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No Vacancy: Why Congress Can Regulate Senate Vacancy-Filling Elections Without Amending (or Offending) the Constitution

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No Vacancy: Why Congress Can Regulate Senate Vacancy-Filling Elections Without Amending (or Offending) the Constitution

Abstract

There currently exists no uniform method for filling vacancies in the United States Senate, leaving the states to create and implement their own vacancy-filling procedures. As a result of recent problems under this system, such as ex-Governor Rod Blagojevich's notorious scandal in Illinois, some in Congress have suggested a standardized method for filling Senate vacancies. However, an apparent constitutional conflict between the Elections Clause and the Seventeenth Amendment's vacancy-filling clause presents the question of whether such standardization could be accomplished with federal legislation, or whether it would require amending the Constitution. Applying the textual, structural, and historical approaches of constitutional interpretation to this conflict shows that the Seventeenth Amendment did not alter Congress's Elections Clause authority to fashion regulations for all types of Senate elections, including those to fill vacancies. Since the Amendment's primary goal was to eliminate state legislatures' selection of senators, it would be an absurd textual result to interpret the Amendment as giving states any exclusive authority over vacancy-filling elections. Such an interpretation would also create structural inconsistency among the Constitution's elections provisions and contravene the intent of the Seventeenth Amendment's framers. Thus, if Congress wants to create a uniform method for filling U.S. Senate vacancies, it can—and should—do so through regular federal legislation, which, even after the Seventeenth Amendment's ratification, remains a constitutionally-permissible exercise of Congress's Elections Clause authority.

COMMENTS

NO VACANCY: WHY CONGRESS CAN REGULATE SENATE VACANCY-FILLING ELECTIONS WITHOUT AMENDING (OR OFFENDING) THE CONSTITUTION

ZACHARY M. ISTA^{*}

There currently exists no uniform method for filling vacancies in the United States Senate, leaving the states to create and implement their own vacancy-filling procedures. As a result of recent problems under this system, such as ex-Governor Rod Blagojevich's notorious scandal in Illinois, some in Congress have suggested a standardized method for filling Senate vacancies. However, an apparent constitutional conflict between the Elections Clause and the Seventeenth Amendment's vacancy-filling clause presents the question of whether such standardization could be accomplished with federal legislation, or whether it would require amending the Constitution.

Applying the textual, structural, and historical approaches of constitutional interpretation to this conflict shows that the Seventeenth Amendment did not alter Congress's Elections Clause authority to fashion regulations for all types of Senate elections, including those to fill vacancies. Since the Amendment's primary goal was to eliminate state legislatures' selection of senators, it would be an absurd textual result to interpret the Amendment as giving states any exclusive authority over vacancy-filling elections. Such an interpretation would also create structural inconsistency

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TABLE OF CONTENTS

Introduction.....	329
I. Background	332
A. Article I, Section 4: The Elections Clause	332
B. Interpreting the Elections Clause	333
1. What can Congress “make or alter?”	334
2. What are “such regulations,” and how may Congress regulate the “[t]imes, [p]laces, and [m]anner” of holding federal elections?	335
C. The Move to Popular Election of U.S. Senators	336
1. In the beginning: State legislatures’ selection of U.S. Senators	337
2. A major shift: The Seventeenth Amendment’s legislative history	339
3. The states’ remaining power in the selection of U.S. Senators: The Seventeenth Amendment’s vacancy-filling clause	342
a. Vacancy-Filling: The principal clause	342
b. Vacancy-Filling: The proviso	343
4. Interpreting the Seventeenth Amendment.....	343
5. Debate over the Seventeenth Amendment today	348
a. The Tea Party’s push to repeal the Seventeenth Amendment	348
b. Current issues surrounding U.S. Senate vacancies.....	350
D. Theories of Constitutional Interpretation and Statutory Construction	353
1. Introduction to the textual approach	353
2. Introduction to the structural approach	356
3. Introduction to the historical approach	359
II. A Comprehensive Legal Analysis of the Seventeenth Amendment and Elections Clause Shows that Congress May Regulate Vacancy-Filling U.S. Senate Elections.....	361
A. Enactment of Federal Regulations of Senate Vacancy-Filling Elections Would Be a Permissible Exercise of Congress’s Elections Clause Authority	362
1. There is no distinction in the Elections Clause between regular and special U.S. Senate elections	362
2. Congress is authorized to preempt state elections laws, including those outlining the timing of special U.S. Senate elections	364
B. The Seventeenth Amendment’s Vacancy-Filling	

Provision Did Not Alter Congress’s Broad Elections Clause Authority	365
1. The textual approach suggests that states are the exclusive regulators of vacancy-filling U.S. Senate elections.....	366
2. The structural approach indicates that Congress has regulatory authority over vacancy-filling U.S. Senate elections because that result is necessary to maintain consistent interpretation between the Elections Clause and the Seventeenth Amendment..	369
3. The historical approach counsels that Congress can regulate vacancy-filling U.S. Senate elections because that result was the intention of the Seventeenth Amendment’s framers.....	373
4. Federal legislation is a superior approach to amending the U.S. Constitution in order to solve the current problems in how U.S. Senate vacancies are filled.....	379
Conclusion	382

INTRODUCTION

Although his governorship ended in embarrassment, scandal, and, ultimately, impeachment,¹ one cannot deny that Rod Blagojevich recognized the inherent value of a United States Senate seat: “I’ve got this thing, and it’s [expletive] golden, and . . . I’m just not giving it up for [expletive] nothing.”² In that now-infamous quote, Blagojevich was referring to his power to temporarily appoint someone to fill Illinois’s open Senate seat, which Barack Obama had vacated upon his election to the presidency.³ However, Blagojevich abused this power and engaged in political corruption when he attempted to sell this Senate seat to whoever promised him a large campaign donation⁴ or a powerful governmental appointment.⁵

1. See Ray Long & Rick Pearson, *G-Rod Out: Blagojevich Ends Political Career with Closing Plea*, CHI. TRIB., Jan. 30, 2009, at A6 (discussing the disgraced Governor’s removal from statewide office in Illinois following his indictment on federal corruption charges).

2. See “I’ve got this thing and it’s f—ing golden”, SALON, (Dec. 9, 2008) (on file with *Law Review*), http://www.salon.com/news/primary_sources/2008/12/09/blagojevich_complaint (describing ex-Governor Blagojevich’s expletive-laced rant about how much political power he wielded in being able to fill Barack Obama’s vacant Senate seat). The Federal Bureau of Investigation caught this rant on tape as part of their ongoing investigation of the Illinois governor. *Id.*

3. See Michael Scherer, *Governor Gone Wild: The Blagojevich Scandal*, TIME, (Dec. 11, 2008), <http://www.time.com/time/magazine/article/0,9171,1865954,00.html> (explaining how Governor Blagojevich treated his power like a tradable commodity).

4. See *id.* (describing how Blagojevich discussed appointing Representative Jesse Jackson, Jr. to the Senate seat in exchange for \$1.5 million in campaign contributions).

When Blagojevich's improprieties eventually came to light, he faced federal corruption charges.⁶

While the Blagojevich saga highlighted the general problem of political corruption, it also exposed the inherent problems with the current system for filling Senate vacancies. The Seventeenth Amendment compels each state to hold an election to fill a vacant Senate seat.⁷ However, the Amendment empowers states to decide whether to temporarily fill such vacancies in the interim period between when the seat is vacated and when an election can be held to fill it permanently.⁸ Accordingly, procedures vary from state to state, with no uniform national standard guiding how Senate vacancies are filled.⁹

In light of the Blagojevich scandal and of other recent noteworthy Senate vacancies,¹⁰ federal lawmakers have sought to standardize how all Senate vacancies are filled. In 2009, Representative Aaron Schock introduced the Ethical and Legal Elections for Congressional Transitions (ELECT) Act.¹¹ Congressman Schock's proposal would require states to hold a special Senate election within ninety days of a seat vacancy, while also allowing governors to make a temporary

5. See Natasha Korecki, *Blagojevich on Jarrett: "How Bad Does She Want to Be U.S. Senator?"*, CHICAGO SUN-TIMES: THE BLAGO BLOG (June 23, 2010, 4:08 PM), http://blogs.suntimes.com/blago/2010/06/blagojevich_on_jarrett_how_bad.html (describing how Blagojevich wanted to be named Secretary of Health and Human Services in exchange for appointing Obama-advisor Valerie Jarrett to the Senate).

6. See Jeff Coen, *Blagojevich, Others Indicted*, L.A. TIMES, Apr. 3, 2009, at A14 (detailing the federal indictment against Blagojevich, which included charges for attempting to sell Illinois's vacant Senate seat and for attempting to extort campaign donations from sitting Congressmen). At his first trial, however, a deadlocked federal jury only convicted Blagojevich on one of the twenty-four charged counts—making false statements to the F.B.I. See Monica Davey & Susan Saulny, *For Blagojevich, A Guilty Verdict on 1 of 24 Counts*, N.Y. TIMES, Aug. 18, 2010, at A1 (discussing how federal prosecutors failed to make their case to the jury in Blagojevich's trial). At a second trial, a new jury convicted Blagojevich of seventeen additional federal charges. Chris Bury, *Rod Blagojevich Convicted on Corruption Charges*, ABC NEWS (June 27, 2011), <http://abcnews.go.com/Politics/rod-bлагоjevich-convicted-corruption-charges/story?id=13940088#.TsnMnbKlmU8>.

7. U.S. CONST. amend. XVII. When Senate vacancies occur, the Seventeenth Amendment dictates that "the executive authority of each state shall issue writs of election to fill such vacancies." *Id.*

8. See *id.* ("[T]he legislature of any state may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.").

9. See generally SULA P. RICHARDSON & THOMAS H. NEALE, CONG. RESEARCH SERV., 97-1009 GOV, HOUSE AND SENATE VACANCIES: HOW ARE THEY FILLED? 9 (2003) (providing examples of various states' methods for temporarily filling Senate vacancies).

10. See *infra* note 176 and accompanying text (discussing the string of Senate vacancies following the 2008 presidential election).

11. H.R. 899, 111th Cong. (2009).

Senate appointment until the election was completed.¹² That same year, Senators Russell Feingold, John McCain, and Mark Begich proposed an amendment to the U.S. Constitution removing states' authority to make temporary appointments altogether by mandating that all Senators be elected directly by the voters in each state.¹³

While both proposals sought to address the perceived problems of states' ad hoc approach to filling Senate vacancies, one did so through the regular legislative process, and the other proposed amending the U.S. Constitution.¹⁴ This significant discrepancy in means begs the question of why some legislators felt that a constitutional amendment was necessary to address the issue of Senate vacancies, whereas others felt a federal statute would suffice.

The answer to that question lies in an apparent constitutional conflict between the Elections Clause and the vacancy-filling provision of the Seventeenth Amendment. The Elections Clause grants Congress the power to "make or alter . . . regulations" as to the "[t]imes, [p]laces, and [m]anner of holding [e]lections for Senators and Representatives,"¹⁵ while the Seventeenth Amendment authorizes states "to make temporary [Senate] appointments until the people fill the vacancies by election *as the legislature may direct.*"¹⁶ The conflict, therefore, is whether the "as the legislature may direct" language in the Seventeenth Amendment grants states exclusive power to regulate special Senate elections, or whether their regulatory power over those elections is subject to Congress's Elections Clause authority.

This Comment will argue that Congress can exercise its Elections Clause authority over special vacancy-filling Senate elections because a textual, structural, and historical analysis shows that the Seventeenth Amendment did not create a realm of exclusive power for state legislatures in these types of elections. This Comment also will analyze how both existing case law and traditional tools of statutory interpretation apply to the text of the Seventeenth Amendment. Lastly, this Comment will argue that not only is legislation regulating special Senate elections constitutionally permissible, it is also preferable because of prevailing policy concerns.

12. *Id.*

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

14. *Compare* H.R. 899, 111th Cong. (2009) (addressing Senate vacancies through traditional legislation), *with* S.J. 7, 111th Cong. (2009) (proposing a constitutional amendment to mandate how states fill Senate vacancies).

15. U.S. CONST. art. I, § 4, cl. 1.

16. U.S. CONST. amend. XVII (emphasis added).

Part I of this Comment will provide background regarding the ratification of the Elections Clause and the Seventeenth Amendment, including its legislative history. Part I will also highlight the reemergence of the direct election of Senators as a modern political issue by discussing efforts both to repeal the Amendment and to standardize how states fill Senate vacancies. Lastly, Part I will provide a brief overview of the applicable methods of constitutional and statutory interpretation used to analyze the apparent conflict between the Elections Clause and the Seventeenth Amendment.

Part II will use this background information to analyze the constitutionality of proposed legislation, which would mandate uniform procedures for filling Senate vacancies in every state. First, Part II will consider whether that type of legislation falls under Congress's traditional Elections Clause authority. Next, Part II will use textual, structural, and historical analyses to discuss whether the vacancy-filling provision of the Seventeenth Amendment changes Congress's Elections Clause authority over special Senate elections. Finally, Part II will discuss why a statutory remedy is preferable to a constitutional amendment in resolving the problems associated with Senate vacancies.

Lastly, this Comment will summarize the information and arguments explored in Parts I and II to conclude that a statutory solution to the issue of Senate vacancies is both permissible and preferable.

I. BACKGROUND

This section traces three major themes: (1) Congress's constitutional power over federal elections; (2) the Seventeenth Amendment's ratification journey, including the renewed interest in the Amendment on the national political stage; and (3) the traditional tools of constitutional and statutory interpretation.

A. *Article I, Section 4: The Elections Clause*

Article I, Section 4 of the U.S. Constitution—commonly called the Elections Clause—provides that “the [t]imes, [p]laces, and [m]anner of holding [e]lections for Senators and Representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time, by law, make or alter such Regulations, except as to the places of chusing [sic] Senators.”¹⁷ This provision was included in the Constitution as a check on the states' potential to abuse their

17. U.S. CONST. art. I, § 4.

power to hold federal elections.¹⁸ Framers like Alexander Hamilton worried that leaving the regulation of federal elections to the whims of individual state legislatures was fraught with peril.¹⁹ Accordingly, the Elections Clause represents a “broad grant of federal power . . . combined with [an] unusually narrow grant of state power.”²⁰

Yet, even though the Elections Clause envisioned “a particularly strong congressional role” in regulating federal elections,²¹ Congress did not first exercise this constitutional power until 1842, when it passed a law mandating that members of Congress be elected by voting districts.²² Over two decades later, Congress made a similar entreaty into federal elections by regulating when state legislatures had to meet to fill U.S. Senate vacancies.²³ Despite its early hesitation to act, Congress has since enacted numerous elections regulations,²⁴ including establishing a national election day,²⁵ mandating when states must hold election for U.S. Senators,²⁶ and, most recently, establishing procedures for how states must fill vacant seats in the House of Representatives.²⁷

B. *Interpreting the Elections Clause*

Because of a steady stream of litigation in federal court, it is now well settled that the Elections Clause is a default constitutional provision, meaning that states may regulate elections only insofar as Congress has declined to preempt these state preferences.²⁸ This section will explore this established general principle and how courts have applied it to various challenges before them.

18. See *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 808–09 (1995) (listing examples of the types of abuse that were “the Framers’ overriding concern” in including the Elections Clause in the Constitution); see also *Millsaps v. Thompson*, 259 F.3d 535, 539–40 (6th Cir. 2001) (chronicling the Framers’ fear that states would undermine the existence of the federal government by unfaithfully promulgating elections regulations designed to limit the federal government’s ability to act).

19. See THE FEDERALIST NO. 59, at 301 (Alexander Hamilton) (Ian Shapiro ed., 2009) (cautioning that leaving the power to regulate federal elections solely to the states would “leave the existence of the Union entirely at their mercy”).

20. *Election Law—Statutory Interpretation—Sixth Circuit Employs Clear Statement Rule in Holding That the Help America Vote Act Does Not Require States to Count Provisional Ballots Cast Outside Voters’ Home Precincts*, 118 HARV. L. REV. 2461, 2467 (2005).

21. *Id.* at 2466.

22. 5 Stat. 491 (1842).

23. 14 Stat. 243 (1866).

24. See, e.g., 42 U.S.C. § 1971 (2006) (prohibiting infringement of civil rights during the voting process); 16 Stat. 140 (1870) (enforcing the anti-racial discrimination guarantees of the Fifteenth Amendment).

25. 2 U.S.C. § 7 (2006).

26. *Id.* § 1.

27. *Id.* § 8.

28. *Foster v. Love*, 522 U.S. 67, 69 (1997).

I. *What can Congress “make or alter?”*

The Supreme Court first interpreted the Elections Clause in its 1879 ruling in *Ex parte Siebold*.²⁹ There, the Court found that the Clause’s “make or alter” language implied a broad grant of congressional authority over the regulation of House and Senate elections.³⁰ Although the Elections Clause created concurrent authority between the states and the federal government to regulate congressional elections, the Court made it clear that Congress’s authority in this area was “paramount.”³¹

With *Siebold* laying the foundation for Elections Clause jurisprudence, the Court has since embraced a broad grant of congressional authority over federal elections. For instance, in its 1932 opinion in *Smiley v. Holm*,³² the Court re-emphasized Congress’s power to supplant state election regulations as it deemed necessary.³³ More recently, in the 1997 case of *Foster v. Love*,³⁴ the Court held that a federal law mandating the date when general elections for the House and Senate must be held trumped a Louisiana state law that provided for a different election day.³⁵

Federal courts have also emphasized that the Election Clause’s “make or alter” language is significant. In the 1997 case *Ass’n of Community Organizations for Reform Now v. Miller*,³⁶ the State of Michigan argued that Congress, similar to its authority under the Commerce Clause, had no power to compel state action where a state had already established its own election regulations.³⁷ The United States Court of Appeals for the Sixth Circuit rejected this position, holding that while the Commerce Clause only allows Congress to make laws pertaining to interstate commerce, the Elections Clause expressly allows Congress to make and to alter election regulations.³⁸ Therefore, the Elections Clause allows Congress to compel state

29. 100 U.S. 371 (1879).

30. *See id.* at 384 (“When exercised, the action of Congress, so far as it extends and conflicts with the regulations of the State, necessarily supersedes them.”).

31. *Id.* at 385.

32. 285 U.S. 355 (1932).

33. *See id.* at 366–67 (noting that Congress can make both its own elections regulations and alter pre-existing state legislation, including being able to impose additional sanctions or penalties beyond those that states have authorized).

34. 522 U.S. 67 (1997).

35. *See id.* at 69 (citing *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 832–33 (1995)) (reaffirming that it is “well-settled that the Elections Clause grants Congress ‘the power to override state regulations’ by establishing uniform rules for federal elections, binding on the States”).

36. 129 F.3d 833 (6th Cir. 1997).

37. *Id.* at 836–37.

38. *Id.* at 836.

action even where states have previously enacted contrary regulations.³⁹

2. *What are “such regulations,” and how may Congress regulate the “[t]imes, [p]laces, and [m]anner” of holding federal elections?*

In addition to interpreting the extent of Congress’s power to make and alter federal elections regulations, federal courts also have discussed the types of regulations that fall under this broad grant of congressional authority. In *Smiley*, the Supreme Court found that the vague phrase “such regulations” allowed Congress to regulate anything “of the same general character” as the more specific time, place, and manner regulations outlined in the Elections Clause.⁴⁰ The Court found that Congress could establish a “complete code for congressional elections . . . [because Congress] has a general supervisory power over the whole subject” of regulating national elections.⁴¹ More recently, in *Millsaps v. Thompson*,⁴² the Sixth Circuit held that the Elections Clause afforded Congress the power to regulate essentially all procedural aspects of congressional elections.⁴³ Stated succinctly, courts have concluded that there is “national authority over national elections.”⁴⁴

Beyond the generic “such regulations” wording, courts have interpreted specific words within the Elections Clause, including both “times” and “manner.” In *Foster*, the Supreme Court considered whether Louisiana could hold its federal elections on a day other than the one proscribed by federal law.⁴⁵ The Court overturned the Louisiana law and held that the “times” provision in the Elections

39. *See id.* (noting that the Elections Clause provides an affirmative grant of power to Congress beyond that found in provisions like the Commerce Clause).

40. *Smiley v. Holm*, 285 U.S. 355, 366 (1932).

41. *See id.* at 366–67 (citations omitted) (concluding that regulations pertaining to, *inter alia*, voter registration, fraud prevention, corruption mitigation, and tabulating of election results are included in this “complete code”). *But see* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 834–35 (1995) (listing approved state regulations of election procedures).

42. 259 F.3d 535 (6th Cir. 2001).

43. *See id.* at 538–40 (framing its conclusion by couching Elections Clause case law in terms of the Framers’ intent).

44. *Oregon v. Mitchell*, 400 U.S. 112, 119 n.2 (1970), *superseded by constitutional amendment*, U.S. CONST. amend. XXVI. *Mitchell* also posits that Congress’s Elections Clause power to regulate national elections “is augmented by the Necessary and Proper Clause.” *Id.* at 120.

45. *Foster v. Love*, 522 U.S. 67, 68–69 (1997). Federal law sets the first Tuesday following the first Monday in November of even-numbered years as “Election Day,” on which elections are held for all members of the House of Representatives and for approximately one-third of the U.S. Senate. 2 U.S.C. §§ 1, 7 (2006). Louisiana law had established an “open primary” system in which, essentially, these federal offices could be filled through an election a month earlier. LA. REV. STAT. ANN. § 18:402(B)(1) (2004).

Clause clearly authorized Congress to mandate uniform dates for federal elections.⁴⁶

The term “manner” has presented a more difficult problem for courts. In its 1921 decision *Newberry v. United States*,⁴⁷ a divided Supreme Court construed the term narrowly, holding that regulating the “manner” of elections did not empower Congress to control party primaries or conventions.⁴⁸ Yet, one concurring justice in *Newberry* immediately questioned this narrow reading of “manner” and called Congress’s power to regulate elections “plenary.”⁴⁹ In 2001, the Supreme Court suggested that it now agrees with that then-minority opinion when, in *Cook v. Gralike*,⁵⁰ it found that valid “manner” regulations are those pertaining to any procedural element of holding elections.⁵¹

C. *The Move to Popular Election of U.S. Senators*

Under the original Constitution, state legislatures elected U.S. Senators.⁵² In 1913, the ratification of the Seventeenth Amendment shifted that responsibility directly to the people of each state by compelling the direct election of Senators.⁵³ This section will explore the events leading up to this fundamental shift, trace the legislative

46. *Foster*, 522 U.S. at 69; *see also* *ACLU of Ohio, Inc. v. Taft*, 385 F.3d 641, 650 (6th Cir. 2004) (finding constitutional a federal law regulating the timing of how states must fill vacant House seats); *Fox v. Paterson*, 715 F. Supp. 2d 431, 437 (W.D.N.Y. 2010) (validating a federal law requiring states to decide for themselves the timing of certain special elections for the House); *supra* notes 34–35 and accompanying text (discussing *Foster’s* holding that federal election regulations trump state election regulations when they conflict with one another so long as the applicable federal regulation pertains to the times, places, or manner of holding elections for federal offices).

47. 256 U.S. 232 (1921), *abrogated by* *Burroughs & Cannon v. United States*, 290 U.S. 534 (1934).

48. *Id.* at 258. The Court concluded that “the fair intendment of the words [‘manner of holding elections’] does not extend so far” as to include authorizing congressional control over electoral processes that are distinct from the actual elections for federal offices. *Id.*

49. *See id.* at 268 (White, C.J., concurring) (explaining that this broad grant of authority was at the very heart of the debate at the time of the Framing).

50. 531 U.S. 510 (2001).

51. *Id.* at 523–24. The Court identified these procedural elements as, among other things, voter registration, vote counting, voter canvassing, and publishing election. *Id.*; *cf.* Vicki C. Jackson, *Cook v. Gralike: Easy Cases and Structural Reasoning*, 2001 SUP. CT. REV. 299, 310 (2002) (positing that the result of *Cook* would have been the same even without applying the Elections Clause to the questioned state law).

52. *See* U.S. CONST. art. I, § 3, cl. 1 (amended 1913) (emphasis added) (“The Senate of the United States shall be composed of two Senators from each State, *chosen by the Legislature thereof*, for six Years; and each Senator shall have one vote.”).

53. *See* U.S. CONST. amend. XVII (emphasis added) (“The Senate of the United States shall be composed of two Senators from each State, *elected by the people thereof*, for six years; and each Senator shall have one vote.”).

history of the Seventeenth Amendment, discuss case law interpreting certain provisions of the Amendment, and examine the reemergence of the direct election of Senators as a modern political issue.

1. *In the beginning: State legislatures' selection of U.S. Senators*

As originally drafted and ratified, Article I, Section 3 ensured states an integral role in the federal government by requiring each state legislature to directly select a state's delegation to the U.S. Senate.⁵⁴ The Framers' intent was that this structure would both guarantee states' active participation in the nascent republic⁵⁵ and, in contrast to the House of Representatives, insulate the Senate from the whims of a fickle populace.⁵⁶

This system faltered in the 1850s when the national tension leading up to the Civil War spilled over into the state legislatures' selection of Senators, causing several Senate seats to remain vacant for extended periods.⁵⁷ These problems continued and intensified after the Civil War,⁵⁸ eventually prompting Congress to pass a law in 1866 mandating how and when each state legislature needed to select its U.S. Senators.⁵⁹ Yet problems persisted, including widespread bribery and corruption.⁶⁰ Moreover, general deadlock continued in some

54. See RALPH A. ROSSUM, *FEDERALISM, THE SUPREME COURT, AND THE SEVENTEENTH AMENDMENT: THE IRONY OF CONSTITUTIONAL DEMOCRACY*, 93–94 (2001) (describing the Framers' vision of the Senate as being designed to protect states' autonomy); see also THE FEDERALIST NO. 62 (James Madison) (extolling the virtues of the constitutional framework for the Senate, including how its members were chosen).

55. See ROSSUM, *supra* note 54, at 96–100 (detailing how state legislatures' "instructions" to sitting Senators provided for the direct representation of state interests in the Senate).

56. See *Direct Election of Senators*, http://www.senate.gov/artandhistory/history/common/briefing/Direct_Election_Senators.htm, (last visited Nov. 14, 2011) [hereinafter *U.S. Senate webpage*] (suggesting that the impact of state legislatures' election of U.S. senators would be to insulate the senators from the temperamental general public).

57. *Id.* For instance, a conflict between Southern Democrats and Northern Republicans in Indiana left one of the state's Senate seats vacant for two years. *Id.* But see ROSSUM, *supra* note 54, at 181 (suggesting that the original method of selecting Senators worked well for the first hundred years after the ratification of the Constitution).

58. See *U.S. Senate webpage*, *supra* note 56 (noting the Civil War's exacerbating effect on the problems of filling Senate vacancies). Most notable among the various conflicts in state legislatures was the case of Senator John Stockton in New Jersey, whose Senate appointment was challenged because the New Jersey legislature "elected" him with only a plurality of the votes. See ROSSUM, *supra* note 54, at 185–86 (discussing the calamity that ensued in the Senate after New Jersey sent Stockton to the chamber, and its role in the body's intense debate surrounding civil rights for newly-freed slaves in the South).

59. See 14 Stat. 243 (1866) (requiring each chamber of state legislatures to meet on a prescribed day to fill a vacant U.S. Senate seat and to continue meeting every subsequent day until that seat was filled).

60. See *U.S. Senate webpage*, *supra* note 56 (noting that nine cases of bribery were

state legislatures,⁶¹ causing forty-five deadlocks and numerous delayed seatings in twenty different states from 1891 until 1905.⁶²

Proposed solutions for fixing the way Senators were appointed were as old as the problem itself.⁶³ However, the push for directly electing Senators did not gain substantial momentum until the latter part of the nineteenth century, when the Progressive movement adopted it as a *cause célèbre*.⁶⁴ Despite this popular demand for direct election of Senators,⁶⁵ Congress, especially the Senate, persistently resisted such a structural change.⁶⁶

Prompted by this lack of congressional action, some states acted independently to bring about direct election of their U.S. Senators.⁶⁷ By 1912, twenty-nine states had adopted a direct or quasi-direct method to elect their Senators.⁶⁸ As a result, the Senate gradually was filled with Senators who were beneficiaries of, and therefore supporters of, the direct election of all Senators.⁶⁹ Because of this, institutional support in Congress eventually shifted in favor of a national change in the process of electing U.S. Senators.⁷⁰

publicized between 1866 and 1906). *But see* C.H. HOEBEKE, THE ROAD TO MASS DEMOCRACY: ORIGINAL INTENT AND THE SEVENTEENTH AMENDMENT 180 (1995) (arguing that allegations of corruption were overblown because they were made against only fifteen out of the 1,180 Senators elected by state legislatures between 1789 and 1909).

61. *See* ROSSUM, *supra* note 54, at 187–90 (charting the instances of deadlock in state legislatures during that era).

62. *See U.S. Senate webpage, supra* note 56 (discussing how deadlocks and vacancies continued after Congress's 1866 attempt at reform and into the twentieth century). Delaware was home to perhaps the most egregious example of this deadlock. There, quarrels in the state legislature kept a Senate seat vacant for four years from 1899–1903. *Id.*

63. *See* ROSSUM, *supra* note 54, at 183 (stating that the first proposal for direct election of U.S. Senators was in 1826).

64. *See* HOEBEKE *supra* note 60, at 151–54 (characterizing the involvement of the Progressives in pushing for direct election of Senators, including efforts by such well-known Progressives as Wisconsin's Robert La Follette).

65. *See* ROSSUM, *supra* note 54, at 183 (suggesting that the public associated direct election of Senators with the overall goals of government reform, and that this prompted a strong call for change among the voting populace).

66. *See id.* at 183 (noting that, in total, Congress considered and rejected 187 direct election resolutions before approving the Seventeenth Amendment). The House actually passed six of those proposals before the Senate finally followed suit in 1912. *Id.*

67. *See U.S. Senate webpage, supra* note 56 (stating that Oregon led the way in adopting this approach, with Nebraska following several years later).

68. *Id.*

69. *See* HOEBEKE, *supra* note 60, at 149–50 (noting that, by 1909, states' efforts in instituting their own direct elections of Senators had "tilt[ed] the balance in the Senate" so that a majority of its members now supported direct election).

70. *See id.* at 157–61 (discussing how the pro-direct election Senators were able to subvert their opponents' stalling tactics by using parliamentary tools to assure that proposed constitutional amendments had hearings before Senate committees sympathetic to the goal of directly electing Senators).

2. *A major shift: The Seventeenth Amendment's legislative history*

In early 1911, Representative William Waller Rucker introduced House Joint Resolution 39 (H.J. Res. 39),⁷¹ a proposed constitutional amendment requiring the direct election of all U.S. Senators.⁷² In addition, H.J. Res. 39 contained a provision that would have eliminated Congress's Elections Clause authority over Senate elections.⁷³ After defeating an amendment that would have removed this provision,⁷⁴ the House of Representatives passed H.J. Res. 39 with the two-thirds majority required for a constitutional amendment.⁷⁵

Days later, the Senate began to consider H.J. Res. 39 by referring it to the Judiciary Committee.⁷⁶ Just months before, the Judiciary Committee considered a virtually identical constitutional proposal;⁷⁷ the Committee reported out that proposal favorably to the whole Senate.⁷⁸ In its Majority Report, the Committee discussed the reasons for, and advantages of, amending the Constitution in such a significant way.⁷⁹ A chief reason it cited was to unshackle state legislatures from the time-consuming (and often deadlock-producing) process of selecting Senators.⁸⁰ Similarly, the Majority Report found that direct election would end the frequent Senate vacancies that resulted from deadlocked legislatures.⁸¹ Additionally, the Report cited the possibility (and confirmed instances) of corruption during the selection of Senators as yet another reason to amend the then-existing process of legislative appointment.⁸² Finally, the Report concluded that direct election of Senators was the best way to further the goals of democratic representation and to align the Constitution with the era's prevailing public opinion, which

71. H.J. Res. 39, 62d Cong. (1911).

72. *Id.*

73. See ROSSUM, *supra* note 54, at 208–11 (noting that H.J. Res. 39 provided for “stipulated state control of elections”).

74. See *id.* at 211 (describing the parallels between Representative Horace Olin Young's proposed amendment and the Sutherland Amendment introduced in the 61st Congress, which left Congress's Elections Clause powers intact for Senate elections).

75. *Id.* at 211; see also U.S. CONST. art. V (detailing the process for amending the Constitution).

76. ROSSUM, *supra* note 54, at 211.

77. S.J. Res. 134, 61st Cong. (1911).

78. S. REP. NO. 61-961 (1911).

79. *Id.* at 13–15.

80. See *id.* at 13 (speculating that states would be freer to take up the important business of state governance if unburdened with the task of selecting U.S. Senators).

81. See *id.* (noting that over a dozen Senate seats had been left vacant over the past two decades due to deadlocked legislatures).

82. See *id.* at 14 (positing that direct elections are easier to keep free from corruption than the process of having legislatures select U.S. Senators).

overwhelmingly favored popular election of Senators.⁸³

One aspect of the resolution not discussed in the Majority Report, however, was the provision that would have stripped Congress of its Elections Clause powers in the arena of Senate elections.⁸⁴ A minority of Senate Judiciary Committee members strongly objected to this change and issued their own Report five months after the Committee published the Majority Report.⁸⁵ The Minority Report noted that altering the Elections Clause would mark a significant change to the constitutional structure envisioned by the Framers.⁸⁶ The Minority Report found this change to be untenable and unwise, fearing that it would result in a severe abrogation of federal power over federal elections.⁸⁷

Accordingly, before the Senate considered H.J. Res. 39, Senator Joseph Bristow offered a substitute resolution that omitted the Elections Clause reference contained in the House version.⁸⁸ A block of Southern Senators opposed the omission, citing concerns over federal control of Senate elections.⁸⁹ However, the Senate ultimately passed the Bristow Amendment, but only after the Vice President—acting in his constitutional role as President of the Senate⁹⁰—cast a tie-breaking vote in its favor.⁹¹ Later the same day, the amended resolution passed the Senate with the requisite two-thirds majority vote.⁹²

Because the Senate passed an amended resolution, the issue returned to the House,⁹³ where debate raged on about whether states or the federal government should have the final word in regulating

83. *See id.* at 14–15 (arguing that support for popular election was “almost unanimous”).

84. *See generally* S. REP. NO. 61-961 (1911) (omitting any reference to the proposal’s Elections Clause ramifications).

85. *See* S. REP. NO. 62-35 (1911) (dissenting from the Committee’s Majority Report as to the clause granting exclusive elections regulation power over Senate elections to the states).

86. *See id.* at 2 (asserting that, had the original Constitution called for direct election of Senators, it also would have extended Congress’s Elections Clause authority to those elections).

87. *See id.* at 2–4 (finding that altering the Elections Clause was unnecessary to achieve the goals of direct Senate elections and that maintaining federal oversight of all elections was more important than changing how Senators were elected).

88. ROSSUM, *supra* note 54, at 211.

89. *Id.*

90. *See* U.S. CONST., art. I, § 3 (explaining that the Vice President serves as the President of the Senate, but that he may cast a vote only when it is necessary to break a tie).

91. ROSSUM, *supra* note 54, at 211.

92. *Id.*

93. *See* U.S. CONST. art. I, § 7 (setting forth the process by which a bill becomes a law).

Senate elections.⁹⁴ On a party-line vote pitting the Northern Republicans, who favored federal control, against the Southern Democrats, who advocated for “states’ rights,” the House rejected the Bristow Amendment.⁹⁵ This created the need for a Conference Committee to reconcile the differences between the House and Senate versions of the proposed amendment.⁹⁶

For nearly a year, the Conference Committee was unable to reach an agreement.⁹⁷ Frustrated by this lack of progress, the Senate urged the House to accept the Bristow Amendment.⁹⁸ By this time, even Representative Rucker, the author of the original H.J. Res. 39 that granted states exclusive regulatory power over Senate elections, urged his House colleagues to support the Bristow Amendment.⁹⁹ Still, the Southern Democrats in the House continued to vehemently protest this change, even offering their own last-minute amendment to keep the federal government out of Senate elections.¹⁰⁰ That amendment failed when many members of Congress, who were sympathetic to the Southern Democrats’ views, concluded that the Bristow Amendment was the only way to bring about the direct election of Senators, a goal these members were not willing to sacrifice.¹⁰¹ Consequently, the House of Representatives passed the Bristow Amendment with a two-thirds majority on May 13, 1912, preserving federal oversight of Senate elections and giving the Amendment the necessary majority in both chambers of Congress.¹⁰²

Per Article V of the U.S. Constitution, the support of three-fourths of the states was next required to ratify the proposal.¹⁰³ This process happened exceedingly fast,¹⁰⁴ and, with Connecticut’s vote to ratify,

94. See ROSSUM, *supra* note 54, at 212 (providing examples of both positions).

95. See *id.* (noting that the final tally was 171–111 against the Bristow Amendment).

96. See *id.* (discussing the process by which the Vice President, serving as President of the Senate, appointed conferees to a special Conference Committee tasked with reconciling the differences between the House and Senate versions of the prospective constitutional amendment).

97. See HOEBEKE, *supra* note 60, at 189 (explaining that Congress was deadlocked for eleven months after the Senate passed the Bristow Amendment).

98. See *id.* (stating that the Senate “resisted the temptation to reverse itself,” instead opting to “[weary] the House into submission”).

99. ROSSUM, *supra* note 54, at 213.

100. See *id.* (detailing Representative Charles Bartlett’s amendment, which would have set strict limits on how Congress could regulate Senate elections).

101. See *id.* (noting that Representative Bartlett’s amendment failed 189 to 89).

102. See *id.* at 213–14 (The Bristow Amendment passed the House 238 to 39.).

103. U.S. CONST. art. V.

104. See ROSSUM, *supra* note 54, at 214 (noting the Seventeenth Amendment’s ratification took less than eleven months; only the Twelfth Amendment had been approved quicker). The Twenty-Sixth Amendment eclipsed the Seventeenth Amendment’s record-setting pace by securing ratification in just under four months.

the Seventeenth Amendment was officially enshrined in the U.S. Constitution on April 8, 1913.¹⁰⁵

3. *The states' remaining power in the selection of U.S. Senators: The Seventeenth Amendment's vacancy-filling clause*

In addition to compelling the direct election of Senators, the Seventeenth Amendment also prescribes how Senate vacancies are to be filled.¹⁰⁶ In its 2010 decision in *Judge v. Quinn*,¹⁰⁷ the United States Court of Appeals for the Seventh Circuit labeled and defined the various parts of the Seventeenth Amendment's vacancy-filling language: the principal clause, which outlines the basic method for filling Senate vacancies; the proviso, which allows for temporary Senate appointments until a direct election can be held; and the "as the legislature may direct" clause, which modifies the term "election" in the proviso.¹⁰⁸ To facilitate easier understanding, this Comment will adopt the Seventh Circuit's labels.

a. *Vacancy-Filling: The principal clause*

The principal clause of the vacancy-filling language states that "[w]hen vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies."¹⁰⁹ The first part of that clause is simply conditional, meaning that a Senate seat must first become vacant for the rest of the clause to have any effect.¹¹⁰

The second part of the principal clause articulates the result of that condition.¹¹¹ It compels governors to issue writs of election so that the vacant seat will be filled through a direct vote of the people.¹¹² The use of the word "shall" in the Amendment means that this clause imposes a mandatory obligation on governors.¹¹³

Id. at 229 n.143.

105. *Id.* at 214. Interestingly, Delaware initially voted against ratification of the Seventeenth Amendment. See HOEBEKE, *supra* note 60, at 189 (noting that only Delaware and Utah rejected the Amendment). However, the Delaware Legislature reversed course in 2010, finally ratifying the Amendment some ninety-seven years later. Doug Denison, *Senate Takes Up 17th Amendment, Finally*, DOVER POST (June 24, 2010, 5:06 PM), <http://www.doverpost.com/newsnow/x41604488/Senate-takes-up-17th-amendment-finally>.

106. U.S. CONST. amend. XVII, para. 2.

107. 612 F.3d 537 (7th Cir. 2010), *cert. denied*, 131 S. Ct. 2958 (2011).

108. *Id.* at 547–51.

109. U.S. CONST. amend. XVII, para. 2.

110. *Judge*, 612 F.3d at 547.

111. See *id.* (describing the chain of events triggered when the condition is met).

112. U.S. CONST. amend. XVII, para. 2.

113. See *Judge*, 612 F.3d at 547 (discussing the plain meaning of "shall"). An earlier Seventh Circuit decision concluded that the language in Article I, Section 2,

b. Vacancy-Filling: The proviso

A proviso acts as an exception to a general rule.¹¹⁴ The Seventeenth Amendment's proviso immediately follows its principal clause: “*Provided*, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.”¹¹⁵ As a proviso, this language acts as a limited exception to the general vacancy-filling procedures outlined in the principal clause by allowing state governors to temporarily fill a Senate seat until a direct election can be held.¹¹⁶

Taken together, then, the principal clause and proviso establish the following sequence when a Senate seat is vacated: (1) a state's governor issues a writ of election; (2) the governor, if authorized by state law, may temporarily appoint someone to fill the vacant Senate seat until an election can be held; and (3) the state holds a popular vote to permanently fill the vacancy.¹¹⁷

However, the proviso concludes with a modifying clause¹¹⁸—“as the legislature may direct.”¹¹⁹ The Seventh Circuit's first *Judge* opinion found that the phrase only modified the word “election,” which immediately precedes it.¹²⁰ However, it is unclear whether this five-word clause also affected Congress's Elections Clause authority. A thorough analysis of that question follows in Part III.¹²¹

4. Interpreting the Seventeenth Amendment

Within eight years of its ratification, the Supreme Court tackled the

which uses the term “shall,” was “mandatory according to the ordinary meaning of its terms . . . render[ing] the issuing of the writs an indispensable duty.” *Jackson v. Ogilvie*, 426 F.2d 1333, 1336 (7th Cir. 1970). The Seventh Circuit also noted that the vacancy-filling language in the Seventeenth Amendment rendered the Senate and House vacancy-filling procedures “functionally identical.” *Judge*, 612 F.3d at 547. *But see* *Valenti v. Rockefeller*, 292 F. Supp. 851, 863 (S.D.N.Y. 1968), *aff'd*, 393 U.S. 1124 (1969) (per curiam) (holding that “the House vacancy provision can give us no aid in construing the Seventeenth Amendment”).

114. See LINDA D. JELLUM, *MASTERING STATUTORY INTERPRETATION* 136 (2008) (stating that provisos “limit the effect of a statutory provision”).

115. U.S. CONST. amend. XVII, ¶ 2 (emphasis in original).

116. See *Judge*, 612 F.3d at 547–48 (discussing governors' temporary appointment power under the Seventeenth Amendment).

117. *Id.* at 554.

118. See *id.* at 549 (attempting to discern what part of the Seventeenth Amendment the phrase “as the legislature may direct” modifies).

119. U.S. CONST. amend. XVII, ¶ 2.

120. See *Judge*, 612 F.3d at 550 (holding that the phrase is “best read” in this narrow way). In doing so, the court followed the rule of the last antecedent, which compels judges to find that limiting clauses, such as “as the legislature may direct,” only narrowly modify the word or phrase that they immediately follow. *Id.*

121. See *infra* Part II.B (concluding that Congress can, in fact, regulate special Senate elections pursuant to its Elections Clause authority).

Seventeenth Amendment in *Newberry v. United States*.¹²² There, the Court considered whether an anti-corruption statute that placed certain campaign spending limits on prospective federal candidates was a valid “manner” regulation under the Elections Clause.¹²³ In reaching its decision in *Newberry*, the Court reiterated that the Elections Clause was the source of Congress’s elections authority.¹²⁴ Further, the Court held that the Seventeenth Amendment had not altered the previously-accepted constitutional definition of “election”¹²⁵ and that the Elections Clause remained “intact and applicable” to Senate elections.¹²⁶

The Court also noted that a provision altering the Elections Clause was present when the Senate Judiciary Committee first reported out the bill that would become the Seventeenth Amendment.¹²⁷ However, that language was excluded from the final version passed by Congress and ratified by the states.¹²⁸ Because of this omission, the Court concluded that Congress both considered and rejected the notion of granting states exclusive authority to regulate Senate elections.¹²⁹

In the 1968 case *Valenti v. Rockefeller*,¹³⁰ a federal district court analyzed the Seventeenth Amendment’s vacancy-filling provisions.¹³¹ In *Valenti*, several New York voters sued the Governor in the aftermath of the assassination of Senator Robert F. Kennedy.¹³² These voters argued that the Seventeenth Amendment required the Senate vacancy created by Senator Kennedy’s death to be filled through a popular vote in the November 1968 general election.¹³³ A contrary

122. 256 U.S. 232 (1921).

123. *Id.* at 247.

124. *Id.* at 248.

125. *See id.* at 250 (defining an “election” as the “final choice of an officer by the duly qualified electors”).

126. *Id.* at 252 (citing 46 CONG. REC. 848 (1911)).

127. *See id.* (citing S.J. Res. 134, 61st Cong. (1911)) (noting that the original legislation included the phrase “[t]he times, places and manner of holding elections for Senators shall be as prescribed in each state by the Legislature thereof”). The Court stated that the “avowed purpose” of such language was to halt Congress’s power to regulate Senate elections. *Id.*

128. *See id.* at 253 (discussing how the pertinent language was removed upon the recommendation of a minority of members of the Senate Judiciary Committee).

129. *See id.* at 253–54 (suggesting that the omission of the original language that would have given sole authority to the states was indicative of Congress’s intent to leave the Elections Clause’s authority in place for Senate elections). For a more detailed discussion of this legislative history, *see supra* Part I.C.2.

130. 292 F. Supp. 851 (S.D.N.Y. 1968), *aff’d*, 393 U.S. 1124 (1969) (per curiam).

131. *See id.* at 862 (stating that the court was “mindful that no court [had] previously construed the Amendment’s vacancy provision”).

132. *Id.* at 853.

133. *Id.*

state statute set November 1970 as the appropriate date for a popular election to fill that vacancy.¹³⁴ Until that date, New York law allowed the Governor to temporarily appoint someone to the Senate.¹³⁵ The plaintiffs argued that the two-year delay in holding a Senate election was not a “temporary appointment” as required by the Seventeenth Amendment.¹³⁶

The court disagreed, holding that New York’s vacancy-filling law was within “the discretion conferred on the states by the Seventeenth Amendment with respect to the timing of vacancy elections.”¹³⁷ The court grounded its decision in an Elections Clause analysis, finding that New York’s law was a permissible exercise of states’ initial “[t]imes, [p]laces, and [m]anner” authority under that provision.¹³⁸ Furthermore, the court held that the Seventeenth Amendment left the Elections Clause unaltered as to vacancy-filling elections.¹³⁹ In a per curiam decision, the Supreme Court unanimously upheld the lower court’s ruling in *Valenti*.¹⁴⁰

In the early 1990s, the United States Court of Appeals for the Third Circuit analyzed the Seventeenth Amendment in *Trinsey v. Pennsylvania*.¹⁴¹ Like *Valenti*, this case followed the tragic death of a sitting Senator.¹⁴² A prospective candidate for that then-vacant Senate seat sued the state’s Governor, asserting that Pennsylvania’s law allowing political parties—rather than a popular vote—to nominate Senate candidates violated his Seventeenth Amendment rights.¹⁴³

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* at 854.

138. *See id.* at 856 (discussing how a “natural reading” of the Seventeenth Amendment compels an application of the Elections Clause).

139. *See id.* (commenting that had the drafters of the Amendment wanted to radically alter the Election Clause’s application to vacancy-filling elections, they would have applied the same type of clear language used to change how Senators were elected). *But see id.* at 862 (suggesting that the Seventeenth Amendment left discretion over vacancy-filling election procedures solely to the states). Notably, this would be a stark departure from the traditional understanding of the Elections Clause, which courts have found to be a default provision granting states regulatory authority over elections only insofar as Congress has declined to act. *See, e.g., Foster v. Love*, 522 U.S. 67, 69 (1997) (noting Congress’s preemptory power under the Elections Clause).

140. *Valenti v. Rockefeller*, 393 U.S. 405 (1969) (per curiam).

141. 941 F.2d 224 (3rd Cir. 1991). This case has been discussed extensively in scholarly work. *See, e.g.,* Kevin M. Gold, *Trinsey v. Pennsylvania: State Discretion to Regulate United States Senate Vacancy Elections and the Standards for Judicial Scrutiny*, 2 WIDENER J. PUB. L. 199, 212–18 (1992–1993) (analyzing the impact of the *Trinsey* decision on state Senate vacancy-filling laws).

142. *See Trinsey*, 941 F.2d at 225 (discussing how Senator John Heinz died in a plane crash in early 1991).

143. *Id.* at 226.

The court disagreed, finding that the Seventeenth Amendment did not require states to hold primary elections before a general election to fill a Senate vacancy.¹⁴⁴

To reach this conclusion, the court considered the Seventeenth Amendment's legislative history but found that it lacked significant discussion about the Amendment's vacancy-filling provision.¹⁴⁵ Consequently, the court turned to precedent, including *Valenti*, to infer that the Seventeenth Amendment left states the discretion to determine the electoral procedures for filling Senate vacancies.¹⁴⁶ Furthermore, the court noted that the vacancy-filling provision in the Seventeenth Amendment twice referred to state legislatures, indicating Congress's intent to allow states to determine how they fill Senate vacancies.¹⁴⁷ Accordingly, the Third Circuit upheld Pennsylvania's law.¹⁴⁸

The recent Rod Blagojevich fiasco in Illinois brought the Seventeenth Amendment back to federal court in 2010. In its first *Judge* opinion, the Seventh Circuit considered whether the Seventeenth Amendment required Illinois's Governor to issue writs of election to fill a Senate vacancy, or whether state law mandating the precise date of a special Senate election was sufficient to meet the commands of the Amendment.¹⁴⁹ In deciding that question, the court extensively examined the Seventeenth Amendment's vacancy-filling provision.¹⁵⁰

144. *Id.* at 234.

145. *See id.* at 231 (noting the court's surprise at the comparative lack of legislative history pertaining to sudden vacancies, which provided "no guidance . . . as to the course to be followed in the present circumstance").

146. *See id.* at 233 (citing *Valenti v. Rockefeller*, 292 F. Supp. 851, 866 (S.D.N.Y. 1968)) (insisting that "as the legislature may direct" was clear evidence that the drafters of the Seventeenth Amendment intended to let states choose their own vacancy-filling elections procedures).

147. *See id.* at 234 (speculating that even though certain lawmakers failed in their attempts to overturn Congress's general Election Clause authority, the Seventeenth Amendment's emphasis on state legislatures in its vacancy-filling provision is "dispositive" evidence that states are empowered as regulators of special Senate elections). However, this language was used only to justify the court's finding that legislatures, not governors, had the ultimate authority to enact a statute providing for temporary Senate appointments if a vacancy occurred. *See id.* (discussing the role legislatures play in empowering governors to temporarily appoint someone to the Senate).

148. *Id.* at 236.

149. *See Judge v. Quinn*, 612 F.3d 537, 543 (7th Cir. 2010) (concluding that the plaintiffs had preserved their right to appeal whether it was constitutionally required for Illinois Governor Pat Quinn to issue writs of election for the state's pending Senate vacancy, and if so, whether he was required to hold that election on the earliest date possible), *cert. denied*, 131 S. Ct. 2958 (2011).

150. *Id.* at 547-55; *see also supra* Part I.C.3 (outlining the structure and labels adopted by the Seventh Circuit).

Through this exhaustive look into the Amendment, the court found that, *inter alia*, states' power to regulate special Senate elections was still rooted in, and limited by, the Elections Clause.¹⁵¹ Thus, the court found that the Seventeenth Amendment "was not intended to change the Elections Clause of the original Constitution."¹⁵² Therefore, the Seventeenth Amendment, in concert with the Elections Clause, requires that states enact procedures for vacancy-filling Senate elections.¹⁵³ In Illinois, the legislature met its Seventeenth Amendment obligations by mandating a specific election day for any vacancy-filling Senate elections;¹⁵⁴ however, the Seventh Circuit also found that the Governor was required to issue formal writs of election to meet his obligations under the Amendment.¹⁵⁵

The Seventh Circuit quickly reaffirmed this ruling in the subsequent case of *Judge v. Quinn*,¹⁵⁶ in which Roland Burris challenged a district court-ordered permanent injunction—issued in response to the Seventh Circuit's ruling in the first *Judge v. Quinn*—compelling Illinois to hold a special Senate election on a specified date.¹⁵⁷ Senator Burris asserted that Illinois state law violated his constitutional rights by excluding his name from the ballot in the primary election to determine candidates in the 2010 Senate general election.¹⁵⁸ With little discussion, the court found that the Illinois law was within the permissible realm of state action authorized by the Seventeenth Amendment and the Elections Clause, a result consistent with its previous ruling on the district court's injunction.¹⁵⁹

151. See *Judge*, 612 F.3d at 550 (noting that the Seventeenth Amendment is not the only source of state authority to promulgate rules for filling Senate vacancies; instead, the Elections Clause lays the foundation for all elections regulations).

152. See *id.* at 552–53 (noting that because the Seventeenth Amendment was added to the Constitution after the Elections Clause, it could have expressly modified that earlier provision).

153. See *id.* at 554 (summarizing states' obligations under the Elections Clause).

154. See *id.* at 541 (affirming the district court's denial of the plaintiffs' requested injunction).

155. See *id.* at 554–55 (clarifying that even if he lacked any discretion over when to hold a special election, the Governor was required to issue writs of election because they gave formal notice to voters, set the electoral process in motion, and ensured that the special election would actually occur on the prescribed day).

156. *Judge v. Quinn*, 624 F.3d 352, 354 (7th Cir. 2010).

157. *Id.*

158. See *id.* at 360–61 (noting that Roland Burris failed to support his claim that his non-appearance on the ballot was an actionable constitutional violation).

159. See *id.* at 359 (discerning that the phrase "as the legislature may direct" and the Elections Clause connote ample discretion upon states to enact election regulations like the disputed Illinois law).

5. *Debate over the Seventeenth Amendment today*

Nearly a century after ratification, the controversy concerning certain provisions of the Seventeenth Amendment has reemerged as a hotly-debated political topic.¹⁶⁰ This surprising renaissance includes debate over two distinct provisions of the Amendment. First, the conservative-leaning Tea Party movement has called for a return to the era of state legislatures selecting U.S. Senators. Second, embarrassing political scandals and the fear of a mass-casualty terrorist attack wiping out large numbers of elected officials has prompted general concern over how Senate vacancies are filled. Both issues are discussed below.

a. The Tea Party's push to repeal the Seventeenth Amendment

In early 2009, a conservative political movement called the "Tea Party" emerged on the national political stage.¹⁶¹ Among other goals,¹⁶² the Tea Party generally supports what it believes is a strict adherence to the structure of federalism outlined in the Constitution, which Tea Party supporters assert only delegates limited enumerated powers to the federal government and leaves everything else to the discretion of the states.¹⁶³ During the 2010 election season, some Tea Party supporters used this "states' rights" platform to call for the repeal of the Seventeenth Amendment.¹⁶⁴ At least two Tea Party-backed congressional candidates pledged to support repeal if

160. See Matt Bai, *Tea Party's Push on Senate Election Exposes Limits*, N.Y. TIMES, June 2, 2010, at A4 (noting that this once-dormant issue made a surprising return to the political debates in 2010 congressional campaigns).

161. See Lexington, *Anger Management: Some Americans are Getting Mad as Hell*, THE ECONOMIST, Mar. 7, 2009, at 42 (discussing both how the Tea Party was, in part, spawned after an on-air rant from a "previously obscure [television] journalist," and how anger over perceived "bail out[s]" of certain American industries, like banking and automobile manufacturing, formed the basis of the Tea Party's political ideology).

162. See Russell Berman, *Gallup: Tea Party's top concerns are debt, size of government*, THE HILL (July 5, 2010, 5:45 PM), <http://thehill.com/blogs/blog-briefing-room/news/107193-gallup-tea-partys-top-concerns-are-debt-size-of-government> (showcasing poll results that found Tea Party supporters primarily were concerned about the federal budget deficit and the size of the federal government).

163. See Kirk Johnson, *States' Rights is Rallying Cry of Lawmakers*, N.Y. TIMES, Mar. 17, 2010, at A1 (noting how some groups in the Tea Party movement are pressuring lawmakers to support bills that these groups believe reflect the limited role of federal government required by the Tenth Amendment and other constitutional provisions).

164. See Evan McMorris-Santoro, *Tea Party-Backed Repeal of the 17th Amendment Gets Republicans Into Trouble*, TALKING POINTS MEMO (May 14, 2010, 4:13 PM), <http://tpmdc.talkingpointsmemo.com/2010/05/tea-party-call-to-repeal-the-17th-amendment-causing-problems-for-gop-candidates.php> (describing proponents of repeal as "a vocal part" of the Tea Party movement, who believe repeal would maximize individual and state liberty).

elected.¹⁶⁵ A sitting Republican member of Congress with ties to the Tea Party movement even introduced legislation calling for a constitutional convention to strike the Seventeenth Amendment and to restore to state legislatures the function of voting for Senators.¹⁶⁶

Supporters of repeal believe the Seventeenth Amendment has usurped the Framers' intent that the states have an integral part in the functioning of the federal government.¹⁶⁷ In the opinion of many affiliated with the Tea Party, the direct election of Senators has given Congress unfettered power over the states, which consequently has left states vulnerable to federal action, such as unfunded mandates.¹⁶⁸

Conversely, supporters of the Seventeenth Amendment have suggested that the Tea Party is too quick to dismiss the motivations behind the initial ratification of the Amendment, namely corruption and deadlock in state legislatures.¹⁶⁹ These supporters argue that special interest groups will gain undue influence over Senators if the selection process is returned to state legislatures.¹⁷⁰ Although calls for repeal remained an ancillary issue during the 2010 election cycle, the relative success of Tea Party-backed candidates in the 2010 midterm elections¹⁷¹ likely means that states' rights, possibly including a

165. See *id.* (identifying Republicans Steve Stivers and Vaughn Ward as congressional candidates who, at least initially, supported repeal of the Seventeenth Amendment).

166. See Eric Kleefeld, *Gohmert: Fight Health Care Bill by Repealing Popular Election of Senators*, TALKING POINTS MEMO (Mar. 23, 2010, 2:21 PM), <http://tpmdc.talkingpointsmemo.com/2010/03/gohmert-fight-health-care-bill-by-repealing-popular-election-of-senators-video.php> (reporting on Representative Louie Gohmert's plan to return Senate elections to the pre-1913 model).

167. See McMorris-Santoro, *supra* note 164 (summarizing repeal supporters' belief that popular election of Senators has undermined the notion of limited federal government by depriving states of the power to protect their interests in Washington).

168. See Bai, *supra* note 160 (distilling the general pro-federalism argument espoused by advocates of repealing the Seventeenth Amendment); see also *Tea Party's Target Not Just the 17th Amendment, Add 14th as Well*, AM. CONSTITUTION SOC'Y BLOG (June 7, 2010), <http://www.acslaw.org/acsblog/tea-party's-target-not-just-the-17th-amendment-add-14th-as-well> (noting that the Tea Party's states' rights platform has also targeted reform, or repeal, of the Fourteenth Amendment, especially as it pertains to birthright citizenship).

169. John A. Farrell, *The Stupidest Tea Party Idea: Repeal the 17th Amendment*, U.S. NEWS & WORLD REPORT THOMAS JEFFERSON ST. BLOG (June 1, 2010), <http://www.usnews.com/opinion/blogs/john-farrell/2010/6/1/tea-party-goes-overboard-by-suggesting-to-repeal-17th-amendment.html> (synthesizing the Progressive Era arguments in support of ratifying the Seventeenth Amendment in 1913).

170. See *id.* (arguing that the robber barons and party machines of the late-nineteenth and early-twentieth centuries will reemerge in modern forms if state legislatures are again entrusted with a key role in shaping who serves in Congress).

171. Five candidates affiliated with Tea Party groups won seats to the U.S. Senate in 2010; over forty Tea Party-supported candidates were elected to the House of Representatives. Alexandra Moe, *Just 32% of Tea Party Candidates Win*, MSNBC FIRST READ (Nov. 3, 2010, 4:34 PM), http://firstread.msnbc.msn.com/_news/2010/

renewed push to repeal the Seventeenth Amendment, will remain a contentious political topic for the foreseeable future.

b. Current issues surrounding U.S. Senate vacancies

Beyond the general debate over whether states or the people should elect U.S. Senators, a particularized debate over what should happen when those Senate seats become vacant also exists. In part, this debate focuses on continuity of government principles, which deal with how the United States government would continue to function in the event of a major catastrophe that causes mass casualties among elected officials.¹⁷² Since the terrorist attacks of September 11, 2001, government officials have been especially concerned with this type of contingency planning.¹⁷³ In fact, these concerns prompted federal legislation that outlined how vacancies in the House of Representatives were to be filled in special circumstances, such as a terrorist attack.¹⁷⁴ However, Congress has yet to pass a similar measure for filling Senate vacancies after a mass casualty event.¹⁷⁵ Accordingly, it seems likely that Congress will one day attempt to address this potential deficiency in the federal continuity of government plan.

Terrorism concerns notwithstanding, several high-profile Senate

11/03/5403120-just-32-of-tea-party-candidates-win.

172. See generally About the Commission, CONTINUITY OF GOV'T COMM'N, <http://www.continuityofgovernment.org/about/about.html> (last visited Nov. 14, 2011) (noting the Commission studies how to maintain the operations of all three federal branches of government in the event of a major terrorist attack, natural disaster, or some other catastrophe).

173. See William M. Arkin, *Back to the Bunker . . . Or, How Washington Learned to Love the Shelter All Over Again*, WASH. POST, June 4, 2006, at B1 (discussing the federal government's largest-ever continuity of government drill, which was planned and executed because of post-9/11 concern over how the federal government would respond to mass casualties in an age of global terrorism).

174. See Michael Stern, *The Constitutionality of the ELECT Act*, POINT OF ORDER BLOG (Mar. 14, 2009, 5:13 PM), <http://www.pointoforder.com/2009/03/14/the-constitutionality-of-the-elect-act/> (discussing the vacancy-filling mechanisms in 2 U.S.C. § 8 (2006), which provided special rules for House elections held under "extraordinary circumstances").

175. The authority for 2 U.S.C. § 8, the House mass-casualty provision, is clearly grounded in the Elections Clause. See *id.* (identifying the constitutional basis for the legislation). However, because of the adoption of the Seventeenth Amendment, many lawmakers seem unsure of the constitutionality of similar federal legislation to address potential mass casualties among Senators. See Vikram David Amar & Michael Schaps, *The Proposal to End Gubernatorial Appointments of Replacement Senators: Reform in This Area May Be Needed, But the Feingold Constitutional Amendment Needs More Thought*, FINDLAW (Mar. 13, 2009), <http://writ.news.findlaw.com/amar/20090313.html> [hereinafter Amar & Schaps] (suggesting that questions persist over whether the Seventeenth Amendment precludes Congress from exercising its Elections Clause authority over special Senate elections); see also *infra* Part II.C.3 (analyzing the answer to those questions).

vacancies have generated national headlines in recent years. The 2008 election of President Barack Obama and Vice President Joseph Biden, along with President Obama's appointment of several Cabinet secretaries, created four Senate vacancies in a matter of weeks.¹⁷⁶ Less than a year later, Massachusetts Senator Edward Kennedy's death created another high-profile vacancy.¹⁷⁷

Each of these vacancies had a unique subtext. In Delaware, the Governor appointed Ted Kaufmann, a former staff member to Vice President Biden, to the Senate.¹⁷⁸ At the time, political observers viewed Kaufman as a "seat warmer" who merely would hold Vice President Biden's old seat until his son, Beau Biden, could run for a full term in 2010.¹⁷⁹ In Colorado, the Governor appointed Michael Bennet, who was criticized because he had never before run for any public office.¹⁸⁰ In New York, prominent media figures accused Governor David Paterson of "dithering"¹⁸¹ and acting "peculiar"¹⁸² during the process that ultimately resulted in Kirsten Gillibrand's

176. See Editorial, *How Not to Pick a Senator*, WASH. POST, Jan. 24, 2009, at A12 (listing the Senate vacancies proximately caused by President Obama's election). Following the 2008 election, Illinois (vacated by Obama), Delaware (vacated by Biden), New York (vacated by Hillary Clinton when she was appointed Secretary of State), and Colorado (vacated by Ken Salazar when he was appointed Secretary of the Interior) all experienced sudden Senate vacancies. *Id.*

177. See John M. Broder, *Causes Defined Him, Even at End*, at 77, N.Y. TIMES, Aug. 27, 2009, at A1 (noting Senator Kennedy's passing after a long struggle with brain cancer).

178. See Kate Phillips, *Biden's Replacement Sworn In to the Senate*, N.Y. TIMES CAUCUS BLOG (Jan. 16, 2009, 12:21 PM), <http://thecaucus.blogs.nytimes.com/2009/01/16/bidens-replacement-sworn-in> (discussing Kaufman's official start to his brief Senate career).

179. See Will Robinson, *Duke Alumnus Picked for Biden's Senate Seat*, CBS NEWS (Feb. 11, 2009), <http://www.cbsnews.com/stories/2008/11/26/politics/uwire/main4633986.shtml> (noting that Kaufman announced he would not seek election to the full Senate term in 2010, prompting speculation that he was keeping the seat warm for Beau Biden). *But see* Charles Mathesian, *Beau Biden declines Senate Bid*, POLITICO (Jan. 25, 2010, 9:45 AM), <http://www.politico.com/news/stories/0110/31952.html> (reporting that Beau Biden opted not to run for his father's old Senate seat in 2010).

180. See Steven K. Paulson, *Michael Bennet Appointed Colorado Senator, Will Replace Ken Salazar*, HUFFINGTON POST (Jan. 3, 2009, 8:59 PM), http://www.huffingtonpost.com/2009/01/03/michael-bennet-appointed-_n_155009.html (discussing Colorado Governor Bill Ritter's surprising choice of a "dark horse candidate" lacking legislative or campaigning experience).

181. See Maureen Dowd, *Which Governor is Wackier?*, N.Y. TIMES, Jan. 25, 2009, at WK11 (accusing Governor Paterson of taking too long and changing his mind too frequently during the Senate appointment process, which included, in Dowd's opinion, his poor handling of the prospective appointment of Caroline Kennedy to the vacant seat).

182. See Chris Smith, *The Zany Adventures of (Senator) Caroline Kennedy*, N.Y. MAGAZINE (Feb. 2, 2009), at 16 (criticizing Governor Paterson for the way in which he filled Hillary Clinton's vacant Senate seat).

appointment to the Senate.¹⁸³ In Massachusetts, Republican Scott Brown's surprising special election win marked the national emergence of the Tea Party movement.¹⁸⁴ The saga of disgraced ex-Governor Rod Blagojevich in Illinois, however, is likely to remain the most infamous and egregious example of the problems surrounding how Senate vacancies are currently filled.¹⁸⁵

Motivated in part because of this noteworthy string of recent Senate vacancies, federal lawmakers recently introduced legislation addressing this issue.¹⁸⁶ On January 29, 2009, Senators Russell Feingold, Mark Begich, and John McCain proposed a constitutional amendment to create a uniform national method for filling Senate vacancies.¹⁸⁷ The proposed amendment would prevent all gubernatorial appointments to the Senate, instead requiring all sitting Senators to be elected directly by the people.¹⁸⁸

Just days later, Representative Aaron Schock introduced a bill designed to tackle the Senate vacancies problem without taking the drastic step to amend the U.S. Constitution.¹⁸⁹ Unlike the Senators' proposed amendment, the ELECT Act would still allow state governors to make temporary Senate appointments, but it would mandate that special vacancy-filling elections occur within ninety days of a seat vacancy.¹⁹⁰ In addition, the ELECT Act would provide federal funding to a state to mitigate its financial burden in holding prompt special elections.¹⁹¹

183. See Nicholas Sabloff, *Kirsten Gillibrand: New York's Next Senator*, HUFFINGTON POST, (Jan. 22, 2009, 8:16 PM), http://www.huffingtonpost.com/2009/01/22/kirsten-gillibrand-new-yo_n_160195.html (noting how Governor Paterson settled on a sitting member of New York's delegation to the House of Representatives to replace Hillary Clinton in the Senate).

184. See Charles Krauthammer, *The Meaning of Brown*, WASH. POST, Jan. 22, 2010, at A21 (opining that the Brown Senate election victory reflected the national power of the Tea Party to shape campaigns and to drive voter turnout).

185. See *supra* notes 1–6 and accompanying text (chronicling the events in Illinois after Barack Obama vacated his Senate seat).

186. See, e.g., S.J. Res. 7 and H.J. Res. 21: *A Constitutional Amendment Concerning Senate Vacancies: Joint Hearing Before the S. Subcomm. on the Constitution and the H. Subcomm. on the Constitution, Civil Rights, and Civil Liberties*, 111th Cong. 12-13 (2009) (written testimony of Rep. Aaron Schock) (suggesting that he was motivated to propose federal legislation creating a uniform process for filling Senate vacancies because the current system is "riddled with the possibility of fraud, abuse, and outright bribery," which he saw firsthand in his home state of Illinois during the Blagojevich saga).

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

188. *Id.*

189. Compare *id.* (proposing a constitutional amendment to address the problem of Senate vacancies), with H.R. 899, 111th Cong. (2009) (proposing a legislative, rather than constitutional, solution to the problem).

190. H.R. 899, 111th Cong. (2009).

191. *Id.*

D. Theories of Constitutional Interpretation and Statutory Construction

This Comment utilizes the traditional tools of constitutional interpretation and statutory construction to analyze the apparent tension between portions of the Seventeenth Amendment and the Elections Clause.¹⁹² Accordingly, a brief introduction to the theories and tools that will be utilized in this Comment is in order here.

1. Introduction to the textual approach

Textualism is a formalistic approach to constitutional interpretation that relies exclusively on the ordinary meaning of the text of any given constitutional provision to interpret that provision's meaning.¹⁹³ In doing so, the textual approach dismisses virtually all inquiries into non-textual sources, including canons of construction and legislative history.¹⁹⁴ Instead, the key question that textualists ask is how a reasonable person would ordinarily understand the words of a certain provision.¹⁹⁵

In a 1987 concurrence in *INS v. Cardoza-Fonseca*,¹⁹⁶ Justice Antonin Scalia—perhaps the most well-known modern textualist¹⁹⁷—articulated his jurisprudential approach to textualism. In *Cardoza-Fonseca*, the Court ruled that the Immigration and Nationality Act only required asylum applicants to demonstrate a “well-founded fear of persecution,” which the Court found was a different and lower

192. See *infra* Part II.B.1–3 (interpreting the text of the Seventeenth Amendment and Elections Clause using traditional tools of constitutional and statutory construction). Constitutional provisions can be considered “super statutes,” meaning that, while the tools of statutory interpretation are by no means dispositive in analyzing constitutional amendments, their general principles are certainly applicable and relevant to any analysis. RONALD B. BROWN & SHARON J. BROWN, STATUTORY INTERPRETATION: THE SEARCH FOR LEGISLATIVE INTENT 16–17 (2002).

193. See PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 14 (1991) (outlining the contours of the textual modality of interpretation); Ian Gallacher, *Conducting the Constitution: Justice Scalia, Textualism, and the Eroica Symphony*, 9 VAND. J. ENT. & TECH. L. 301, 306 (2006) (noting that “textualism requires a devotion to the text above all other considerations”); see also Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 22 (Amy Gutmann ed., 1997) (defending his view of textualism by stating that “[t]he text is the law, and it is the text that must be observed”).

194. See Gallacher, *supra* note 193, at 307 (noting that “[any] interpretation going beyond the text’s meaning is impermissible”).

195. See BOBBITT, *supra* note 193, at 25–26 (demonstrating how a textual argument is made by analyzing Article VI in the Supremacy Clause of the Constitution through the lens of an average contemporary American’s understanding of the text). Bobbitt also refers to this as the “man on the street” approach. *Id.* at 12.

196. 480 U.S. 421 (1987).

197. See Gallacher, *supra* note 193, at 306–07 (bestowing upon Justice Scalia the title of “most influential” textualist by virtue of his position on the Supreme Court).

standard than the one that INS had been using.¹⁹⁸ The majority opinion cited the Act's legislative history at length in reaching its conclusion,¹⁹⁹ even though the majority also felt its interpretation of "well-founded fear" reflected the plain meaning of that term.²⁰⁰ Justice Scalia agreed with the result of the case, but he strongly objected to the majority's reliance on legislative intent.²⁰¹ Justice Scalia felt that the Court's analysis should have ended when it determined the plain meaning of "well-founded fear," rather than further inquiring into the law's legislative history.²⁰² Thus, for Justice Scalia, textualism was the only approach to constitutional interpretation needed in this case because, "[w]here the language of . . . laws is clear, [judges] are not free to replace it with unenacted legislative intent."²⁰³

The plain meaning theory is to statutory interpretation what textualism is to constitutional interpretation.²⁰⁴ Like textualism, the plain meaning approach uses the ordinary meaning of words, grammar, and punctuation to dictate statutory interpretation.²⁰⁵ While the plain meaning approach does not look to external sources of interpretation, it sometimes will use dictionary meanings and linguistic canons of construction—those that explain how to apply the normal rules of the English language to the law—to discern the ordinary meaning of text.²⁰⁶

The plain meaning approach also buttresses the canon of construction that disfavors creating surplusage or redundancy within a law.²⁰⁷ This canon presumes that legislators carefully draft all

198. *Cardoza-Fonseca*, 480 U.S. at 449–50.

199. *See id.* at 434–35 (noting that the Act's legislative history indicated that Congress did not seek to modify a prior standard it had been using for refugee determinations).

200. *See id.* at 450 (Blackmun, J., concurring) (noting that "the very language of the term 'well-founded fear'" compelled the majority's reasoning in this case).

201. *See id.* at 452 (Scalia, J., concurring) (agreeing with the majority that "well-founded fear" had a clear, plain meaning, but imploring the Court to stop its analysis there rather than delving into the Act's legislative history).

202. *See id.* (calling the Court's legislative intent analysis "an ill-advised deviation from the venerable principle that if the language of a statute is clear, that language must be given effect—at least in the absence of patent absurdity"). Justice Scalia expressed further concern that the majority's insistence at looking into legislative history would be a cue to other courts that such a practice was appropriate or even required in all cases. *Id.* at 453.

203. *Id.* at 453.

204. *See* JELLUM, *supra* note 114, at 17 (defining the plain meaning approach as the statutory interpretation counterpart to textualism).

205. *Id.*

206. *Id.*

207. *Id.* at 104 (defining the canon against surplusage to mean that in a properly-interpreted statute, "every word has meaning; nothing is redundant or meaningless").

statutes;²⁰⁸ therefore, each word in a statute must have an independent meaning, and no words should be viewed as duplicative.²⁰⁹ The Supreme Court has validated this general principle by declaring that it has the “duty to give effect, if possible, to every clause and word of a statute.”²¹⁰

Sometimes, however, applying the plain meaning of words in a statute creates a result unintended by the legislature. Hence, statutory interpreters have developed the absurd result exception to the plain meaning rule.²¹¹ The Supreme Court first articulated this exception in the 1892 case *Holy Trinity Church v. United States*,²¹² which centered on a federal anti-immigration statute banning businesses from bringing anyone into the country “to perform labor or service of any kind.”²¹³ Consequently, when a church hired a pastor from England, the federal government fined the church.²¹⁴ However, the Court rejected the lower court’s holding that the law’s application to work “of any kind” was clear, plain language.²¹⁵ Instead, the Court held that denying a church the right to recruit pastors from overseas would be an absurd result.²¹⁶ The Court famously concluded that “a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.”²¹⁷ This rationale opened the door for other jurists to look beyond the clear text of a statute when that analysis would produce a similarly absurd result.²¹⁸

208. See *id.* (positing that, if legislators would have found extra or useless words in a statute, they would have deleted them before passing the law).

209. But see BROWN & BROWN, *supra* note 192, at 86 (noting Judge Easterbrook’s position that “redundancy is common in statutes; . . . [not] every enacted word must carry independent force”).

210. *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (citation and internal quotation marks omitted).

211. See JELLUM, *supra* note 114, at 71 (deeming this exception the “Golden Rule” of statutory interpretation).

212. 143 U.S. 457 (1892).

213. *Id.* at 458. The Court noted “of any kind” was included in the statute to “guard against any narrow interpretation and emphasize a breadth of meaning.” *Id.*

214. *Id.* at 457–58.

215. See *id.* at 458–59 (“While there is great force to this reasoning, we cannot think Congress intended to denounce with penalties a transaction like that in the present case.”).

216. See *id.* at 471–72 (finding that Congress did not intend for the outcome advocated by the Government because America’s “laws,” “business,” “customs,” and “society” along with “unofficial declarations” and “organic utterances” suggest that “[the United States] is a Christian nation,” and it would be absurd to think that Congress intended to categorize contracts for foreign Christian ministers as misdemeanors).

217. *Id.* at 459.

218. See JELLUM, *supra* note 114, at 71 (noting that, with *Holy Trinity*’s recognition of an “absurd result” exception, “the Golden Rule was born”). The *Holy Trinity* Court itself listed several external sources helpful in analyzing legislative intent. See *Holy*

2. *Introduction to the structural approach*

In contrast to the strict constraints of textualism, structuralism considers the relationships among various constitutional provisions to discern the meaning of a given provision within the context of the whole document.²¹⁹ This approach particularly applies to the constitutional principles of “federalism, separation of powers, and democracy.”²²⁰ As such, structuralism has been used to analyze controversies ranging from the scope of Congress’s power under the Necessary and Proper Clause to the limits of Congress’s Commerce Clause authority.²²¹

The Supreme Court’s 2005 opinion in *Granholm v. Heald*²²² provides a recent example of structuralism. In *Granholm*, the Court resolved a conflict between the Twenty-First Amendment and the Dormant Commerce Clause.²²³ Michigan law criminalized the shipment of wine from out-of-state wineries directly to Michigan residents but allowed in-state wineries to ship directly to Michigan homes.²²⁴ Michigan argued that this law was a permissible exercise of its Twenty-First Amendment power to regulate liquor inside the state.²²⁵ Opponents of the law argued that it violated the Dormant Commerce Clause because the Michigan statute discriminated against out-of-state wine sellers.²²⁶

The Court relied on structural arguments in siding with these opponents and striking down the Michigan law.²²⁷ The Court held

Trinity Church, 143 U.S. at 465 (suggesting an act’s title, the “evil which was intended to be remedied,” Congress’s impetus for acting, and congressional committee reports as persuasive sources of legislative history).

219. See BOBBITT, *supra* note 193, at 14–15 (defining the structural modality of constitutional interpretation).

220. SOTIRIOS A. BARBER & JAMES E. FLEMING, CONSTITUTIONAL INTERPRETATION: THE BASIC QUESTIONS 117 (2007).

221. See *id.* at 121–30 (providing examples of the Supreme Court’s use of structuralism to analyze constitutional questions).

222. 544 U.S. 460 (2005).

223. *Id.* at 471. The Twenty-First Amendment overturned the Eighteenth Amendment’s prohibition of alcohol, and, in doing so, gave states the power to regulate “the transportation or importation” of liquor. U.S. CONST. amend. XXI. Although not expressly written into the Constitution, the Dormant Commerce Clause stands for the proposition that the explicit Commerce Clause, located in Article I, section 8, clause 3 of the Constitution, prevents states from passing laws that burden or discriminate against interstate commerce. See generally James L. Buchwalter, Annotation, *Construction and Application of Dormant Commerce Clause*, U.S. CONST. ART. I, § 8, CL. 3—*Supreme Court Cases*, 41 A.L.R. FED. 2D 1, 13–15 (2009) (defining and explaining the Dormant Commerce Clause’s application).

224. *Granholm*, 544 U.S. at 469.

225. *Id.* at 469, 473–74.

226. *Id.* at 469.

227. See *id.* at 484–86 (discussing the relationship between the Twenty-First Amendment and the Commerce Clause).

that no language in the Twenty-First Amendment was meant to empower states to violate the long-standing Dormant Commerce Clause.²²⁸ It emphasized that the Dormant Commerce Clause was an important part of the Constitution's federalist structure, and that it prevented states from passing laws discriminating against one another in the realm of interstate commerce.²²⁹ The Court concluded that the passage of the Twenty-First Amendment was not intended to upset that balance.²³⁰

Analogous to structuralism is the statutory construction canon of *in pari materia*, which requires that new statutes be interpreted consistently with older legislation regarding the same subject matter.²³¹ Like structuralism, *in pari materia* emphasizes context in interpreting legislative language.²³² Accordingly, *in pari materia* promotes consistency and coherency among various provisions within legislation.²³³

In pari materia has two separate, but related, components: the whole act aspect and the whole code aspect.²³⁴ The whole act aspect requires individual sections of legislation to be interpreted within the context of the whole statute.²³⁵ In *Rhyne v. K-Mart Corp.*,²³⁶ the North Carolina Supreme Court used this aspect to interpret the meaning of the word "defendant" in a punitive damages statute, which capped such damages at \$250,000.²³⁷ There, the defendant corporation argued that this figure was the maximum total punitive liability it could face in any one lawsuit, regardless of the number of plaintiffs jointly suing in the same case.²³⁸ Citing the maxim of *in pari materia*, the court rejected this position, finding that other clauses within the same statutory section referred to "a verdict" and "the award" as the

228. *Id.* at 486. The Court noted that "the Twenty-First Amendment does not supersede other provisions of the Constitution and, in particular, does not displace the rule that States may not give a discriminatory preference to their own producers." *Id.*

229. *Id.* at 472-73.

230. *See id.* at 493 (overturning the Michigan winery law because even though the Twenty-First Amendment gave states broad regulatory power, the Court's Commerce Clause rulings require regulation to be done in an even-handed way, which was not the case with Michigan's law).

231. *See* JELLUM, *supra* note 114, at 99-100 (noting that *in pari materia* literally means "part of the same material").

232. The whole statute maxim articulates a similar idea. *See* BROWN & BROWN, *supra* note 192, at 89-90 (defining the whole statute maxim to mean that legislation should be read as a whole, rather than as individual provisions).

233. JELLUM, *supra* note 114, at 100.

234. *Id.*

235. *Id.*

236. 594 S.E.2d 1 (N.C. 2004).

237. *Id.* at 7.

238. *Id.* at 19.

operative words regarding maximum damages.²³⁹ Therefore, the court held that the statute was meant to cap each plaintiff's individual punitive damages award, not to limit a defendant's total liability.²⁴⁰ Accordingly, it rejected the defendant's attempt to read one part of the statute in isolation from the rest of it because such an interpretation would contravene the principles of *in pari materia*.²⁴¹

Similar to the whole statute aspect, the whole code aspect of *in pari materia* asserts that new statutes must be read in harmony with existing legislation about the same subject.²⁴² This aspect relies on the presumption that legislatures are aware of all previous statutes regarding a certain subject matter when they enact a new law pertaining to that same subject.²⁴³ The Supreme Court has validated the whole code aspect, finding that *in pari materia* applies when two statutes "[b]oth deal with precisely the same subject matter."²⁴⁴

The United States Court of Appeals for the Federal Circuit followed this Supreme Court dictate in the 2000 case *Florida Sugar Marketing & Terminal Ass'n v. United States*.²⁴⁵ The court interpreted the meaning of the term "export" to mean only commerce done with foreign entities.²⁴⁶ In reaching that conclusion, the court read the Constitution's Export Clause in context with other constitutional provisions relating to commercial activities.²⁴⁷ Through its analysis, the court rejected the petitioner's argument because accepting it would have created inconsistencies among other constitutional clauses pertaining to commerce, namely the Commerce Clause itself.²⁴⁸ Thus, the court opted to interpret the term "export" *in pari materia* with all other constitutional provisions relating to commerce.²⁴⁹

239. *Id.* at 20.

240. *Id.* at 21.

241. *See id.* at 19 (holding that the court "[did] not agree with K-Mart's argument" regarding how the statute capped damages).

242. JELLUM, *supra* note 114, at 100.

243. *Id.* at 101.

244. *United States v. Stewart*, 311 U.S. 60, 64 (1940).

245. 220 F.3d 1331 (Fed. Cir. 2000). The court noted that constitutional provisions "should be interpreted to avoid contradictions in the text." *Id.* at 1337.

246. *See id.* at 1338–39 (finding that the Export Clause only applies to "foreign commerce, not interstate shipments").

247. *See id.* at 1337 ("Reading the Export Clause in light of other clauses of the Constitution provides additional indications that the Framers intended it only to limit federal powers with regard to foreign commerce.").

248. *Id.*

249. *See id.* at 1337–38 (recognizing the need to interpret the term "export" consistently with the Exports Clause and the Commerce Clause).

3. *Introduction to the historical approach*

Like structuralism, the historical approach to constitutional interpretation, which is closely aligned with originalism,²⁵⁰ looks beyond the plain text of the Constitution by analyzing the original intent of the drafters and ratifiers of the Constitution and its amendments.²⁵¹ The theory holds that when provisions of the Constitution are ambiguous, courts should look to how the drafters and ratifiers of those provisions generally understood them at the time they were added to the Constitution.²⁵² Under this approach, looking beyond the drafters' and ratifiers' original intent risks the courts creating, changing, or repealing constitutional provisions—a job that supporters of the historical approach believe is reserved for Congress and state legislatures through the ratification process.²⁵³

The Supreme Court applied the historical approach in its 1983 *Marsh v. Chambers*²⁵⁴ decision. In that case, the Court held that the Nebraska Legislature did not violate the First Amendment's Establishment Clause when it began each legislative session with a chaplain-led prayer.²⁵⁵ Though the literal text of the First Amendment suggested that this practice violated the Establishment Clause,²⁵⁶ the Court found that that was not the original intent of the Amendment's framers.²⁵⁷ Instead, the Court traced the history of legislative chaplains back to the First Continental Congress and the

250. See BOBBITT, *supra* note 193, at 12 (defining the historical approach). See also SCALIA, *supra* note 193, at 38 (articulating his understanding of the theory of original intent).

251. See BOBBITT, *supra* note 193, at 12 (identifying the relevant inquiry under the historical approach).

252. *Id.* at 12–13.

253. *E.g.*, Todd S. Purdum & Robin Toner, Roberts Pledges He'll Hear Cases With "Open Mind", N.Y. TIMES, Sept. 13, 2005, at A1 (discussing Chief Justice John Roberts's judicial philosophy, which he articulated during his Senate confirmation hearing). Chief Justice Roberts analogized the courts to the game of baseball, opining "that it's [his] job to call balls and strikes, and not to pitch or bat." *Id.* But see Erwin Chemerinsky & Catherine Fisk, *Judges Do Make Law—It's Their Job*, USA TODAY, Aug. 23, 2005, http://www.usatoday.com/news/opinion/editorials/2005-08-23-forum-judges_x.htm# (rejecting the originalists mantra against "legislating from the bench"). Chemerinsky and Fisk instead argue that all judges must make law because that process is at the heart of the common law system, which governs areas like tort law, contract law, and property law. *Id.* The authors also suggest that the very doctrine of judicial review, which gives judges the authority to declare laws unconstitutional, was made up by judges. *Id.*

254. 463 U.S. 783 (1983).

255. *Id.* at 786.

256. See U.S. CONST. amend. I (emphasis added) (stating that "Congress shall make no law respecting an establishment of religion").

257. See *Marsh*, 463 U.S. at 788 (observing that the First Amendment's drafters did not view paid legislative chaplains and opening prayers as a First Amendment violation because such practices had occurred since Congress's first session).

First Congress, which ratified the First Amendment.²⁵⁸ Therefore, the Court concluded that the framers of the Establishment Clause did not intend for it to preclude chaplain-led prayers before the start of legislative sessions,²⁵⁹ meaning Nebraska's customary practice was constitutionally permissible.²⁶⁰

In the field of statutory interpretation, the historical approach is most often called intentionalism.²⁶¹ To intentionalists, the legislature's motivation and specific intent in passing a law are of paramount importance.²⁶² In discerning that intent, a court looks to the legislative history of a statute, even if the text of that statute is unambiguous.²⁶³ Intentionalists have outlined a hierarchy of the extrinsic sources of legislative history, ranging from the most persuasive to the least persuasive: conference committee reports; regular committee reports; earlier versions of a bill, including rejected amendments; statements made by the bill's supporters during its floor debate, with special consideration sometimes given to the bill's drafters and sponsors; and, finally, statements made by the bill's opponents during floor debate.²⁶⁴

When analyzing legislative intent, courts strongly disfavor statutory interpretations that would result in repeal by implication.²⁶⁵ This canon of construction presumes that when legislatures want to repeal a pre-existing law, they only do so expressly.²⁶⁶ Accordingly, judges

258. *See id.* at 786–91 (chronicling the history of legislative chaplains in colonial America).

259. *See id.* at 790 (noting that it would have been odd for the Framers of the First Amendment, who had just opened their own legislative session with a chaplain-led prayer, to simultaneously declare such a practice unacceptable under the First Amendment).

260. *Id.* at 794–95.

261. *See* JELLUM, *supra* note 114, at 22–23 (explaining the role of original intent in statutory interpretation).

262. *Id.* at 23.

263. *See id.* (contrasting textualism, which only begrudgingly looks to extrinsic sources when statutory language is ambiguous, with intentionalism, which embraces extrinsic sources of interpretation even when a statute's plain meaning seems clear).

264. *See id.* at 161–65 (identifying and explaining this hierarchy). Some intentionalists also consider post-enactment history, such as presidential signing statements and veto messages. *Id.* at 164. However, neither of those sources are technically *legislative* history since they come from the *executive* branch of government. *Id.* at 164 (emphasis added).

265. BROWN & BROWN, *supra* note 192, at 94–95 (citing *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976)) (noting that the issue of implied repeal typically arises when one plausible interpretation of an ambiguity within a new statute would implicitly overturn a provision in a pre-existing law, but the legislature or Congress neglected to expressly address this apparent conflict).

266. JELLUM, *supra* note 114, at 146. However, Jellum also notes that this is a “potentially flawed presumption.” *Id.*

are very hesitant to interpret ambiguous statutory language so as to implicitly repeal another law.²⁶⁷

In the 1974 case *Morton v. Mancari*,²⁶⁸ the Supreme Court utilized this canon to reconcile a conflict between the Indian Reorganization Act (IRA) of 1934 and the Equal Employment Opportunity Act (EEO) of 1972.²⁶⁹ The IRA required that Native Americans receive special hiring preference for positions in the Bureau of Indian Affairs; the later-enacted EEO mandated that all federal personnel decisions be made without racial prejudice.²⁷⁰ However, the EEO did not contain an expressed repeal of the old IRA preference provision.²⁷¹ Because the Court disfavors repeals by implication, it ruled that the EEO did not implicitly repeal the IRA.²⁷² Instead, the Court reconciled the contradictory statutes by holding that the IRA preference was an implied exception to the EEO because both laws were aimed at tackling racial discrimination in the federal workplace.²⁷³ Consequently, the Court upheld the principle of disfavoring repeals by implication.²⁷⁴

II. A COMPREHENSIVE LEGAL ANALYSIS OF THE SEVENTEENTH AMENDMENT AND ELECTIONS CLAUSE SHOWS THAT CONGRESS MAY REGULATE VACANCY-FILLING U.S. SENATE ELECTIONS

The recent controversies surrounding U.S. Senate vacancies and the subsequent congressional attempts to legislate the issue prompt the question of whether Congress has ultimate authority to mandate how states fill these vacancies or whether the Seventeenth Amendment exclusively delegated this power to the states. This section analyzes that question by examining prior case law on the subject and applying traditional methods of constitutional and statutory interpretation to the competing clauses at issue.

267. See BROWN & BROWN, *supra* note 192, at 94–95 (warning courts not to interpret an ambiguous statutory provision so as to effectively repeal another law).

268. 417 U.S. 535 (1974).

269. See *id.* at 538 (observing that the IRA’s preferential language created the central conflict in the case following the EEO’s subsequent enactment).

270. See *id.* at 537–38, 542, 545 (explaining the requirements of each federal law).

271. See *id.* at 550 (noting the “congressional silence” in the EEO as to whether it repealed the IRA).

272. *Id.* at 550–51. The Court categorized its decision as the “prototypical case where . . . repeal by implication [was] not appropriate.” *Id.* at 550.

273. *Id.* But see JELLUM, *supra* note 114, at 147 (suggesting that this reconciliation was disingenuous). This canon does not mean, however, that courts never recognize an implied repeal. See *id.* (insisting that specific evidence of Congress’s intent to implicitly repeal a law can overcome this canon’s general thrust).

274. See JELLUM, *supra* note 114, at 146–47 (categorizing *Morton* as “[o]ne of the more famous cases addressing implied repeal”).

Although it never passed Congress, the 2009 ELECT Act serves as a useful proxy for analyzing the extent of congressional authority in this area. Specifically, it is useful to consider whether the legislation's mandate to schedule special elections within a narrow timeframe²⁷⁵ after a Senate seat becomes vacant falls within the scope of both the Elections Clause and the Seventeenth Amendment. However, this Comment is not simply an analysis of the constitutionality of the proposed ELECT Act; rather, it analyzes more generally the principles enumerated in that Act, i.e., Congress's constitutional authority to regulate vacancy-filling Senate elections.

A. Enactment of Federal Regulations of Senate Vacancy-Filling Elections Would Be a Permissible Exercise of Congress's Elections Clause Authority

Federal authority to regulate elections for federal offices is limited to the power delegated to Congress in the Elections Clause, which authorizes Congress to regulate the “[t]imes, [p]laces, and [m]anner” of holding federal elections.²⁷⁶ Therefore, momentarily setting aside any changes that the Seventeenth Amendment may have made to this Clause, any federal legislation mandating how states fill Senate vacancies must fall within the Election Clause's broad grant of authority.²⁷⁷ Accordingly, analysis of prospective federal legislation regarding Senate vacancies must start with whether the legislation represents a valid exercise of Congress's Elections Clause powers.²⁷⁸

1. There is no distinction in the Elections Clause between regular and special U.S. Senate elections

Just as Congress is authorized to pass laws concerning regularly-scheduled Senate elections, it can also mandate the timing and procedure of special elections to fill Senate vacancies.²⁷⁹ Textually, the Elections Clause makes no distinction between general, regularly-scheduled elections, and special elections required to fill sudden

275. See H.R. 899, 111th Cong. § 2 (2009) (mandating that states hold a special Senate election within ninety days of a seat becoming vacant).

276. U.S. CONST. art. I, § 4, cl. 1; see also *infra* Part I.A–B (detailing the parameters of congressional power under the Elections Clause).

277. See, e.g., *Judge v. Quinn*, 612 F.3d 537, 554 (7th Cir. 2010) (citing the Elections Clause as the basis for both state and federal regulatory power over elections), *cert. denied*, 131 S. Ct. 2958 (2011).

278. See *Newberry v. United States*, 256 U.S. 232, 258 (1921) (striking down a law governing party primaries and conventions because it was not within the “manner” provision of the Elections Clause), *abrogated by* *Burroughs & Cannon v. United States*, 290 U.S. 534 (1934).

279. See Amar & Schaps, *supra* note 175 (arguing that “nothing in the text of the Seventeenth Amendment . . . distinguishes regular popular [Senate] elections from vacancy-filling popular elections”).

vacancies.²⁸⁰ Thus, textualists would likely have no problem applying the Elections Clause to both regular and special Senate elections.²⁸¹

A structural analysis confirms this lack of distinction. As the Court found in *Newberry*, the word “election,” as used throughout the Constitution, simply means the “final choice of an officer by the duly qualified electors.”²⁸² Both regular and special elections represent the voters’ final choice.²⁸³ Therefore, creating a distinction between regular and special Senate elections would subvert the Framers’ structural design.

Additionally, Congress itself has previously adopted this understanding of the Elections Clause.²⁸⁴ It has already passed election regulations both for regularly-scheduled elections²⁸⁵ and for special vacancy-filling elections.²⁸⁶ Moreover, prior to the passage of the Seventeenth Amendment, Congress applied its Elections Clause powers to Senate vacancies through an 1866 act regulating the timing and manner of how state legislatures must appoint U.S. Senators both in the event of regular and unexpected vacancies.²⁸⁷ Accordingly, any new federal legislation mandating how and when states fill Senate vacancies fits squarely into this established congressional understanding of its Elections Clause authority.

The principle of *in pari materia* bolsters this conclusion. As the whole code aspect of that canon instructs, the same word is to be interpreted to have the same meaning throughout an entire code of laws, such as the Constitution.²⁸⁸ Hence, just as the term “export” was interpreted to have a consistent meaning among all constitutional

280. *Id.*

281. See Gallacher, *supra* note 193, at 307 (“Any interpretation going beyond the text’s meaning is impermissible.”).

282. *Newberry*, 256 U.S. at 250.

283. Article I, section 2 uses the term “election” (and variations thereof) to describe both the general election procedures for electing Congressmen and the more particularized procedures for electing Representatives to fill sudden House vacancies. Compare U.S. CONST. art. I, § 2, cl. 1–2 (outlining the general election procedures and qualifications for House members), with U.S. CONST. art. I, § 2, cl. 4 (outlining the procedures for elections held to fill House vacancies). After a duly-held election, whether regularly-scheduled or otherwise, members of Congress serve their complete respective terms, subject only to expulsion by a two-thirds vote of either the House or Senate. U.S. CONST. art. I, § 5, cl. 2.

284. See 2 U.S.C. §§ 1, 7–9 (2006) (creating various federal election regulations pertaining to both regular and vacancy-filling congressional elections).

285. See *id.* §§ 1, 7 (regulating the timing of Senate elections and establishing a national “Election Day” in November of even-numbered years).

286. See *id.* § 8 (regulating the timing of special elections to fill House vacancies occurring during “extraordinary circumstances,” such as terrorist attacks).

287. 14 Stat. 243–44 (1866).

288. See JELLUM, *supra* note 114, at 100 (noting that “[i]n *pari materia* promotes coherence,” especially in reference to statutes).

provisions pertaining to commerce in *Florida Sugar Marketing*, the term “election” should have the same meaning regardless of where it appears in the Constitution.²⁸⁹ Therefore, to infer a distinction between special and general Senate elections would violate the principle of *in pari materia*, a result disfavored by the Supreme Court.²⁹⁰

2. *Congress is authorized to preempt state elections laws, including those outlining the timing of special U.S. Senate elections*

From as early as its *Siebold* decision in 1879, the Supreme Court has recognized that Congress has “paramount authority” to promulgate federal elections regulations.²⁹¹ Thus, that each state has already established its preferred method for filling Senate vacancies is of no consequence. The Supreme Court has consistently held that federal laws trump state laws in this area under Congress’s Elections Clause power to “make or alter” election regulations.²⁹² Therefore, legislation like the ELECT Act would be a valid expression of Congress’s power to “alter” existing state election regulations and would trump any pre-existing state laws with different processes for filling Senate vacancies.²⁹³

Courts have made it clear that this congressional power to override state laws broadly extends to all laws relating to the procedural aspects of the electoral process.²⁹⁴ The setting of a special election

289. See *Florida Sugar Mktg. & Terminal Ass’n v. United States*, 220 F.3d 1331, 1337–39 (Fed. Cir. 2000) (using structural analysis to find that “export” should be interpreted *in pari materia* with other provisions of the Constitution relating to commerce, such as the Commerce and Exports Clauses); JELLUM, *supra* note 114, at 101 (explaining, for example, that one statute criminalizing certain behavior should be read *in pari materia* with statutes criminalizing the same or similar type of behavior).

290. See *United States v. Stewart*, 311 U.S. 60, 64 (1940) (holding that statutes should be interpreted *in pari materia* when they “[b]oth deal with precisely the same subject matter”).

291. Ex parte *Siebold*, 100 U.S. 371, 385 (1879).

292. See *Foster v. Love*, 522 U.S. 67, 69 (1997) (overturning a state law that contradicted a federal statute mandating a uniform day for federal elections); *Smiley v. Holm*, 285 U.S. 355, 366–67 (1932) (asserting the supremacy of federal law over state law in the realm of elections regulation); *Ass’n of Cmty. Orgs. for Reform Now v. Miller*, 129 F.3d 833, 836–37 (6th Cir. 1997) (holding that the word “alter” in the Elections Clause grants to Congress broad authority to override state election regulations where Congress sees fit to do so).

293. See, e.g., *Foster*, 522 U.S. at 69 (exemplifying the Court’s understanding of how the Election Clause allows Congress to alter pre-existing state laws; the Court termed the issue “well settled”).

294. See *Smiley*, 285 U.S. at 366–67 (finding that Congress has the power to regulate a “complete code” over the “whole subject” of elections); *Millsaps v. Thompson*, 259 F.3d 535, 538–40 (6th Cir. 2001) (holding that Congress can regulate “nearly every procedural aspect of a federal election”).

day is one of those procedural aspects. For instance, in *Foster* the Supreme Court upheld a federal law requiring a uniform national election day for federal offices because that regulation fit squarely into the “times” provision of the Elections Clause.²⁹⁵

The ELECT Act requires that special Senate elections be held within ninety days of a seat vacancy.²⁹⁶ This ninety-day requirement can be readily analogized to existing federal elections laws, which were interpreted in *Foster*, requiring that Senators be elected on the first Tuesday following the first Monday in November in the year immediately preceding the expiration of a sitting Senator’s term in office.²⁹⁷ Both laws mandate when states must hold elections for federal office. Therefore, a prospective federal law like the ELECT Act, which only relates to the procedural aspects of voting, would be within the accepted reach of congressional authority under the Elections Clause.²⁹⁸

B. The Seventeenth Amendment’s Vacancy-Filling Provision Did Not Alter Congress’s Broad Elections Clause Authority

As the Supreme Court explained in *Newberry*, the Seventeenth Amendment “neither announced nor require[d] a new meaning of election” that would change any of the above analysis of Congress’s Elections Clause authority.²⁹⁹ Thus, it is generally assumed that Congress can still invoke its Elections Clause authority over Senate elections even in the wake of passage of the Seventeenth Amendment.³⁰⁰ However, the wording of the Amendment’s vacancy-filling provision leaves ambiguity as to whether that result is also true for special Senate vacancy-filling elections.³⁰¹

Thus far, this Comment’s analysis has mostly (and deliberately)

295. *Foster*, 522 U.S. at 69.

296. H.R. 899, 111th Cong. § 2(a)(2) (2009).

297. Compare H.R. 899, 111th Cong. § 2 (2009) (setting Senate vacancy-filling elections exactly ninety days after a seat becomes open), with 2 U.S.C. §§ 1, 7 (2006) (setting the precise date for general Senate elections), and *Foster*, 522 U.S. at 69–70 (upholding one standardized election day as a valid exercise of Congress’s Election Clause authority).

298. See Amar & Schaps, *supra* note 175 (discussing that Congress already regulates regular Senate elections via the Elections Clause and concluding that the Seventeenth Amendment did not alter its power to extend this authority to vacancy-filling elections).

299. *Newberry v. United States*, 256 U.S. 232, 250 (1921), *abrogated by* *Burroughs & Cannon v. United States*, 290 U.S. 534 (1934).

300. See Amar & Schaps, *supra* note 175 (touting the general agreement among scholars that the Elections Clause applies to regularly-scheduled Senate elections).

301. See *supra* notes 118–20 and accompanying text (discussing the modifying clause “as the legislature may direct” at the end of the proviso in the Seventeenth Amendment).

ignored the “as the legislature may direct” clause. However, that clause represents the strongest argument that the Seventeenth Amendment usurped federal authority to regulate vacancy-filling Senate elections by giving states *exclusive* power to regulate these elections.³⁰² This section explores the evidence supporting and refuting that notion.

1. *The textual approach suggests that states are the exclusive regulators of vacancy-filling U.S. Senate elections*

Textualism only considers the ordinary meaning of the text in any given constitutional provision.³⁰³ Thus, a textualist would ask what a reasonable person understands the words “as the legislature may direct” to mean.³⁰⁴ Examining only the words of the Seventeenth Amendment, it seems that such a reasonable person would conclude that only state legislatures have dominion over special vacancy-filling Senate elections.³⁰⁵ In fact, the vacancy-filling provision says nothing about Congress,³⁰⁶ but it specifically references state legislatures’ authority to direct special Senate elections.³⁰⁷

For jurists like Justice Scalia, the analysis would end there.³⁰⁸ Following his logic in *Cardoza-Fonseca*, Justice Scalia would look only to the plain meaning of “as the legislature may direct.”³⁰⁹ Since that phrase is arguably unambiguous, Justice Scalia and fellow textualists would argue that no further inquiry is needed,³¹⁰ and would bristle at any examination of extrinsic sources, such as the Amendment’s legislative history.³¹¹ Therefore, ardent textualists would claim that

302. See, e.g., Stern, *supra* note 174 (noting that the author was originally skeptical of federal forays into Senate vacancy-filling laws because he feared that the “as the legislature may direct” clause precluded legislation like the ELECT Act).

303. See BOBBITT, *supra* note 193, at 12 (explaining that the textualist uses the perspective of the “average contemporary ‘man on the street’” to interpret text).

304. *Id.*

305. See Amar & Schaps, *supra* note 175 (conceding that the phrase does “suggest that state legislatures enjoy discretion” over vacancy-filling elections).

306. See U.S. CONST. amend. XVII, § 2 (omitting any reference to the federal government).

307. See *id.* (thrice referencing the power of state actors, be it governors or legislatures).

308. See SCALIA, *supra* note 193, at 22 (declaring unequivocally that “the text is the law, and it is the text that must be observed”).

309. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 452 (1987) (Scalia, J., concurring) (chastising the Court for looking to legislative history even though it concluded the phrase in question had a clear meaning). Justice Scalia added that “judges interpret laws rather than reconstruct legislators’ intentions.” *Id.* at 452–53.

310. *Cf. id.* at 453 (cautioning the Court against setting the precedent that lower courts should consider legislative intent even where statutory text is unambiguous).

311. See JELLUM, *supra* note 114, at 17 (noting that textualists close the door on nearly all supplemental sources of legislative intent).

the Seventeenth Amendment made states the exclusive regulators of special Senate elections.³¹²

This plain meaning approach to constitutional interpretation also urges that the Seventeenth Amendment be interpreted to avoid surplusage or redundancy.³¹³ Each word and phrase in the Amendment should have independent meaning or significance.³¹⁴ Therefore, to avoid the strictures of the canon against surplusage, “as the legislature may direct” must mean something.³¹⁵

Surely the clause does mean something if viewed as an exclusive grant of power to state legislatures to regulate special Senate elections. In that instance, “as the legislature may direct” would mean that Congress’s traditional Elections Clause authority does not extend to special Senate elections.³¹⁶ As a result, that interpretation renders the clause anything but superfluous or redundant.

However, if that interpretation is not correct, the question becomes whether “as the legislature may direct” means anything at all. One possible alternative explanation is that it is merely a reminder of state legislatures’ initial authority to promulgate elections regulations under the Elections Clause.³¹⁷ A second possibility is that the clause does not pertain to the relationship between Congress and state legislatures, but rather to the relationship between state legislatures

312. See, e.g., Rick Hasen, *Illinois Scandal Spawns a Debate: Amendment Would End Appointments*, ELECTION LAW BLOG (Mar. 11, 2009, 9:10 PM), <http://electionlawblog.org/archives/013171.html> (suggesting that Professor Hasen’s initial reaction to the proposed ELECT Act was that it was unconstitutional because the ordinary and plain understanding of the “as the legislature may direct” language is that it does not authorize Congress to regulate vacancy-filling elections).

313. See JELLUM, *supra* note 114, at 104 (explaining how statutes should generally be interpreted to avoid creating duplicity or meaninglessness).

314. *Id.*

315. See Vikram David Amar, *Reforming the Way Senate Vacancies are Filled: A Q & A About the Proposed Constitutional Amendment and the “ELECT Act” Bill*, FINDLAW (Mar. 27, 2009), <http://writ.news.findlaw.com/amar/20090327.html> (acknowledging this concern by offering alternative possibilities as to what “as the legislature may direct” means). But see JELLUM, *supra* note 114, at 104 (contending that legislative drafting is often a sloppy process and that legislators rarely waste time arguing over possibly redundant language); Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 812 (1983) (explaining that legislation is typically the result of political compromise, enhancing the likelihood of meaningless redundancies). Posner’s observation seems particularly relevant to the Seventeenth Amendment, which took several different forms before Congress ultimately passed it. See *supra* Part I.C.2 (detailing the Amendment’s legislative history).

316. See Stern, *supra* note 174 (outlining the general parameters of the Elections Clause and noting how interpreting “as the legislature may direct” as an exclusive grant of state power would change that general understanding).

317. Amar, *supra* note 315. Amar suggests that, under Article I, section 4, state legislatures have the power to regulate all congressional elections “*in the first instance.*” *Id.* (emphasis added).

and state governors.³¹⁸ In that sense, the clause can be read as clarifying that legislatures, not governors, are tasked with setting special Senate election procedures.³¹⁹ Given these two distinct possibilities, then, the canon against redundancy and surplusage does not doom an interpretation of “as the legislatures may direct” that leaves the Elections Clause intact.³²⁰

Additionally, even if “as the legislature may direct” is unambiguous language, interpreting it to deprive Congress of the power to regulate special Senate elections could be considered an absurd result because depriving Congress of that power would be contrary to Congress’s intent in passing the Seventeenth Amendment.³²¹ As its legislative history makes clear, Congress passed the Seventeenth Amendment to give state legislatures less, not more, power.³²² Yet construing the “as the legislature may direct” clause to give these legislatures an exclusive realm of power over special Senate elections produces the exact opposite result because state election laws are generally subject to congressional override under the Elections Clause.³²³

The *Holy Trinity* doctrine illustrates this as well.³²⁴ Finding that “as the legislature may direct” is an exclusive grant of power to the states may be a plausible reading of the language—one “within the letter of the statute.”³²⁵ However, the *Holy Trinity* doctrine counsels that a plausible reading of the language is not dispositive in interpreting a given provision.³²⁶ Instead, a correct interpretation should be “within [the] spirit” of the law and “within the intention of its makers.”³²⁷

318. *Id.*

319. *Id.*

320. *See id.* (answering the question of why the Seventeenth Amendment referred to state legislatures at all by positing two plausible reasons for the inclusion of the “as the legislature may direct” clause at the end of the vacancy-filling portion of the Amendment).

321. *See* JELLUM, *supra* note 114, at 71 (noting that the rationale of the so-called “Golden Rule” of statutory interpretation allows judges to ignore plain meaning if such an interpretation would not be reflective of legislative intent).

322. *See supra* Part I.C.2 (chronicling the Seventeenth Amendment’s long path to ratification).

323. *See* *Judge v. Quinn*, 612 F.3d 537, 549 (7th Cir. 2010) (noting that “the Congress that drafted the [Seventeenth] [A]mendment was consciously changing the system [of electing Senators] from one that was in the hands of the legislature to a new one”), *cert. denied*, 131 S. Ct. 2958 (2011). The court refused to believe that the same Congress that passed the Seventeenth Amendment simultaneously re-introduced the state legislature as the exclusive authority over special Senate elections. *Id.*

324. *Holy Trinity Church v. United States*, 143 U.S. 457 (1892).

325. *See id.* at 459 (cautioning that a statute can contain language that nonetheless conflicts with the purpose of, or intentions behind, the statute).

326. *See id.* (The *Holy Trinity* Court continued to interpret the disputed provision even though its plain meaning was “within the letter of the law”).

327. *Id.*

Here, the spirit of the Seventeenth Amendment and the intention of its drafters were to severely restrict state legislatures' power over Senate elections, not to give the legislatures unlimited discretion in filling Senate vacancies.³²⁸ Accordingly, this application of the *Holy Trinity* "absurd result" exception would allow a court to look beyond the text of the Seventeenth Amendment.³²⁹ Instead, judges could consult extra-textual sources to interpret the meaning of the Amendment consistently with the goals of its framers.³³⁰

2. *The structural approach indicates that Congress has regulatory authority over vacancy-filling U.S. Senate elections because that result is necessary to maintain consistent interpretation between the Elections Clause and the Seventeenth Amendment*

Structuralism is one way to look beyond the mere text of the Seventeenth Amendment. The approach focuses on the relationships inferred from the structure and context of the whole Constitution, particularly in the area of federalism.³³¹ The relationship between state and federal power, a basic question of federalism, is at the heart of the controversy over whether states have exclusive authority to regulate special Senate elections.³³² Additionally, resolving this issue requires analyzing how a later-enacted constitutional provision authorizing state action affects a previously-enacted provision authorizing federal action, which adds another layer to the basic federalism question.³³³ Since these types of questions are particularly amenable to structural analysis,³³⁴ it follows that structuralism is particularly relevant to the conflict between the

328. See *supra* Part I.C.2 (discussing the motivations of lawmakers in fundamentally changing how Senators are elected).

329. See JELLUM, *supra* note 114, at 71 (stating that once a court invokes the absurd result exception, judges can interpret ambiguous language to reflect the intent of the legislature even if that interpretation flies in the face of the plain meaning of the statute's text).

330. *Id.*

331. See BOBBITT, *supra* note 193, at 14–15 (defining the structural modality of constitutional interpretation); see also BARBER & FLEMING, *supra* note 220, at 117 (listing some of the most pertinent areas where structuralism is applied).

332. See generally Andreas Follesdal, *Federalism*, STAN. ENCYCLOPEDIA OF PHILOSOPHY (Mar. 9, 2010), <http://plato.stanford.edu/entries/federalism/> (defining federalism as the "divi[sion] [of] powers between member units and common institutions). In the United States, the federal government is the common institution, while states are the member units.

333. See Amar & Schaps, *supra* note 175 (alluding to the conflict between the Seventeenth Amendment and the Elections Clause as one in which a subsequent constitutional amendment provided states with explicit power to do something they previously lacked any authority to do).

334. See BARBER & FLEMING, *supra* note 220, at 117 (identifying federalism as one of "[t]he Constitution's leading structural principles").

Elections Clause and the Seventeenth Amendment.³³⁵

In 2005, the Supreme Court undertook a similar type of structural analysis in *Granholm v. Heald*.³³⁶ The Court held that states' powers under the later-enacted Twenty-First Amendment did not trump federal powers contained in the earlier-recognized Dormant Commerce Clause.³³⁷ In its decision, the Court emphasized the Dormant Commerce Clause's importance to the Constitution's federalism structure.³³⁸ Consequently, the Court found that even though the Twenty-First Amendment affirmatively authorized states to regulate alcohol within their borders, it should not be interpreted to overturn the limits that the Dormant Commerce Clause places on these regulations, including its prohibition of state laws that discriminate against out-of-state commercial interests or producers.³³⁹

A similar analysis is appropriate to the tension between the Seventeenth Amendment and the Elections Clause. The Twenty-First Amendment allows states to regulate alcohol, while the Seventeenth Amendment allows states to regulate special Senate election procedures.³⁴⁰ Additionally, the previously-enacted Elections Clause limits that state authority, just as the earlier-recognized Dormant Commerce Clause limited the scope of state authority under the Twenty-First Amendment.³⁴¹ Moreover, both conflicts involve the proper allocation of power between the states and the federal government.³⁴² Federal authority overrides state authority when the

335. See Amar, *supra* note 315 (suggesting that analysis of the structure of the Constitution is one pertinent way in which to analyze a proposed law like the ELECT Act).

336. 544 U.S. 460, 484–86 (2005).

337. See *id.* at 466 (holding that Michigan's winery law violated the Dormant Commerce Clause and that that type of violation was not authorized by potentially contradictory language in the Twenty-First Amendment).

338. *Id.* at 472–73.

339. *Id.* at 484–86.

340. Compare U.S. CONST. amend. XXI (abolishing federally-mandated Prohibition and returning to the states the right to regulate alcohol), with U.S. CONST. amend. XVII (giving states the power to regulate the process of filling Senate vacancies by directing governors to issue writs of election and allowing state legislatures to empower the governor to make temporary appointments until the seats are filled by election).

341. Compare, U.S. CONST. art. I, § 4 (granting states broad power to regulate elections but reserving to Congress the right to “make or alter such Regulations”), with *Gibbons v. Ogden*, 22 U.S. 1, 199 (1824) (generally prohibiting state regulation of interstate commerce, a power that is reserved to the federal government). Justice O'Connor later explained the concepts behind the Dormant Commerce Clause, acknowledging them to be a creature of judicial origin that “not only empowers Congress to regulate interstate commerce, but also imposes limitations on the States in the absence of congressional action.” *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 401–02 (1994) (O'Connor, J., concurring) (internal citations omitted).

342. Amar & Schaps, *supra* note 175.

Constitution clearly delegates power to the federal government.³⁴³ Since the Constitution explicitly gives Congress the power to issue federal elections regulations, its authority should supersede that of the states on this issue. Therefore, just as the *Granholm* Court held that the Twenty-First Amendment did not overturn the Dormant Commerce Clause, a structural analysis shows that the Seventeenth Amendment's "as the legislature may direct" clause likely did not overturn Congress's "make or alter" powers under the Elections Clause.³⁴⁴ Accordingly, the Court's holding in *Granholm* provides persuasive precedent in any potential challenge to federal legislation like the ELECT Act.

Similar to the precedential holding in *Granholm*, the statutory construction maxim of *in pari materia* provides another structural analysis tool. This canon requires that equivalent statutory terms and phrases be interpreted consistently.³⁴⁵ It is premised on the assumption that when legislatures pass a law, they are aware of all previously-enacted statutes dealing with the same subject.³⁴⁶

That presumption is confirmed in this instance. The Seventeenth Amendment's legislative history shows that both houses of Congress were well aware that the Elections Clause gave Congress default authority to regulate Senate elections.³⁴⁷ In fact, some lawmakers repeatedly attempted to overturn that federal authority using the language of what would become the Seventeenth Amendment.³⁴⁸ However, those lawmakers were ultimately unsuccessful, and the Amendment passed without any repeal of Congress's Elections Clause authority over Senate elections.³⁴⁹ Accordingly, since Congress possessed direct knowledge of prior elections provisions in the Constitution when it ratified the Amendment, the "as the legislature may direct" clause should be interpreted consistently with those provisions, including the Elections Clause itself.³⁵⁰

343. *Granholm*, 544 U.S. at 466 (noting the supremacy of the Commerce Clause in reaching the conclusion that Michigan's winery law was unconstitutional).

344. See Amar & Schaps, *supra* note 175 (analogizing the holding in *Granholm* to a potential court case interpreting the conflict between the Seventeenth Amendment and the Elections Clause).

345. JELLUM, *supra* note 114, at 99–100.

346. *Id.*

347. See HOEBEKE, *supra* note 60, at 189 (noting the protracted fight over whether the states or Congress should regulate Senate elections).

348. See ROSSUM, *supra* note 54, at 213 (discussing Representative Bartlett's failed amendment as the last gasp of Southern Democrats hoping to remove Congress from the role of Senate elections regulator).

349. *Id.* at 213–14.

350. See Amar & Schaps, *supra* note 175 (identifying the particular relevance of this subjective understanding of the framers' intent when analyzing the Seventeenth Amendment).

By faithfully applying *in pari materia*, the “as the legislature may direct” clause should be interpreted harmoniously with the rest of the Seventeenth Amendment (the whole act aspect)³⁵¹ and other constitutional provisions covering the same general subject of federal elections (the whole code aspect).³⁵² *Rhyne v. K-Mart Corp.* provides a useful framework for how courts might apply the whole act aspect of *in pari materia*.³⁵³ There, the North Carolina Supreme Court invoked *in pari materia* to decide whether a state statute capped punitive damages at \$250,000 per plaintiff or per defendant.³⁵⁴ In its analysis, the court cited other language within the same statute as evidence of the structures set out in the statute, which this court concluded was a plaintiff-centered law.³⁵⁵ The court used these internal structural cues to conclude that the quarter-million dollar damages cap referred to each plaintiff’s maximum award rather than to the highest cumulative total that could be assessed against any individual defendant.³⁵⁶

The Seventeenth Amendment has a similar internal structural cue. The first sentence of the Amendment makes clear that its goal is to empower people, not legislatures, to elect senators.³⁵⁷ Thus, this Amendment shifted the election of U.S. Senators from states’ legislatures to states’ voters.³⁵⁸ In that sense, the Seventeenth Amendment is a narrowing of state power.³⁵⁹ However, interpreting “as the legislature may direct” to mean that states are the sole arbiters of election regulations for special Senate elections would be a vast expansion of previously understood state power.³⁶⁰ This interpretation would ignore the Seventeenth Amendment’s structure by placing its two major provisions—how Senators are elected and how vacancies are filled—in conflict with one another.³⁶¹ Instead, by

351. JELLUM, *supra* note 114, at 100.

352. *Id.* at 101.

353. *Rhyne v. K-Mart Corp.*, 594 S.E.2d 1, 20 (N.C. 2004).

354. *Id.*

355. *Id.* at 20–21.

356. *Id.* at 19.

357. U.S. CONST. amend. XVII, § 1 (emphasis added) (stating that senators would be elected from each state “by the people thereof”).

358. Compare U.S. CONST. art I, § 3, cl. 1 (amended 1913) (directing that state legislatures select senators), with U.S. CONST., amend. XVII, § 1 (emphasizing that each state’s senators would be elected “by the people thereof”).

359. See ROSSUM, *supra* note 54, at 219–20 (bemoaning states’ loss of power after the ratification of the Seventeenth Amendment).

360. See Amar, *supra* note 315 (noting that from as early as 1866, Congress recognized that it had ultimate authority over vacancy-filling Senate elections and that state regulations were subject to being overridden by contrary federal rules).

361. See Amar & Schaps, *supra* note 175 (speculating that the default position in this debate is to apply the Elections Clause to all Senate elections, including those to fill vacancies).

interpreting “as the legislature may direct” *in pari materia* with the rest of the Seventeenth Amendment, it does not give states any exclusive power, meaning that the Elections Clause would still apply to all types of Senate elections.

Outside of this internal consistency within the Seventeenth Amendment, the “as the legislature may direct” clause also ought to be interpreted *in pari materia* with other constitutional provisions pertaining to elections, as this is the thrust of the whole code aspect of the canon.³⁶² As the Supreme Court has held, *in pari materia* applies when two provisions “[b]oth deal with precisely the same subject matter.”³⁶³ This command was closely followed in *Florida Sugar Marketing*, which interpreted the term “export” consistently with other constitutional provisions related to commercial activity.³⁶⁴

The whole code aspect likewise can apply here because the Elections Clause and the Seventeenth Amendment both deal with “precisely the same subject matter”—elections for federal offices.³⁶⁵ As the *Florida Sugar Marketing* court ensured internal harmony amongst provisions relating to commerce within the Constitution, the Seventeenth Amendment similarly can be interpreted to maintain harmony among the Amendment and other constitutional provisions pertaining to federal elections, namely the Elections Clause. That harmonious interpretation would apply the Elections Clause to all congressional elections and reject the notion that special Senate elections are solely within state legislatures’ jurisdiction.³⁶⁶

3. *The historical approach counsels that Congress can regulate vacancy-filling U.S. Senate elections because that result was the intention of the Seventeenth Amendment’s framers*

Like structuralism, the historical approach to constitutional

362. See JELLUM, *supra* note 114, at 100 (distinguishing the whole code aspect from the whole act aspect by concluding that the whole code aspect seeks harmony among all laws concerning the same general subject matter).

363. *United States v. Stewart*, 311 U.S. 60, 64 (1940).

364. See *Florida Sugar Mktg. & Terminal Ass’n v. United States*, 220 F.3d 1331, 1338–39 (Fed. Cir. 2000) (viewing the term “export” in context with “the entirety of the relevant constitutional text,” including Article 1, section 8, clause 1 and the Exports Clause).

365. Compare U.S. CONST. art. I, § 4, cl. 1 (pertaining to the relationship between states and the federal government in regulating elections for Congress, including the Senate), with U.S. CONST. amend. XVII (outlining the process by which U.S. Senators are elected).

366. See Amar & Schaps, *supra* note 175 (rejecting any exclusive authority in the “as the legislature may direct clause” by positing that a consistent interpretation of that clause with other constitutional provisions “provides no barrier to statutes like [the] ELECT Act”).

analysis,³⁶⁷ along with the intentionalist approach to statutory interpretation,³⁶⁸ also allows for looking beyond just the text of constitutional language. These approaches use the motivations and understandings of a provision's drafters and ratifiers to guide the interpretation of the provision.³⁶⁹ Thus, the intentions of the framers of the Seventeenth Amendment—why they drafted the provision and what they understood it to mean—are essential in conducting an originalist analysis.³⁷⁰

In discerning this intent, the Amendment's legislative history provides a window into its framers' minds.³⁷¹ As noted earlier, the Seventeenth Amendment by no means sailed through Congress.³⁷² Rather, it was the subject of intense debate, both within congressional committees and on the floor of the House and Senate.³⁷³ When trying to discern the meaning of the Amendment, this legislative history is instructive to understand what Congress actually intended the Seventeenth Amendment to do.³⁷⁴

Traditionally, conference committee reports provide the most conclusive evidence of legislative history.³⁷⁵ Therefore, the Senate Judiciary Committee's Majority and Minority Reports are among the most persuasive documents in the Seventeenth Amendment's cache of legislative history.³⁷⁶ The Majority Report clearly articulated

367. See *supra* Part I.D.3 (summarizing the historical and intentionalist approaches).

368. See JELLUM, *supra* note 114, at 22–23 (explaining that discerning legislatures' specific intent is the primary inquiry in any intentionalist analysis).

369. *Id.*; BOBBITT, *supra* note 193, at 13 (noting that the intent of a constitutional provision's framers and ratifiers is the distinguishing feature of the historical modality of constitutional interpretation).

370. See Amar & Schaps, *supra* note 175 (referencing the legislative history of the Seventeenth Amendment in reaching the conclusion that the ELECT Act would be constitutional).

371. See *id.* (suggesting that the Amendment's legislative history, which evinces the intent of its framers, "strongly favors" applying the Elections Clause to vacancy-filling Senate elections).

372. See HOEBEKE, *supra* note 60, at 157–85 (tracing the Amendment's path to ratification, which the author deemed "the deliberation to end all deliberations"); *supra* Part I.C.2 (detailing the Amendment's long, tumultuous journey).

373. See *supra* Part I.C.2 (describing the positions of both the Amendment's supporters and detractors as it was debated in Congress).

374. See JELLUM, *supra* note 114, at 161–65 (outlining and ranking the various sources of legislative history).

375. *Id.* at 162.

376. See S. REP. NO. 62-35, at 1–2 (1911) (accompanying the Senate Judiciary Committee's minority report opposing the proposed amendment providing for popular election of senators and recommending an amendment that maintained Congress's Elections Clause authority over Senate elections); S. REP. NO. 61-961, at 1 (1911) (accompanying the Senate Judiciary Committee's majority recommendation for a proposed amendment that stripped Congress's Elections Clause authority over Senate elections).

Congress's reasons for supporting the Seventeenth Amendment: to free deadlocked state legislatures to attend to other business in their states; to prevent corruption; to further the goals of open, democratic representation; and to align the Constitution with the public's overwhelming support for direct Senate elections.³⁷⁷ This clear statement of legislative purpose and goals can be instructive to a court analyzing whether prospective federal legislation violates the Seventeenth Amendment.³⁷⁸

The Senate Judiciary Committee's Minority Report, which rejected any alteration to Congress's Elections Clause authority, provides further specific insight into how Congress understood the Amendment's relationship with the Elections Clause.³⁷⁹ This Minority Report argued against making wholesale changes to the federal elections structure contemplated by the Framers in the Elections Clause.³⁸⁰ Because this minority opinion reflected the position that eventually passed the Senate—that the Seventeenth Amendment would not alter the Elections Clause—it is a particularly relevant piece of legislative history that courts could—and should—turn to when interpreting the Amendment.³⁸¹

When courts examine legislative history, the proposal and failure of amendments is also instructive.³⁸² As discussed above, the original proposal for the Seventeenth Amendment included making states the exclusive regulators of Senate elections,³⁸³ a proposal that would have altered Congress's Elections Clause power.³⁸⁴ However, the Senate

377. S. REP. NO. 61-961, pt. VIII–XI, at 13–15 (1911).

378. See JELLUM, *supra* note 114, at 162 (noting that the *Holy Trinity* Court relied on a committee report to reach its decision).

379. S. REP. NO. 62-35, at 1–5 (1911) (noting that the proposed amendment did not necessarily secure the direct election of senators by the people, that the proposed changes would be “fundamental and vital change[s] . . . and should be regarded as far more important than the change from legislative to direct election of [s]enators,” and that the change would disturb the balance of power in both the Constitution itself and the branches of the government).

380. *Id.*

381. See JELLUM, *supra* note 114, at 162–63 (explaining that, when considering legislative intent, “[i]t can be instructive to see what the committee . . . changed or rejected”).

382. *Id.*; see also *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 515 (1979) (finding rejected amendments useful in interpreting statutory language).

383. S. REP. NO. 61-961 (1911) (providing that each state would be responsible for determining the “time, place, and manner” of holding popular elections for Senators and that, in the event of a vacancy, the state executive branch would have exclusive power of filling the vacancy).

384. See ROSSUM, *supra* note 54, at 208, 211 (noting that several representatives and senators proposed amendments to the original version of H.J. Res. 39 because the original version essentially eliminated Congress's Elections Clause authority over Senate elections).

rejected that provision,³⁸⁵ and the House later defeated a last-ditch attempt to reinsert that language into the Amendment.³⁸⁶ Ultimately, two-thirds of both the House and Senate passed the Seventeenth Amendment without the rejected Elections Clause language.³⁸⁷ This shows both that Congress was aware of the issue of whether states or the federal government should have final authority over Senate election regulations and that Congress chose to maintain its “make or alter” power over Senate elections.³⁸⁸ Accordingly, any interpretation of the Seventeenth Amendment concluding that Congress abrogated its Elections Clause authority over any type of Senate elections is, arguably, incongruent with Congress’s explicit intent and, thus, in conflict with the historical approach.³⁸⁹

Courts that have interpreted the Seventeenth Amendment have reached a similar conclusion. In *Newberry*, the Supreme Court found that the Seventeenth Amendment left the Elections Clause “intact and applicable both to the election of Representatives and Senators.”³⁹⁰ Later, *Valenti* confirmed that, even after the ratification of the Seventeenth Amendment, states still derived their authority to regulate Senate elections from the Elections Clause rather than from a new grant of authority within the Amendment itself.³⁹¹ Similarly, the *Trinsey* court relied on the Elections Clause to uphold a particular

385. See *id.* at 211 (explaining that a substitute for H.J. Res. 39, which removed the language of the originally proposed amendment that gave states exclusive control of senatorial elections, was passed with a two-thirds majority).

386. *Id.* at 213; see also Amar & Schaps, *supra* note 175 (emphasizing the Southern Senators’ failed attempts to re-insert anti-Elections Clause language into the final version of the Amendment to reach the conclusion that the Amendment’s legislative history counsels that the “as the legislature may direct” clause did not leave any exclusive power to states).

387. See ROSSUM, *supra* note 54, at 213–14 (recounting the end stages of congressional debate over the Seventeenth Amendment).

388. See *Marsh v. Chambers*, 463 U.S. 783, 791 (1983) (suggesting that evidence of opposition to a legislative provision “demonstrat[es] that the subject was considered carefully and the action not taken thoughtlessly”); Amar & Schaps, *supra* note 175 (inferring that Congress’s rejection of these Elections Clause changes meant that the ratifiers of the Seventeenth Amendment knew it left that Clause untouched).

389. See Amar, *supra* note 315 (stating that the author has not seen a historical analysis of the Constitution that would call into question the validity of legislation like the ELECT Act).

390. *Newberry v. United States*, 256 U.S. 232, 252 (1921) (quoting 46 CONG. REC. 848 (statement of Senator Borah)), *abrogated by* *Burroughs & Cannon v. United States*, 290 U.S. 534 (1934).

391. *Valenti v. Rockefeller*, 292 F. Supp. 851, 856 (W.D.N.Y. 1968) (per curiam) (noting that if the drafters of the amendment had desired a “radical departure” from the traditional understanding of the Elections Clause, then they could have written the amendment to reflect that legislative priority), *aff’d*, 393 U.S. 405 (1969). The *Valenti* Court also held that, notwithstanding the Seventeenth Amendment, states still had “reasonable discretion” over the timing and manner of conducting Senate elections, particularly those held to fill sudden vacancies. *Id.* at 866.

Senate election regulation in Pennsylvania.³⁹² Most recently, in the Seventh Circuit's initial *Judge* opinion, the court explicitly found that a "state legislature's power to make laws governing vacancy elections is limited by Congress's power under the Elections Clause to 'make or alter' such regulations."³⁹³ This unambiguous interpretation of the relationship between the Elections Clause and the Seventeenth Amendment shows that states may regulate the "[t]imes, [p]laces, and [m]anner" of Senate elections only insofar as Congress does not make other regulations or alter any pre-existing state laws.³⁹⁴

Given this clear message of the legislative history and interpretive case law of both the "as the legislature may direct" clause and the whole Amendment, it would seem incoherent not to apply the Elections Clause to all Senate elections, including those to fill vacant seats.³⁹⁵ Yet, as noted above, the plain text of the "as the legislature may direct" clause plausibly can be read as an exclusive grant of power to the states,³⁹⁶ which creates a conflict between the textual and historical analytical approaches.

In *Marsh*, the Supreme Court suggested that, when presented with competing outcomes from a textual and historical analysis, the historical approach prevails.³⁹⁷ Thus, a similar result is likely when analyzing the conflict between the Elections Clause and the Seventeenth Amendment. Taken alone, the words "as the legislature may direct" imply an exclusive grant of state power.³⁹⁸ However, the Amendment's legislative history shows that its drafters' motivation was to take power away from the states by having the people directly

392. *Trinsey v. Pennsylvania*, 941 F.2d 224, 234 (3d Cir. 1991) (acknowledging that the Elections Clause and the Seventeenth Amendment work together to confer power upon the states to regulate Senate elections).

393. *Judge v. Quinn*, 612 F.3d 537, 554 (7th Cir. 2010), *cert. denied*, 131 S. Ct. 2958 (2011). *But see Valenti*, 292 F. Supp. at 866 (emphasis added) (finding that the Seventeenth Amendment only "confer[red] a reasonable discretion upon the states concerning the timing and manner of conducting vacancy elections").

394. *Judge*, 612 F.3d at 554. However, at least one court has found that the legislative history of the "as the legislature may direct" clause is not entirely clear. *See Trinsey*, 941 F.2d at 231 (finding the clause's legislative history too vague to guide the court's analysis in determining the legislative intent of the clause).

395. *See Amar & Schaps, supra* note 175 (concluding that the ELECT Act would be constitutional because of the prevailing interpretation of the Seventeenth Amendment).

396. *See supra* Part II.B.1 (applying textualism to the Seventeenth Amendment).

397. *Marsh v. Chambers*, 463 U.S. 783, 786 (1983) (upholding Nebraska's tradition of beginning each legislative session with a chaplain-led prayer, even though this practice seemed to violate the plain language of the First Amendment; the emphasized intention of the original framers of the First Amendment, which was evinced by the fact that chaplains actually led prayers during the earliest sessions of Congress).

398. *See supra* Part II.B.1 (determining the plain meaning of the Seventeenth Amendment).

vote for their senators.³⁹⁹ In fact, the Amendment only passed after repeated failed attempts by some lawmakers to add explicit language altering the Elections Clause's reach over Senate elections, which is evidence that the ratifiers of the Amendment understood the Elections Clause remained in full effect.⁴⁰⁰ Therefore, following the Court's lead in *Marsh*, this clear legislative history and subsequent evidence of its understanding can trump the otherwise plain meaning of "as the legislature may direct," meaning that the historical analysis could outweigh the textual analysis in the minds of a majority of the Court.⁴⁰¹

An additional reason for this outcome is the fear of judicial overreach, including the risk of improperly interpreting statutes as being implicit repeals of other pre-existing laws.⁴⁰² Hence, repeal by implication is strongly disfavored,⁴⁰³ as courts presume that because legislators are aware of all pre-existing legislation, they only explicitly repeal existing laws.⁴⁰⁴

As evinced by its decision in *Morton*, the Supreme Court prefers reconciling seemingly contradictory statutory provisions rather than finding that Congress implicitly repealed the earlier statute.⁴⁰⁵ A similar approach is applicable to the conflict between the Seventeenth Amendment and the Elections Clause. Reading "as the legislature may direct" as an exclusive grant of state power would implicitly repeal the Elections Clause's application to special Senate elections.⁴⁰⁶ However, Congress rejected such an explicit repeal of

399. See generally ROSSUM, *supra* note 54 (detailing the impetus behind changing the way Senators are elected).

400. Amar & Schaps, *supra* note 175.

401. See, e.g., *Marsh*, 463 U.S. at 791–93 (1983) (upholding Nebraska's chaplain-led prayer because the First Congress and other early federal legislative meetings engaged in a similar custom, even though the plain meaning of the Establishment Clause suggests that this is an impermissible endorsement of religion).

402. See Purdum & Toner, *supra* note 253 (noting Chief Justice Robert's warning that judges only need to be the umpires in a courtroom).

403. See BROWN & BROWN, *supra* note 192, at 94–95 (stating that "[t]here is a presumption against repeal by implication" because, without express repeal, "the legislature probably did not intend to repeal the earlier act" and whenever possible new legislation should be read to coexist with the earlier statute).

404. See JELLUM, *supra* note 114, at 146 (explaining that legislatures make laws with the general intent of changing something; legislators are presumed "aware of the conflicting, existing law and specifically opt[] not to repeal it").

405. *Morton v. Mancari*, 417 U.S. 535, 550 (1974) (reconciling two conflicting provisions, the Employment Opportunity Act and the Indian Reorganization Act, by holding that the IRA's specific clause granting federal-hiring preference to Native Americans for certain jobs was merely an exception to the EEO's general prohibition of using race as a factor in federal hiring at all).

406. See Amar & Schaps, *supra* note 175 (noting the presumption that the Elections Clause extends to all elections for federal office). Accordingly, not applying it to vacancy-filling elections would be an implied repeal of the Clause to

the Elections Clause during the debate over the Seventeenth Amendment.⁴⁰⁷ Therefore, applying the analysis of *Morton*, the “as the legislature may direct” clause instead should be reconciled with the Elections Clause.⁴⁰⁸ These clauses can be reconciled by viewing “as the legislature may direct” as either a reminder of states’ initial role in promulgating elections regulations, which remains subject to congressional oversight, or as a clarification that legislatures, not governors, are in charge of making state election laws.⁴⁰⁹ As in *Morton*, either of those interpretations gives effect to both the pre-existing provision (the Elections Clause) and the later-enacted provision (the Seventeenth Amendment), thereby reconciling the two clauses rather than reading one as an implied repeal of the other. Consequently, applying the canon against implied repeal bolsters the conclusion that an intentionalist analysis favors applying the Elections Clause to all Senate elections.

4. *Federal legislation is a superior approach to amending the U.S. Constitution in order to solve the current problems in how U.S. Senate vacancies are filled*

Punctuated by recent events like the scandal in Illinois,⁴¹⁰ it has become increasingly clear that Senate vacancies should be filled in a uniform way throughout the country. This uniformity should be based on the principle that direct elections are best.⁴¹¹ Moreover, perpetual concerns about terrorism highlight the risks that several Senate seats could become vacant simultaneously should an unspeakable tragedy hit Congress and the country.⁴¹² Even in less-tragic circumstances, such as when a Senate seat is vacated because the sitting senator chooses to take a position within a presidential

that narrow subset of elections. *Id.*

407. See ROSSUM, *supra* note 54, at 213–14 (discussing the failure of Representative Bartlett’s amendment seeking to abolish federal oversight of Senate elections).

408. Cf. *Morton*, 417 U.S. at 550 (avoiding an implicit repeal by reconciling two potentially contradictory provisions in separate statutes).

409. See Stern, *supra* note 174 (suggesting myriad reasons why the “as the legislature may direct” clause was added to the Amendment).

410. See *supra* notes 1–6 and accompanying text (detailing Governor Blagojevich’s political corruption when he attempted to sell his State’s open Senate seat to the highest bidder, an illegal action that ultimately led to his impeachment and conviction).

411. See Amar & Schaps, *supra* note 175 (agreeing with the premise that direct election is the best way to elect senators, but expressing doubt that eliminating temporary gubernatorial appointments altogether should be part of the solution to address the current problems surrounding Senate vacancies).

412. See *id.* (elaborating on the crippling effect such an attack could have on governmental functionality).

administration,⁴¹³ delays in filling Senate vacancies risk denying each state its constitutionally-mandated number of votes in Congress.⁴¹⁴

However, while both legislation like the ELECT Act or a constitutional amendment like S.J. Res. 7 would substantively address the problems with the current ad hoc approach to filling Senate vacancies, a standard legislative approach is superior for a number of reasons.⁴¹⁵ Chief among these reasons is that legislation is a significantly easier political accomplishment than amending the Constitution. Since the first ten amendments were ratified in 1791, lawmakers have only amended the Constitution seventeen subsequent times in the last 220 years.⁴¹⁶ This is no surprise given the rigorous nature of the amendment process, which requires the support of two-thirds of both houses of Congress and three-fourths of the states for ratification.⁴¹⁷

Today, finding this high threshold of support for any prospective constitutional amendment seems almost unimaginable.⁴¹⁸ This is likely to be especially true for an amendment that would federalize the regulation of special Senate elections because popular political factions, such as the Tea Party, generally oppose the Seventeenth Amendment's consolidation of power in the federal government.⁴¹⁹

413. See *supra* notes 176–184 and accompanying text (highlighting that exact scenario when President Barack Obama selected his first Cabinet).

414. See Amar & Schaps, *supra* note 175 (discussing the “antidemocratic consequences” of leaving Senate seats vacant for extended periods).

415. See *id.* (supporting the ELECT Act over S.J. Res. 7, which proposed amending the Constitution); see also *supra* Parts II.B.1–3 (concluding that a legislative solution is permissible because a textual, structural, and historical analysis of the relationship between the Seventeenth Amendment and the Elections Clause shows that Congress does have ultimate authority to regulate vacancy-filling Senate elections).

416. See U.S. CONST. amend. XXVII (representing the last amendment added to the Constitution).

417. See U.S. CONST. art. V (outlining the amending process). Alternatively, two-thirds of states can call a Constitutional Convention to propose an amendment in lieu of the traditional process in which Congress first passes an amendment through a two-thirds vote of each chamber. *Id.*; see also Mary Frances Berry, *Amending the Constitution: How Hard It Is to Change*, N.Y. TIMES MAGAZINE, Sept. 13, 1987, at 93 (recounting the difficulty in attempting to pass the Equal Rights Amendment, which never gained enough support for ratification into the Constitution).

418. Per Article V, a prospective constitutional amendment today would need the support of at least 290 congressmen, sixty-seven senators, and thirty-eight state legislatures in order to be ratified. The sixty-seven senator threshold might be particularly onerous given the record number of filibusters during the 111th Congress. See Brian Beutler, *111th Senate Breaks a Filibuster Record*, TALKING POINTS MEMO (Dec. 23, 2010, 9:24 AM), <http://tpmdc.talkingpointsmemo.com/2010/12/111th-senate-breaks-one-filibuster-record.php> (noting that Senate Democrats, who held the majority in that chamber during the 111th Congress, were forced to break more filibusters than at any other time before).

419. See *supra* Part I.C.5 (noting the relevancy of the Seventeenth Amendment to current political discourse, which includes the push by some in the Tea Party to repeal the Amendment altogether).

Conversely, regular legislation, like the ELECT Act, only requires a simple majority vote of support in the House and Senate to become law.⁴²⁰ Therefore, when juxtaposed with the prospects of amending the Constitution, regular federal legislation is the most politically-feasible option for dealing with the Senate vacancy problem in the current political climate.⁴²¹

An additional advantage of regular legislation is the relative ease with which that legislation could be changed.⁴²² For instance, if Congress passed legislation like the ELECT Act and a large number of states had valid complaints about a certain provision of the law, Congress could repeal or amend the law through the normal legislative process as outlined above.⁴²³ Theoretically, Congress could tweak this legislation until it reached the optimal set of regulations for vacancy-filling Senate elections.

A constitutional amendment, however, would impose a permanent rule for how vacancies could be filled.⁴²⁴ If some portion of the amendment proved to be unworkable, the only way to fix that flaw would be to re-start the constitutional amendment process to effectuate a repeal of the new amendment.⁴²⁵ Therefore, the nation would be stuck with an imperfect constitutional amendment, which could only be removed through the arduous ratification process. Accordingly, basic federal legislation is preferable to the drastic step of amending the Constitution.⁴²⁶

420. This would require 218 votes in the House and 51 votes in the Senate. However, modern Senate filibuster rules would effectively require a sixty-vote supermajority to pass this legislation in the Senate. See *STANDING RULES OF THE UNITED STATES SENATE*, § 22.2 (1986), <http://rules.senate.gov/public/index.cfm?p=RuleXXII> (requiring sixty votes to invoke cloture on any motion before the Senate).

421. See Amar & Schaps, *supra* note 175 (supporting federal legislation over a constitutional amendment by noting that statutes are more easily perfectible).

422. See *id.* (observing that statutory enactment can more easily respond to states' experiences).

423. For example, the Senate recently amended a perceived flaw in the newly-enacted Affordable Care Act, President Obama's signature health care reform legislation. See Vicki Needham, *Senate Approves 1099 Repeal as Amendment to FAA Measure*, THE HILL (Feb. 2, 2011, 7:08 PM), <http://thehill.com/blogs/on-the-money/domestic-taxes/141855-senate-approves-1099-repeal-as-amendment-to-faa-measure> (discussing how the Senate repealed a health care reform provision that required small business owners to submit "onerous" 1099 tax forms).

424. See U.S. CONST. art. V (setting forth the exclusive means for amending the Constitution).

425. *Id.*

426. See Amar & Schaps, *supra* note 175 (arguing that the Constitution should only be amended when the public distrusts Congress to maintain a certain new legal framework).

CONCLUSION

Prompted by fears of corruption, state legislative overburdening, and the undemocratic nature of having legislatures select senators,⁴²⁷ Congress and the states ratified the Seventeenth Amendment in 1912, compelling the direct popular election of U.S. Senators.⁴²⁸ Those same fears have resurfaced in recent years regarding the process by which Senate vacancies are filled.⁴²⁹ Accordingly, some lawmakers have proposed solutions to standardize how states fill Senate vacancies.⁴³⁰ However, an apparent conflict between the Elections Clause and the Seventeenth Amendment has called into question whether Congress can take action in this area short of amending the Constitution.

Based on a textual, structural, and historical analysis of that conflict, this Comment concludes that Congress does have the authority to regulate all types of Senate elections. During the Seventeenth Amendment ratification debate, Congress passionately debated who should have ultimate authority over Senate election regulations.⁴³¹ In the end, those favoring federal control won, leaving the Elections Clause applicable to Senate elections.⁴³² Thus, the contemporary understanding of those who drafted and ratified the Amendment shows that they expected Congress to have regulatory power over Senate elections.⁴³³ Although a plain reading of the “as the legislature may direct” clause arguably finds that states retained exclusive control over vacancy-filling elections,⁴³⁴ this would be an

427. See S. Rep. No. 61-961, at 1, 13–15 (1911) (articulating reasons for supporting the popular election of senators).

428. See U.S. CONST. amend. XVII (compelling the direct election of U.S. Senators); *supra* notes 102–105 and accompanying text (chronicling the final stages in the Seventeenth Amendment’s ratification journey).

429. See Amar & Schaps, *supra* note 175 (noting how the recent Rod Blagojevich scandal in Illinois, among other recent questionable vacancy-filling appointments, prompted federal lawmakers to address concerns over how Senate vacancies are filled); *supra* notes 1–6 and accompanying text (detailing Blagojevich’s fall from grace in Illinois).

430. See H.R. 899, 111th Cong. (2009) (proposing that all Senate vacancies must be filled by a direct election within ninety days of the seat becoming open, but allowing governors to make temporary appointments to fill the seat until that election occurs); S.J. Res. 7, 111th Cong. (2009) (proposing a constitutional amendment that would entirely ban even temporary appointments to the Senate).

431. See *supra* Part I.C.2 (outlining the arduous ratification journey of the Seventeenth Amendment, including the passionate fight between supporters of federal oversight of Senate elections and advocates of states being the final arbiters of Senate election regulations).

432. *Id.*

433. See Amar & Schaps, *supra* note 175 (arguing that the contemporary view of the Seventeenth Amendment’s framers should be persuasive evidence of its applicability to all Senate elections today).

434. See *supra* notes 301–10 and accompanying text (conducting a textual analysis

absurd result given Congress's motivations for ratifying the Amendment in the first place.⁴³⁵ Moreover, the Supreme Court has dismissed such textual analysis when contrary structural and historical analyses compelled a different result.⁴³⁶

Because of this analysis, this Comment also argues that a legislative approach to addressing the problems of Senate vacancies is better than a constitutional amendment.⁴³⁷ The most important reason is that amending the Constitution is a comparatively herculean task, requiring the support of two-thirds of Congress and three-fourths of states.⁴³⁸ Given the current political gridlock in the United States, it is exceedingly hard to imagine that scenario happening.⁴³⁹ Moreover, constitutional amendments carry the risk of permanency, potentially burdening the country with an unworkable system if any aspects of a proposed constitutional amendment prove to be untenable.⁴⁴⁰ Consequently, a statutory solution to the problems caused by current senate vacancy-filling laws is both constitutionally permissible and politically preferable.

of the "as the legislature may direct" clause, which found that the plain meaning of that clause does suggest exclusive state authority of vacancy-filling Senate elections).

435. See *supra* notes 322–28 and accompanying text (concluding that the *Holy Trinity* "absurd result" exception would require applying the Elections Clause to all Senate elections).

436. See *Granholt v. Heald*, 544 U.S. 460, 476–89 (2005) (relying on structural and historical analysis to find that the Twenty-First Amendment, despite its clear language suggesting otherwise, did not overturn the application of the Dormant Commerce Clause to state liquor regulations); *Marsh v. Chambers*, 463 U.S. 783, 786–91 (1983) (using historical analysis to find that the First Amendment, despite its clear wording regarding the freedom of religion, did not ban state-employed chaplains from beginning a legislative session with a public prayer).

437. See *supra* Part II.B.4 (positing reasons why regular legislation is preferable to the difficult task of amending the Constitution).

438. See *supra* note 315 (discussing the comparative difficulties of amending the Constitution as opposed to passing regular federal legislation).

439. See Tim Rice, *Analysis: U.S. May Be Entering Age of Political Deadlock*, REUTERS (July 28, 2011, 10:45 AM), <http://www.reuters.com/article/2011/07/28/us-usa-debt-gridlock-idUSTRE76R43U20110728> (suggesting that, by mid-2011, the federal government had entered an "era of deadlock" and was embroiled in a "crisis of governance," evinced in part by the prolonged debate during the summer and fall of 2011 among House Republicans, Senate Democrats, and the Obama Administration over raising the federal debt ceiling).

440. See *supra* notes 422–26 and accompanying text (arguing that flexible federal legislation is preferable to a rigid, permanent constitutional amendment).