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DEMOCRATIZING GUBERNATORIAL SUCCESSION

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ABSTRACT

In most states, lieutenant governors operate as built-in governors-in-waiting. But in the early days of the United States, relatively few lieutenant governors existed—and in the states without them, governors were usually succeeded by legislative, or quasi-legislative, officers. The adoption of lieutenant governorships, which primarily took place during the nineteenth century, reflects the culmination of a long trend in state constitutional law toward the democratization of state institutions.

The story of gubernatorial succession is primarily the story of how lieutenant governors were created. But it is more than that—it is the story of how state separation-of-powers systems evolved over time, how legislators lost their perch in the line of gubernatorial succession, how other state officers were created and positioned as gubernatorial successors, and how small features of state constitutional law became polarizing issues in constitutional development. It is also a story of incompletion. Many states today lack lieutenant governors, or provide for a method of lieutenant-gubernatorial election that defies the logic for establishing such an office in the first place. This Article tells each of these stories, recounting in detail the history of gubernatorial succession, using that history to extract a narrative of democratization, and arguing that there remain undemocratic vestiges in current gubernatorial succession provisions that ought to be reformed.

I. INTRODUCTION

If the governor of a state dies—or resigns, is removed from office, is appointed to another position, or otherwise leaves office, voluntarily or otherwise—we might reasonably assume that they will be replaced in a procedure mirroring presidential succession. In other words, if the governor dies, their lieutenant governor becomes governor. And in the vast majority of states, that is certainly the case. In some states, however, gubernatorial power cannot flow to the lieutenant governor because there is not one. In these cases, the state constitutions instead provide that, in case of a vacancy, the state senate president or the secretary of state becomes governor. But these exceptions are few and far between. Only seven states—Arizona, Maine, New Hampshire, Oregon, Tennessee, West Virginia, and Wyoming—along with one territory, Puerto Rico, lack

a lieutenant governor.[1] The most common permutation instead occurs in states *with* lieutenant governors. While many states follow the presidential model, providing for a jointly elected governor–lieutenant governor team, in some states, the lieutenant governor is elected separately from the governor; in others, even though the governor and lieutenant governor are elected on a joint ticket, they are nominated in separate primaries.[2]

Despite these inconsistencies, the current process of gubernatorial succession is largely uniform throughout the country—at least compared to the historical process of succession. In the early days of the United States, there was no uniform method of gubernatorial succession, and though some states shared the same method, the overall picture was crowded with many different lines of succession. Over time, however, lieutenant governors were widely adopted as built-in gubernatorial successors, which is reflective of a long-running effect to democratize state constitutions and institutions. But today, though the line of gubernatorial succession is more uniform and cohesive, there is still work to be done. Though lieutenant governors function as far better gubernatorial successors than any other state officer, not every state has provided for a lieutenant governor. And many states with lieutenant governors have employed methods of lieutenant-gubernatorial election that make the process of gubernatorial succession of doubtful democratic legitimacy.

Accordingly, this Article has a twofold purpose. First, it aims to tell the legal history of gubernatorial succession provisions, including how these provisions have evolved over the last two and a half centuries. Second, it extrapolates from this legal history a long trend toward democratization and argues that the movement to democratize gubernatorial succession is not done yet. It argues that, for the process by which a governor is succeeded to be democratically legitimate, additional changes need to be made: creating lieutenant governors in the states that currently lack them and creating team-based election of the governor and lieutenant governor where they are otherwise separately elected.

Part II begins by reviewing two offices that prior to the widespread adoption of lieutenant governors were placed first in the line of gubernatorial succession: state senate presidents and members of state

1. *Our Members*, NAT'L LT. GOV'RS ASS'N, https://nlga.us/lt-governors/ (last visited September 13, 2021).

2. *See* discussion *infra* Part V; *see generally* T. Quinn Yeargain, *One Vote, Two Winners: Team-Ticket Gubernatorial Elections and the Need for Further Reform*, 75 U. MIAMI L. REV. 751 (2021) (reviewing the creation of team-ticket gubernatorial elections).

executive councils. It reviews the history of gubernatorial transitions from elected governors to these successors and explains why these offices were either abolished or displaced from the line of succession. Part III continues with a detailed history of how lieutenant governors were created, from their initial adoption in the early days of the United States to their widespread adoption today. It focuses on the explicit reasons for the creation of the office, as well as several noticeable patterns. Part IV then discusses the placement of secretaries of state as gubernatorial successors, detailing both the history of such provisions and arguing that those provisions can be contemporarily understood as creating lieutenant governors with another name.

Finally, Part V argues that the history of gubernatorial succession provisions is, at its core, a history of how the governor's office has been transformed into a democratic office. It further argues that this history is not yet complete—and that some current succession provisions, as well as the method by which many lieutenant governors are elected, are vestiges of a more undemocratic time. Accordingly, it argues for the adoption of a clear, democratic line of gubernatorial succession.

II. LEGISLATORS AS GUBERNATORIAL SUCCESSORS

At the time that the United States declared independence, the most common gubernatorial successor was a legislator—or quasi-legislator.[3] State senate presidents and leaders on state executive councils were first in the line of gubernatorial succession in eight states.[4] Their placement in the line of succession reflected public skepticism and fear of a too-powerful state executive.[5] Over time, however, state executive councils were abolished, and the role that they played in gubernatorial succession was allocated to other officers. Similarly, though state senate presidents remained a popular successor to governors, concerns over separation of powers and ambiguities in the line of succession eventually caused them to be bumped down in the line of succession.

This Part begins the historical discussion of gubernatorial succession by focusing on the two most antiquated gubernatorial successors: state executive councilors and state senate presidents. Section A provides a condensed history of state executive councils and details their placement in the line of succession. Next, Section B outlines the designation of state senate presidents as gubernatorial successors and explores the

3. *See* discussion *infra* Part II, Section A.

4. *Id.*

5. *See* FLETCHER MELVIN GREEN, CONSTITUTIONAL DEVELOPMENT IN THE SOUTH ATLANTIC STATES, 1776–1860: A STUDY IN THE EVOLUTION OF DEMOCRACY 89–91 (1930).

constitutional questions that their succession—even in temporary instances—prompted. Both sections explore the potential problems with placing these officers first in the line of gubernatorial succession.

A. State Executive Councils

At the time of Independence, and in the years immediately preceding the ratification of the U.S. Constitution, most states provided for an executive council. In all states but Pennsylvania,[6] the council was elected by the legislature.[7] The typical council served as a gatekeeper to executive power. If the governor sought to do anything that we might prototypically classify as "executive"—like issue a pardon,[8] make an appointment,[9] or even convene the legislature[10]—the executive council frequently needed to approve it.[11] More broadly speaking, the executive council served in an "advice and consent" role to the governor,[12] likely making its power dependent on the relationship between the governor and the council members.[13]

This power, however, is almost suggestive of a *legislative*, not executive, role for executive councils. The idea of "advice and consent," though originally based on the model of the executive council giving advice and consent,[14] has firmly rooted itself as a prerogative of the

6. *See* PA. CONST. of 1776, § 19.

7. *E.g.*, MD. CONST. of 1776, art. XXVI; MASS. CONST. pt. 2, ch. 2, § 3, art. II, *amended by* MASS. CONST. amend. XIII; N.H. CONST. of 1784, pt. 2; N.J. CONST. of 1776, § VII, VIII; N.C. CONST. of 1776, § XIV; S.C. CONST. of 1776, art. V; S.C. CONST. of 1778, art. III; VA. CONST. of 1776; VA. CONST. of 1830, art. IV, § 5. The Massachusetts Executive Council was converted from legislative election to popular election in 1840. LAWRENCE FRIEDMAN & LYNNEA THODY, THE MASSACHUSETTS STATE CONSTITUTION 20 (2011).

8. *E.g.*, ME. CONST. art. V, pt. 1, § 11; VA. CONST. of 1776.

9. *E.g.*, GA. CONST. of 1777, art. XXI; ME. CONST. art. V, pt. 1, § 8; N.H. CONST. of 1792, pt. 2, § XLVI; N.J. CONST. of 1776, art. XII; S.C. CONST. of 1776, art. XXIV.

10. *E.g.*, GA. CONST. of 1777, art. XX; N.H. CONST. of 1792, pt. 2, § XLIII; VA. CONST. of 1776.

11. *See, e.g.*, JOHN V. ORTH & PAUL MARTIN NEWBY, THE NORTH CAROLINA STATE CONSTITUTION 7 (2d ed. 2013) ("[The Governor] could make no important decision without the advice of the Council of State.").

12. GREEN, *supra* note 5, at 89–91; David Fontana, *The Second American Revolution in the Separation of Powers*, 87 TEX. L. REV. 1409, 1420–21 (2009); *see, e.g.*, N.J. CONST. of 1776, art. VIII; N.C. CONST. of 1776, art. XIV; S.C. CONST. of 1776, art. V; VA. CONST. of 1776.

13. *See, e.g.*, DUANE LOCKARD, NEW ENGLAND STATE POLITICS 106 (1959) (discussing the mid-twentieth century relationship between the Governor of Maine and the state executive council).

14. *See, e.g.*, Adam J. White, *Toward the Framers' Understanding of "Advice and Consent": A Historical and Textual Inquiry*, 29 HARV. J.L. & PUB. POL'Y 103, 110 (2005).

legislature. [15] The powers exercised by executive councils might reasonably be viewed as the power of a legislature's upper chamber today. Moreover, it is clear that state constitutional drafters felt similarly. Some state constitutions explicitly included executive councils as, contrary to their titles, part of the *legislative* branch. Others implicitly included them as such. In three states—Georgia, Pennsylvania, and Vermont—the legislatures were unicameral prior to the abolition of executive councils. [16] That is to say, as state constitutions were eliminating executive councils, they were simultaneously creating state senates, suggesting that state senates replaced executive councils in the state system of government.[17]

But regardless of how their power might be classified today, these councils had two sources of creation. First, they were continuations of privy councils created under the states' previous colonial charters and were loosely inspired by the British privy council.[18] Second, because of the new states' negative experiences with unchecked executive power, the councils were put in place to broadly distribute executive power so that no one person could wield it.[19] Though these motivations might seem mutually exclusive, it is possible that early state constitutional drafters sought to repurpose and reclaim a governmental institution already in existence to serve their broader ideological aims.

Given the extent to which executive councils simultaneously exercised executive power with the governor, it is unsurprising that many of the original thirteen colonies provided that a member of their executive council would serve as governor in case of a vacancy. Five states—Georgia, Maryland, Pennsylvania, South Carolina, and Virginia—provided that a member of their executive council would serve as governor in case of a vacancy.[20] But the ways that states did so,

15. *See* Nolan McCarty & Rose Razaghian, *Advice and Consent: Senate Responses to Executive Branch Nominations 1885–1996*, 43 AM. J. POL. SCI. 1122, 1122–24 (1999).

16. *Compare* GA. CONST. of 1777, art. II and PA. CONST. of 1776, §§ 9, 19, *with* GA. CONST. of 1789, art. I, § 1, art. II, § 1 and PA. CONST. of 1790, art. I, § 1, art. II, § 1 (creating a bicameral legislature and abolishing the executive council); *see also* VT. CONST. of 1793, ch. II, §§ 8, 10, *amended by* VT. CONST. ch. II. §§ 6, 20 (creating the state senate and abolishing the executive council).

17. Moreover, the fact that, in many states, the upper chamber of the legislature was originally *called* the "council" is suggestive that the council was intended to function in a quasi-legislative capacity. *See, e.g.*, DEL. CONST. of 1776, art. IV; N.J. CONST. of 1776, arts. I, II.

18. *See* David I. Lewittes, *Constitutional Separation of War Powers: Protecting Public and Private Liberty*, 57 BROOK. L. REV. 1083, 1125 (1992).

19. *E.g.*, GREEN, *supra* note 5, at 89–91; FRIEDMAN & THODY, *supra* note 7, at 11.

20. GA. CONST. of 1777, art. XXIX; MD. CONST. of 1776, art. XXXII; PA. CONST. of 1776, pt. 2, § 19; S.C. CONST. of 1776, art. XIV; S.C. CONST. of 1778, art. VIII; VA. CONST. of 1776.

perhaps reflecting the different composition of the councils, differed wildly. Several states made the process quite simple—the president or chair of the executive council became governor in case of a vacancy. This was the method used in Georgia and Virginia, under its 1776 constitution. [21] Other states—namely, Pennsylvania and South Carolina—set up a slightly different structure. In Pennsylvania, the governor served as *ex officio* president of the executive council, and the vice-president of the council was designated as the gubernatorial successor. [22] And in South Carolina, the vice-president of the state simultaneously served as the president of the council.[23]

And in Maryland and Virginia (under its 1830 constitution), gubernatorial succession fell not to the president or chair of the council, but instead to its senior-most member.[24] But while relying on the senior-most councilors to act as governor may have been rooted in a desire to maximize that councilor's perceived experience, the operation of the procedure in practice had the potential to result in many vacancies. Take, for example, the vacancy caused by Virginia Governor Thomas Gilmer's resignation in 1841. Gilmer had been elected to a three-year term[25] beginning in 1840.[26] Upon his resignation on March 18, 1841, he was succeeded by John Patton, the senior-most member of the council.[27] But Patton's term on the council ended just two weeks later, at which point, he was no longer the senior-most councilor.[28] The governorship then

21. GA. CONST. of 1777, art. XXIX; VA. CONST. of 1776.

22. PA. CONST. of 1776, pt. 2, § 19.

23. S.C. CONST. of 1776, arts. III, V, XIV; S.C. CONST. of 1778, arts. III, VIII. Several technical points are worth emphasizing. First, Pennsylvania's executive power was concentrated in a Supreme Executive Council, which was elected by the voters of the state. PA. CONST. of 1776, pt. 2, §§ 3, 19. The legislature and the council then elected two of the council members to serve as president and vice president, respectively. PA. CONST. of 1776, pt. 2, § 19. This differs slightly from the other states—because executive power was simultaneously placed in an elected governor and an executive council, of which the governor was an *ex officio* president—but is similar enough to be included in this category. Second, prior to South Carolina's 1790 constitution, it referred to the legislatively elected vice-president of the council as the "lieutenant governor." The lieutenant governor created in the 1776 and 1778 constitutions operates as a lieutenant-governor-executive-council hybrid and is included in discussions of both officers. S.C. CONST of 1776, arts. III, V, XIV; S.C. CONST. of 1778, arts. III, VIII; *see infra* Part III.C.

24. MD. CONST. of 1776, art. XXXII; VA. CONST. of 1830, art. IV, § 5.

25. VA. CONST. of 1830, art. IV, § 1 (providing a three-year term for governors of Virginia).

26. MARGARET VOWELL SMITH, VIRGINIA 1492–1892: A BRIEF REVIEW OF THE DISCOVERY OF THE CONTINENT OF NORTH AMERICA, WITH A HISTORY OF THE EXECUTIVES OF THE COLONY AND OF THE COMMONWEALTH OF VIRGINIA, IN TWO PARTS 350 (1893).

27. *Id.* at 350–52.

28. *See id.* at 351–52.

passed to John Rutherfoord, then the senior-most councilor.[29] The next year, in 1842, Rutherfoord's term expired, and the governorship passed to John Gregory, *then* the senior-most councilor.[30] In switching from Gilmer to Patton to Rutherfoord to Gregory, the governorship was occupied by four men in one term and switched parties twice over.[31]

Ultimately, however, these provisions did not last long. Almost every state executive council—save for those in Massachusetts[32] and New Hampshire,[33] neither of which played any role in gubernatorial succession—was abolished over the course of the late eighteenth and nineteenth centuries.[34] The idea of an executive council had been proposed at the Federal Constitutional Convention, but was ultimately rejected by the delegates.[35] In support of the dominant view at the convention for a unitary executive, Alexander Hamilton wrote in Federalist No. 70 that "the plurality of the Executive"—that is, in both the governor and the council—"tends to deprive the people of the two greatest securities they can have for the faithful exercise of any delegated power, first, the restraints of public opinion, . . . and, second, the opportunity of discovering with facility and clearness the misconduct of the persons they trust."[36]

Given the consideration—and very public rejection—of the idea of an executive council at the federal level, it is perhaps unsurprising that the idea began to be rejected at the state level as well. Very shortly after the ratification of the Federal Constitution, Georgia and South Carolina abolished their executive councils in 1789 and 1790.[37] Pennsylvania similarly abolished its Supreme Executive Council in 1790.[38] Changes in the other states took significantly longer. It was not until 1837 that Maryland abolished its executive council, and it was joined by Virginia in 1850.[39]

29. *Id.* at 352.

30. *Id.* at 355–56.

31. The transitions from Patton to Rutherfoord and from Rutherfoord to Gregory both involved party switches. *See Former Virginia Governors*, NAT'L GOVERNORS ASS'N, https://www.nga.org/former-governors/virginia/ (last accessed Sept. 7, 2021) (listing party identifications).

32. MASS. CONST. of 1780, ch. II, § 2, art. I (providing that the lieutenant governor would succeed the governor).

33. N.H. CONST. pt. II, § 49 (providing for the president of the senate to succeed the governor).

34. *See infra* notes 37–39.

35. Lewittes, *supra* note18, at 1124–30; Michael Sevi, *Original Intent, Timetables, and Iraq: The Founders' Views on War Powers*, 13 TEX. REV. L. & POL'Y 73, 80–85 (2008).

36. THE FEDERALIST NO. 70, at 459 (Alexander Hamilton) (EBSCO Publishing 2021).

37. GA. CONST. of 1789, art. II, §§ 1–2; S.C. CONST. of 1790, art. II, § 1.

38. PA. CONST. of 1790, art. II, § 2; *id.* sched. § 2.

39. MD. CONST. amend. § 13; VA. CONST. of 1850, art. V, § 1.

After abolishing their executive councils, each state responded by placing different officers in the line of gubernatorial succession. Two states—South Carolina and Virginia—empowered separately elected lieutenant governors to fill gubernatorial vacancies.[40] Georgia and Pennsylvania placed the presidents of their state senates in the line of succession,[41] at least until lieutenant governors were created much later.[42] Maryland joined these states in 1851,[43] after briefly empowering its legislatively elected secretary of state to act as governor.[44]

Today, though executive councils remain in Massachusetts and New Hampshire, no executive councilor exists in any (immediate) state gubernatorial line of succession.[45] Given this reality, and with the benefit of hindsight, we can (theoretically) objectively evaluate the effectiveness of this mode of succession. But these constitutional provisions were in place for only short periods of time, and gubernatorial vacancies occurred sparingly under them. In Maryland, for example, the senior-most member of the executive council only served until a new election for governor could be held—an election by the legislature, which was the manner of selection for the governor at that time.[46] Issues regarding the interim governor's operation are nonexistent, and unsurprisingly so given the short periods of time during which they served. In many cases in these states, the executive councilor acting as governor was then elected by the legislature,[47] perhaps an indication of confidence in the acting governor's performance.

Moreover, despite their quasi-legislative role, placing executive council members in the line of gubernatorial succession makes sense. In today's parlance, it may seem somewhat akin to placing a member of a state cabinet—like a state treasurer, attorney general, secretary of state, et cetera—in the line of succession. But there is one critical difference: only Pennsylvania's executive council was democratically elected.[48] Accordingly, an executive council member lacked any sort of plausible imprimatur of democratic legitimacy in ascending to the governorship. Even more concerningly, there was no guarantee that a state executive

40. S.C. CONST. of 1790, art. II, §§ 3, 5; VA. CONST. of 1851, art. V, §§ 8–9; *see* discussion *supra* note 23.

41. GA. CONST. of 1789, art. II, § 4; PA. CONST. of 1790, art. II, § 14.

42. *See infra* notes 113–17 and accompanying text.

43. MD. CONST. of 1851, art. II, § 8.

44. MD. CONST. amend. § 13.

45. NAT'L LT. GOV'RS ASS'N, *supra* note 1.

46. MD. CONST. of 1776, pt. II, art. XIX.

47. *E.g.*, FRANK F. WHITE, JR., THE GOVERNORS OF MARYLAND: 1777–1970, at 101–04 (1970) (detailing Maryland Governor George Howard's ascension to the governorship in 1831 and election in 1832).

48. *See supra* notes 6–7 and accompanying text.

councilor succeeding a governor would be of the same party, as the rapid gubernatorial succession in Virginia in the early 1840s demonstrated.[49]

But at the time that state executive councils existed, were placed in the line of succession, and were abolished at subsequent constitutional conventions or by constitutional amendments, there is little recorded argument against *this* particular method of gubernatorial succession. Instead, the removal of state executive councils from the line of gubernatorial succession should likely be interpreted not as a slight against how executive councilors acting as governor operated, but instead as opposition to the idea of an executive council as a whole, and as support for the idea of a democratically elected governor with more power. This was roughly the logic that led to the Federal Constitutional Convention's rejection of the office.[50] At the state level, the abolition of state executive councils and creation of a democratically elected governor are related events. Indeed, these changes were frequently made simultaneously[51] and took place during a period of democratization in state constitutions.[52]

B. The President of the State Senate

In the early United States, state senate presidents were common gubernatorial successors. They remained so until the mid-to-late nineteenth century, at which point, states began creating lieutenant governorships in large numbers. There's a lot to talk about with respect to state senate presidents exercising gubernatorial power, ranging from the historical adoption—and, later, widespread elimination—of the practice, to problems related to separation of powers and democratic legitimacy. Accordingly, this Section proceeds in five subsections, which address, respectively, (1) the historical trends in the adoption of the practice; (2) the rationale behind placing state senate presidents in the line of succession; (3) ambiguities caused by this line of succession; (4) the separation-of-powers concerns; and (5) issues of democratic legitimacy.

49. *See supra* notes 25–31 and accompanying text.

50. *See supra* notes 35–36 and accompanying text.

51. *See, e.g.*, MD. CONST. amend. §§ 13, 20 (1837) (abolishing executive council and providing for directly elected governor); PA. CONST. of 1790, art. II, § 2 (same); *id.* at sched., §§ 2, 3; VA. CONST. of 1850, art. V, §§ 1–2; *id.* at sched., § 14 (same).

52. *See, e.g.*, Albert L. Sturm, *The Development of American State Constitutions*, 12 PUBLIUS 57, 65–66 (1982).

1. The Positioning of Senate Presidents as Governors-in-Waiting

While state executive councils largely faded with time, state senates—and their officers—have remained. Prior to the ratification of the Constitution in 1789, Delaware, New Hampshire, New Jersey, and North Carolina each provided that their state senate presidents would succeed the governor in case of a vacancy.[53] From there, as mentioned previously, as Georgia, Maryland, and Pennsylvania eliminated their executive councils, they also named their state senate presidents as next-in-line.[54]

Moreover, as new states joined the Union, many of their original constitutions included similar provisions. Placing state senate presidents and lieutenant governors in the line of gubernatorial succession became equally popular provisions. Between 1790 and 1850, eighteen states were admitted to the Union. Of their state constitutional provisions relating to gubernatorial succession, eight placed the state senate president first in line,[55] nine created a lieutenant governorship,[56] and one briefly named the secretary of state as the governor's successor.[57] Some constitutional shuffling occurred in these states during the same time period. Kentucky and Louisiana created lieutenant governorships in 1799 and 1845,[58] respectively, and Mississippi abolished its lieutenant governorship in 1832.[59]

But starting in the mid-nineteenth century, state senate presidencies became relatively unpopular positions to be first in the line of succession. Since 1850, only one state—West Virginia—has been admitted to the union with a constitution that devolved gubernatorial power to the senate president in case of a vacancy.[60] And since then, fifteen states have altered their gubernatorial succession provisions to create

53. DEL. CONST. of 1776, art. VII; N.H. CONST. of 1784, pt. II; N.J. CONST. of 1776, § VIII; N.C. CONST. of 1776, § XIX.

54. *Supra* notes 41, 43 and accompanying text.

55. ALA. CONST. of 1819, art. IV, §§ 18, 19; ARK. CONST. of 1836, art. V, § 18; FLA. CONST. of 1838, art. III, § 18; KY. CONST. of 1792, art. II, § 15; LA. CONST. of 1812, art. III, § 17; ME. CONST. art. V, § 14; OHIO CONST. of 1802, art. II, § 12; TENN. CONST. of 1796, art. II, § 12.

56. CAL. CONST. of 1849, art. V, § 16; ILL. CONST. of 1818, art. III, §§ 15, 17; IND. CONST. of 1816, art. IV, § 18; MICH. CONST. of 1835, art. V, § 14; MISS. CONST. of 1817, art. IV, §§ 19–21; MO. CONST. of 1820, art. IV, § 1614; TEX. CONST. of 1845, art. V, §§ 12–13; VT. CONST. of 1786, ch. II, § 3; WIS. CONST. of 1848, art. V, § 3.

57. *Compare* IOWA CONST. of 1846, art. V, § 18, *with* IOWA CONST. of 1857.

58. KY. CONST. of 1799, art. III, § 16; LA. CONST. of 1845, tit. III, art. 38.

59. MISS. CONST. of 1832, art. V, § 17.

60. *See* W. VA. CONST. of 1862, art. V, § 6.

lieutenant governorships.[61] Though four of those states temporarily restored their original succession provisions, all ended up resurrecting their lieutenant governorships.[62]

2. Why State Senate Presidents?

One of the more curious things about placing the state senate president first in the line of gubernatorial succession is the identity of the legislative officer. Every state that named a legislative officer as a gubernatorial successor chose the state senate president, not the state house speaker. Even in the three states with unicameral legislatures, the state constitutions did not name that chamber's presiding officer as the gubernatorial successor—the responsibility instead fell to other officers—and when upper chambers were created, it was the senate president who filled the void.

The main reason that placing the state senate president in the line of succession may seem strange is because it represents an inverse of succession provisions at the federal level. Presidential succession flows first to the Vice-President, but second to the Speaker of the House, and only *third* to the Senate President pro tempore. But the presidential line of succession after the Vice-President is not set by the Constitution, which is altogether silent on the subject,[63] but instead by federal statute. While the Presidential Succession Act of 1947 provides that the Speaker of the House, followed by the President pro tempore of the Senate, acts as president,[64] that was not always the case. Under the Presidential Succession Act of 1792, the Senate President pro tempore, *then* followed by the Speaker, would serve as President in the event of a dual vacancy in the offices of President and Vice-President.[65] This change likely reflects a change in how the President pro tempore is selected; prior to the late nineteenth century, "the Senate elected a President pro tempore each time the Vice President was absent at the beginning of a daily session," meaning that between 1789 and 1890, "the Senate elected

61. ALA. CONST. of 1867, art. V, § 2; ALASKA CONST. art. III, § 7; ARK. CONST. of 1864, art. V, § 19; DEL. CONST. art. III, § 19; FLA. CONST. of 1868, art. VI, § 14; GA. CONST. of 1945, art. V, § 1, para. VII; IOWA CONST. art. IV, § 3; MD. CONST. of 1864, art. II, § 6; MISS. CONST. of 1868, art. V, § 14; NEB. CONST. of 1875, art. V, § 1; N.J. CONST. art. V, § 1, para. 4; N.C. CONST. of 1868, art. III, § 1; PA. CONST. of 1873, art. IV, § 1; VA. CONST. of 1851, art. V, § 8; UTAH CONST. art. VII, §§ 1–2.

62. *See infra* Part II.B.

63. *See generally* U.S. CONST. art. II, § 1, cl. 6; U.S. CONST. amend. XXV (amended 1967).

64. 3 U.S.C. § 19(a)(1)–(b).

65. Presidential Succession Act of 1792, ch. 8, § 9, 1 Stat. 239, 240 (repealed 1886).

Presidents pro tempore on no fewer than 166 occasions."[66] But in more recent years, the Senate President pro tempore has become the longest-serving senator of the majority party.[67] On a practical level, this guarantees that an octogenarian or nonagenarian is in the office—hardly a reliable successor in a time of crisis, which explains the shift to the Speaker.

But even assuming that state constitutions adopted after 1792 sought to model their constitutions on the federal one[68]—even without creating a comparable position to the vice-presidency—why did the state constitutions *before* 1792 place the senate president in the role? The likeliest answer is that state senates were seen as moderating influences on state houses, which were more receptive to the whims of the electorate,[69] and that choosing the state senate president guaranteed a more measured person to serve as governor in the event of a crisis.

3. Ambiguities and Instability in Senate President Succession

Allowing state senate presidents to act as governors creates significant ambiguities and raises the possibility of instability in a state's executive office. For one, it was a matter of constitutional dubiousness in some states as to whether the state senate president continued in office after the legislature adjourned. Though there are relatively few recorded instances in which this question presented itself, a notable such situation occurred in Pennsylvania in 1848. Governor Francis Shunk resigned

66. CHRISTOPHER M. DAVIS, CONG. RSCH. SERV., RL30960, THE PRESIDENT PRO TEMPORE OF THE SENATE: HISTORY AND AUTHORITY OF THE OFFICE 3 (2015).

67. *Id.* at 6.

68. There is some evidence that the Federal Constitution's provisions for presidential succession borrowed from state constitutional provisions concerning gubernatorial succession. As mentioned, at the time of the Constitution's ratification, states primarily relied on executive council members or state senate presidents to fill gubernatorial vacancies. *Supra* Part II.A. Alexander Hamilton rejected the idea of a federal executive council, THE FEDERALIST NO. 70, and instead proposed that the Senate President pro tempore ascend to the presidency—and that the vice-presidency not be created at all. Richard D. Friedman, *Some Modest Proposals on the Vice-Presidency*, 86 MICH. L. REV. 1703, 1707 n.15 (1988) [hereinafter *Some Modest Proposals on the Vice-Presidency*]. However, after the convention rejected Hamilton's proposal, he did an about-face and defended the method of presidential succession in the *Federalist Papers*. *See* THE FEDERALIST NO. 68 (Alexander Hamilton) ("We have a Lieutenant-Governor [in New York], chosen by the people at large, who presides in the Senate, and is the constitutional substitute for the Governor, in casualties similar to those which would authorize the Vice-President to exercise the authorities and discharge the duties of the President.").

69. *See* T. Quinn Yeargain, *New England State Senates: Case Studies for Revisiting the Indirect Election of Legislators*, 19 U.N.H. L. REV. 335, 340–47 (2021).

from office on July 9, 1848, and died shortly thereafter.[70] However, because the state senate was out of session, State Senate Speaker William Johnston only became governor on July 26—leaving the state without a governor for seventeen days.[71]

But a far more common question arose from the mechanics of succession. Suppose that a state senate president acts as governor—either permanently or temporarily—and then another state senate president is elected. Does the power of governor then shift hands to the new senate president? The usual conclusion of the state supreme courts faced with that question is that power shifts to the new senate president because the power is tied to the office, not the person.

Take an early example. The 1829 Maine gubernatorial election was particularly close, with National Republican Jonathan Hunton appearing to win an extremely narrow majority over Democrat Samuel Smith.[72] Nonetheless, the legislature had to receive the results and declare a winner;[73] if it turned out that no candidate had won a majority, then the election would have been thrown to the legislature.[74] Prior to the election, incumbent Governor Enoch Lincoln had passed away, resulting in State Senate President Nathan Cutler acting as governor. But after the new legislature was organized, the state senate elected a new president: Joshua Hall.[75] Did Hall then replace Cutler as governor? Cutler requested an advisory opinion from the state supreme court as to who the lawful governor was, and the court concluded that Hall's election as senate president transferred the governorship to him.[76] Accordingly, Hall served as governor for about a month—all for the legislature to determine that Hunton had won the requisite majority and had been lawfully elected governor.[77]

A similar situation presented itself in Louisiana following Governor Pierre Derbigny's death. Derbigny began serving a four-year term in 1828, died in late 1829, and was succeeded by State Senate President Armand Beauvais.[78] However, Beauvais had only been elected to a one-

70. *See* MICHAEL F. HOLT, THE RISE AND FALL OF THE AMERICAN WHIG PARTY: JACKSONIAN POLITICS AND THE ONSET OF THE CIVIL WAR 364 (2003).

71. GEORGE SWETNAM, THE GOVERNORS OF PENNSYLVANIA, A BICENTENNIAL BIOGRAPHY, 1790–1990, at 23 (1990).

72. *Maine's First Decade*, *in* 1 MAINE: A HISTORY 173, 199 (Louis Clinton Hatch ed., Centennial ed. 1919).

73. *See id.* at 199–200.

74. *See* ME. CONST. of 1819, art. V, § 3.

75. *Maine's First Decade*, *supra* note 72, at 200–02.

76. *In re* Opinion of the Justices, 6 Me. 506, 509–13 (1830).

77. *See Maine's First Decade*, *supra* note 72, at 202.

78. Joseph Tregle, Jr., *The Governors of Louisiana: Armand Beauvais: 1829–1830*, 22 LA. HIST. 368, 368 (1981) [hereinafter *The Governors of Louisiana: Armand Beauvais*];

year term as senate president; when the senate reconvened in 1830, it elected Jacques Dupré as president.[79] Accordingly, Beauvais vacated the office in favor of Dupré. To avoid a "ridiculous succession of governors" as new senate presidents were elected, the legislature ordered a (possibly unconstitutional) 1830 special election to permanently fill the gubernatorial vacancy.[80] The confusion over the succession provision's applicability in such situations likely motivated the creation of the lieutenant governorship in the state's 1845 constitution.

The resignation of newly elected Arkansas Governor Joseph Robinson so that he could serve in the U.S. Senate[81] created a similar aura of uncertainty, but this time, the uncertainty gave way to a small constitutional crisis. The incumbent senate president, William Oldham, served as acting governor for about a week.[82] At the end of the legislative session, the senate elected a new senate president, Junius Futrell.[83] Both Oldham and Futrell believed that they were the rightful governor; each set up separate offices in the capitol to that effect.[84] The potential for conflict was somewhat mitigated by the fact that the legislature was not in session, leaving no question as to which person was lawfully empowered to sign bills,[85] but nonetheless, Oldham and Futrell sought clarification from the Arkansas Supreme Court.[86] The court, like the supreme court in Maine, ended up deciding that Futrell was the *de jure* acting governor, based on its conclusion that the reference in the succession provision to the senate president was "not used as descriptive of the person, but of the *officer*."[87]

One final—and much more contemporary—example. When the Republican governor of New Jersey, Christine Todd Whitman, resigned to become Administrator of the Environmental Protection Agency in 2001, State Senate President Donald DiFrancesco served as acting governor. In that year's gubernatorial election, Jim McGreevey was

Joseph G. Tregle, Jr., *Pierre Auguste Charles Bourguignon Derbigny*, 64 PARISHES, https://64parishes.org/entry/pierre-auguste-charles-bourguignon-derbigny (last updated Dec. 15, 2016).

79. Joseph Tregle, Jr., *The Governors of Louisiana: Jacques Dupré: 1830–1831*, 22 LA. HIST. 418, 418 (1981) [hereinafter *The Governors of Louisiana: Jacques Dupré*].

80. *The Governors of Louisiana: Armand Beauvais*, *supra* note 78, at 368; *The Governors of Louisiana: Jacques Dupré*, *supra* note 79, at 418.

81. Stuart Towns, *Joseph T. Robinson and Arkansas Politics: 1912–1913*, 24 ARK. HIST. Q. 291, 307 (1965).

82. Futrell v. Oldham, 155 S.W. 502, 503 (Ark. 1913).

83. CENTENNIAL HISTORY OF ARKANSAS 1091 (Dallas T. Herndon ed., vol. II 1922).

84. *Id.*; *Futrell*, 155 S.W. at 503.

85. *Id.*

86. *Id.*

87. *Id.* at 505 (emphasis added).

elected governor, but because of inconsistencies between the end of a gubernatorial term and a state senatorial term, there was an additional vacancy *after* DiFrancesco's term expired but before McGreevey could be sworn in. To make matters worse, the New Jersey state senate was split evenly among Democrats and Republicans after the 2001 election, thus requiring an unusual co-presidency. The resulting situation sounds like a *Veep* episode:

> When Acting Governor DiFrancesco's term as Senator expired, he was followed by Attorney General John Farmer, who served as Acting Governor for about an hour as the Legislature elected new leadership. Farmer was followed by Co-Senate President John Bennett, who served as Acting Governor for 84 hours. Bennett was followed by Co-Senate President Richard Codey, who served as Acting Governor for another 84 hours. Codey was followed by Governor-elect McGreevey[,] who took the oath of office on the date prescribed by the state constitution.[88]

McGreevey's inauguration only ended up solving *that* succession problem—he resigned from office in scandal a few years later, once again elevating Senate President Richard Codey to the governorship—this time for a little more than a year.[89] None of these situations ended up creating constitutional crisis, but it is not hard to imagine the situation in 2002 developing differently had the two parties not negotiated a co-presidency among Bennett and Codey. But despite the averted crisis, the situation seemed to have sufficiently spooked New Jersey politicians into finally adding an amendment to the state constitution to create a lieutenant governor, which they did after Codey's second term as acting governor.[90]

4. Separation-of-Powers Concerns

What does it mean for a state senate president[91] to act as governor? This is not necessarily a question posed in the abstract. If the state senate

88. Jason A. Cabrera, Note, *The Right and Wrong Ways to Reform the Gubernatorial Absence Provision of the New Jersey Constitution*, 44 RUTGERS L.J. 271, 299 n.155 (2014) (internal citation omitted).

89. *See id.* at 299.

90. *See* Travis Lynch, *The Problem with the Lieutenant Governor: A Legislative or Executive Position Under the Separation of Powers Clause*, 84 MISS. L.J. 87, 95 (2015); *see also* Cabrera, *supra* note 88, at 299.

91. "State senate president first in the line of gubernatorial succession in a state without a lieutenant governor" is a bulky, unnecessary phrase. Unless stated otherwise, or unless unstated but nonetheless obvious from context, references to the "state senate president" encompass the trailing descriptors.

president ascends to the governorship, what is that officer's role in the state system of government? Under some past and present state constitutions, state senate presidents acting as governor appear to be able to occupy *both* the governorship and the state senate presidency, creating a virtually omnipotent state officer.

The theory behind this supposition is relatively straightforward. First, many state constitutions provide that, in the event of a gubernatorial vacancy, the named successor doesn't *become* governor, but instead just *acts* as governor.[92] Second, as mentioned previously, some state supreme courts have reasoned that when the senate presidency changes hands while the president is exercising the power of governor, the gubernatorial powers change hands, too, because the devolution of power to the senate president is not a devolution to the senate president *personally*, but with respect to their office. [93] Barring a state constitutional provision to the contrary,[94] because the power of the office is *exercised* by the successor and the successor does not *become* governor—and because the power exercised is specific to the office, not the person—the successor acting as governor necessarily continues to hold the office giving rise to the right to exercise the gubernatorial power.

The separation-of-powers concerns here are obvious. Vikram and Akhil Amar have persuasively argued that the Presidential Succession Act of 1947 is unconstitutional specifically because it could create a distribution of power at the federal level resulting in "simultaneous service as Chief Executive and Chief Legislator." [95] The context is materially identical at the state level if the state senate president simultaneously acts in both roles.

5. Democratic Legitimacy Concerns

The final note in the discussion of senate presidents as governors-in-waiting focuses on a much more practical concern: the basic legitimacy of

92. *E.g.*, ALA. CONST. of 1819, art. IV, § 18; ME. CONST. art. V, § 14.

93. Futrell v. Oldham, 155 S.W. 502, 505 (Ark. 1913) (emphasis added); *see also In re* Opinion of the Justices, 6 Me. 506, 509–13 (1830). The question of whether the governor's powers, duties, and emoluments, but not the office, devolve to the named successor is reflective of a much broader area of gubernatorial succession that lies outside the bounds of this Article. Nonetheless, it is helpful to note that recent decisions in this arena are inconsistent. *Compare* Bryant v. English, 843 S.W.2d 308, 313 (Ark. 1992) (concluding that "upon the resignation of the Governor, the Lieutenant Governor becomes 'the Governor of the State of Arkansas'") (citation omitted), *with* Op. Vt. Att'y Gen. 91-15F (Sept. 3, 1991) (concluding that Lieutenant Governor Howard Dean was merely *acting* as Governor).

94. *E.g.*, N.H. CONST. of 1792, pt. 2, § XLIX.

95. Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113, 118–25 (1995).

the government. Democratic legitimacy is a broad concept, but in the context of gubernatorial vacancies, it might be distilled into asking two separate, but related questions. First, does the succession provision operate to ensure continuity of government? Second, does the successor have a legitimate claim to the democratic mandate of their predecessor? Placing state senate presidents first in the line of gubernatorial succession fails on both counts.

First, there is no guarantee that the state senate president and the governor will be from the same party. As Amos Harris, a delegate to the 1857 Iowa constitutional convention noted, if the sentiments of a statewide elected official "differ from those of the majority of the [legislature], we are bound to conclude that the body does not represent the sentiments of the people of the State, and that majority must have been placed there by the low trick of demagoguism, generally called gerrymandering."[96] If there is a difference in party between the governor and the legislative majority—and, therefore, the senate president—gerrymandering is a likely culprit. But the creation of partisan asymmetry between the wishes of the electorate and the results of elections is attributable to far more than the operation of line-drawing to create specific legislative districts. Prior to *Baker v. Carr* and the adoption of "one person, one vote" standards in apportionment,[97] state senate districts were of wildly different populations, leading to the persistent underrepresentation of voters in urban, densely populated areas. Moreover, the infrequency with which states redistricted prior to the modern era—no doubt hindered by the fact that state legislative districts were frequently enshrined in state constitutions—also resulted in misrepresentation. The confluence of these forces is ultimately suggestive that the state senate president, who won election to a constitutionally significant office on the backs of an illegitimate majority, may have no democratically legitimate claim to the governorship.

At its core, this is a question of the government's continuation. A change in party operates as more than an ideological change; it operates as a change from what the people voted for to what they *didn't* vote for. As a delegate to the 1897 Delaware constitutional convention put it, "When the people of a state elect a governor[,] they not only show that they wanted that man for governor, but they favored the policy which he represented. They vote to have his party in power for four years." With

96. IOWA CONST. CONVENTION, 1 THE DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF IOWA, ASSEMBLED AT IOWA CITY, MONDAY, JANUARY 19, 1857, at 594 (Davenport, Luse, Lane & Co. 1857) (remarks of Delegate Amos Harris) [hereinafter 1857 IOWA CONSTITUTIONAL CONVENTION DEBATES].

97. 369 U.S. 186 (1962).

the state senate president first in the line of succession, "there is no assurance that this policy will be continued."[98]

But imagine that the senate president and the governor are of the same party. Imagine, even, that the state legislative seats are fairly drawn and equally apportioned, and that the legislative majorities were won in fairly conducted, legitimate elections. Even in this light, elevating the senate president to the governorship lacks democratic legitimacy. The authenticity of their majority aside, what democratic claim does the senate president—as an individual officeholder—have to the governorship? Senate presidents are, of course, state senators, meaning that they are elected by voters in their legislative district, who comprise a mere fraction of the state.[99] That narrow slice of the electorate itself forms no legitimate claim to hold a statewide office. They have, of course, a democratic claim that is derivative of the mandates of the state senators who voted for them, but that cannot function as a legitimate claim to the governorship.

III. CREATING THE MODERN LIEUTENANT GOVERNOR

At the time of the American Revolution, few states provided for a lieutenant governor. The lieutenant governors existing at that time bear little resemblance to the model of a modern lieutenant governor.[100] Many of them did not even bear that label, and some of them existed merely because their states continued their colonial charters into statehood rather than drafting their own state constitutions. But as new states were admitted to the Union, and as existing states altered their gubernatorial succession procedures, lieutenant governors increased in number. Today, almost every state has a lieutenant governor.

The history of how lieutenant governorships were created is fascinating and largely untold. It serves as a microcosm of state constitutional change since the early days of the United States and reflects many regionally specific trends in state constitutional development. This Part tells that story in several sections. Section A reviews the historical adoption of the office, beginning with the Declaration of Independence and continuing to the present day. Section B then details the explicit reasons, articulated at state constitutional

98. *Lieutenant Governor: Constitutional Convention Decides on One*, MORNING NEWS (Wilmington, De.), Jan. 8, 1897, at 2 (remarks of Delegate Spruance).

99. Harvey Walker, *Office of the Lieutenant Governor: Authority and Responsibility*, 42 SOC. SCI. 142, 145 (1967).

100. *See generally* WILLIAM S. GILBERT & ARTHUR SULLIVAN, *I Am the Very Model of a Modern Major-General*, *in* PIRATES OF THE PENZANCE (1879).

conventions or in contemporaneous secondary sources, that lieutenant governors were added to state constitutions. Finally, Section C addresses a largely unspoken reason for the office's adoption—namely, a state's experience with a gubernatorial succession provision that resulted in ambiguity or an otherwise undesirable result.

A. Adoption of the Lieutenant Governor

Today, the lieutenant governor is the most common officer placed first in the gubernatorial line of succession. But at the time of Independence, lieutenant governors were relatively uncommon. Their origin dated back to colonial government,[101] and the antipathy that Independence-era Americans had toward governors and other powerful state officials[102] likely extended to lieutenant governors, as well. Prior to the ratification of the Constitution, only five states had lieutenant governors: Connecticut, Massachusetts, New York, Rhode Island, and South Carolina.[103] The existence of the office in Connecticut and Rhode Island occurred by virtue of both states' continuation of their colonial charters[104]—which created the office of the lieutenant governor and called it the "Deputy Governor."[105] In South Carolina, the lieutenant governor, like the governor, was elected by the legislature, not the people.[106] Only in Massachusetts and New York did the original lieutenant governorship reflect something akin the modern office, with the same title and same role in gubernatorial succession.[107]

As more states were admitted to the Union, lieutenant governors slowly increased in number. In the roughly sixty years following the Constitution's ratification, about half of the newly admitted states created lieutenant governorships and about half did not.[108] And following

101. *See* MASS. LEGIS. RSCH. COUNCIL, DUTIES AND POWERS OF THE LIEUTENANT GOVERNOR, S. Rep. No. 1224, at 15–21 (1972); R. F. PATTERSON, THE OFFICE OF LIEUTENANT-GOVERNOR IN THE UNITED STATES 4–6 (1944); WALKER, *supra* note 99, at 143–44.

102. *E.g.*, GREEN, *supra* note 5, at 90–91.

103. CONN. CHARTER of 1662; N.Y. CONST. of 1777, art. X; MASS. CONST., pt. 2, ch. II, § 3, art. II, *repealed by* MASS. CONST. amend. XVI; RHODE ISLAND ROYAL CHARTER of 1663; S.C. CONST. of 1776, art. IV; S.C. CONST. of 1778, art. III.

104. CONN. CHARTER of 1662; RHODE ISLAND ROYAL CHARTER of 1663.

105. CONN. CHARTER of 1662; RHODE ISLAND ROYAL CHARTER of 1663. *See generally* PATRICK T. CONLEY & ROBERT G. FLANDERS, JR., THE RHODE ISLAND STATE CONSTITUTION 19–24 (G. Alan Tarr ed., Oxford Univ. Press 2011) (2007); WESLEY W. HORTON, THE CONNECTICUT STATE CONSTITUTION 10–16 (G. Alan Tarr ed., Oxford Univ. Press 2011) (1993).

106. S.C. CONST. of 1776, art. IV; S.C. CONST. of 1778, art. III.

107. *See* N.Y. CONST. of 1777, art. XX; MASS. CONST. of 1780, pt. 2, ch. II.

108. *See supra* notes 55–62 and accompanying text.

1850, most of the states admitted to the Union—that is, 14 out of 21—created lieutenant governors.[109]

The more substantial changes took place among states that had already promulgated state constitutions. Before the Civil War, five states—chronologically, Kentucky (1799), Louisiana (1844), Virginia (1851), Ohio (1851), and Iowa (1856)—amended their state constitutions to create lieutenant governorships.[110] In all of those states but Iowa, the creation of the lieutenant governor displaced the president of the state senate as the first-in-line gubernatorial successor. In Iowa, the creation displaced the secretary of state.[111]

The Civil War itself, along with the Reconstruction constitutions imposed on the southern states by carpetbagger delegates, which is discussed in greater detail in the next section, marked the real turning point in the office's creation. During Reconstruction, six states created lieutenant governorships: Arkansas (1863), Maryland (1864), Florida (1865), Alabama (1866), Mississippi (1867), and North Carolina (1867).[112] Of those, Arkansas, Alabama, Florida, and Maryland would remove the office from their post-Reconstruction constitutions, only to resurrect it in the twentieth century.[113]

In the several decades that followed, three other states—Pennsylvania (1873), Nebraska (1875), and Delaware (1897)—similarly created lieutenant governorships.[114] From there, state constitutions have largely remained intact. Alabama resurrected its lieutenant governor in 1901, Arkansas in 1926, Florida in 1968, and Maryland in 1970.[115] Georgia, one of the few southern states that did not create the office during Reconstruction, did so in its 1945 constitution.[116] Moreover, New Jersey finally created the office in 2006, making it the newest lieutenant governorship.[117]

109. *See supra* notes 55–62 and accompanying text.

110. IOWA CONST. art. IV, § 3; KY. CONST. of 1799, art. III, § 16; LA. CONST. of 1845, tit. III, art. 38; OHIO CONST. art. III, § 17; VA. CONST. of 1851, art. V, §§ 8–9.

111. *See infra* notes 173–178 and accompanying text.

112. *See* PAUL E. HERRON, FRAMING THE SOLID SOUTH: THE STATE CONSTITUTIONAL CONVENTIONS OF SECESSION, RECONSTRUCTION, AND REDEMPTION, 1860–1902, at 144–45 (2017); Benjamin Nispel, The Office of the Lieutenant Governor in the United States 30–40 (Mar. 15, 1957) (Ph.D. dissertation, University of Pennsylvania) (on file with author).

113. The abolition of the lieutenant governorships in these states is likely reflective of the office's association with the so-called "carpetbagger" constitutions adopted by Northern-dominated state constitutional conventions following during Reconstruction.

114. DEL. CONST. art. III, § 19; NEB. CONST. of 1875, art. V, § 1; PA. CONST. of 1874, art. IV, § 1.

115. *See supra* Part II.B.

116. GA. CONST. of 1945, art. V, § 1, para. VII.

117. N.J. CONST. art. V, § 1, para. 4 (amended 2006); *see also supra* notes 88–90 and accompanying text.

Lieutenant governors were also introduced in the vast majority of America's territories. As the territories established constitutions (as was the case in American Samoa, Puerto Rico, and the Northern Mariana Islands), or where they acquired elected governors by virtue of modifications to their organic acts (in Guam and the U.S. Virgin Islands), lieutenant governors were provided for in all of them but Puerto Rico.[118] Interestingly, at the 1977 constitutional convention in the Northern Mariana Islands, one delegate proposed creating *two* lieutenant governors—one each for the islands of Rota and Tinian.[119] Under the terms of the proposal, the lieutenant governors "would be elected by the voters on the individual islands and would supervise the administration of public service on such islands and the general execution of commonwealth law," which was meant to provide the smaller islands in the commonwealth both with some measure of self-government and some amount of influence and power to rival that of the largest island, Saipan.[120] Relevantly for the discussion of gubernatorial succession, the proposal provided that the governor would "designate in writing which lieutenant governor shall [succeed] to the office of governor if a vacancy in that office occurs."[121] Ultimately, however, the proposal was rejected after Rota and Tinian were guaranteed enough self-government and protections to their delegates' satisfaction.[122]

Two final state constitutional changes are worth noting.[123] In their statehood constitutions, both Alaska and Utah provided for elected secretaries of state who were first in the line of gubernatorial succession.[124] Alaska's secretary of state was elected on a joint ticket with the governor and was a *de facto* lieutenant governor with the duties of

118. N. MAR. I. CONST. art. III, § 4; P.R. CONST. art. IV, § 7; AM. SAM. CONST. art. IV, § 2; Guam Elective Governor Act, Pub. L. No. 90-497, 82 Stat. 842, 842–44 (1968) (codified as amended at 48 U.S.C. § 1422); Virgin Islands Elective Governor Act, Pub. L. 90-496, 82 Stat. 837, 837–38 (1968) (codified as amended at 48 U.S.C. § 1591).

119. Howard P. Willens & Deanne C. Siemer, *The Constitution of the Northern Mariana Islands: Constitutional Principles and Innovation in a Pacific Setting*, 65 GEO. L.J. 1373, 1428 n.227 (1977).

120. *Id.* at 1428, n.227, 1434–35.

121. N.M.I. HUMAN. COUNCIL: FIRST NMI CONSTITUTIONAL CONVENTION 1976, DELEGATE PROPOSALS NO. 001–044, *Proposal No. 1: Proposal Regarding the Executive Branch of Government*, RECORD COPIES 654.

122. Willens & Siemer, *supra* note 119.

123. This discussion must have a stopping place, and here is as good a place as any. While virtually every state without a lieutenant governor has proposed creating one, and while every state with one has proposed eliminating it, this Article does not—and, indeed, cannot—detail each of these proposals. Unsuccessful proposals for the abolition or creation of the office are mentioned in the following sections where appropriate, but there are some proposals, even some that made it to a ballot, that are not addressed.

124. ALASKA CONST. of 1956, art. III, § 10; UTAH CONST. of 1895, art. VII, § 11.

the secretary of state.[125] But in the 1970s, both states created lieutenant governorships by simply renaming their existing secretaries of state.[126]

B. Contemporaneous Arguments for the Lieutenant Governorship

When lieutenant governorships were created—either at state constitutional conventions or through legislatively referred constitutional amendments [127] —their advocates advanced many supportive arguments. These arguments could be reasonably categorized into arguments that: (1) *this* succession procedure is needed; (2) *other* succession provisions should not be adopted or continued; and (3) secondary benefits of the office.

First, many proponents of lieutenant governorships emphasized the specific benefits of having the office in the line of gubernatorial succession. They noted that the succession procedure with the lieutenant governorship would be clear and known to the voters at the election, thereby enabling them to consider that in casting their ballot.[128] They also argued that having a lieutenant governor would likely guarantee same-party replacement of the governor.[129] This argument is actually more anachronistic than it seems—until the 1950s, no state provided for joint governor–lieutenant governor elections, instead having separate elections for the separate offices.[130] Accordingly, having the lieutenant governorship on the ballot as a separate office theoretically required

125. ALASKA CONST. art. III, § 8 (amended 1970).

126. S.J. Res. 2, 6th Leg., 2d Reg. Sess. (Alaska 1970); H.B. 140, 41st Leg., Reg. Sess. (Utah 1975); S.J. Res. 7, 43rd Leg., 1st Reg. Sess. (Utah 1979).

127. No lieutenant governorship was created by a voter-initiated state constitutional amendment.

128. *See* 1857 IOWA CONSTITUTIONAL CONVENTION DEBATES, *supra* note 96, at 591–92; *see also* IDAHO CONST. CONVENTION, PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF IDAHO 1889, at 412 (Caldwell, Idaho, Caxton Printers, Ltd. 1912) [hereinafter 1889 IDAHO CONSTITUTIONAL CONVENTION DEBATES]; OHIO CONST. CONVENTION, OFFICIAL REPORTS OF THE DEBATES AND PROCEEDINGS OF THE OHIO STATE CONVENTION, CALLED TO ALTER, REVISE OR AMEND THE CONSTITUTION OF THE STATE, at 267–68 (Columbus, Scott & Bascom 1851) [hereinafter 1850 OHIO CONSTITUTIONAL CONVENTION DEBATES]; UTAH CONST. CONVENTION, 1 OFFICIAL REPORT OF THE PROCEEDINGS AND DEBATES OF THE CONVENTION ASSEMBLED AT SALT LAKE CITY ON THE FOURTH DAY OF MAY, 1895, TO ADOPT A CONSTITUTION FOR THE STATE OF UTAH 654 (Salt Lake City, Star Printing Co. 1898) [hereinafter 1895 UTAH CONSTITUTIONAL CONVENTION DEBATES]; *For a Lieutenant-Governor*, WILMINGTON NEWS J., Jan. 8, 1897, at 4.

129. 1857 IOWA CONSTITUTIONAL CONVENTION DEBATES, *supra* note 96, at 593; Dan Friedman, *Magnificent Failure Revisited: Modern Maryland Constitutional Law from 1967 to 1998*, 58 MD. L. REV. 528, 566–67 (1999); *Lieutenant Governor: Constitutional Convention Decides on One*, *supra* note 98, at 2 (remarks of Delegate Spruance).

130. *Infra* notes 239–46 and accompanying text.

voters to contemplate whom they wanted to succeed the governor.[131] Finally, perhaps as a means of comforting convention delegates in creating the office, supporters emphasized its widespread adoption in other states.[132] Prior to the Civil War, in northern states, some delegates specifically emphasized its adoption in *free* states.[133]

Second, many of the arguments in support of the lieutenant governorship were actually arguments *against* other officers ascending to the governorship—specifically, the state senate president and the secretary of state. With respect to the state senate president, lieutenant-gubernatorial advocates argued that the position placed gubernatorial succession in the hands of the people—who elected the lieutenant governor—and not the legislature.[134] They raised specific concerns over a mismatch in legislative composition, perhaps owing to gerrymandering, as resulting in a party winning control of the governorship by virtue of a succession procedure.[135] With respect to both offices, the advocates emphasized the conflicts of interest and separation-of-powers concerns with having the same person hold two different offices at once.[136]

Third, the lieutenant governorship was further justified—though clearly in a less-important, tertiarily beneficial manner—as enabling the efficient organization of the state senate. Given the lieutenant governor's role as *ex officio* president of the state senate, the advocates argued that the lieutenant governor would serve as a stabilizing force in the body.[137]

131. *Infra* notes 278–80 and accompanying text.

132. 1857 IOWA CONSTITUTIONAL CONVENTION DEBATES, *supra* note 96, at 591–92; M. L. St. John, *Senate Turns Thumbs Down on Negro Vote*, ATLANTA J. CONST., Feb. 14, 1945, at 3.

133. 1857 IOWA CONSTITUTIONAL CONVENTION DEBATES, *supra* note 96, at 591–92.

134. *E.g.*, *id.* at 592; WIS. CONST. CONVENTION, JOURNAL OF THE CONVENTION TO FORM A CONSTITUTION FOR THE STATE OF WISCONSIN, WITH A SKETCH OF THE DEBATES, BEGUN AND HELD AT MADISON, ON THE FIFTEENTH DAY OF DECEMBER, EIGHTEEN HUNDRED AND FORTY-SEVEN 77–78 (Madison, W.T. Tenney, Smith & Holt, Printers 1848) [HEREINAFTER 1847 WISCONSIN CONSTITUTIONAL CONVENTION DEBATES].

135. *E.g.*, 1857 IOWA CONSTITUTIONAL CONVENTION DEBATES, *supra* note 96, at 594*; Protest of the Republican Delegate to the Constitutional Convention Against the Action of the Revolutionary Majority of that Body*, STATESVILLE AM., Mar. 18, 1876, at 4 ("We protest against the abolition of the office of Lieutenant-Governor and giving his functions to a president of the Senate, elected by that body, which is so organized as to defeat the popular will and choose a man to perform [the] gubernatorial functions hostile to the wish of the people.").

136. *E.g.*, 1857 IOWA CONSTITUTIONAL CONVENTION DEBATES, *supra* note 96, at 587, 593–94; 1850 OHIO CONSTITUTIONAL CONVENTION DEBATES, *supra* note128, at 267.

137. *E.g.*, 1857 IOWA CONSTITUTIONAL CONVENTION DEBATES, *supra* note 96, at 592; 1850 OHIO CONSTITUTIONAL CONVENTION DEBATES, *supra* note128, at 267; *Extracts from the Western Address*, DAILY CONST. (Raleigh, N.C.), July 15, 1875, at 3 (recounting extracts from members of the 1851 General Assembly from western North Carolina in support of constitutional amendments).

In the event of a tied senate, or the inability to elect a president pro tempore, the lieutenant governor could play a more active role, thereby avoiding days of impasse and gridlock.

Finally, it is worth addressing some of the arguments against the lieutenant governorship. To some extent, these arguments mirrored the arguments in support of it. Opponents contended that the office itself was unnecessary because of existing succession procedures,[138] it was too expensive,[139] other states got along without it,[140] and gubernatorial vacancies were rare events.[141] And with respect to the lieutenant governor's role as president of the state senate, some arguments focused on the deprivation of the senate's power to elect its own presiding officer and concerns about the hypothetical lieutenant governor's lack of prowess in presiding.[142]

As a whole, the arguments against the creation of the office have aged poorly. The concerns about the expenses of the office seem particularly frivolous today. Spending a few thousand dollars a year to prevent an unclear and undemocratic gubernatorial succession seems like an easy choice, even accounting for inflation and smaller state budgets before the modern era. But the most galling argument, by far, is the argument that the office wasn't necessary because gubernatorial vacancies happened so

138. *See, e.g.*, 1857 IOWA CONSTITUTIONAL CONVENTION DEBATES, *supra* note 96, at 592; KAN. CONST. CONVENTION, A REPRINT OF THE PROCEEDINGS AND DEBATES OF THE CONVENTION WHICH FRAMED THE CONSTITUTION OF KANSAS AT WYANDOTTE IN July, 1859, at 348 (Topeka, Kansas State Printing Plant 1920) [hereinafter 1859 KANSAS CONSTITUTIONAL CONVENTION DEBATES]; W.V. CONST. CONVENTION, 1 DEBATES AND PROCEEDINGS OF THE FIRST CONSTITUTIONAL CONVENTION OF WEST VIRGINIA (1861–1863) 889 (Charles H. Ambler et al. eds., Huntington, Gentry Brothers 1939) [hereinafter 1861–63 WEST VIRGINIA CONSTITUTIONAL CONVENTION DEBATES]; Hon. W. F. Love, Letter to the Editor, *Constitutional Convention*, S. HERALD (Liberty, Miss.), May 9, 1890, at 2.

139. *E.g.*, 1857 IOWA CONSTITUTIONAL CONVENTION DEBATES, *supra* note 96, at 593; 1859 KANSAS CONSTITUTIONAL CONVENTION DEBATES, *supra* note138, at 348; 1895 UTAH CONSTITUTIONAL CONVENTION DEBATES, *supra* note128, at 653; ARK. CONST. CONVENTION, DEBATES AND PROCEEDINGS OF THE CONVENTION WHICH ASSEMBLED AT LITTLE ROCK, JANUARY 7TH, 1868, UNDER THE PROVISIONS OF THE ACT OF CONGRESS OF MARCH 2D, 1867, AND THE ACTS OF MARCH 23D AND JULY 19TH, 1867, SUPPLEMENTARY THERETO, TO FORM A CONSTITUTION FOR THE STATE OF ARKANSAS 658, 672 (Little Rock, J.G. Price 1868) [hereinafter 1868 ARKANSAS CONSTITUTIONAL CONVENTION DEBATES].

140. *E.g.*, 1889 IDAHO CONSTITUTIONAL CONVENTION DEBATES, *supra* note 128, at 412; 1895 UTAH CONSTITUTIONAL CONVENTION DEBATES, *supra* note 128, at 653.

141. 1857 IOWA CONSTITUTIONAL CONVENTION DEBATES, *supra* note 96, at 595; 1850 OHIO CONSTITUTIONAL CONVENTION DEBATES, *supra* note 128, at 978; 1847 WISCONSIN CONSTITUTIONAL CONVENTION DEBATES, *supra* note 134, at 77, 86; VA. CONST. CONVENTION, REGISTER OF THE DEBATES AND PROCEEDINGS OF THE VA. REFORM CONVENTION 88 (Richmond, Robert H. Gallaher 1851) [hereinafter 1851 VIRGINIA CONSTITUTIONAL CONVENTION DEBATES].

142. *E.g.*, 1857 IOWA CONSTITUTIONAL CONVENTION DEBATES, *supra* note 96, at 592; *Editorial Paragraphs*, DAILY ARK. GAZETTE (Little Rock, Ark.), July 24, 1873, at 2.

infrequently. One delegate to the 1850–51 constitutional convention in Virginia, who advanced this argument himself, noted: "As to the probability of a Governor's dying, I think we may safely say, that like our judges, *he never dies*."[143] Even meant rhetorically or sarcastically, this is a difficult argument to square with reality. Governors do permanently vacate office by dying and resigning, and not without some frequency.[144] The idea behind such an argument seems derivative of the governor's weak role in state government at the time—if the governor exercises few powers, and is elected to such short terms, it makes little difference how the vacancy is filled in the interim. This may have made sense in the abstract, but governors clearly had, and continue to have, executive power that extends beyond whether they had a veto or appointment power.

C. Creating Lieutenant Governors Following Successions

A much more compelling reason for the creation of lieutenant governorships developed following the employment of existing gubernatorial succession procedures. Gubernatorial vacancies are relatively uncommon events—at least, with respect to any individual state—and so succession provisions were triggered infrequently. It may well be that a succession provision devolving power to someone other than the lieutenant governor might have been theoretically acceptable to constitutional drafters, but subsequent events demonstrated that it was unworkable or undesirable in practice. Accordingly, there is a clear link between a succession provision being triggered and then, at the next state constitutional convention, that provision being substantially rewritten.

143. 1851 VIRGINIA CONSTITUTIONAL CONVENTION DEBATES, *supra* note 141, at 88 (emphasis added). The same delegate had previously noted that the other methods triggering succession—refusal to qualify, resignation, or absence from the state—were "remote" possibilities, "except that the Governor may absent himself from the State." *Id.* He went on to note: "Well, if I thought our Governor would absent himself from the State, I think I would go for providing in the Constitution a fugitive Governor law, and bring him back, instead of providing an officer to act in his place." *Id.* It is difficult to find the words to condemn, even 170 years too late, such a gratuitously heinous reference to the Fugitive Slave Act.

144. While data on the historical frequency of gubernatorial vacancies is not kept, the National Lieutenant Governors Association counts 29 vacancies from 2000–2018, which suggests that, every year, an average of 1 or 2 governors will leave office. *See Chart of Gubernatorial Successions*, NAT'L LT. GOV'RS ASS'N (June 2018), https://nlga.us/wp-content/uploads/Chart-of-Successions-to-Governor-since-1980-060418.pdf. Other sources refer to gubernatorial vacancies as "few," citing data from individual states like New York, which from 1777 to 1944 only saw six vacancies. *See, e.g.*, PATTERSON, *supra* note 101, at 4.

There are references in state constitutional conventions to creating lieutenant governorships as a response to recent events. In some instances, delegates referred to specific events—many of which are detailed later—but in other cases, delegates made oblique references to things like "[t]he experience of the past few years."[145] And in many cases, no explicit reference was made to a particular event, but the close temporal proximity between a succession provision being triggered and the rewriting of that provision is suggestive of a connection between them. This is true for many of the examples mentioned previously. In Louisiana, Governor Pierre Derbigny's death in 1829, and the subsequent chain of senate presidents acting as governor, was followed shortly by the creation of the lieutenant governorship at the 1844 constitutional convention.[146] In Virginia, the resignation of Governor Thomas Gilmer in 1841, and his replacement by *three* different successors, was likely a motivating factor for the creation of the lieutenant governorship at the 1850–51 constitutional convention.[147] In Arkansas, Governor Joseph Robinson's resignation in 1913 explicitly resulted in the state legislature approving a constitutional amendment to recreate the office of lieutenant governor—the succession crisis that followed only increased the urgency.[148] And in New Jersey, the repeated gubernatorial successions in the early 2000s, and the resulting absurdity, similarly triggered the 2006 constitutional amendment to create the office of lieutenant governor.[149]

Another example is worth mentioning. Following the death of Joshua Marvil, the Republican governor of Delaware, in 1895, State Senate Speaker William Watson, a Democrat, succeeded him.[150] That year, the legislature was tasked with electing a candidate to the U.S. Senate—but because of split control of the Delaware legislature, the election was particularly close. Watson announced that, despite serving as governor, he had not given up his seat in the state senate, and cast a vote in the U.S. Senate election that deprived Republican candidate Henry du Pont of a majority.[151] Du Pont challenged Watson's vote all the way to the U.S.

145. *E.g.*, PA. CONST. CONVENTION, DEBATES OF THE CONVENTION TO AMEND THE CONSTITUTION OF PENNSYLVANIA, at 516 (Harrisburg, Benjamin Singerly 1873).

146. *See supra* notes 78–80 and accompanying text; *see also* LA. CONST. of 1845, tit. III, art. 38.

147. *See supra* notes 25–31 and accompanying text; *see also* VA. CONST. of 1851 art. V, §§ 8–9.

148. *Supra* notes 81–87 and accompanying text.

149. *Supra* notes 88–90 and accompanying text.

150. GEORGE S. TAFT ET AL., COMPILATION OF SENATE ELECTION CASES FROM 1789 TO 1885, at 821 (3d ed., Gov't Printing Off. 1903).

151. *Id.* at 820–21.

Senate Committee on Privileges and Elections, but the Committee rejected Du Pont's claim, concluding that the legality of Watson's vote was a question for the Delaware State Senate.[152] Two years later, at the state's 1897 constitutional convention, the office of lieutenant governor was created—at least in part because of the 1895 controversy.[153]

But even when the operation of gubernatorial succession provisions created no recorded controversy, their very operation seemed likely to trigger the creation of lieutenant governorships. After Nebraska Governor David Butler was impeached in 1871, he was replaced by Secretary of State William James, who served as acting governor for the remainder of the term.[154] Shortly thereafter, at the 1871 constitutional convention, delegates endorsed creating a lieutenant governor.[155] When the 1871 constitution was rejected, the effort was attempted again in 1875, this time successfully.[156]

In Maryland, the constitutional convention that occurred from 1967 to 1968 proposed the creation of a lieutenant governor, but the constitution was rejected in its entirety by the voters.[157] State legislators began organizing for a legislatively referred constitutional amendment shortly thereafter, and the resignation of then-Maryland Governor Spiro Agnew to become Vice-President provided the movement with more urgency. [158] Some contemporary commentators connect Agnew's resignation with the impetus behind the amendment,[159] but it is clear that the legislature was already seriously considering the change at the time.[160] Moreover, the legislature clearly was not disturbed by State Senate President Marvin Mandel's elevation to the governorship at the

152. *Id.* at 854–57. As some Delaware newspapers argued at the time, there was a strong argument under the state's constitution for Watson's position—the Delaware Constitution merely provided that "the Speaker of the Senate shall *exercise the office* until a governor elected by the people shall be duly qualified." DEL. CONST. of 1831, art. III, § 14 (emphasis added); *The Senatorial Question*, NEWS J. (Wilmington, Del.), May 31, 1895, at 8.

153. *For a Lieutenant-Governor*, *supra* note 128, at 4.

154. *See* ROBERT D. MIEWALD & PETER J. LONGO, THE NEBRASKA STATE CONSTITUTION: A REFERENCE GUIDE 12 (Oxford University Press 2011).

155. *See id.*

156. *See id.*

157. Friedman, *supra* note 129, at 565–66.

158. *See id.* at 566.

159. *See, e.g.*, HERBERT C. SMITH & JOHN T. WILLIS, MARYLAND POLITICS AND GOVERNMENT: DEMOCRATIC DOMINANCE 184 (2012).

160. *See* Edward G. Pickett, *Agnew Bars New Session Despite Request by Burch*, BALT. SUN, Aug. 16, 1968, at C22 (noting that some state legislators urged a special session after Agnew was chosen as Nixon's running mate to approve a constitution amendment creating the lieutenant governorship).

time—after his interim assumption of the office, the legislature *chose* to elect him to finish out Agnew's term.[161]

IV. SECRETARIES OF STATE AS SUCCESSORS

The discussions in the previous parts about legislators and lieutenant governors and gubernatorial successors treats succession as a binary choice from those two options. But in most states, there are a bounty of other statewide elected officials in the executive branch to whom gubernatorial power could, at least theoretically, be entrusted on an interim basis. Why have states not embraced this as a means of providing for gubernatorial succession?

Some have. Throughout the course of American history, eight states have positioned their secretaries of state to serve as gubernatorial successors, and three states (and Puerto Rico) continue to do so today.[162] This Part tells the (significantly briefer) story of how secretaries of state came to serve as gubernatorial successors. It does so by outlining the history of secretaries of state assuming gubernatorial power in Section A, beginning with the creation of territorial secretaries and their positioning as interim successors, and continuing to the adoption of parallel provisions in state constitutions. Then, Section B argues that modern secretaries of state, at least in states without lieutenant governors, can be understood as quasi-lieutenant governors.

A. The History

Before masses of land and population are admitted to the Union as states, they have historically been organized as territories by Congress pursuant to organic acts.[163] Though these organic acts differed somewhat in how they established territorial governments, all contained presidentially or congressionally appointed governors and most contained secretaries appointed in a similar manner. Many of these organic acts provided that, in the event of a gubernatorial vacancy, the territorial secretary would serve as interim governor either for the

161. *Marvin Mandel Is Elected Governor: First-Ballot Win Voted by Joint Session*, CUMBERLAND NEWS, Jan. 8, 1969, at 1.

162. *See* discussion *infra* Part IV; NAT'L LT. GOV'RS ASS'N, *supra* note 1.

163. *See* PATRICK M. GARRY, THE SOUTH DAKOTA STATE CONSTITUTION: A REFERENCE GUIDE 3–12 (2014). This is not *always* the case. The states of North and South Dakota, for example, were jointly organized as the Dakota Territory, but were simultaneously admitted as states. *Id.*

remainder of the term or until the vacancy was filled.[164] In essence, territorial secretaries were understood as being *de facto* lieutenant governors.[165]

In this light, it might make sense that many of the successor states of territories organized under such organic acts would turn to a familiar gubernatorial successor: the secretary, a position which was restyled in its modern label as the "secretary of state." But the first state to place its secretary of state in the line of gubernatorial succession was Maryland—one of the original thirteen colonies, which had never been governed under any congressionally imposed organic act.[166]

Under Maryland's original constitution, in the event of a gubernatorial vacancy, the senior-most member of the state executive council acted as governor until the legislature elected a new one.[167] In 1837, when the Maryland General Assembly passed a constitutional amendment providing for the direct election of governor, it altered the method of gubernatorial succession.[168] It kept the requirement of a legislative election to permanently fill the vacancy, but instead devolved power to the secretary of state on an interim basis until that point.[169] This was a bizarre choice—the secretary of state of Maryland was created by the same constitutional amendment and was an unelected officer.[170] In any event, the provision did not last long; the state senate president was named the interim gubernatorial successor in the 1851 constitution [171] and no gubernatorial vacancy occurred in the meantime.[172]

In 1846, while the Maryland provision was still in effect, Iowa adopted its own constitution, which provided that the secretary of state ascended to the governorship in the event of a vacancy.[173] While the

164. *E.g.*, NORTH-WEST TERRITORY, AN ORDINANCE FOR THE GOVERNMENT OF THE TERRITORY OF THE UNITED STATES NORTH-WEST OF THE RIVER OHIO ch. 8, § 2 (1789).

165. *See* Gregory Ablavsky, *Administrative Constitutionalism and the Northwest Ordinance*, 167 U. PA. L. REV. 1631, 1633 (2019) (noting that territorial secretaries were "effectively lieutenant governor[s]"). The Northwest Ordinance then served as the model for many other organic acts. *See* Denis P. Duffey, *The Northwest Ordinance as a Constitutional Document*, 95 COLUM. L. REV. 929, 929–30 (1995).

166. *Lieutenant Governor: Origin & Functions*, MARYLAND.GOV, https://msa.maryland.gov/msa/mdmanual/08conoff/ltgov/html/02ltgovf.html (last visited Sept. 6, 2021).

167. MD. CONST. of 1776, pt. II, §§ XXV, XXXII.

168. MD. CONST. amend. § 18 (ratified 1837).

169. *Id.*

170. *Id.* at §§ 14, 17.

171. MD. CONST. art. II, § 8 (1851).

172. *See generally* WHITE, *supra* note 47, at 111–39 (noting no gubernatorial vacancies between 1837 and 1851).

173. IOWA CONST. art. V, § 18 (1846).

simultaneous operation of both provisions might suggest that Maryland influenced Iowa, the very few records of the 1846 constitutional convention contain no reference to Maryland.[174] Instead, it seems likely that the 1846 convention, which convened following the failure of the 1844 constitution—which *did* contain a lieutenant governor [175] — eliminated the office as a matter of economy.[176] But shortly thereafter, at the 1857 constitutional convention, the delegates changed their mind once again, instead reverting back to the original plan of having a lieutenant governor.[177] The primary reasons articulated by the delegates for removing the secretary of state as a built-in gubernatorial successor focused on the potential conflict of interest in having the secretary of state—who is theoretically checked by the governor—also acting as governor.[178]

Nonetheless, despite its short operation, the Iowa provision had a longer-term effect. At the 1857 Oregon constitutional convention, the delegates adopted a gubernatorial succession provision seemingly modeled after Iowa's.[179] The language was similar, though clearly not copied directly from Iowa, [180] and the influence of Iowa law on the development of Oregon law has been well-documented.[181] The adoption of Oregon's succession provision occurred without substantial debate, and the text of the adopted provision was virtually identical to the provision as it was introduced. [182] Oregon, like Iowa, was seemingly motivated by a drive for governmental economy in the composition of its government, which likely motivated the combined lieutenant governor–secretary of state.[183] Today, the Oregon secretary of state still serves as

174. *See, e.g.*, BENJAMIN F. SHAMBAUGH, FRAGMENTS OF THE DEBATES OF THE IOWA CONSTITUTIONAL CONVENTIONS OF 1844 AND 1846 ALONG WITH PRESS COMMENTS AND OTHER MATERIALS ON THE CONSTITUTIONS OF 1844 AND 1846 (1900).

175. IOWA CONST. art V, §§ 1, 3 (1844).

176. *See* BENJAMIN F. SHAMBAUGH, THE CONSTITUTIONS OF IOWA 192, 195–96 (1934) ("In comparison with the Convention of 1844 its history may be summed up in the one word 'economy'.").

177. 1857 IOWA CONSTITUTIONAL CONVENTION DEBATES, *supra* note 96, at 587–88, 591–98.

178. *Id.*

179. *Compare* OR. CONST. art. V, § 8 (1857), *with* IOWA CONST. art. V, § 18 (1846).

180. *See* OR. CONST. art. V, § 8 (1857); IOWA CONST. art. V, § 18 (1846).

181. *See, e.g.*, David Schuman, *The Creation of the Oregon Constitution*, 74 OR. L. REV. 611, 611 n.2 (1995); *see also* OREGON ACTS AND LAWS PASSED BY THE HOUSE OF REPRESENTATIVES AT A MEETING HELD IN OREGON CITY AUGUST, 1845, at 16 (1921); *see generally* F. I. Herriott, *Transplanting Iowa's Laws to Oregon*, 6 ANNALS OF IOWA 455 (1904).

182. *See* Claudia Burton, *A Legislative History of the Oregon Constitution of 1857—Part II (Frame of Government: Articles III–VII)*, 39 WILLAMETTE L. REV. 245, 358–60 (2003).

183. *See* Schuman, *supra* note 181, at 622–23.

the *de facto* lieutenant governor—most recently, in 2015, Secretary of State Kate Brown ascended to the governorship following Governor John Kitzhaber's resignation.[184]

Nebraska was the next state to name its secretary of state as the designated gubernatorial successor, which it did in its 1867 constitution.[185] There, the debates and proceedings of the constitutional development remain unknown—even the drafters of the constitution remain unknown.[186] But modern commentators have noted that the drafters were clearly motivated by Nebraska voters' opposition to statehood on the grounds that it would produce an expensive government that would raise taxes; accordingly, they drafted a "cheap" state government.[187] Additionally, the constitution "exhibited little inventiveness," simply replicating from the territorial organic act the same executive officers,[188] which is the strongest proof that territorial secretaries motivated the positioning of secretaries of state as gubernatorial successors. But like in Iowa, the provision did not last long. A lieutenant governorship was proposed in the rejected 1871 constitution and was re-proposed in the ultimately successful 1875 constitution.[189]

In 1889, Wyoming ratified its constitution, which provided for a secretary of state and no lieutenant governor.[190] Though a lieutenant governor had originally been a part of the constitution,[191] perhaps derived from one of the other western state constitutions,[192] the delegates amended the draft constitution and removed it.[193] Their motivation here, given the paucity of debate on the subject,[194] is not entirely clear. Like the other states, the constitutional convention was dominated by a desire

184. Kirk Johnson, *Kate Brown, New Governor in Oregon, Seeks Public's Trust*, N.Y. TIMES (Feb. 18, 2015), https://www.nytimes.com/2015/02/19/us/kate-brown-replacing-john-kitzhaber-as-oregon-governor.html.

185. NEB. CONST. of 1866, art. III, § 16.

186. ROBERT D. MIEWALD & PETER J. LONGO, THE NEBRASKA STATE CONSTITUTION: A REFERENCE GUIDE 5–6 (1993).

187. *Id.* at 6.

188. *Id.*

189. *See id.* at 1, 91.

190. WYO. CONST. art. 4, § 6.

191. JOURNAL AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF WYOMING BEGUN AT THE CITY OF CHEYENNE ON SEPTEMBER 2, 1889, AND CONCLUDED SEPTEMBER 30, 1889, at 89, 630 [hereinafter 1889 WYOMING CONSTITUTIONAL CONVENTION PROCEEDINGS].

192. *See* Richard Kenneth Prien, The Background of the Wyoming Constitution 66 (Aug. 1956) (M.A. thesis, University of Wyoming) (on file with author).

193. 1889 WYOMING CONSTITUTIONAL CONVENTION PROCEEDINGS, *supra* note 191, at 88–89, 630.

194. *Id.*

to create a frugal government,[195] but some debate at the convention is suggestive that the amended provision was derived from the organic act.[196] Similarly, the Wyoming provision remains operative today, though the most recent time that a secretary of state acted as governor was in 1961.[197]

From there, two other western states—Utah and Arizona—approved constitutions with similar gubernatorial succession provisions. At Utah's 1895 constitutional convention, the draft proposal devolved gubernatorial power to the secretary of state, and delegates defeated an effort to amend the draft and add a lieutenant governor.[198] In rejecting the proposed amendment, the debate revealed that the delegates were concerned about the cost of a lieutenant governor and an apparently negative experience in Nevada.[199] A member of the executive branch committee specifically noted that "in some of the states which have been more recently admitted to the Union the secretary of state performs the duties of governor during his disability"—a reference that could only be to Oregon and Wyoming—"and it was with this view that the section was passed in the committee as it is."[200] And at Arizona's 1910 constitutional convention, though a lieutenant governor was proposed at the convention[201] and by some outside parties,[202] it did not make it to the final cut.[203] Reports of the debates are relatively limited,[204] so the reasons remain largely unclear. However, some observers have noted the role that the Oregon Constitution—especially its promotion of direct

195. Prien, *supra* note 192, at 16 ("Running through all of the debates, however, was the idea of economy; perhaps more friction occurred because of conflicting ideas about the demands of economy as opposed to those of efficiency or provision for future needs than for any other single reason."); *see also* 1889 WYOMING CONSTITUTIONAL CONVENTION PROCEEDINGS, *supra* note 191, at 630–31.

196. 1889 WYOMING CONSTITUTIONAL CONVENTION PROCEEDINGS, *supra* note 191, at 460 (noting that the state constitutional provision for gubernatorial succession was similar to "the present system" under the organic act).

197. *See* T. A. LARSON, HISTORY OF WYOMING 554 (2d ed. 1990).

198. 1895 UTAH CONSTITUTIONAL CONVENTION DEBATES, *supra* note 128, at 653–56.

199. *Id.* at 654–56.

200. *Id.* at 656.

201. *Bill of Rights Constitutional Convention*, ARIZ. DAILY STAR, Oct. 25, 1910, at 1.

202. *See Be Careful: We Want Statehood*, ARIZ. DAILY STAR, Nov. 1, 1910, at 4 ("This constitution should provide a state executive department and what officers are required to handle, such as governor, lieutenant governor, secretary, treasurer, auditor, a railroad commission, etc. . . . ."); *Proposed Constitution for Arizona and New Mexico Eastern Consideration*, ARIZ. DAILY STAR, July 31, 1910, at 9.

203. ARIZ. CONST. art. V, § 6 (providing for no lieutenant governor position).

204. *See generally* MINUTES OF THE CONSTITUTIONAL CONVENTION OF THE TERRITORY OF ARIZONA (1910) (containing no details of the executive branch article).

democracy—played in Arizona constitutional development,[205] which perhaps suggests a source of the gubernatorial succession provision.

In the twentieth century, the positioning of secretaries of state as gubernatorial successors became somewhat rarer. Only Alaska and Puerto Rico adopted constitutions that did so, and each occurred in somewhat unique circumstances. Under Puerto Rico's constitution, the gubernatorially appointed secretary of state becomes governor in the event of a vacancy.[206] It is the only subnational constitution since Maryland's 1837 constitutional amendment that designates an appointed secretary of state as first-in-line. As recent events surrounding gubernatorial succession in the territory have made clear, the secretary of state must be confirmed by the legislature to then serve as governor.[207]

And in Alaska, the secretary of state was positioned as the governor's successor but was elected on a joint ticket with the governor.[208] Delegates to the state's constitutional convention made it quite clear that their intent was to create a lieutenant governor—but with responsibilities that extended beyond waiting for the governor to die and presiding over the state senate.[209] Alaska's unusual succession provision did not last long; in 1970, the state constitution was amended to redesignate the secretary of state as the lieutenant governor.[210] Utah made a similar move in the late 1970s, replacing its secretary of state with a lieutenant governor elected on a joint ticket with the governor.[211]

B. Secretaries of State as De Facto Lieutenant Governors

The states that, in laying out plans of gubernatorial succession, opted to task secretaries of state with the responsibility of acting as governor, rather than creating lieutenant governors, made quite clear that their

205. JOHN R. MURDOCK, CONSTITUTIONAL DEVELOPMENT OF ARIZONA 45 (1930).

206. P.R. CONST. art. IV, § 7.

207. *See* Senado de Puerto Rico v. Gobierno de Puerto Rico, 203 D.P.R. 62, 66–67, 73–74, 87–88 (D.P.R. 2019). During the 2019 political corruption scandal in Puerto Rico, Secretary of State Luis Rivera Marín resigned from office. Then-Governor Ricardo Rosselló nominated Pedro Pierluisi to fill the vacancy, but the legislature did not confirm Pierluisi, leaving him as acting secretary of state. When Rosselló resigned, Pierluisi claimed that he was governor, but the Puerto Rico Supreme Court rejected his claim. *See generally Senado de Puerto Rico*, 203 D.P.R. 62.

208. ALASKA CONST. art. III, §§ 7–10 (1959).

209. *Alaska Constitutional Convention, Part I, Proceedings: November 8 – December 12, 1955*, THE ALASKA STATE LEGIS., 2004–05, http://www.akleg.gov/pdf/billfiles/ConstitutionalConvention/Proceedings/Proceedings%20-%20Complete.pdf (last visited Sept. 13, 2021).

210. S.J. Res. 2, 6th Leg., 2nd Reg. Sess. (Alaska 1970).

211. H.B. 140, 1975 Leg. (Utah 1975); S.J. Res. 7, 43rd Leg., 1st Reg. Sess. (Utah 1979).

chief motivator in doing so was the cost.[212] In so doing, they adopted the explicit rationale of states that named their state senate presidents as gubernatorial successor. But perhaps their adoption was really *co-option*. Rather than giving further power to the legislature, these western states adopted relatively powerful governors[213] and a litany of statewide elected officers, shying away from the archaic idea of creating an all-powerful legislature and a governor that merely operated as its extension.[214]

But what if we imagine this co-option of the cost argument not as a rejection of lieutenant governors as an unjustifiable extravagance but instead as a veiled embrace of the office—just with a different title and administrative responsibilities? This sort of approach is justified for two main reasons. First, the context of existing state governments in the late nineteenth and early twentieth centuries makes it clear that secretaries of state as gubernatorial successors functioned with little difference than lieutenant governors. Second, there is significant overlap in powers between lieutenant governors and secretaries of state. This section addresses each in turn.

At the time that secretaries of state were originally named as gubernatorial successors—that is, the period of time between 1846, when the first Iowa Constitution was adopted, and 1952, when Puerto Rico's constitution was adopted—governors and lieutenant governors were not selected on a team ticket.[215] New York was the first state to require that its governors and lieutenant governors be elected on a joint ticket, which it did in 1953; from there, the idea of a joint ticket exploded in popularity.[216] So from a structural standpoint, there was originally no difference in how, for example, the lieutenant governor of Connecticut and the secretary of state of Wyoming were elected, because both were originally elected in separate elections from the governor that they were first in line to replace. Accordingly, this method of gubernatorial replacement—through which a governor would be replaced by another elected state officer—did not materially differ depending on the title of the elected state officer in question.

212. *See supra* text accompanying notes 176, 183, 187, 195, and 199.

213. *See* Thad L. Beyle, *The Powers of the Governor in North Carolina: Where the Weak Grow Strong—Except for the Governor*, 12 N.C. INSIGHT 27, 42–43 (1990) (ranking powers of state governors).

214. *See, e.g.*, G. Alan Tarr, *State Constitutional Design and State Constitutional Interpretation*, 72 MONT. L. REV. 7, 13 (2011) ("[S]tate-constitution makers in western states in the late nineteenth century[] [were] suspicious of state legislatures. . . .").

215. T. Quinn Yeargain, *One Vote, Two Winners: Team-Ticket Gubernatorial Elections and the Need for Further Reform*, 75 U. MIA. L. REV. 751, 755–56 (2021).

216. *Id.*

Moreover, the powers of secretary of state and lieutenant governor share significant overlap. The traditional duties of the state secretary of state include serving as their state's chief elections officer and maintaining public records,[217] and in many states, secretaries of state serve in other roles, like supervising state licensure requirements, serving as an administrative officer, or opening state legislative sessions. [218] Three states—Alaska, Hawai'i, and Utah—and four territories—American Samoa, Guam, the Northern Mariana Islands, and the U.S. Virgin Islands—have no secretary of state.[219] In most of these jurisdictions, the lieutenant governor serves as *de facto* secretary of state.[220]

In the states without secretaries of state, lieutenant governors frequently serve as chief election officers,[221] oversee state publications and records,[222] and have other miscellaneous responsibilities typically endogenous to the secretary of state. [223] Moreover, the lieutenant governors of Alaska, American Samoa, Guam, Hawai'i, Utah, and the Virgin Islands are listed as secretary-of-state equivalents by the National Association of Secretaries of State.[224] This is also true in reverse; the National Lieutenant Governors Association lists secretaries of state who

217. JOY HART SEIBERT, THE SECRETARY OF STATE: THE OFFICE AND DUTIES 3–12, 38–42 (1987); THE COUNCIL OF STATE GOV'TS, THE BOOK OF THE STATES 150–53 (2019); *see generally* JOCELYN F. BENSON, STATE SECRETARIES OF STATE: GUARDIANS OF THE DEMOCRATIC PROCESS (2010) (outlining the election responsibilities of secretaries of state).

218. SEIBERT, *supra* note 217, at 14–15, 16–37, 43–49 (outlining legislative, licensure, and other duties).

219. *Roster of Secretaries of State/Lieutenant Governors*, NAT'L ASS'N OF SEC'YS OF STATE, http://www.nass.org/membership (last visited Sept. 13, 2021).

220. In New Jersey, the lieutenant governor can be appointed by the governor as secretary of state. N.J. CONST. art. V, § 4, ¶ 3. Governor Chris Christie did this with his lieutenant governor (the state's first). Claire Heininger, *N.J. Lieutenant Gov.-elect Guadagno to Serve as Secretary of State*, NJ.COM (Apr. 1, 2019), https://www.nj.com/news/2009/12/lieutenant_gov-elect_guadagno.html.

221. BENSON, *supra* note 217, at x ("In Utah, Hawaii, and Alaska, the Lieutenant Governor oversees election administration for the state."); *see also* ALASKA STAT. ANN. § 44.19.020(1) (West 1991); UTAH CODE ANN. §§ 67-1a-2(1)(c), (2) (West 2020).

222. *E.g.*, UTAH CODE ANN. §§ 67-1a-2(1)(e), (f) (West 2020) (establishing that the lieutenant governor "keep[s] a register of . . . the official acts of the governor" and "affix[es] the Great Seal, with an attestation, to all official documents and instruments to which the official signature of the governor is required"); AM. SAMOA CONST. art. IV, § 3 (noting that the lieutenant governor "shall record and preserve the laws and executive orders"); V.I. CODE ANN. tit. 3, § 34(a) (1982) (establishing the Office of Legal Publications within the lieutenant governor's office).

223. *E.g.*, ALASKA STAT. §§ 44.19.020(2)–(3) (1991); 5 GUAM CODE ANN. § 2101 (2020); V.I. CODE ANN. tit. 3, § 31 (2007); V.I. CODE ANN. tit. 3, § 35 (2017).

224. *Roster of Secretaries of State/Lieutenant Governors*, *supra* note 219. This is, admittedly, an imperfect proxy for gauging the similarities between lieutenant governors and secretaries of state.

are placed in the line of gubernatorial succession as its members.[225] In Utah and American Samoa, the implicit overlap is made explicit by state law, which provides that the lieutenant governor *is* the secretary of state.[226]

Perhaps most importantly for the categorization of the offices as of a similar lineage, the basic powers of the secretary state and the lieutenant governor are relatively neutral and nonpartisan. The secretary of state is occasionally described as an administrative officer, and this is especially true in states with appointed secretaries of state. But regardless of this description, the duty of secretaries of state to administer elections, oversee state publications, and regulate licensure are nonpartisan at their core. And the lieutenant governor's limited constitutional power to break a tie in the state senate and to serve as president of the body envisions similarly nonpartisan responsibilities. Even the additional statutory responsibilities with which some states have tasked their lieutenant governors do not necessarily involve partisan or ideological decision-making. And trends in state constitutional development seem to have embraced the idea of secretaries of state as lieutenant governors—and, in some cases, vice-versa. The constitutional changes by Alaska and Utah in the 1970s, which created lieutenant governors by repurposing their existing secretaries of state,[227] make clear that the roles function in similar manners and can be understood as complementary.

V. MAKING GUBERNATORIAL SUCCESSION DEMOCRATICALLY LEGITIMATE

It is obvious from the complicated, messy history of gubernatorial succession provisions that the process of succession has been largely inconsistent in the United States. Individual, regional patterns, along with state-specific contexts, have determined the path of succession more than any discernible national trends. Nonetheless, the history of gubernatorial succession contains one overarching theme:

225. NAT'L LT. GOV'RS ASS'N, *supra* note 1. Of note is the fact that the NLGA listed Oregon State Treasurer Tobias Read as its member in Oregon in 2019. *Id.* Secretary of State Dennis Richardson, who would ordinarily be first in the line of succession died, and Governor Kate Brown appointed his successor. Jeff Maples, *Oregon Secretary of State Richardson Dies Following Struggle with Cancer*, OPB (Feb. 27, 2019), https://www.opb.org/news/article/oregon-dennis-richardson-secretary-state-died-obit/. However, under Oregon law, an appointed secretary of state is excluded from the line of succession, meaning that the official *next* in line is the designated successor. *Id.* That the NLGA accounts for this reflects its flexibility in determining membership.

226. AM. SAMOA CONST. art. IV, § 3; UTAH CODE ANN. § 67-1a-6(1) (West 1984).

227. *Supra* notes 210–11 and accompanying text.

democratization. This Part weaves together the tangled historical threads outlined in the previous parts and ultimately argues that the process of gubernatorial succession is in the middle of a long-term trend toward democratization, and that there is more work to be done in democratizing the process.

Section A argues that the creation of the modern lieutenant governor—along with a longer-term trend away from naming state legislative leaders as gubernatorial successors—reflects the broad goal of democratizing the process of gubernatorial succession. It derives this thesis from the contemporary arguments in favor of creating lieutenant governorships, along with the importance of failed gubernatorial successions in creating the office. It notes some contemporary examples from the last several decades that indicate that this trend is still ongoing.

Section B contains Part IV's core argument—that the democratization of gubernatorial succession has work to be done and needs to be finished. It argues for the creation of lieutenant governorships in the states that do not have them and for tying gubernatorial and lieutenant-gubernatorial elections together in the states in which both offices are elected separately.

A. The Trend of Democratization

It is difficult to argue in good faith that the system of government employed by states in the early days of the United States was democratic. At the time of Independence, most governors were indirectly elected.[228] Many more were theoretically popularly elected, but the operation of majority-vote provisions in practice frequently resulted in indirect election.[229] To make matters even worse, state legislatures were not democratically elected either. Several early state senates were indirectly elected—again, either *de jure* or by the *de facto* operation of majority-vote requirements[230]—but even in states where legislatures were directly elected, the absence of "one person, one vote" requirements and the omnipresence of gerrymandering deprived people of an effective voice in state government.

228. *See* DEL. CONST. art. VII (1776); GA. CONST. art. II (1777); MD. CONST. art. XXV (1776); N.J. CONST. § VII (1776); N.C. CONST. § XV (1776); PA. CONST. § 19 (1776); S.C. CONST. art. III (1776); VA. CONST. (1776) ("A Governor, or chief magistrate, shall be chosen annually by joint ballot of both Houses . . . .").

229. *See* Yeargain, *supra* note 69, at 340–47 (noting the extent to which majority-vote requirements in Maine, Massachusetts, and New Hampshire elections resulted in indirect election).

230. *See id.* at 344.

All of these undemocratic strands came together to make gubernatorial succession a particularly undemocratic process. In states where governors were indirectly elected, so were their successors. In virtually all of the remaining states, directly elected governors were frequently succeeded by legislative leaders—in effect, indirectly elected successors. And even in the states with directly elected governors *and* lieutenant governors, the operation of majority-vote requirements in *lieutenant*-gubernatorial elections could make lieutenant governors indirectly elected as well.[231]

But today, every state has a directly elected governor. Few states have majority-vote requirements for gubernatorial elections.[232] Vermont maintains the old method of settling no-majority elections—that is, the legislature deciding—with Georgia, Louisiana, and Mississippi opting for runoff elections. [233] Likewise, virtually every state has an elected lieutenant governor.[234] Of those that do not, all but five have a directly elected secretary of state who serves as a *de facto* lieutenant governor and built-in gubernatorial successor. [235] While state constitutional changes in this arena are relatively rare in the modern era, the changes in the last fifty years have exclusively been in the direction of lieutenant-gubernatorial succession. New Jersey is the most recent state to have created a lieutenant governorship, having adopted a constitutional amendment to do so in 2006 and electing its first lieutenant governor in 2009.[236] Prior to that, Utah ditched its elected secretary of state for a lieutenant governor elected on a ticket with its governor in 1975.[237] Given more recent legislative activity, it is entirely possible that similar changes may happen in the next few decades.[238]

231. *See, e.g.*, D. Gregory Sanford & Paul Gillies, *And if There Be No Choice Made: A Meditation on Section 47 of the Vermont Constitution*, 27 VT. L. REV. 783, 784 (2003) ("There have been 160 general elections in Vermont's 225-year history. In that time, there has been no popular (majority) election of seventy offices, including . . . twenty-six [elections] for Lieutenant-Governor[.]").

232. *See, e.g.*, MISS. CONST. art. V, § 140; VT. CONST. ch. II, § 47; GA. CODE ANN. § 21-2-501 (West 2021).

233. V.T. CONST. ch. II, § 47; GA. CODE ANN. § 21-2-501 (West 2021); MISS. CONST. art. VI, § 141; LA. REV. STAT. ANN. § 18:511(A) (West 2011).

234. NAT'L LT. GOV'RS ASS'N, *supra* note 1.

235. *Id.*

236. *See supra* notes 88–90 and accompanying text; N.J. CONST. art 5, § 1, para. 6 (amended 2006).

237. *See supra* note 211 and accompanying text.

238. In 2020, for example, the Arizona House of Representatives approved a constitutional amendment that would create a lieutenant governorship. Andrew Oxford, *Arizona Does Not Have a Lieutenant Governor. Do We Need One? Some Lawmakers Think So*, ARIZ. REPUBLIC (Mar. 6, 2020), https://www.azcentral.com/story/news/politics/legislature/2020/03/06/arizona-legistlators-state-politics-time-have-lieutenant-governor/

On top of changes in creating lieutenant governors, the last half-decade has seen a flurry of state constitutional amendments that have radically altered the way that governors and lieutenant governors have been elected. New York amended its state constitution in 1953 to provide that its governor and lieutenant governor would be elected on a joint ticket.[239] Since then, twenty-five additional states have adopted joint-ticket elections for governors and lieutenant governors.[240] The most recent change took place in South Carolina, pursuant to a 2012 constitutional amendment, making the 2018 election the first time that the governor and lieutenant governor were elected jointly.[241]

Even within the joint election process, however, there is an additional distinction. In some states, gubernatorial and lieutenant-gubernatorial candidates run in different primary elections, but on the same ticket in the general election, which some have called a "shotgun marriage."[242] The split-nomination-but-joint-election method of electing governors and lieutenant governors is still in place in eight states.[243] It appears to be giving way, however, to a method mirroring how presidential candidates select their running mates. Pennsylvania may vote on a constitutional amendment doing away with separate primaries.[244] If it ultimately approves the amendment, it would be the first state since Illinois, in 2010, [245] to abolish separate primaries. The abolition of separate primaries opens the door, at least theoretically, to bipartisan gubernatorial tickets, raising a set of questions as to whether such tickets are permissible under state law.[246]

4965305002/. However, Arizona voters have twice rejected proposals to create a lieutenant governor—in 1994 and 2010, respectively. *Id.*

239. *See* Lynch, *supra* note 90, at 97.

240. *See id.*

241. Jamie Lovegrove, *S.C. Lawmakers Hit Impasse Over Bill to Create Joint Ticket for Governor, Lt. Gov in 2018 Election*, POST & COURIER (Jan. 11, 2018), https://www.postandcourier.com/politics/s-c-lawmakers-hit-impasse-over-bill-to-create-joint-ticket-for-governor-lt-gov/article_5b7e23ae-f700-11e7-8618-c3f642cc8c26.html.

242. *See, e.g.*, Sam Janesch, *Former Lt. Govs. Cawley, Jubelirer, Singel: Change the Way Lieutenant Governors Are Elected in Pennsylvania*, LANCASTERONLINE (Nov. 15, 2017), https://lancasteronline.com/news/politics/former-lt-govs-cawley-jubelirer-singel-change-the-way-lieutenant-governors-are-elected-in-pennsylvania/article_b9ab1740-c986-11e7-9619-13ec733a21c5.html.

243. *See* Kristin Sullivan, *Methods of Electing Lieutenant Governors*, OLR RSCH. REP., https://www.cga.ct.gov/2015/rpt/2015-R-0021.htm (last visited Sept. 13, 2021).

244. *See* Janesch, *supra* note 242; Jan Murphy, *Minimum Wage, Cocktails to Go and More: Pa. Lawmakers Have Unfinished Business When They Return in Fall*, PENNLIVE (July 6, 2021, 5:30 AM), https://www.pennlive.com/news/2021/07/minimum-wage-cocktails-to-go-and-more-pa-lawmakers-have-unfinished-business-when-they-return-in-fall.html.

245. Yeargain, *supra* note 2, at 779.

246. *See, e.g.*, Marc Caputo, *'Millions of Dollars Committed': Murphy Enters New Phase of Bipartisan Bid with Jolly*, POLITICO (May 17, 2018, 5:07 AM), https://www.politico.com/

The balance of the constitutional changes in the arena of gubernatorial selection, both through election and succession, suggests that state lawmakers and voters are broadly interested in altering gubernatorial succession procedures to make the process more democratically legitimate.[247] It is possible that not all of these changes actually accomplish greater democratic legitimacy; reasonable people can certainly disagree as to the efficacy of some of these changes. But it is clear from the arguments made at state constitutional conventions in support of lieutenant governorships that the office was created as a means of ensuring that the broader will of the public was reflected in gubernatorial succession.[248] The assumptions made by the drafters of constitutional amendments—namely, that unified elections for governor and lieutenant governor were unnecessary because voters will *usually* vote for gubernatorial and lieutenant-gubernatorial nominees of the same party—admittedly may have been faulty. [249] But that faulty assumption was largely corrected in the mid-to-late twentieth century by state constitutional amendments that provided for joint tickets.[250] To the extent that *those* drafters relied on a faulty assumption regarding separate primaries, that appears to be in the process of correction in the twenty-first century.[251]

B. Finishing the Process

It would be difficult to sift through the available literature on lieutenant governors, or through state constitutional convention debates on the creation of the office, without encountering some choice words about lieutenant governors. The office is frequently called a sinecure—even today, [252] even as the word has largely faded from common

states/florida/story/2018/05/17/millions-of-dollars-committed-murphy-enters-new-phase-of-bipartisan-bid-with-jolly-424566.

247. *See* Sturm, *supra* note 52, at 65 ("Hallmarks of the governor's enhanced constitutional position that both preceded and followed the beginning of the Jacksonian era included a longer term, popular election, restoration of the veto power, increased pardoning and appointing power, and abolition of the executive councils . . . . The Jacksonian emphasis on frequent rotation in office resulted in election of numerous executive officers in addition to the governor. Besides members of the legislature and the governor, typically, a lieutenant governor, a secretary of state, an attorney general, a treasurer, and often other officers were popularly elected.").

248. *See supra* notes 128–131 and accompanying text.

249. *See supra* note 129 and accompanying text.

250. *See* Lynch, *supra* note 90, at 97.

251. *See supra* notes 244–45 and accompanying text.

252. *See, e.g.*, A. G. Sulzberger, *Jokes and Secret Hopes for Lieutenant Governors*, N.Y. TIMES (Dec. 3, 2010), https://www.nytimes.com/2010/12/04/us/04lieutenant.html.

parlance[253]—and historically was referred to as the "fifth wheel on the wagon."[254] Other rhetorical references were less frequent, but no less imaginative, like at the 1859 Kansas constitutional convention, when a delegate noted that the lieutenant governor was like "a sort of a figure on the chequer board that don't amount to much."[255] The jokes are similarly manifold, and are derivative of jokes about vice-presidents:[256] "[T]he lieutenant governor's main job is to wake up in the morning and see if the governor is still alive."[257] "How does a lieutenant governor shake hands with the governor? He clasps firmly and extends two fingers up the governor's sleeve to check for a pulse."[258] The job "has been likened to the Maytag repairman, waiting for the phone to ring[.]"[259]

It may be the case that the lieutenant governor has few formal responsibilities. Even the National Lieutenant Governors Association has conceded that the lieutenant governor's main job "is to be the first official in the line of succession to the governor's office."[260] Though most lieutenant governors still have legislative responsibilities, these powers have been narrowed considerably. In many states, lieutenant governors have been removed as state senate presidents following constitutional amendments.[261] Though lieutenant governors do have substantial policymaking responsibilities under state statutes, and are frequently tasked with heading up executive departments either by statute or by delegation from the governor,[262] these responsibilities are usually quite minimal in practice.

But even under this worst-case scenario—that the lieutenant governorship "is a notoriously do-little job, a bully pulpit at best, a

253. *Ngram Viewer: Sinecure*, GOOGLE BOOKS, https://books.google.com/ngrams (last visited Sept. 7, 2021) (showing that "sinecure" peaked in usage in the 1810s).

254. *See, e.g.*, Dye v. State, 507 So. 2d 332, 334 (Miss. 1987).

255. 1859 KANSAS CONSTITUTIONAL CONVENTION DEBATES, *supra* note138, at 348.

256. *See, e.g.*, Jaime Fuller, *Here Are a Bunch of Awful Things Vice Presidents Have Said About Being No. 2*, WASH. POST (Oct. 3, 2014, 12:48 PM), https://www.washingtonpost.com/news/the-fix/wp/2014/10/03/a-brief-history-of-vice-presidents-bemoaning-the-vice-presidency/.

257. Melody Gutierrez, *Newsom Called Lieutenant Governor Job Dull, but Candidates Have Big Plans*, S.F. CHRON. (Oct. 5, 2018, 7:51 PM), https://www.sfgate.com/politics/article/Gavin-Newsom-called-job-dull-but-lieutenant-13272318.php.

258. Sulzberger, *supra* note 252.

259. Marsha Mercer, *Lieutenant Governor Is (Sometimes) a Real Job*, GOVERNING MAG. (Apr. 7, 2015), https://www.governing.com/topics/politics/lieutenant-governor-sometimes-is-a-real-job.html.

260. Julia Nienaber Hurst, *Lt. Governors' Statutory Duties*, *in* THE BOOK OF THE STATES 201, 201 (2017).

261. Lynch, *supra* note 90, at 93–94, 100–01.

262. Nienaber Hurst, *supra* note 260, at 201–03.

ceremonial post at wors[t]"[263]—the office should be created and continued with enthusiasm. The lieutenant governorship, along with the Vice-Presidency, is a job in American democracy that exists solely to ensure that succession in the event of a vacancy travels along democratically legitimate lines.[264] When voters cast ballots for governor, they are charting a course for the state and picking someone to lead the way. If the person selected as governor is unable to complete the job, that is not the fault of the voters. It makes little sense that gubernatorial power should transfer to another state official who might be of a different political party. Voters should not have to endure a change in ideology or governance because of the randomness of gubernatorial vacancies.[265]

Though American elections have become more democratic since the nineteenth century, they really *haven't* become more democratic in the ways that might justify trusting a state's democratic processes enough to abolish the lieutenant governorship. As discussed earlier, a delegate to Iowa's constitutional convention in 1857 argued that if the party affiliation of the governor and the legislative majority were different, the culprit was gerrymandering.[266] That argument, while slightly exaggerated, is just as poignant today as it was 150 years ago. With the Supreme Court concluding that the constitutionality of districts blatantly drawn to favor one party over another is a non-justiciable political question,[267] the power of voters to control the composition of their ostensibly democratically elected legislature is dependent on their ability to elect a governor to veto legislative maps[268] or a state supreme court that will rely on state constitutional provisions to invalidate gerrymanders.[269] It is therefore entirely possible that partisan inconsistencies between governors and state legislatures can be attributable to gerrymandering—and the logic of allowing a state legislative leader to ascend to the governorship is specious.

263. Opinion, *Endorsement: Gavin Newsom for Lieutenant Governor*, L.A. TIMES (Sept. 29, 2014, 5:50 PM), https://www.latimes.com/opinion/endorsements/la-ed-end-lt-governor-20140930-story.html.

264. *See Some Modest Proposals on the Vice-Presidency*, *supra* note 68, at 1712–13.

265. *See id.* at 1713.

266. 1857 IOWA CONSTITUTIONAL CONVENTION DEBATES, *supra* note 96, at 594.

267. *See* Rucho v. Common Cause, 139 S. Ct. 2484, 2506–08 (2019).

268. *See, e.g.*, Andrew Prokop, *7 Key Governor Races That Could Let Democrats Roll Back Gerrymandering*, VOX (Nov. 5, 2018, 8:30 AM), https://www.vox.com/policy-and-politics/2018/11/5/18058968/elections-2018-governors-races-gerrymandering-redistricting.

269. *See Rucho*, 139 S. Ct. at 2524 (Kagan, J., dissenting); Taylor Larson & Joshua Duden, *Breaking the Ballot Box: A Pathway to Greater Success in Addressing Political Gerrymandering Through State Courts*, 22 CUNY L. REV. 104, 113–20 (2019).

Of course, split-ticket voting obviously still occurs—albeit at a lower rate than previous decades.[270] Even in states with fairer elections and more equitably drawn maps, it is possible for voters to render a split judgment by electing a governor of one party and a legislature of another.[271] But regardless of the motivation for such a split judgment—whether it is meant as a check on the power of either branch or borne out of a cross-partisan admiration of a particular candidate[272]—that decision should be respected. The absence of gerrymandered maps does not justify a legislative leader stepping in as governor.

The problems of relying on another statewide elected official are less straightforward. On a practical level, there is little difference in devolving gubernatorial power to a secretary of state as opposed to a separately elected lieutenant governor. There may theoretically be separation-of-powers concerns with placing the secretary of state—or any statewide elected official other than the lieutenant governor—in the line of gubernatorial succession,[273] but if the official *becomes* governor rather than merely exercising the powers of governor, these concerns are minimal.[274] Moreover, as Alaska's original constitution—which elected the governor and secretary of state on a joint ticket[275]—made clear, the title of the official placed in the line of succession is largely irrelevant. The important thing for the purpose of a democratically legitimate line of succession is that the election of the successor be tied together with that of the governor.

In the abstract, it may be the case that splitting executive elections, and allowing voters to freely and separately choose their governor and lieutenant governor, would encourage voters to take more seriously

270. BARRY C. BURDEN & DAVID C. KIMBALL, WHY AMERICANS SPLIT THEIR TICKETS: CAMPAIGNS, COMPETITION, AND DIVIDED GOVERNMENT 163 (2002); David C. Kimball, *A Decline in Ticket Splitting and the Increasing Salience of Party Labels*, *in* MODELS OF VOTING IN PRESIDENTIAL ELECTIONS: THE 2000 U.S. ELECTION 161, 162 (Herbert F. Weisberg & Clyde Wilcox eds., 2004); Drew Desilver, *Split-Ticket Districts, Once Common, Are Now Rare*, PEW RSCH. CTR. (Aug. 8, 2016), https://www.pewresearch.org/fact-tank/2016/08/08/split-ticket-districts-oncecommon-are-now-rare/.

271. For example, in the 2018 elections, voters in Maryland, Massachusetts, and Vermont re-elected Republican governors, even as they elected Democratic legislatures. *See* Patrick Gleason, *Blue State Republican Governors Are Among the Nation's Most Popular Politicians*, FORBES (Sept. 30, 2019, 10:44 PM), https://www.forbes.com/sites/patrickgleason/2019/09/30/blue-state-republican-governors-are-among-the-nations-most-popular-politicians/#68dd219d4239.

272. *See* Kevin Deutsch, *Why Blue States Elect Red Governors*, WASH. U. POL. REV. (Nov. 11, 2014), http://www.wupr.org/2014/11/11/why-blue-states-elect-red-governors/.

273. *See* 1857 IOWA CONSTITUTIONAL CONVENTION DEBATES, *supra* note 96, at 587, 593–94.

274. *See supra* notes 91–95 and accompanying text.

275. ALASKA CONST. art. III, § 8 (amended 1970).

lieutenant-gubernatorial elections—especially the ability of the lieutenant-gubernatorial candidates to act as governor. This is, at least, a state-level analogy of the argument that Akhil and Vikram Amar made in support of splitting presidential and vice-presidential elections.[276] It is true that there are a fair number of cases in which voters in a state choose a governor of one party and a designated successor of another—be it the secretary of state or a separately elected lieutenant governor.[277] It is tempting to assume that, in casting ballots for statewide officers, this sort of distinction reflects a voter preference for a party switch in the event of a gubernatorial vacancy.

But—at the risk of *quite* belatedly responding to an argument made nearly two decades ago[278]—this argument extrapolates too much from too little. Whether voters, in voting for a gubernatorial nominee of one party and a lieutenant-gubernatorial nominee of another, take into account how their seemingly conflicting votes might result in a gubernatorial succession that radically transforms their state's politics is an empirical question of voter behavior, not a granted assumption. Gubernatorial and presidential vacancies are relatively rare,[279] and it is unlikely that many voters affirmatively cast ballots based on their concern for how statistically unlikely events will be affected by the outcome of the election.[280]

276. Akhil Reed Amar & Vik Amar, *President Quayle?*, 78 VA. L. REV. 913, 939–40 (1992).

277. In the 1960s, the simultaneous election of governors and lieutenant governors of different parties was fairly common, with 25% of states having opposing party duos in 1966. Eugene Declercq & John Kaminski, *A New Look at the Office of Lieutenant Governor*, 38 PUB. ADMIN. REV. 256, 258 (1978). The introduction of joint-ticket elections has significantly reduced the frequency of that phenomenon. Back-of-the-envelope math shows that, of the 99 elections that have taken place in states with split elections between 2000 and 2019, 26 (or about a quarter) have resulted in a governor of one party and a lieutenant governor (or secretary of state) of another. This excludes Oregon because governors and secretaries of state are elected in separate elections.

278. This is not terribly dissimilar to John Mulaney joking about the plot of *Home Alone 2: Lost in New York* in a standup special that was released decades later. *See* NEW IN TOWN (Comedy Central 2012) ("I know it's kind of stupid to complain about a movie that came out seventeen years ago, but I wasn't a comedian back then. So I have to do it now.").

279. *See supra* note 144 and accompanying text.

280. While social psychological and public opinion research has not addressed this precise question, the available literature is strongly suggestive that low-probability events—like gubernatorial vacancies—do not motivate specific decision-making. *See* Cheryl J. Wakslak et al., *Seeing the Forest When Entry Is Unlikely: Probability and the Mental Representation of Events*, 135 J. EXPERIMENTAL PSYCH. 641, 641–42 (2006). And because party switches following gubernatorial vacancies are relatively rare events experienced by few states, this relative rarity is suggestive that voters may underweight the likelihood of such an event based on their own experience. *See* Nicholas Barberis, *The Psychology of Tail Events: Progress and Challenges*, 103 AM. ECON. REV. 611, 613–14 (2013).

This argument is also too dismissive of the value of electing executives and their deputies on a team. Allowing gubernatorial candidates to select a running mate of their choosing allows them to balance their ticket and represent their party's coalitions on the statewide ticket.[281] The Professors Amar suggest that these balancing efforts could result in greater conflict within the executive branch.[282] But the available political science research instead suggests that electing governors and lieutenant governors on a joint ticket "is associated with more gubernatorial assignments for the lieutenant governor . . . and also with the participation of the second executive in the development of more bills for the governor's agenda."[283] Though there are certainly examples to the contrary,[284] it is likelier that these conflicts are deviations from the norm, not representative of the typical case.[285]

Perhaps more concerning is the risk that dividing the executive branch of a state into dueling factions—one dominated by a governor of one party and the second dominated by the lieutenant governor of another—may create perverse incentives. To be clear, the specific concern here, in the context of a politically divided executive branch, is not that the *lieutenant governor's* powers are so far-reaching that the lieutenant governor could do real damage; it is that the access barriers to the lieutenant governor exercising the *governor's* powers are relatively low. State constitutional provisions concerning gubernatorial vacancies have historically defined vacancies pretty broadly, going so far as to encompass absence from the state.[286] Though many of these provisions

281. *See* BENJAMIN NISPEL, REFORM OF THE OFFICE OF LIEUTENANT GOVERNOR 1–2 (1958); *see also* Valerie M. Hennings & R. Urbatsch, *There Can Only Be One (Woman on the Ticket): Gender in Candidate Nominations*, 37 POL. BEHAV. 749, 762–63 (2015) (concluding that female gubernatorial nominees are likelier to have male running mates).

282. Amar & Amar, *supra* note 276, at 938 ("[T]he current system may affirmatively tend to create loose cannons: a party might encourage its presidential candidate to pick as a running mate someone whose geographical ties and political leanings are somewhat different from (and thus in tension with) his own in order to 'balance the ticket' and attract support from as broad an electoral base as possible.").

283. David W. Winder & David Hill, *The Governor and the Lieutenant Governor: Forms of Cooperation Between Two State Executives*, 34 POL. & POL'Y 634, 651 (2006).

284. *See, e.g.*, Jack Brammer, *Kentucky Lt. Gov. Hampton Vows to Continue Court Case Against Bevin Despite Setback*, LEXINGTON HERALD LEADER (Sept. 12, 2019, 1:08 PM), https://www.kentucky.com/news/politics-government/article234984317.html; Mercer, *supra* note 259; Sulzberger, *supra* note 252.

285. NISPEL, *supra* note 281, at 1 ("Harmonious relationships between the governor and the lieutenant governor are found more often when these two officials are of the same political faith.").

286. *See generally*, Richard H. Hansen, *Executive Disability: A Void in State and Federal Law*, 40 NEB. L. REV. 697, 717–20 (1961).

have been written out of constitutions, some have not.[287] Accordingly, when dealing with separately elected lieutenant governors, especially when they belong to a different party, governors might reasonably be skeptical about conduct that would trigger their state's succession provisions—like leaving the state or voluntarily relinquishing the office for a short period of time.[288] And for good reason.[289]

But setting aside the potential intra-executive branch conflict that split gubernatorial and lieutenant-gubernatorial elections may trigger, the crux of the argument in favor of split elections is the assumption that voters are making a conscious choice to provide for inter-party succession when they elect a governor of one party and a lieutenant governor of another. Though no political science study has explored why voters render these split decisions, the available data and the structural realities of gubernatorial elections suggest that the intent is not to "mix and match" from among the candidates to select the most qualified in each race.

Moreover, alternative theories abound as to why states end up with governors and lieutenant governors of different parties. The incumbency advantage, for example, is a strong possibility. Over the last two decades, in one-quarter of gubernatorial and lieutenant-gubernatorial (or secretary of state) elections, voters have selected a governor of one party and a lieutenant governor of another. At first blush, this might seem like a validation of the theory that, when elections are split, voters will choose the most qualified gubernatorial and lieutenant gubernatorial candidates, mixing and matching as the case may be. But this theory

287. *See id.*

288. Part of the solution may be updating the definition of "vacancy" to exclude absences from the state, which are anachronistic in the twenty-first century.

289. It is difficult to catalogue the extent to which rogue lieutenant governors, acting with apparent gubernatorial authority, have attempted to assert power. A substantial amount of litigation has occurred in state supreme courts, primarily during the nineteenth and early twentieth centuries, concerning the constitutionality of a lieutenant governor's ostensible action as governor. *See, e.g.*, Sawyer v. First Jud. Dist. Ct., 410 P.2d 748, 749–51 (Nev. 1966) (rejecting grand-jury empanelment issued by lieutenant governor ostensibly acting as governor); Montgomery v. Cleveland, 98 So. 111, 115 (Miss. 1923) (upholding pardon issued by lieutenant governor acting as governor); *Ex parte* Crump, 135 P. 428, 436 (Okla. Crim. App. 1913); State *ex rel.* Att'y Gen. v. Barrow, 29 La. Ann. 243, 243 (La. 1877) (upholding removal from office ordered by lieutenant governor acting as governor). The most notable recent decision in this respect was the California Supreme Court's decision in *In re Commission on the Governorship of California v. Curb*. 603 P.2d 1357 (Cal. 1979). In *Curb*, then-Governor Jerry Brown left the state and Lieutenant Governor Mike Curb, exercising the powers of governor, named Armand Arabian to the state court of appeals. *Id.* at 1360. Upon Brown's return, he recalled Arabian's nomination. *Id.* The California Supreme Court ultimately ruled that Curb's nomination was valid—but so was Brown's withdrawal, rendering Arabian's nomination void. *Id.* at 1364–66.

omits the role that the incumbency advantage plays in achieving these election results. In 20 of the 26 elections producing divided executive branches, at least one of the gubernatorial or lieutenant-gubernatorial candidates was running as an incumbent. The incumbency advantage—which is similar for gubernatorial and lieutenant-gubernatorial candidates[290]—helps explain some of these seemingly divergent results.

Next, the fact that split elections are, well, split means that the field of candidates is also split. Different combinations of independent or third-party candidates may run in each race, which complicates the assumption that, with split elections, voters mix and match from among the gubernatorial and lieutenant-gubernatorial candidates. An independent running for governor may not have a companion candidate running in the separate lieutenant-gubernatorial election.[291] Similarly, a party may only run a candidate in one of the two races. In either of these circumstances, voters will have to redistribute themselves in the other race. If the Green Party runs a candidate for governor but not lieutenant governor, or if an independent runs for governor, their respective voters will have to make an entirely different choice in the lieutenant-gubernatorial election.[292]

There are also some structural issues that are present in different states. Depending on a state's election laws and constitutional requirements for holding office, split decisions could be rendered not by operation of an affirmative voter preference, but instead by how elections are decided. These possibilities exist because of three different features of state election law: (1) top-two primaries that create the possibility of

290. *See* Stephen Ansolabehere & James M. Snyder, Jr., *The Incumbency Advantage in U.S. Elections: An Analysis of State and Federal Offices, 1942–2000*, 1 ELECTION L.J. 315, 327–29 (2002).

291. Though it's certainly possible that independents in split gubernatorial elections form an informal "ticket" with independent candidates for lieutenant governor, no such examples are evident in contemporary state elections.

292. *See e.g.,* Nathan L. Gonzales, *Oklahoma Governor: Hell Just Froze Over*, ROTHENBERG POL. REP., Dec. 18, 2002, at 1. Take, for example, the 2002 Oklahoma elections for governor and lieutenant governor. *Id.* Gary Richardson, a wealthy and well-known attorney, ran for governor as an independent and did quite well, ending up with 14% of the vote. *Id.* Richardson effectively split the state's conservative-leaning vote with Steve Largent, the Republican nominee, allowing Democrat Brad Henry to win the election with just 43% of the vote. *Id.* Simultaneously, in the lieutenant-gubernatorial election, incumbent Mary Fallin, a Republican, was easily winning re-election over Democratic nominee Laura Boyd, 57–39%. *See* Bryan Dean, *Mary Fallin Wins Third Term as State's Lieutenant Governor*, OKLAHOMAN (Nov. 6, 2002, 12:00 AM), https://www.oklahoman.com/article/2813943/mary-fallin-wins-third-term-as-states-lieutenant-governor. Because of Richardson's strong performance, it's difficult to view the split result—a Democrat as Governor, a Republican as Lieutenant Governor—as the result of voters affirmatively choosing to mix and match candidates to select the best in both elections.

one-party lockouts; (2) majority-vote requirements; and (3) elections for governors and successors occurring in different years.

First, the operation of top-two primaries could artificially produce a split decision. In California, Louisiana, and Washington, all candidates of all parties appear on the same ballot, with the top two candidates advancing to the general election.[293] This can result in all-Republican or all-Democratic general elections—not necessarily because that is what voters want, but rather because of how the vote is split.[294] For example, in the 2016 election for Washington state treasurer, the Republican candidates finished as the top two finishers.[295] As a result, the general election was an all-Republican affair[296]—even though the Republicans received fewer votes than all the Democratic candidates on the ballot.[297] The same could have happened in the 2020 lieutenant gubernatorial election, but with two strong Democratic candidates matched up against several weak Republican candidates, a repeat of the 2016 top-two lockout ultimately did not occur.[298] But in any of these three states, this is a distinct possibility.[299]

Second, majority-vote requirements can similarly produce asymmetric results. As mentioned previously, Georgia, Mississippi, and Vermont have majority-vote requirements for statewide offices.[300] In the event that a gubernatorial, or lieutenant-gubernatorial, candidate fails

293. CAL. CONST. art. II, § 5; LA. STAT. ANN. § 18:481 (2011); WASH. REV. CODE ANN. § 29A.04.127 (West 2004); *see also* Chenwei Zhang, Note, *Towards a More Perfect Election: Improving the Top-Two Primary for Congressional and State Races*, 73 OHIO ST. L.J. 615, 623-24 (2012).

294. The Supreme Court openly discussed this possibility in upholding the constitutionality of Washington's blanket primary. *See* Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 447, 448 n.5 (2008).

295. Nicholas K. Geranios, *Washington State Treasurer Race a GOP Showdown*, SPOKESMAN-REV. (Sept. 20, 2016), https://www.spokesman.com/stories/2016/sep/20/for-first-time-2-republicans-on-ballot-for-state-t/.

296. *Id.*

297. *See August 2, 2016 Primary Results: State Treasurer*, WASH. SEC'Y OF STATE (Aug. 16, 2016, 5:12 PM), https://results.vote.wa.gov/results/20160802/State-Treasurer.html.

298. *See* Jim Camden, *Democrats Heck, Liias Vie for Lieutenant Governor*, SPOKESMAN-REV. (Spokane, Wash.) (Oct. 25, 2020), spokesman.com/stories/2020/oct/06/heck-liias-compete-for-lieutenant-governor-spot/; James Drew, *Political Dominoes Could Make Lt. Governor's Race the One to Watch in 2020*, NEWS TRIB. (May 24, 2020, 5:45 AM), https://www.thenewstribune.com/news/politics-government/article242927086.html.

299. For example, the 2018 California lieutenant gubernatorial election was between Eleni Kounalakis and Ed Hernandez—both Democrats. *See* Peter Fimrite & Sophie Haigney, *Kounalakis, Hernandez Finish Top Two in Tight CA Lieutenant Governor Race*, S.F. GATE (June 6, 2018, 8:14 AM), https://www.sfgate.com/news/article/Kounalakis-Hernandez-finish-top-two-in-tight-CA-12971869.php.

300. MISS. CONST. art. V, § 140; VT. CONST. ch. II, § 47; GA. CODE ANN. § 21-2-501 (West 2021).

to win a majority, the resulting procedure—a runoff election or an election by the legislature—could artificially create a split executive.[301]

Third, and least commonly, the election of governors and their designated successors in separate elections held in different years prevents voters from making a simultaneous judgment about governors and their preferred successors. Only in Oregon does this occur; governors are elected in midterm election years, and secretaries of state are elected in presidential election years.[302] However, in states that require special elections to fill lieutenant-gubernatorial vacancies, this mismatch could occur more frequently.[303]

Combined, these seven states amount to more than a third of all of the states in which gubernatorial power devolves to a separately elected statewide official. Though the possibility of the aforementioned events occurring is low, that is beside the point. Gubernatorial successions themselves are rare events. It makes no sense to ignore, in the conversation about a low-probability event, the potential effect of *another* event simply because it is a low-probability event. And though strong arguments can be made against these state election procedures on the merits, [304] states will always employ slightly different electoral procedures. The idea that states operate as laboratories of democracy guarantees such a result. It is far more pragmatic to make a marginal change to state systems of government or electoral procedure—by creating a lieutenant governorship and by tying gubernatorial and lieutenant-gubernatorial elections together—than it is to radically upend state election law in support of a theory of split-executive elections devoid of empirical support.

301. To Vermont's credit, its legislature has only rarely elected the non-plurality winner in a statewide treasurer contest in which no candidate won a majority. *See* Sanford & Gillies, *supra* note 230, at 795–96. And in Mississippi's case, the majority-vote requirement has only been implicated a handful of times, all without controversy, in the hundred-plus years following the adoption of the 1890 constitution. *See* Bobby Harrison, *Jim Hood Could Win the Governor's Race and Not Be Seated, Or So Says the State Constitution*, MISS. TODAY (Feb. 3, 2019), https://mississippitoday.org/2019/02/03/based-on-state-constitution-hood-could-win-governors-race-and-not-be-seated/.

302. *See* ORE. CONST. art. II, § 14.

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

304. *See, e.g.,* Vikram David Amar & Jason Mazzone, *Evaluating the Lawsuit Attacking Mississippi's Distinctive Method of Picking Governors: Part Three in a Series*, VERDICT (Dec. 12, 2019), https://verdict.justia.com/2019/12/12/evaluating-the-lawsuit-attacking-mississippis-distinctive-method-of-picking-governors; Sanford & Gillies, *supra* note 230, at 796–97 (reviewing efforts to repeal Vermont's majority-vote requirement); Graham Paul Goldberg, Note, *Georgia's Runoff Election System Has Run Its Course*, 54 GA. L. REV. 1063 (2020) (arguing against the use of primary runoffs).

Nonetheless, even if we find persuasive the argument that gubernatorial and lieutenant-gubernatorial elections should be split, embracing that argument necessarily requires that lieutenant governorships exist. If it is a fair assumption that voters choosing governors and lieutenant governors of different parties are doing so because they are simultaneously choosing the most qualified gubernatorial candidate *and* the lieutenant-gubernatorial candidate most qualified to step in, that assumption simply cannot extend to other officials in the line of succession. Secretaries of state, for example, have additional job responsibilities than lieutenant governors.[305] Splitting executive elections but not providing for a lieutenant governor theoretically queues up a voter dilemma: in a secretary of state election, one candidate might be preferable for the actual job while another might be preferable to fill in as governor.

Ultimately, to realize the democratic aspirations of state constitutional reformers who created lieutenant governorships—and who positioned secretaries of state as gubernatorial successors—the next step must be tying gubernatorial and lieutenant-gubernatorial elections together. To ensure that voters are empowered to select the best candidates for each state office, it makes sense to separate the lieutenant governorship from other positions, like secretary of state, and to convert the office's responsibilities from formally laid out in state constitutions to those given at the discretion of the governor.[306] These state constitutional changes—which are relatively minor—have significant effects in ensuring that gubernatorial succession travels along democratically legitimate lines.

V. CONCLUSION

From the beginning, states employed a diversity of methods in filling gubernatorial vacancies. Most of these methods, as originally conceived, deputized legislative or quasi-legislative officials with the responsibility of succeeding the governor. These provisions were peripherally affected by state constitutional developments during the nineteenth century but remained largely unchanged throughout the first half of the century. Newly admitted states split in how they filled gubernatorial vacancies—

305. *See generally* SEIBERT, *supra* note 217 (detailing job responsibilities of secretaries of state).

306. *See Some Modest Proposals on the Vice-Presidency*, *supra* note 68, at 1714–19 (making an analogous argument at the federal level). To the extent that a state wishes to continue its secretary of state as a *de facto* lieutenant governor—perhaps to maximize fiscal efficiency—the path of least resistance may well be to do as Alaska did in its first constitution, and tie the election of the governor and secretary of state together.

with about half preferring the state senate president and about half preferring the lieutenant governor.

This dramatically shifted by the mid-1800s. The Reconstruction-era constitutional changes created the lieutenant governorship in southern states where it did not otherwise exist, and following dissatisfaction with existing gubernatorial succession provisions, other states followed suit. By the end of the century and the beginning of the next, the new norm was for states to have a lieutenant governor. Subsequent state constitutional changes—and the creation of lieutenant governorships in American territories—further cemented this trend.

But these changes are far from being fully realized. Though most states laudably now provide for lieutenant governors, how they elect their lieutenant governors belies much of the rationale for the office's creation. Split elections do little to minimize the risk of a democratically illegitimate succession. Accordingly, this Article concludes that not only do lieutenant governors need to be created where they do not otherwise exist, but also that the election of lieutenant governors needs to be tied to the election of governors. The importance of answering these questions in a way that respects the popular will far exceeds the perceived frivolousness of the lieutenant governorship. It is fine to make jokes at the lieutenant governor's expense, and to trivialize the office as a fifth wheel to wagon—so long as we simultaneously recognize that the fifth wheel is not a waste of space, but instead is waiting in patient service for one of the four wheels to stop spinning.