressively employing their power as acting Governor to set policy, sign legislation, make appointments, issue

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324. See *supra* note 112 and accompanying discussion.

325. See *supra* notes 136–38 and accompanying discussion.

326. See *supra* notes 252–57 and accompanying discussion.

327. See *supra* notes 157–81 and accompanying discussion.

328. See generally Yeargain, *supra* note 102 (discussing adoption of team-ticket gubernatorial elections).

pardons, and more.<sup>329</sup> This history shouldn't be repeated. On the other hand, however, in states with split elections, the states always run the risk of a divided executive branch anyway, so these concerns are somewhat minimized.

Another potential actor to name a lieutenant-gubernatorial replacement could be the state party, if states adopted a same-party replacement requirement for filling lieutenant-gubernatorial vacancies and tasked the state party with nominating a slate of replacement candidates or selecting the replacement outright. Only Oregon, Utah, and Wyoming have employed this sort of procedure.<sup>330</sup> Oregon and Wyoming employ it for secretary of state vacancies, with Wyoming requiring that the state party of the previous incumbent nominate a slate of candidates, and with Oregon simply imposing the requirement on the Governor.<sup>331</sup> Utah is the only state that employs a similar procedure specifically with actual lieutenant-gubernatorial vacancies.<sup>332</sup> Nonetheless, *especially* in states with split elections, this sort of requirement could function well. It could prevent, for example, a Governor taking advantage of an untimely and coincidental vacancy in the Lieutenant Governor's office to flip the office for their party, like Arnold Schwarzenegger did in 2010.<sup>333</sup> Employing such a procedure would respect voter intent and preserve the status quo from the previous election and warrants serious consideration in states with split gubernatorial elections. Outside of states with split elections, however, this procedure could sow division. Most states that have joined their gubernatorial and lieutenant gubernatorial elections have done so in a manner that allows each party's gubernatorial nominee to select their running mate; only a small minority require that the gubernatorial and lieutenant-gubernatorial candidates run in separate primaries and then unite for the general election.<sup>334</sup> Accordingly, in those states, employing a same-party requirement—or, at least, a same-party requirement that vests appointment power directly with the state party—could force the Governor and appointed Lieutenant Governor into a “shotgun wedding” of sorts.<sup>335</sup>

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329. See Yeagain, *supra* note 110, at 1191.

330. See OR. CONST. art. V, § 8a; WYO. STAT. ANN. § 22-18-111(a)(i) (2012); UTAH CONST. art. VII, § 10(3)(c)(ii).

331. WYO. STAT. ANN. § 22-18-111(a)(i) (2012); OR. CONST. art. V, § 8a.

332. UTAH CONST. art. VII, § 10(3)(c)(ii).

333. See *supra* notes 118–22 and accompanying discussion.

334. Yeagain, *supra* note 102, at 754.

335. See, e.g., Sam Janesch, *Former Lt. Govs. Cawley, Jubelirer, Singel: Change the Way Lieutenant Governors Are Elected in Pennsylvania*, LANCASTERONLINE (Nov. 15, 2017), [https://lancasteronline.com/news/politics/former-lt-govs-cawley-jubelirer-singel-change-the-way-lieutenant-governors-are-elected-in-pennsylvania/article\\_b9ab1740-c986-11e7-9619-13ec733a21e5.html](https://lancasteronline.com/news/politics/former-lt-govs-cawley-jubelirer-singel-change-the-way-lieutenant-governors-are-elected-in-pennsylvania/article_b9ab1740-c986-11e7-9619-13ec733a21e5.html) [<https://perma.cc/A9RY-57U3>].

Therefore, we might reasonably conclude the following: Governors should generally be tasked with nominating lieutenant-gubernatorial replacements, but in states with split elections, it may be advisable to employ a same-party requirement and to give state parties a more active role in the selection process. With this conclusion in mind, how should those selections be limited—either by narrowing the universe of possible replacements or by imposing a confirmation requirement?

First, with respect to the universe of possible replacements, only Alaska and the states that have same-party requirements discussed previously explicitly do so.<sup>336</sup> In Alaska's case, the lieutenant-gubernatorial succession statute requires that the Governor pre-emptively nominate a designated successor to the Lieutenant Governor from among their senate-confirmed cabinet officials.<sup>337</sup> This proposal certainly has some merit to it. Though it has been employed only sparingly since Alaskan statehood, it has theoretically ensured that replacement Lieutenant Governors are capable administrators, rather than partisan politicians. In a state that positions its Lieutenant Governor as secretary of state, this is certainly a benefit. But in states with fewer constitutional and statutory responsibilities for their Lieutenant Governors, limiting the universe and constraining the Governor's power to appoint may make less sense. And, of course, for the aforementioned reasons, imposing a same-party requirement in states with split elections likely makes sense.

Second, what value is derived from requiring legislative confirmation of a lieutenant-gubernatorial nominee? The benefits here are obvious: advice and consent is a trademark of the American appointment process and theoretically seeks to ensure that only qualified candidates are nominated. Historically, the legislative confirmation of lieutenant-gubernatorial nominees has occurred without significant controversy.<sup>338</sup> Even when the legislative majority and the Governor are of different parties, the Governor's nominees have had no difficulty winning near-unanimous confirmation.<sup>339</sup> It's difficult to conclude that the major exception to that rule—Schwarzenegger's 2010 nomination of a Republican to replace a Democrat—was inappropriate, given the quite reasonable objections as to the party switch implicated by the appointment.<sup>340</sup>

But in an era of increased polarization, requiring legislative confirmation might prove, depending on the context, both too illusory of a gatekeeping

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336. See Act of May 5, 1959, ch. 174, § 2, 1959 Alaska Sess. Laws 261, 261. Under Alaska's original constitution, the "Secretary of State" was functionally the Lieutenant Governor. The position was retitled as the "Lieutenant Governor" with a 1970 constitutional amendment. S.J.R. No. 2, 6th Leg., 2d Sess. (Alaska 1970).

337. See § 2, 1959 Alaska Sess. Laws at 261; ALASKA STAT. §§ 44.19.040, .042, .044.

338. See *supra* note 116 and accompanying discussion.

339. *Supra* notes 116–17 and accompanying discussion.

340. *Supra* notes 118–22 and accompanying discussion.

measure and a requirement easily manipulable by cynical legislators. The advice-and-consent requirement imposed by the Constitution is self-executing—if the Senate majority doesn't wish to exercise its constitutional prerogative to reject presidential nominees, and instead chooses to serve as a rubber stamp, it can do so.<sup>341</sup> In so doing, it may well accept otherwise unacceptable, unqualified nominees and make the process of legislative confirmation superfluous and illusory.<sup>342</sup> Conversely, when the Governor and the legislative majority are of different parties, the confirmation process may quickly be transformed from superfluous to an impenetrable gate, in which nominees aren't even considered. As Merrick Garland's failed 2016 Supreme Court nomination demonstrated, when a legislative majority can extract a strategic advantage from refusing to consider a nomination, it will do so.<sup>343</sup> Garland's nomination is a fairly apt analogy for the advantage that a legislature could extract from refusing to confirm a Governor's nominee for Lieutenant Governor. If the state senate president is, because of the lieutenant-gubernatorial vacancy, next in line for the governorship, the legislative majority would have a strong incentive to reject a lieutenant-gubernatorial nominee in the hopes of elevating one of their own as Governor. And even if the legislature is willing to confirm a Governor's nominee in theory, there is no guarantee that it would be willing to confirm one of the Governor's top choices for a governing partner.<sup>344</sup>

Another significant disadvantage of requiring legislative confirmation is the delay it introduces into the process. If a legislature is out of session when a lieutenant-gubernatorial vacancy occurs, the Governor would be forced to reconvene the legislature in a special session—or to wait until the legislature next convenes. If the Governor happens to leave office in the meantime, the existence of a lieutenant-gubernatorial succession procedure would be

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341. See, e.g., Stephen M. Maurer, *The Healing Constitution: Updating the Framers' Design for a Hyperpolarized Society*, 29 KAN. J.L. & PUB. POL'Y 173, 210 (2020).

342. See *id.* at 211 (noting the extent to which partisanship affects confirmation votes); Carl Tobias, *President Donald Trump's War on Federal Judicial Diversity*, 54 WAKE FOREST L. REV. 531, 537 (2019) (noting the extent to which the Republican Senate majority has approved judicial nominees rated as "unqualified" by the American Bar Association).

343. Ron Elving, *What Happened with Merrick Garland in 2016 And Why It Matters Now*, NAT'L PUB. RADIO (June 29, 2018), <https://www.npr.org/2018/06/29/624467256/what-happened-with-merrick-garland-in-2016-and-why-it-matters-now> [<https://perma.cc/L4W2-9X5C>].

344. This is a rough summary of an important plotline in season five of *The West Wing*. Following the vice president's resignation, the Republican congressional majority refuses to consider President Josiah Bartlet's initial nominee, instead forcing him to nominate a no-name congressman with ties to mining interests. See Howard M. Wasserman, *The West Wing and Presidential Succession*, PICTURING JUST. (May 19, 2006), [https://cap-press.com/sites/pj/westwing\\_wasserman.htm](https://cap-press.com/sites/pj/westwing_wasserman.htm) [<https://perma.cc/68TD-GHR9>]; see also *The West Wing: Jefferson Lives* (NBC television broadcast Oct. 8, 2003).

practically irrelevant. This sort of delay occurred in Alaska in 2009, when Palin announced her resignation before the legislature had the opportunity to consider her nominee for the Lieutenant Governor's designated successor.<sup>345</sup>

These political realities—which are both based on current circumstances and a reasonable expectation of how polarization will continue to affect politics—matter in this conversation. The halcyon ideal of how legislative confirmation *should* function, rooted in the separation-of-powers theory that forms the basis of our government, simply isn't how confirmation *does* function today. Though we might reasonably be concerned that, if confirmation is omitted from the process, a Governor will select an unqualified nominee, there's no guarantee that confirmation will otherwise stop that from occurring.<sup>346</sup> If that's the case, legislative confirmation makes no difference, and Governors who happen to be of different parties than the legislative majority in their state shouldn't have their hands tied in a way that governors in other states don't.

Accordingly, at least in states with joint gubernatorial elections, there's a strong argument to be made for allowing the Governor an unfettered choice in filling a lieutenant-gubernatorial vacancy. If such an approach seems too extreme or unworkable, a modified Alaska approach—whereby the Governor is able to name a senate-confirmed cabinet official as the designated lieutenant-gubernatorial successor, with no second round of legislative confirmation required—might work as a reasonable compromise. And again, in states with split gubernatorial and lieutenant-gubernatorial elections, imposing a same-party requirement, perhaps by requiring the state party to nominate a slate of nominees, may work to the same practical effect.

## V. CONCLUSION

For centuries, most lieutenant-gubernatorial vacancies weren't filled—either because no Governor chose to exercise their inherent power to fill the vacancy or because, under an archaic theory of gubernatorial succession, lieutenant-gubernatorial vacancies technically didn't happen all that frequently. But changes in the mid-twentieth century, following the ratification of the Twenty-fifth Amendment, dramatically changed the landscape of lieutenant-gubernatorial succession. Today, most states with Lieutenant Governors provide an explicit means of succession, which is

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345. *Supra* note 135 and accompanying text.

346. Even in a less polarized era, and even when the Governor and legislature were of different parties, legislatures were sufficiently deferential to the Governor that, in 1993, the South Dakota Legislature approved a lieutenant-gubernatorial nominee who was widely considered to be unqualified for the position. *See* Mercer, *supra* note 117.

usually based on the Twenty-fifth Amendment's procedure: gubernatorial nomination and joint legislative confirmation.

These changes represent a sea change in state constitutional law, but the tide hasn't yet turned in every state. In too many states, the Governor's power to fill a lieutenant-gubernatorial vacancy is either ambiguous or nonexistent. And in some others, succession to the Lieutenant Governor's office happens automatically, with power devolved to the state senate president. The time has come to abolish these rogue methods of filling (or not filling) lieutenant-gubernatorial vacancies and to instead adopt a procedure that is democratically legitimate and cognizant of current political realities.

This Article doesn't adopt a single recommendation as to lieutenant-gubernatorial vacancies as much as it lays out how different succession procedures might play out in different states with different methods of electing Governors and Lieutenant Governors. In the end, these questions are best addressed by state legislatures or state constitutional conventions based on individual state experiences. If states are to serve as laboratories of democracy, they should be allowed the freedom to experiment with different methods of lieutenant-gubernatorial replacement provisions. What matters in the end is that there is a clear and democratically legitimate line of lieutenant-gubernatorial succession and that the second fiddle, regardless of its background presence in the orchestra, can be recast.