Third Wheeling in the Two-Party System: How Same-Party Replacement Systems Impede the Replacement of Independent and Third-Party Legislators

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THIRD WHEELING IN THE TWO-PARTY SYSTEM: HOW SAME-PARTY REPLACEMENT SYSTEMS IMPEDE THE REPLACEMENT OF INDEPENDENT AND THIRD-PARTY LEGISLATORS

Tyler Yeargain*

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I. INTRODUCTION

When a state fills its legislative vacancies through special elections, it makes no difference who the legislators are, nor why they left office. In the unlikely event that an independent candidate is elected to the state legislature and then leaves office prior to the next election, the legislator’s party affiliation (or lack thereof) doesn’t affect the special election that follows. At this subsequent

* Associate Director, Yale Center for Environmental Law and Policy. I extend my sincerest appreciation to my friend Samuel Steele McLellanl for his suggestion on this Article’s title. This Article is my final entry—the threequel, if you will—in a series of three articles about legislative appointments. The first two, The Legal History of State Legislative Vacancies and Temporary Appointments, 28 J.L. & Pol’y 564 (2020), and Same-Party Legislative Appointments and the Problem of Party Switching, 8 Tex. A&M L. Rev. 163 (2020), are cited throughout this piece as relevant.

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special election, the voters—whichever small percentage of whom show up—
can choose another independent, a Democrat, a Republican, or someone else
altogether.

But while vacating legislators’ party affiliations are irrelevant when they
are replaced at a special election, it is highly relevant when they are replaced by
a same-party appointment, a mechanism employed by 23 states and territories.¹
In those instances, their lack of party affiliation presents a conceptual, and legal,
challenge. The well-established purpose of a same-party appointment is to
preserve the status quo to the greatest extent possible without the expense and
unrepresentative nature of a special election, enabling voters to continue being
fully and equitably represented, until the next regularly scheduled election. But
when a candidate is elected as an independent or third-party candidate, there’s
no logical way to replace them with an appointment that maintains the status quo.

Candidates run as independents for a multitude of reasons and with a
rainbow of varying ideologies—so merely requiring the appointment of another
registered independent, as some states do, doesn’t serve the aims of same-party
appointments the same way that replacing a Democrat with another Democrat
does. Though some states with same-party appointment schemes provide that
vacancies caused by independent legislators are filled by another independents,
most don’t.² Some of these states instead opt for different procedures altogether,
through which a state actor vested with appointment power may appoint
whomever she likes.³ Of course, these alternative procedures present their own
disadvantages, chief among them that they don’t even attempt to fill the vacancy
in a way that matches voter intent. And with respect to third-party state
legislators, though most states’ processes would seemingly apply to them and fill
their vacancies without a problem, some processes are dependent on a party
infrastructure that does not exist with any regularity for parties outside the
Democratic–Republican binary.

And relevantly, the near-total absence of an adequate process to replace
independent and third-party legislators is important—even if the frequency of
such vacancies is low. Admittedly, independent and third-party candidates are
rarely elected to state legislatures.⁴ They similarly rarely vacate their offices in a
manner that would trigger the need for a replacement.⁵ But this doesn’t mean that
the process used to replace these blue-moon legislators doesn’t matter. On a
mathematical level, how an independent or third-party legislator is replaced may

¹ Tyler Yeargain, The Legal History of State Legislative Vacancies and Temporary
² See infra notes 51–78 and accompanying text.
³ Id.
⁴ See infra notes 12–19 and accompanying text.
⁵ Yeargain, supra note 1.
make the difference as to which party has a legislative majority—or whether a party has a legislative supermajority.

From a democratic-legitimacy perspective, the voters who elected such a legislator are entitled to be represented in their state legislature by someone with similar views as the previous incumbent. And from a more practical perspective, the infrequency of these vacancies is completely irrelevant. State legislative vacancies themselves are relatively infrequent regardless of the previous incumbent’s party, so it would be fallacious to dismiss the need for a legitimate procedure to replace independent or third-party legislators simply because their elections and vacancies are infrequent. By that logic, because state legislative vacancies are infrequent in the abstract, no procedure is needed to fill them. Accordingly, if a procedure can be developed to more effectively replace independent and third-party state legislators, it should be.

Recent events have given particular salience to answering this question. Following the 2020 election, with Senate control dependent on the outcome of runoff elections for the U.S. Senate, the question of how independent legislators can be replaced with a same-party appointment requirement has become especially important. U.S. Senator Bernie Sanders, who has thrice been elected to the Senate as an independent—despite winning the Democratic nomination in each of the three elections—has indicated an interest in joining President-elect Joe Biden’s cabinet as Secretary of Labor. Given that the Governor of Vermont is a Republican, this presents a unique challenge. Governor Phil Scott has pledged to appoint a Democrat to replace Sanders, but he is under no legal obligation to do so. But even if state Democrats were inclined to impose such a requirement on Governor Scott, drafting a requirement that ensures that Sanders is replaced by a like-minded Senator would prove challenging.

In light of the litany of (mostly) bad options to replace independent and third-party state legislators, this Article believes that an alternative approach is possible. It explains what such an approach would look like and advocates for its

adoption. It begins in Part II with an analysis of independent and third-party candidates, focusing on their characteristics and traits, along with their historical success in state legislative elections. Part III surveys the different state laws that provide for filling state legislative vacancies caused by independent legislators. It identifies commonalities among the state laws, along with the laws that are altogether silent on the matter. Finally, Part IV argues for the adoption of a totally different procedure, pulling largely from the Colorado replacement statute, in a way that seeks to match voter intent to the results of replacement.

II. INDEPENDENT AND THIRD-PARTY STATE LEGISLATORS: ELECTIONS AND VACANCIES

This Part begins by laying out data and relevant background information for the parts that follow. It considers two questions, the intersection of which motivate this Article’s purpose: (1) what are the characteristics of independent and third-party state legislators, and (2) how frequently do they vacate their seats? Each of these questions is addressed in a separate section.

A. Common Characteristics

Few independents or third-party members have served in state legislatures in recent years. Though some individual third-party and independent candidates have attracted media attention, few have been successfully elected to office, and fewer still maintained their third-party or independent affiliation.

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10 TODD DONOVAN, DANIEL A. SMITH, TRACY OSBORN & CHRISTOPHER Z. MOONEY, *STATE AND LOCAL POLITICS* 173 (4th ed. 2015) (“Although less than 1 percent of the total, nationwide over the past 30 years, more than 150 nominees of third parties have won seats in state legislatures.”).
after winning office.\textsuperscript{11} Instead, most of the (admittedly small) growth in independent membership in state legislatures comes from members of the major parties who switch to become independents while in office.\textsuperscript{12} Few of these party-switchers themselves end up winning re-election.\textsuperscript{13}

Today, virtually all state legislators are elected as Democrats or Republicans. Following the 2018 and 2019 elections, out of 7,334 state legislators elected in partisan elections,\textsuperscript{14} only 31 (or 0.42\%) are independents or members of third parties.\textsuperscript{15} If the lens expands to include America’s six non-state entities, out of 150 legislators elected in partisan elections, 18 (or 12\%) are independents or members of third parties.\textsuperscript{16} Over the past several decades, about

\begin{flushleft}
\textsuperscript{13} See, e.g., Shor, supra note 12, at 20–21.
\textsuperscript{14} This calculation excludes the 49 people elected to Nebraska’s unicameral legislature, who are elected in nonpartisan elections. See Mike McCabe, A Legislative Branch Like No Other: Nebraska Unicameral Remains a Unique Part of Nation’s Political System, Council of State Gov’ts Midwest (Feb. 2011), https://www.csigmidwest.org/member_services/feb2011unicameral.aspx.
\textsuperscript{16} Id. This excludes the 39 legislators elected to American Samoa’s Fono, which, like the Nebraska Legislature, is nonpartisan. This number could be higher if Puerto Rico’s 23 Popular Democratic Party and 55 New Progressive Party legislators are counted as members of third parties, but this would be disingenuous—Puerto Rico is a two-party system, just with different
150 independents have won state legislative elections, representing less than 1% of the total. And in the aggregate, it is rare for independent state legislative candidates to win more than 1% of the vote in the average election. Part of these difficulties may stem from the fact that independents and third-party candidates do not participate in a significant number of state-legislative elections. Moreover, winning begets winning—independent candidates winning one election makes it likelier that they will win another, which creates an entry barrier for successful candidates.

These numbers have dropped precipitously since the early and mid-twentieth century, when the number of independents elected to state legislatures was several times that. However, even then, the overall numbers were very small, and have rarely eclipsed 5% since the late 1800s or the early 1900s, when populist and progressive parties elected a significant number of legislators, especially in western states. The only state today with a consistently significant number of independent legislators is Vermont, where members of the Progressive Party are able to win elections because of fusion voting.

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17 DONOVAN ET AL., supra note 10, at 173.

18 Euel Elliott, Gerard S. Gryski & Bruce Reed, Minor Party Support in State Legislative Elections, 22 STATE & LOC. GOV'T REV. 123, 125 (1990) (“Minor party voting in state legislative elections during the period under study [1976 to 1984] was essentially a rare phenomenon. Altogether such parties account for less than 1 percent of all votes cast (0.62 percent).”).

19 See Keith E. Hamm & Robert E. Hogan, Campaign Finance Laws and Candidacy Decisions in State Legislative Elections, 61 POL. RES. Q. 458, 462 (2008) (noting that only 11% of state legislative races involving an incumbent saw an independent or third-party candidate). These numbers varied greatly depending on the state and its ballot access laws—in states with stricter ballot-access laws, fewer than 1% of incumbent state legislators were challenged by independent or third-party candidates, but in states with looser ballot-access laws, like California or Minnesota, nearly all incumbent state legislators faced such challengers. Id.

20 See, e.g., Alex Welch, Where Are the House Independents? 33 (Nov. 16, 2016) (unpublished manuscript) (available at http://www.atwelch.com/uploads/4/8/3/2/48328127/methods_paper.pdf) (“[W]e found that holding a previous office (and hence establishing a brand) was necessary for an independent to enjoy a greater level of success. This is logically intuitive and is backed up, empirically.”).

21 JAMES L. SANDQUIST, DYNAMICS OF THE PARTY SYSTEM 112–15 (2011) (discussing the Greenback Party); id. at 120–23 (discussing the Anti-Monopolist Party, which won 50 state legislative seats in the early-to-mid 1880s); id. at 127–32 (discussing the Farmers’ Alliance, a movement that elected legislative majorities in Kansas, Nebraska, and South Dakota, in the 1890s); id. at 170–82 (discussing the Progressive Party).

But regardless of how independent and third-party candidates do, they are simply not monolithic. This is particularly obvious for third-party candidates—nominees of the Constitution, Green, and Libertarian parties represent a vast array of ideologies. But it is also true that independents, whether state legislative candidates or voters, are not monolithic. Though nearly 40% of Americans identify as “independent,” this finding is somewhat misleading. Most of those ostensible independents lean heavily toward one of the two parties, and frequently behave like, and hold views consistent with, partisan Democrats or Republicans. Instead, only about 7% of Americans are “true” independents.

Furthermore, it is incorrect to associate “independent” and “moderate” as synonymous. Though 35% of Americans consider themselves “moderate,” very few of these self-identified “moderates” hold truly middle-of-the-road positions on the issues. Rather, they hold extreme or immoderate positions on individual issues that seem to contradict each other and are only placed in the middle of the ideological spectrum because their seemingly contradictory views, on balance, cancel each other out. Little research has been done on the ideology

24 Gerald C. Wright & Brian F. Schaffner, The Influence of Party: Evidence from the State Legislatures, 96 AM. POL. SCI. REV. 367, 376, 376 n.14 (2002) (“Not answering questions in a way that roughly aligns in a general liberal–conservative dimension would probably mean that the respondent does not accept the common terms of discourse in contemporary American politics . . . . Consistent with this is the finding that third-party candidates, especially those identified with different ways of organizing political choices, do not reflect this alignment.”).
27 Id.
29 Douglas J. Ahlers & David E. Broockman, How Ideological Moderation Conceals Support for Immoderate Policies: A New Perspective on the “Disconnect” in American Politics 4 (Sept. 23, 2014) (unpublished manuscript) (available at http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.688.8618&rep=rep1&type=pdf) (“We . . . demonstrate that ideologically centrist citizens tend to support many policies that are not moderate, that their support for these immoderate policies persists over time, and that they want to see these views represented.”); Lee Drutman, The Moderate Middle Is a Myth, FIVETHIRTYEIGHT (Sept. 24, 2019), https://fivethirtyeight.com/features/the-moderate-middle-is-a-myth/ (“[M]any people who call themselves ‘moderate’ do not rate as moderate on policy issues. Just like self-identified independents, moderates come from all over the ideological space, including moderates who also identify as independent.”); see also DONALD R. KINDER & NATHAN P. KALMOE, NEITHER LIBERAL NOR CONSERVATIVE 7 (Benjamin L. Page et al. eds., 2017). (“[G]enuine ideological
of independent candidates, and though some of them certainly run as middle-of-the-road centrists,\(^\text{30}\) it is clear that most independent candidates are not necessarily moderates.\(^\text{31}\) Candidates run as independents for a wide variety of reasons, which could include their ideological moderation, but which also include their legal inability to run as a member of a political party.\(^\text{32}\)

**B. The Frequency of Vacancies**

As has been remarked before, legislative vacancies happen with the approximate frequency of blue moons.\(^\text{33}\) In a given two-year legislative session, vacancies will happen about 3.4% of the time—or, framed slightly differently, for every 100 legislators, 3.4 of them will vacate their seats in a two-year period.\(^\text{34}\)

But the structural reasons for legislative vacancies suggest that this vacancy rate might be lower, perhaps by several magnitudes, for independent or third-party legislators. While these legislators are certainly no less likely to *involuntarily* leave office—they have, for example, no elixir of life preventing them from dying in office nor shield of invincibility protecting them from expulsion or recall\(^\text{35}\)—they might be less prone to *voluntarily* do so. According to the best available research, voluntary vacancies account for 70% of all

identification—an abiding dispositional commitment to an ideological point of view—turns out to be rare.”).

\(^\text{30}\) See Cara Poplak, Transcending Political Party Constraints: An Ideographic Analysis of the Rhetoric of Charlie Crist and Joe Lieberman as Independent Candidates 44–52 (Dec. 2011) (M.A. thesis, Florida Atlantic University) (on file with author) (arguing that Charlie Crist and Joe Lieberman ran as centrists during their independent campaigns for the U.S. Senate in 2010 and 2006, respectively); Welch, *supra* note 20, at 24–30 (noting that, of the elected independents in the U.S. Senate today, “Bernie Sanders and Lisa Murkowski . . . are dependable partisans who enjoy establishment backing in their home states,” while “Angus King . . . represents the only case of a truly independent senator who is always willing to switch caucus affiliation in the Senate and always wins races against candidates from both major parties”).

\(^\text{31}\) See Poplak, *supra* note 30, at 89–90.


\(^\text{33}\) Yeagern, *supra* note 1.


\(^\text{35}\) Id. at 130 (noting that involuntary reasons for a legislative vacancy include death, criminal conviction, and recall).
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...vacancies. These reasons are manifold and include things like winning election to another office, receiving an appointed position, taking a full-time job elsewhere, moving, health concerns, or uncategorized personal reasons. But the most common voluntary reason for leaving office are the first two—winning election to another office or receiving an appointment to a government office. These opportunities are likelier to present themselves to Democratic or Republican legislators. As explained previously, independents and third-party members are rarely elected to state legislatures. Accordingly, they are similarly unlikely to win statewide or national positions unless they are affiliated with a major political party through fusion voting or becoming the party’s de facto or de jure nominee—so they are unlikely to vacate their seats because of a

36 Id.
37 Id.
38 Id. (noting that winning elective office or receiving an appointed position represent 52% of all legislative vacancies, and 74% of all voluntary vacancies).
39 See DONOVAN ET AL., supra note 10, at 173; see also supra notes 15–19 and accompanying text.
subsequent election. Relatedly, because fewer independents and third-party members are elected to positions that grant them appointive power, like governor, mayor, or county executive—much less President—we would similarly expect fewer independent and third-party state legislators to leave office because they were appointed to another position.

Therefore, despite a state legislative vacancy rate of about 3.4%, this number is likely lower for independent and third-party legislators. Excluding the likely inapplicable voluntary reasons for a vacancy and recalculating the vacancy rate, we might expect a vacancy rate of about 1.7%. To that effect, few documented vacancies have occurred in legislative seats held by independent or third-party legislators.

One of the few occurred in 1977, when District of Columbia City Councilman Julius Hobson, a founder of the D.C. Statehood Party, died. The Statehood Party appointed Hilda Mason, one of the co-founders of the Party, to fill the vacancy. In 2009, Maryland State Delegate Richard Weldon—who was elected as a Republican in 2006 but changed his party affiliation to independent in 2008—resigned from office. Because Maryland’s same-party legislative replacement scheme looks to the most recent election, not the previous

43 Steven J. Rosenstone, Roy L. Behr & Edward H. Lazarus, Third Parties in America 32 (2d ed. 1996); Steve B. Lem & Conor M. Dowling, Picking Their Spots: Minority Party Candidates in Gubernatorial Elections, 59 Pol. Res. Q. 471, 471 (2006) (“One office that minor party candidates often pursue is state governorships, which, with the exception of Minnesota’s election of Jesse Ventura and a few others (e.g., Lowell P. Weicker, Jr. in Connecticut in 1990 and Angus S. King in Maine in 1994 and 1998), is typically dominated by the two major parties.”).

44 Rosenstone et al., supra note 43, at 32 ("[S]ince few third parties win federal, state, or local elections, the party lacks patronage—an important political resource through the late nineteenth and early twentieth centuries.").

45 See Hamm & Olson, supra note 34, at 130, 133.


47 Valentine & Davis, supra note 46. As a matter of semantics, the District of Columbia’s City Council is, of course, a city council because the District is a city, but given the District’s quasi-state, quasi-territory status, the Council functions as the District’s legislature. See generally Gregory E. Mize, A Guide to Deciphering the Laws of a Unique City-State Legislature—The Council of the District of Columbia, 2 POTOMAC L. REV. 1 (1979) (noting that “the Council retain[s] functions of a predecessor City Council, namely, a limited role as a municipal legislative agency of the federal government, and gained legislative power analogous to that of a state legislature”). In other words, the D.C. City Council counts as a legislature for these purposes. Id.

incumbent’s most recent affiliation, the local Republican Party was tasked with picking Weldon’s replacement.49

Beyond these two documented vacancies, it is probable that more vacancies have occurred. By virtue of either election or party switches, nearly 100 independents or third-party members have served in the legislatures of the 20 states with same-party replacement schemes since the adoption of those schemes.50 Even assuming a conservative vacancy rate,51 it seems likely that at least some of them vacated their offices during that time. But, however frequent the actual vacancy rate, it is undoubtedly a relatively rare occurrence.

III. HOW OTHER-PARTY CANDIDATES FIT INTO SAME-PARTY REPLACEMENT

Given the rarity with which independent or third-party candidates are elected to state legislatures, it is perhaps understandable that in the states that use same-party replacements to fill state legislative vacancies, there is rarely a procedure for filling a vacancy caused by a politician other than a Democrat or a Republican. Admittedly, many states have procedures for filling vacancies caused by independents or third-party candidates, but few states have both. This Part surveys the mechanisms by which independent and third-party legislators are replaced in same-party replacement systems, addressing each in turn.

A. Independent Legislators

“Independent” legislators are specifically those legislators who are elected as non-members of any political party. In practice, independent candidates for office might be listed as “independent”52 on the ballot, or perhaps as something else, like “no party affiliation,”53 “no party preference,”54 or a just blank space.55 (And, of course, write-in candidates are elected without any party

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49 Id.
51 Hamm & Olson, supra note 34, at 130, 133 and accompanying text.
54 E.g., Wash. Rev. Code Ann. § 29A.52.112(4) (West 2020) (“A candidate may choose to express no party preference.”); see also Cal. Elec. Code § 13105(a)(2) (West 2020) (“In the case of a candidate who did not state a preference for a political party . . . ‘Party Preference: None.’”).
55 See, e.g., Chamness v. Bowen, 722 F.3d 1110, 1113 (9th Cir. 2013) (noting that the California Secretary of State “concluded that a candidate who prefers a ‘non-qualified’ party could . . . either state he has ‘No Party Preference,’ or leave the space blank”).
affiliation on the ballot, but may have a party affiliation in practice.56) Some confusion can arise from organized political parties with the word “independent” in their name, like the American Independent Party or the Independent Party of Florida—which can lead to voters accidentally registering to vote as members of these parties by writing “Independent” on their voter registration applications.57

But regardless of what independent state legislative candidates are called on the ballot, they pose a unique challenge to same-party replacement procedures. Twenty-three states fill legislative vacancies, at least some of the time, with same-party appointments.58 Most of these states involve the actual political parties in the appointment process itself; that is, the most common procedure in states with these systems is for the political party to send a nominee or list of nominees to the county commission or governor, who makes the final appointment.59 In that kind of system, how can an independent legislator—who is elected without any party affiliation at all—possibly be replaced?

Of these 23 states, almost all of them provide some sort of alternative procedure and usually one that fits into the pre-existing appointment process. In Alaska, Hawai‘i, and Maryland, the governor is normally vested with the power to appoint and has specific authority to do so in the case of an independent legislator.60 In Arizona, Montana, Oregon, and Wyoming, the county commission (or commissions) corresponding with the legislative district is normally vested with the power to appoint and has specific authority to do so in the case of an independent legislator.61 In Colorado—where, normally, the local political party would fill the vacancy62—the state has adopted a unique approach for independent legislators. When independent candidates file to run for the

56 The most prominent recent example was Emilio Vazquez, who was elected to the Pennsylvania House of Representatives in a 2017 special election as a “Democratic write-in candidate.” Claire Sasso, Democratic Write-In Candidate Emilio Vazquez Wins Special Election, PHILLY MAG. (Mar. 24, 2017, 2:21 PM), https://www.phillymag.com/news/2017/03/24/democrat-emilio-vazquez-special-election/. After the Democratic nominee was kicked off the ballot, party leaders scrambled to organize a coordinated write-in effort, which ultimately culminated in Vazquez’s successful campaign. Id.


58 Yeargain, supra note 1, at 610–11.

59 Id.


61 ARIZ. REV. STAT. ANN. § 41-1202 (2020); MONT. CODE ANN. § 5-2-402 (West 2020); OR. REV. STAT. ANN. § 171.060 (West 2020); WYO. STAT. ANN. § 22-18-111(a)(iii) (West 2020).

62 COLO. REV. STAT. ANN. § 1-12-203 (West 2020).
legislature, they can name “one or more unaffiliated registered electors as a committee” to fill their seat if they vacate it.\textsuperscript{63} Nevada, meanwhile, does not specifically provide a procedure for filling independent legislators’ vacancies, but its pre-existing procedure—the county commission makes a same-party appointment with no formal party input\textsuperscript{64}—seems as though it would function in that instance.

Illinois, North Dakota, the District of Columbia, and the U.S. Virgin Islands alter their procedure slightly. All four would ordinarily empower the previous incumbent’s political party to fill the vacancy but in the case of an independent legislator provide for a different process. Illinois allows its governor to make an appointment.\textsuperscript{65} North Dakota allows the head of an inter-chamber legislative committee to fill the vacancy,\textsuperscript{66} and the District of Columbia and the Virgin Islands allow the legislature to fill the vacancy itself.\textsuperscript{67}

Of the states with same-party appointment schemes that provide, explicitly or implicitly, for some mechanism to replace independent legislators, a little less than half require that the replacement be a voter registered without a political party. Arizona, the District of Columbia, Hawai‘i, Illinois, Maryland,

\textsuperscript{63} Id. § 1-4-802(1)(e); see also id. § 1-12-203(1).
\textsuperscript{65} Compare 10 Ill. Comp. Stat. Ann. 5/25-6(a) (West 2020) (“When a vacancy occurs in the office of State Senator or Representative in the General Assembly, the vacancy shall be filled within 30 days by appointment of the legislative or representative committee of that legislative or representative district of the political party of which the incumbent was a candidate at the time of his election.”, with id. 5/25-6(b) (“When a vacancy occurs in the office of a legislator elected other than as a candidate of a political party, the vacancy shall be filled within 30 days of such occurrence by appointment of the Governor.”).
\textsuperscript{66} Compare N.D. Cent. Code Ann. § 16.1-13-10(1) (West 2020) (“If a vacancy in the office of a member of the legislative assembly occurs . . . [t]he district committee shall hold a meeting within twenty-one days after receiving the notification and select an individual to fill the vacancy.”, with id. (“If the former member was elected as an independent candidate or if the district committee does not make an appointment within twenty-one days after receiving the notice from the chairman of the legislative management, the chairman of the legislative management shall appoint a resident of the district to fill the vacancy.”).
\textsuperscript{67} Compare D.C. Code Ann. § 1-204.01(d)(2) (West 2020) (“In the event of a vacancy in the Council of a member elected at large, other than a vacancy in the Office of Chairman, who is affiliated with a political party, the central committee of such political party shall appoint a person to fill such vacancy . . . .”), and V.I. Code Ann. tit. 2, § 111(b) (2020) (“When the vacancy occurs within one year prior to the general election, the President of the Legislature, upon the written recommendation of the territorial committee of the political party of which the previous office holder was a candidate, shall appoint the person so recommended . . . .”), with D.C. Code Ann. § 1-204.01(d)(2) (“With respect to a vacancy on the Council of a member elected at large who is not affiliated with any political party, the Council shall appoint a similarly non-affiliated person to fill such vacancy . . . .”), and V.I. Code Ann. tit. 2, § 111(b) (“[I]f the previous office holder was not a candidate of a political party as defined by law, the Legislature by a two-thirds majority of its members shall elect a person from said district, or at large, as the case may be, to fill the vacancy.”).
and Nevada seem to apply the same-party requirement to replacing an independent legislator—either explicitly68 or based on a fair reading of the replacement provisions.69 But in Alaska, Colorado, Montana, Oregon, Wyoming, and the U.S. Virgin Islands, the appointing actors aren’t subject to any same-party requirement,70 and some are affirmatively empowered to appoint anyone to fill the vacancy.71

However, regardless of whether the same-party requirement is specifically extended to independent candidates, Alaska and Illinois have

68 Ariz. Rev. Stat. Ann. § 41-1202(B) (2020) (“If the person elected to or appointed to the office immediately before the vacancy was not registered with a political party that is organized pursuant to [state law], the qualified electors [nominated to fill the vacancy by the citizens panel] shall be qualified electors who are not registered with a political party that is organized pursuant to [state law].”); Haw. Rev. Stat. Ann. § 17-3(a)(2) (West 2020) (“If the prior incumbent was not a member of any political party, the governor shall . . . appoint a person . . . who is not, and has not been for at least six months prior to the appointment, a member of any political party.”); 10 Ill. Comp. Stat. Ann. 5/25-6(b) (“When a vacancy occurs in the office of a legislator elected other than as a candidate of a political party, the vacancy shall be filled within 30 days of such occurrence by appointment of the Governor. The appointee shall not be a member of a political party.”); D.C. Code Ann. § 1-204.01(d)(2) (“With respect to a vacancy on the Council of a member elected at large who is not affiliated with any political party, the Council shall appoint a similarly non-affiliated person to fill such vacancy . . . ”).

69 Md. Const. art. III, § 13 (“In the event there is no Central Committee in the County or District from which said vacancy is to be filled, the Governor shall within fifteen days after the occurrence of such vacancy appoint a person, from the same political party, if any, as that of the vacating Delegate or Senator, at the time of the last election or appointment of the vacating Senator or Delegate, who is otherwise properly qualified to hold the office of Delegate or Senator in such District or County.”); Nev. Rev. Stat. Ann. §§ 218A.260(2), (3) (“[T]he board of county commissioners of the county in which the district is located shall fill the vacancy by appointing a person who is a member of the same political party as the former legislator . . . ”).


71 Alaska Stat. Ann. § 15.40.330(a) (“If the predecessor in office was not nominated by a political party or if no other member of the predecessor’s political party is a member of the predecessor’s house of the legislature, the governor may appoint any qualified person.”) (emphasis added); see also N.D. Cent. Code Ann. § 16.1-13-10(1) (“If the former member was elected as an independent candidate . . . the chairman of the legislative management shall appoint a resident of the district to fill the vacancy.”) (emphasis added); Wyo. Stat. Ann. § 22-18-111(a)(iii)(C) (If the incumbent who has vacated office did not represent a political party at the time of his election . . . any person qualified to hold the office may make application directly to the county commissioners for appointment to fill the vacancy . . . the county commissioners shall fill the vacancy by appointing one (1) person qualified to hold the office from among those submitting applications.”) (emphasis added); V.I. Code Ann. tit. 2, § 111(b) (2020) (“[I]f the previous office holder was not a candidate of a political party as defined by law, the Legislature by a two-thirds majority of its members shall elect a person from said district, or at large, as the case may be, to fill the vacancy.”) (emphasis added).
provided narrow exceptions to their general rules, which allow independent legislators to be treated like party-affiliated legislators under certain circumstances. Because membership on legislative committees—and, therefore, access to power—is dependent on party membership,\textsuperscript{72} many independent legislators caucus with one of the two major parties once elected.\textsuperscript{73} The same-party replacement statutes in Alaska and Illinois recognize this reality, and if an independent legislator caucuses with an established political party and subsequently vacates her seat, that party is entitled to replace the caucusing legislator.\textsuperscript{74}

\textsuperscript{72} See, e.g., Wayne L. Francis, Leadership, Party Caucuses, and Committees in U.S. State Legislatures, 10 LEGIS. STUD. Q. 243, 246 (1985); Ronald D. Hedlund & Keith E. Hamm, Political Parties as Vehicles for Organizing U.S. State Legislative Committees, 21 LEGIS. STUD. Q. 383, 386–92 (1996); Carol S. Weissert, Determinants and Outcomes of State Legislative Effectiveness, 72 SOC. SCI. Q. 797, 805 (1991); see also Keith E. Hamm, U.S. State Legislative Committee Decisions: Similar Results in Different Settings, 5 LEGIS. STUD. Q. 31, 49 (1980) (noting the powerful role that committees play in the state legislative process).

\textsuperscript{73} Little research of this phenomenon has been done at the state level, Hedlund & Hamm, supra note 72, at 394–95 (noting that members of a bipartisan majority are likelier to receive plum committee assignments), but at the federal level, it is well-accepted that independent and third-party members of Congress caucus with a major party for committee assignments, see, e.g., JUDY SCHNEIDER, CONG. RSC. SERV., RL30743, COMMITTEE ASSIGNMENT PROCESS IN THE U.S. SENATE: DEMOCRATIC AND REPUBLICAN PARTY PROCEDURES 1 (2006); Welch, supra note 20, at 5.

\textsuperscript{74} ALASKA STAT. ANN. § 15.40.330(b) (“A member of a political party is a person who supports the political program of a party. The filing for office of a candidate as an independent or no-party candidate does not preclude a candidate from being a member of a political party. Recognition of an independent or no-party candidate as a member of a party caucus of members of the legislature at the legislative session following the election of the independent or no-party candidate is recognition of that person’s party membership at the time filings were made by party candidates for the preceding general election.”); 10 ILL. COMP. STAT. ANN. 5/25-6(b) (West 2020) (“[T]he appropriate body of the General Assembly may, by resolution, allow a legislator elected other than as a candidate of a political party to affiliate with a political party for his term of office in the General Assembly. A vacancy occurring in the office of any such legislator who affiliates with a political party pursuant to resolution shall be filled within 30 days of such occurrence by appointment of the appropriate legislative or representative committee of that legislative or representative district of the political party with which the legislator so affiliates. The appointee shall be a member of the political party with which the incumbent affiliated.”). In Alaska, matters are further complicated by the frequent presence of bipartisan (and cross-partisan) governing coalitions in both chambers of the state legislature. For example, for the 2018–20 legislature, independents and a handful of Republicans joined with Democrats to form a majority in the State House. One of the Republicans included State Representative Gary Knopp. See Elizabeth Earl, Despite Republicans’ Ire, Knopp Says He Won’t Resign or Change Party, ALASKA J. COM. (Feb. 18, 2019), https://www.alaskajournal.com/2019-02-18/despite-republicans%E2%80%99-ire-knopp-says-he-wont-resign-or-change-party. However, in 2020, Knopp died in a plane crash, triggering the state’s replacement procedure. James Brooks, Shock and Sadness After State Legislator Gary Knopp Dies in Midair Crash, ANCHORAGE DAILY NEWS (July 31, 2020), https://www.adn.com/politics/alaska-legislature/2020/07/31/shock-and-sadness-after-state-legislator-gary-knopp-dies-in-midair-crash/. Despite Knopp’s participation in the bipartisan
Rather than providing for any one of these processes, Indiana, New Jersey, and Puerto Rico explicitly provide for independent candidates—but not in a manner that allows them to be efficiently replaced. In Indiana and Puerto Rico, which also ordinarily provide for political party appointment, the law doesn’t even attempt to provide an alternative appointment procedure for independents and instead requires that a special election be held to fill the vacancy.\textsuperscript{75} New Jersey is even worse off, instead mandating that the seat remain \textit{vacant} until the next election.\textsuperscript{76}

That leaves 7 states—Idaho, Kansas, North Carolina, Ohio, Utah, Washington, and West Virginia—that provide no explicit or implicit procedure for filling state legislative vacancies for independent legislators.\textsuperscript{77} In these states, the process for filling a vacancy requires a formal action by the political party of the prior incumbent and provides no specific procedure for filling a legislative vacancy where the legislator is not affiliated with a party.\textsuperscript{78} These vacancies, should they ever occur, would presumably exist until the next general election. Alternatively, in at least a few of these states, the vacancies \textit{could} be filled by

\textsuperscript{75} \textit{Ind. Code Ann.} § 3-13-5-0.1(c) (West 2020); \textit{P.R. Laws Ann. tit. 16, § 4146} (2020).

\textsuperscript{76} \textit{N.J. Stat. Ann.} § 19:27-11.4 (West 2020) (“In the case of a vacancy occurring with respect to a member of the Senate or General Assembly who was not elected as the candidate of such a political party, the office shall remain vacant pending expiration of the term.”).


\textsuperscript{78} Sources cited \textit{supra} note 77. Ohio presents an unusual case—there, vacancies in the legislature are filled by a vote of the members of the previous incumbent’s party. \textit{Ohio Const.} art. II, § 11. However, there is no obvious way to fill the vacancy if the only independent member of the legislature vacates her seat; nor is it plainly obvious that if there are two independent members and one vacates, the remaining one is entitled to fill the other’s seat. Though this specific situation has not seemingly presented itself, the only court to address this question—however obliquely—declined to rule on it. \textit{See State ex rel. Hayes v. Jennings}, 182 N.E.2d 546, 550 (Ohio 1962) (noting that the challenged statute, as well as the Ohio constitutional provision relating to legislative vacancies, “make[d] no provision for the filling of a vacancy created by the death of an officeholder who was originally elected as an independent”).
falling back on the governor’s constitutional or statutory power to make appointments where no other method is provided.79

B. Third-Party Legislators

Unlike independents, who are elected without any party, third-party legislators are obviously elected with a party affiliation—the difficulty is simply that it is a party affiliation outside the Democratic–Republican binary. Only five states actually have a specific vacancy-filling procedure for third parties.80 At first glance, it may not appear intuitive that any sort of alternative procedure would be required to fill third-party legislative vacancies. Most states ostensibly provide a procedure through their existing same-party appointment processes for filling the state-legislative vacancies of legislators elected as members of third parties. In the states that involve the political parties—either through their state

79 E.g., UTAH CONST. art. VII, § 9 (“When any State or district office shall become vacant, and no mode is provided by the Constitution and laws for filling such vacancy, the Governor shall have the power to fill the same by granting a commission, which shall expire at the next election, and upon qualification of the person elected to such office.”); WASH. CONST. art. III, § 13 (“[W]hen at any time a vacancy shall have occurred in any other state office, for the filling of which vacancy no provision is made elsewhere in this Constitution, the governor shall fill such vacancy by appointment, which shall expire when a successor shall have been elected and qualified.”); IDAHO CODE ANN. § 59-912 (“When any office becomes vacant, and no mode is provided by law for filling such vacancy, the governor must fill such vacancy by appointment.”). This was the method used for filling vacancies in Idaho prior to the adoption of a same-party appointment scheme in 1971. See Yeargain, supra note 1, at 622. It was also the method used in Montana in 1967 during a brief, and awkward, interim period. See Thomas E. Mooney, Legislative Vacancies Up to Gov. Babcock, Missoulian, May 14, 1967, at 16. The state had (perhaps accidentally) repealed the state constitutional provision allowing county commissions to fill legislative vacancies in 1966. Id. The 1967 legislature provided for a statutory replacement system, but it did not come into effect until the summer. Id. Accordingly, the Governor relied on his inherent appointment authority to fill several legislative vacancies. See Id.; Governor Names Mrs. Fern Jensen as Representative, INDEPENDENT-RECORD (Helena), June 25, 1967, at 3. More recently, in the 2020 election, a man was elected to the North Dakota House of Representatives following his death from COVID-19. The state has adopted a system of same-party legislative appointments following vacancies, and the Attorney General advised that the candidate’s election created a vacancy. In response, however, the Governor of North Dakota filed a writ of mandamus with the Supreme Court of North Dakota, seeking the court’s authorization to fill the vacancy himself. The Governor argued that the legislative appointment statute did not adequately cover an ostensibly “vacancy” caused by the election of an ineligible candidate and sought to invoke his inherent constitutional power to fill vacancies. However, the North Dakota Supreme Court did not reach the constitutional question, instead holding that the legislative appointment statute applied to the vacancy. See Burgum v. Jaeger, 2020 WL 6878563, at *1–2, 5 (N.D. Nov. 24, 2020); Petition for Preliminary Injunctive Relief, Declaratory Judgment, Writ of Injunction, and Writ of Mandamus at 4–10, Burgum v. Jaeger, No. 20200298 (N.D. 2020).

80 ALASKA STAT. ANN. § 15.40.330(a) (West 2020); ARIZ. REV. STAT. ANN. § 41-1202(B) (West 2020); COLO. REV. STAT. ANN. § 1-12-203(1) (West 2020); IND. CODE ANN. § 3-13-5-0.1(c); OR. REV. STAT. ANN. § 171.060(2) (West 2020).
or district-level committees—in the appointment process, we might reasonably expect the third-party committees to function identically to the Democratic and Republican party committees. But does this work in practice?

Consider, for example, the vacancy-filling procedure used by Wyoming: If a vacancy occurs in a district represented by a member of a political party, the county commission(s) of the county (or counties) in which the district is located notifies the former incumbent’s political party of the vacancy.\footnote{Wyo. Stat. Ann. § 22-18-111(a)(iii)(A) (West 2020).} The state party then convenes a meeting of all of the party’s precinct committee members in that district to select a list of three replacement candidates.\footnote{Id.} That list of three nominees is then relayed to the county commission (or commissions), which picks one.\footnote{Id.} Those requirements do not facially discriminate on the basis of whether the legislator represented the Republican or Democratic parties—the state’s only “major” parties\footnote{Political Parties in Wyoming, Wyo. Sec’y of State, https://sos.wyo.gov/Elections/PoliticalPartyInfo.aspx (last visited Oct. 9, 2020).}—or a “minor” party like the Constitution or Libertarian parties.\footnote{Id.}

But in practice, this would be a hollow procedure for the state’s minor parties to follow. Only the major parties are required to elect precinct committee members;\footnote{Wyo. Stat. Ann. § 22-4-101(b); see id. § 22-4-101(a) (“This article is applicable only to ‘major political parties.’”)} minor parties are only required to have “a sufficient number of officers to govern the party and shall have at least a state party chairman and a state party secretary.”\footnote{Id. § 22-4-302.} Similarly, North Dakota doesn’t require that political parties organize legislative district committees—which are responsible for filling state legislative vacancies—and so it is feasible that a third party that managed to elect a state legislator lacks the organizational infrastructure to fill a vacancy.

While frustrating in the context of filling vacancies in state legislatures, these disparate requirements reflect the practical reality that many minor parties

\footnote{81 Wyo. Stat. Ann. § 22-18-111(a)(iii)(A) (West 2020).} \footnote{82 Id.} \footnote{83 Id.} \footnote{84 Political Parties in Wyoming, Wyo. Sec’y of State, https://sos.wyo.gov/Elections/PoliticalPartyInfo.aspx (last visited Oct. 9, 2020).} \footnote{85 Id.} \footnote{86 Wyo. Stat. Ann. § 22-4-101(b); see id. § 22-4-101(a) (“This article is applicable only to ‘major political parties.’”).} \footnote{87 Id. § 22-4-302.} \footnote{88 N.D. Cent. Code Ann. § 16.1-03-03 (West 2020) (“If a political party chooses to organize by precinct, the party in each voting precinct of this state is entitled to elect one precinct committeeman for each two hundred fifty votes, or majority of a fraction thereof, cast for the party’s presidential electors, governor, attorney general, or secretary of state in the precinct in the last general election.”); id. § 16.1-03-07 (“If a legislative district chooses to organize by precinct in every odd-numbered year, the district committee of each party shall meet within fifteen days after the caucus . . . .”).}
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are not organized as formally as the major parties are, and though they are subject to some organizational regulations by the states in which they operate, they may not have the resources to comply with those requirements. The situation is likelier better for third parties that have achieved “major party” status in their states, but this is frequently difficult for third parties to do with any amount of consistency. Accordingly, the vacancy-filling procedures that ostensibly create a procedure that involves third parties may prove inoperative in practice. Even in the states that, unlike Wyoming, do require that a party maintain a particular level of organization, those parties might not have it in the real world. Or even

89 Richard S. Katz & Robin Kolodny, Party Organization as an Empty Vessel: Parties in American Politics, in How Parties Organize 23, 30–31 (Richard S. Katz & Peter Mair eds., 1994); see also John C. Berg, Greens in the USA, in Green Parties in Transition 245, 245 (E. Gene Frankland et al. eds., 2008) (“The Green Party of the United States has developed some of the characteristics of a professional electoral party. However, the party remains too small, and too poorly financed, to support a fully developed professional apparatus.”).

90 E.g., Clingman v. Beaver, 544 U.S. 581, 605–06 (2005) (O’Connor, J., concurring) (noting that, in recent history, no third party in Oklahoma had managed to maintain “recognized party” status).


92 For third parties in states that only have statewide organizational requirements, the vacancy-filling procedures may not prove to be dead letters. See, e.g., Utah Code Ann. § 20A-8-402(1) (“Each state political party shall . . . designate a party officer to act as liaison with . . . the lieutenant governor’s office.”); P.R. Laws Ann. tit. 16, § 4091 (establishing general requirements for parties).

93 See, e.g., Haw. Rev. Stat. Ann. § 11-64 (“All parties shall submit to the chief election officer and the respective county clerks not later than 4:30 p.m. on the ninetieth day prior to the next primary, a list of names and addresses of officers of the central committee and of the respective county committees.”); Idaho Code Ann. § 34-503 (“The legislative district central committee of each political party in each legislative district shall consist of the precinct committeemen representing the precincts within the legislative district, and the legislative district chairman elected by the precinct committeemen.”); 10 Ill. Comp. Stat. Ann. 5/8-5 (“There shall be constituted one legislative committee for each political party in each legislative district and one representative committee for each political party in each representative district.”); Kan. Stat. Ann. § 25-3302 (“Before each primary and general election held in even-numbered years, and at times and in a form to be prescribed by the secretary of state, each county election officer shall certify to the secretary of state the number of members of each party in each precinct of the county as shown by the party affiliation list in the office of such county election officer. Each county election officer shall furnish a copy of such certificates to the county chairperson of each party in the county having members on the party affiliation list.”); Md. Code Ann. Elec. Law § 4-202 (West 2020) (outlining requirements for local central party committees); Mont. Code Ann. § 13-38-201 (“Each political party shall appoint or elect at each primary election one person of each sex to serve as committee
more concerning, they might treat the inability of a party to fill a vacancy as a refusal or failure to fill the vacancy, thereby triggering the replacement schemes’ backup procedures.\textsuperscript{94}

So perhaps it is wiser to develop an alternative procedure for members of certain third parties—as Alaska, Arizona, Colorado, Indiana, Maryland, and Oregon have done—than it is to shoehorn third-party legislators into vacancy-filling provisions that are inoperable. But three of these states, rather than attempting to create a procedure that respects the intent and wishes of the voters who elected for a third-party candidate, instead just eliminate the “same-party” requirement altogether.\textsuperscript{95}

Arizona and Colorado, meanwhile, opt for innovative and depoliticized procedures. If third-party legislators vacate their seats in Arizona, and the party “has fewer than thirty elected committee members who are from precincts that are in the legislative districts and that are in the county in which the vacancy occurred,” the county board of supervisors assembles a “citizens panel” to nominate three representatives for each election precinct.”; \textit{id.} \textsuperscript{94} § 13-28-203 (“If there is no county central committee, the state central committee shall appoint a county central committee.”); \textit{N.J. STAT. ANN.} \textsuperscript{95} § 19:5-3 (outlining requirements for county party committees); \textit{WASH. REV. CODE ANN.} \textsuperscript{96} § 29A.80.030 (West 2020) (“The county central committee of each major political party consists of the precinct committee officers of the party from the several voting precincts of the county.”); \textit{W. VA. CODE ANN.} \textsuperscript{97} § 3-1-9 (“Every fourth year at the primary election, the voters of each political party in each state senatorial district shall elect four members consisting of two male members and two female members of the state executive committee of the party.”); \textit{V.I. CODE ANN. tit. 18, § 303} (establishing requirements for territorial party committees).

\textsuperscript{94} \textit{See, e.g., IDAHO CODE ANN.} \textsuperscript{95} § 59-904A (“Upon the failure of the committee to make such selection before the expiration of the fifteen (15) day period the governor shall within five (5) days, fill said vacancy by appointing a person having the qualifications above set forth.”); \textit{MONT. CODE ANN.} \textsuperscript{96} § 5-2-402(3)(d)(i) (allowing the county commission to make an appointment if the political party “ha[s] not provided a list of prospective appointees”); \textit{N.D. CENT. CODE ANN.} \textsuperscript{97} § 16.1-13-10(1) (“If the district committee does not make an appointment within twenty-one days after receiving the notice from the chairman of the legislative management, the chairman of the legislative management shall appoint a resident of the district to fill the vacancy.”); \textit{W. VA. CODE ANN.} \textsuperscript{98} § 3-10-5(a) (“If the list is not submitted to the Governor within the 15-day period, the Governor shall appoint within five days thereafter a legally qualified person of the same political party with which the person holding the office immediately preceding the vacancy was affiliated at the time the vacancy occurred.”); \textit{P.R. LAWS ANN. tit. 16, § 4146(1)(a)(iv)} (“When the political party has failed to present a candidate within sixty (60) days, the Governor shall, within thirty (30) days of the expiration of said term, call a special election in which any voter affiliated to any political party may participate as a candidate, as well as any independent candidate.”).

\textsuperscript{95} \textit{ALASKA STAT. ANN.} \textsuperscript{96} § 15.40.330(a) (West 2020) (“[I]f no other member of the predecessor’s political party is a member of the predecessor’s house of the legislature, the governor may appoint any qualified person.”); \textit{IND. CODE ANN.} \textsuperscript{97} § 3-13-5-1(b) (West 2020) (“A vacancy in a legislative office that was last held by a person [not affiliated with a major party] shall be filled by a special election.”); \textit{OH. REV. STAT. ANN.} \textsuperscript{98} § 171.060(2) (West 2020) (“When any vacancy . . . exists in the office of Senator or Representative not affiliated with a major political party, the county commission or commissions shall fill the vacancy with any qualified person.”).
replacements “who belong to the same political party” as the previous incumbent. 96 Colorado, meanwhile, ordinarily requires political parties to have a “vacancy committee” in each legislative district to nominate replacements. 97 However, recognizing the reality that this may not be possible for minor parties, Colorado law allows a minor party to designate a statewide vacancy committee in its “constitution or bylaws” that can fill legislative vacancies, 98 a substantially easier requirement for third parties to follow. Maryland has similarly employed a backup mechanism in case a third party lacks the apparatuses to fill a vacancy but instead merely delegates the authority to the governor, who is required to appoint someone of the “same political party.” 99

The two remaining states—Nevada and Ohio—attach a same-party requirement to temporary appointments, omit the political party from the process, and do not create an alternative procedure for a third-party vacancy. So, at first glance, they would seem not to suffer from the maladies of an inoperative process.

In Nevada, this is certainly true. There, when the county commission in which the district is located fills the vacancy, it is held to a same-party requirement, but is not restricted to that party’s nominees. 100 In that case, the third party’s lack of formal organization is irrelevant. But the situation is considerably worse in Ohio. There, legislative vacancies are filled by a vote of that party’s legislative caucus. 101 But if the previous incumbent was the only member of her party in the legislature, no one would be constitutionally able to fill the vacancy, effectively leaving it open. 102

Therefore, third parties may be worse off than independents. Despite their formal organization and official recognition by the states in which they operate, both of which theoretically make it easier for same-party appointment processes to actually be employed to replace their legislators. With independent legislators, the vast majority of states that fill state legislative vacancies through same-party appointments have some sort of backup measure—whether explicit or implicit—that would actually enable their replacement. But with respect to third-party legislators, even though many of these same states have procedures that would theoretically enable an easy appointment process, the procedures may simply be inoperative in practice.

98 Id. § 1-12-203(1).
101 Ohio Const. art. II, § 11.
102 See id.
IV. PROPOSING A DIFFERENT APPROACH

The inconsistency of approaches in the 20 states—along with two territories and the District of Columbia—identified in Part II justifies a different procedure to replacing independent and third-party legislators in states with same-party replacement schemes. This Part advocates for the adoption of such an approach, modeled on the Colorado scheme. It begins by grappling with the practical and conceptual difficulties of filling the vacancies of independent and third-party legislators in a manner consistent with the spirit of same-party replacement in Section A. Then, Section B justifies the need for a new approach in the first place, balancing the difficulties identified in the previous section and the rarity with which independent and third-party legislators are elected, much less vacate their seats. Finally, Section C outlines a modified version of the Colorado scheme and argues for its adoption.

A. The Difficulties of Replacing Independent and Third-Party Legislators

The states that have adopted same-party replacement schemes have done so with fairly clear motivations: they balance the need for uninterrupted representation with the need for accurate representation. States that solely rely on special elections to fill legislative vacancies see messy, bizarre processes unfold, in which low-turnout, off-season special elections, largely attended by an unrepresentative electorate, produce results that are frequently inconsistent with the views of the district. In a low-turnout election, it is entirely possible for a minority party candidate, who otherwise stands no chance of winning, to end up as the winner because her base, unlike her opponent’s, is energized—only for her to lose at the next regularly scheduled election. And in the interim period between the vacancy and the election, the district is left entirely unrepresented. If a vacancy hits at the wrong time, a district could spend an entire legislative session without representation in one of the state’s legislative chambers.103

Same-party replacement schemes avoid these outcomes. By not requiring that a special election take place, these states are able to ensure that no disruption (or only a short-term disruption) takes place in the representation of a district in the legislature. But physical representation—that is, the presence of a legislator ostensibly voting on behalf of a district—is inadequate to ensure actual representation. Same-party replacement schemes guarantee that a district will be represented by someone with the same, or comparable, ideological leanings as the previous incumbent. And while partisan affiliation is merely a proxy for ideology, the decline of split-ticket voting and the increased correlation of presidential and legislative voting, strongly suggests that a district will be just as

103 Yeargain, supra note 1, at 619–20.
accurately represented by a same-party appointee as it was with the previous incumbent. 104

With this in mind, replacing independent and third-party legislators presents unique challenges. “Independents,” as an abstract concept, lack anything resembling a shared vision, ideology, or mission. So, while the states that require independents to be replaced by other independents have the right idea in mind, the result is simply absurd. A left-wing candidate who runs for the state legislature as an independent because the Democratic Party isn’t left-wing enough could be replaced by a right-wing independent. Even assuming that a “moderate” is replaced by another “moderate,” the change in ideology from one independent legislator to the next could be just as extreme—the replacement might simply be swapping out one set of immoderate views for another. 105

Obviously, the states that impose no restrictions on the partisan identity of the replacement legislator can suffer from this exact same malady. But there is no reason to think that they perform worse in this regard. The ideological universe of voters registered with no party affiliation is likely not narrower than the ideological universe of all voters in any meaningful way.

Third-party legislators likely fare better than independents—so long as the system works. But when a political party is either exempted from creating party organs that are responsible for filling legislative vacancies, 106 or lacks the capacity or number of party officers to comply with those requirements, 107 it may simply not be able to fill the vacancies of its members. For a third party, this practical failure could prove devastating. Given the rarity with which any third-party candidates are elected to state office, an untimely death coupled with the impossibility of meeting the state’s replacement requirements may very well result in its total lack of representation.

B. The Practical Need for a New Approach

While it is clear that state statutes providing for same-party appointments would prove inoperative or wholly unsatisfactory in the case of independent and third-party legislators, it may be unclear why a fix would be needed now, at a time when these candidates hardly ever win elections. But looking to the unlikelihood of a specific problem is a flawed way of approaching policymaking. Even if we just consider vacancies in office, and the unlikelihood of certain types


105 See supra notes 28–31 and accompanying text.

106 See supra notes 81–88 (discussing North Dakota and Wyoming exemptions).

107 Supra note 93 (outlining state party committee requirements).
of vacancies occurring, the federal and state governments have gone out of their way to ensure that those vacancies will be filled.

It is exceedingly unlikely, for example, that any sort of mass-casualty event causing widespread vacancies in state legislatures will occur—and yet, on the recommendation of the Federal Emergency Management Agency, many states have emergency succession statutes.\footnote{Eric R. Daleo, \textit{State Constitutions and Legislative Continuity in a 9/11 World: Surviving an “Enemy Attack”}, 58 DePaul L. Rev. 919, 936–38 (2009).} It is similarly unlikely that both the President and Vice President will vacate their offices at the same time—but the Constitution allows Congress the ability to legislate for such an occurrence.\footnote{\textsc{U.S. CONST. art. II, § 1, cl. 6.}} And along that same line, it is unlikely that any Governor and Lieutenant Governor will vacate their offices at the same time, but some states have provided for succession in the event of a dual vacancy.\footnote{\textsc{E.g., Md. Const. art. II, § 6; Alaska Stat. Ann. § 44.19.046 (West 2020).}} And, of course, state legislative vacancies themselves are uncommon—though, of course, they occur with enough regularity as to incentivize clear rules of succession.

The likelihood of a mass-casualty of state legislators or a dual vacancy in the offices of President and Vice President, or Governor and Lieutenant Governor, is substantially less than independent and third-party legislative vacancies. Though, as mentioned previously, there are few documented cases of these sort of vacancies, there are at least several recorded instances and the odds are good that others have occurred—\footnote{\textsc{Supra notes 47–50.}}—meanwhile, there are no instances of mass-casualty events or dual vacancies. Even adopting the flawed perspective of odds-based policymaking, independent and third-party state legislative vacancies are frequent enough to justify clear succession.

But set that aside. States have already provided for these vacancies. Even if they do so with flawed procedures, most states explicitly provide for either independent or third-party state legislative vacancies. Policymakers in those states clearly concluded that their frequency—or the severe consequences of not having an adequate procedure, irrespective of their frequency—was sufficient to justify inclusion in their states’ legislative replacement schemes.\footnote{There is little legislative history indicating that policymakers specifically considered how to replace independent and third-party legislators in same-party systems. However, in 1953, when Oregon adopted its same-party replacement procedure for partisan elected offices, it was represented in the U.S. Senate by independent Wayne Morse. As one newspaper columnist rhetorically asked as state legislators considered the proposal, “[J]ust where would a governor turn if Wayne Morse, Independent, yielded his seat in the Senate?” Charles A. Sprague, \textit{It Seems to Me}, Statesman J. (Salem, Or.), Feb. 4, 1953, at 4.} The existence of these procedures, notwithstanding their unlikely activation, means that they should function well. It makes little sense to implement a flawed procedure that
resolves an unlikely situation and to leave the flaws unaddressed because the situation itself is unlikely.

The consequences of a flawed procedure could be massive. The absence of a clear or representative succession procedure in the case of an independent or third-party legislator vacating their seat could actually cause a constitutional crisis. Enough state legislative chambers have been deadlocked, or control determined by how independents or third-party legislators have decided to caucus, that an untimely vacancy could alter control of the chamber. Take a simple example. In 2006, Constitution Party candidate Rick Jore was elected to the Montana House of Representatives.113 With Jore’s election, the chamber was roughly even, with 50 Republicans, 49 Democrats, and Jore.114 Jore agreed to caucus with House Republicans and a Republican was elected Speaker.115 But suppose that Jore vacated his seat prior to the 2008 election. If the Constitution Party of Montana lacked a central committee in Lake County, as seems likely, then the Lake County Commission would be responsible for filling the vacancy with no same-party requirement.116 It could have selected a Democrat to fill the seat, which would’ve tied the House of Representatives 50–50. Montana law provides that, in the case of a tied vote, the candidate for Speaker of the House of the party of the Governor is elected.117 At that time, Democrat Brian Schweitzer was Governor, and if the Democrats were able to trigger a new election for Speaker, the Democratic candidate would have won. That win, coupled with the Democratic majority in the Montana State Senate,118 would have allowed Democrats to win total control of the state government until the 2008 election.

But that hypothetical assumes that the state in which the vacancy occurs actually has a procedure to address the issue. Suppose that the exact same situation came to pass in a state like Hawai‘i or Kansas,119 which lack a clear procedure for replacing a third-party state legislator where there is no organized political party empowered to fill a vacancy.120 In that case, the vacancy might

113 Devlin, supra note 9.
114 Devlin, supra note 50, at 113.
116 MONT. CODE ANN. § 5-2-403(3) (West 2020).
117 Id. § 5-2-216.
118 Devlin, supra note 50, at 113.
119 This hypothetical admittedly requires the suspension of disbelief that either chamber of the Hawaii or Kansas legislatures could be nearly evenly divided between the two parties.
120 See HAW. REV. STAT. ANN. §§ 17-3, 17-4 (West 2020); KAN. REV. STAT. ANN. §§ 25-3902, 25-3903 (West 2020). Both statutes necessarily contemplate the selection of a replacement
remain unfilled by means of the normal process. Neither state appears to provide for such an occurrence, and what would happen next is unclear. If control of the legislature comes down to how the vacancy is filled, both parties would mobilize to try to fill the vacancy itself. And regardless of the ultimate outcome, which would likely be decided by the state’s supreme court, the legitimacy of the state government during that period of time would be marred by the controversy.

Admittedly, none of those hypotheticals have come to pass—yet. The question of how Bernie Sanders could be fairly replaced with a same-party requirement illustrates exactly how high the stakes are in answering this question correctly. But absent a nearly evenly divided legislature, any failure of the vacancy-filling process will affect control at the margins. But even slight alterations in the composition of a legislature can affect the overall control—and slight changes are likelier to be much more impactful in legislatures that have unsteady alliances between major parties and independents. Even if the overall control isn’t changed, changes at the margins can have far-reaching effects. An untimely vacancy, coupled with an unrepresentative method of filling it, could give a party a supermajority, a veto-proof majority, or a majority large enough to amend the state’s constitution without any input from the minority party. The reverse could similarly be true; a party that enjoyed such a majority by virtue of an independent or third-party legislator caucusing with them could lose it.

Finally, setting aside the likelihood and the potential changes in power, resolution of this question matters because voters deserve to be accurately represented. If voters in a legislative district elected a member of a bizarre, single-issue third-party, that choice should be honored, whether or not the individual legislator they elected remains in office. Any quibbles that policymakers may have with parties on a micro-level should not be relevant in how a vacancy in a seat last held by that party is filled. Same-party legislative appointment schemes function to ensure representation, but their effectiveness shouldn’t be limited to the major parties—if we’re in for a penny with them, we ought to be in for a pound.

C. The Colorado Approach

Assuming that a new system is necessary, which approach would function best in the real world? Ensuring accurate representation—as same-party replacement schemes are meant to—should guide this inquiry as the primary goal. In so doing, the ideal approach should provide a clear procedure for replacement that recognizes the two political realities identified earlier: (1) that independents are unusually difficult to replace, and (2) that third parties are frequently not organized as well as the two major parties. But recognition of

affiliated with the same party as the preceding legislator and do not account for the event of an independent legislator.
these realities does not justify a cumbersome system with too many procedural
crises; instead, whenever possible, a simpler, straightforward procedure is
preferable. Colorado’s same-party replacement scheme, both as applied to
independent legislators and third-party legislators, meets these goals, as
explained in each subsection that follows.

1. Independent Legislators

Because independent candidates run for office with a virtually limitless
universe of ideologies and views, replacing them presents a unique challenge.
We might reasonably expect, in most cases, for Democratic candidates to largely
articulate the same viewpoints and the same core ideology as each other; we
might expect the same of Republican candidates, too. In those instances,
replacing one Democrat with another—and involving the party in the process—
is likely to result in a replacement that is, broadly speaking, ideologically similar
to the legislator being replaced. Indeed, a study of legislative replacements in
Colorado and Illinois confirms that there are few ideological differences in
elected and appointed legislators.\(^{121}\)

But with independents, replacing one with another provides no guarantee
of ideological similarity. Whether an independent legislator is “moderate” (but
with immoderate views on individual issues) or an extremist (in any direction)
surely matters to the electorate—but there is no codifiable way of making those
ideological distinctions relevant. It is impossible to draft a neutral statute that is
able to identify a legislator as belonging to a particular part of the ideological
universe and restricting the pool of potential replacements to that same part of
the universe.

That is not to say, however, that proxies do not exist. As discussed
previously, Alaska and Illinois allow an independent or unaffiliated legislator to
be replaced by a political party if the legislator caucuses with that political party
in the legislature.\(^{122}\) While this has some merit as a suggestion, it is oblivious to
the reasons why an independent legislator would choose to caucus with a major
party—specifically, for power and influence. This choice may not be difficult for
a left- or right-wing independent, but for a “moderate” independent, even with
immoderate views on individual issues, the choice of joining the Democratic or
Republican caucus might come down to what either of the parties is willing to
offer as far as committee memberships and influence.\(^{123}\)

\(^{121}\) Seth Masket & Boris Shor, Primary Electors vs. Party Elites: Who Are the Polarizers? 11
\(^{122}\) Supra notes 72–74 and accompanying text.
\(^{123}\) See, e.g., Welch, supra note 20, at 4 n.2 (discussing how independent U.S. Senate candidate
Greg Orman, if he were elected, would be able to “extract major concessions” from the Democratic
or Republican parties if he chose to caucus with them).
Even assuming a relatively neat ideological fit between the independent legislator and the party with which she caucuses, tying that decision to how that legislator will be replaced is an entirely different matter, and doing so is an affront to the voters. Few voters cast their ballots for an independent candidate with the expectation that they will caucus with one of the major parties.\footnote{At the national level, even where the stakes are higher, few high-profile independent candidates have an incentive to pre-announce with which party they will caucus if elected. \textit{See}, e.g., Philip Rucker, \textit{Greg Orman, a Political Enigma, Faces Growing Scrutiny in Kansas Senate Race}, \textsc{Wash. Post} (Sept. 28, 2014), https://www.washingtonpost.com/politics/greg-orman-a-political-enigma-faces-growing-scrutiny-in-kansas-senate-race/2014/09/28/401d5c5e-4587-11e4-b437-1a7368204804_story.html; Sean Sullivan, \textit{Meet Larry Pressler, the One-Man Band Shaking up the Battle for the Senate Majority}, \textsc{Wash. Post} (Oct. 10, 2014, 4:22 PM), https://www.washingtonpost.com/news/post-politics/wp/2014/10/10/meet-larry-pressler-the-one-man-band-shaking-up-the-battle-for-the-senate-majority/; Jonathan Weisman, \textit{Independent Senate Run in Maine Puts Parties in a Pinch}, \textsc{N.Y. Times} (May 6, 2012), https://www.nytimes.com/2012/05/07/us/politics/senate-control-could-hinge-on-angus-king-of-maine.html. \textit{But see} Peter Wallsten, \textit{Crist Would Caucus with Democrats, Advisor Says}, \textsc{Wall St. J.} (Oct. 29, 2010, 2:17 PM), https://blogs.wsj.com/washwire/2010/10/29/crist-would-caucus-with-democrats-advisor-says/} Allowing a major political party to entice an independent legislator to join its caucus with plum committee assignments and influence,\footnote{For example, when Constitution Party candidate Rick Jore was elected to the Montana House and caucused with Republicans, guaranteeing that they would control the chamber, he was rewarded by being named the chair of the House Education Committee. Matt Gouras, \textit{Constitution Party Legislator Named Chairman of House Education}, \textsc{Missoulian} (Dec. 7, 2006), https://missoulion.com/news/state-and-regional/constitution-party-legislator-named-chairman-of-house-educationposted-on-dec/article_df3185d5-e029-5dbf-889b-9c8571a648cf.html} and then allowing it to replace that legislator if she vacates her seat, grants it a windfall that the voters did not intend. It is effectively a switch in party by the legislator—and party switches should not affect how a legislator is replaced in a same-party legislative replacement system.\footnote{\textit{See generally} Yeargain, \textit{supra} note 1, at 622 (arguing that, in the case of party-switching state legislators, party affiliation should be determined by the most recent election, not the legislator’s most recent party affiliation).} Balanced against these concerns, Colorado’s method of replacing independent legislators is particularly well-taken. Under Colorado law, independent candidates running for the legislature are required to designate a “vacancy committee,” which would be tasked with replacing them in the event of a vacancy.\footnote{\textit{Colo. Rev. Stat. Ann.} § 1-4-802(1)(e) (West 2020); see also id. § 1-12-203(1).} The vacancy committee is only required to be composed of other unaffiliated voters and can be constituted by as few as just one person.\footnote{\textit{Id.} § 1-4-802(1)(e).} This sort of replacement method—which calls on the independent legislator’s allies to fill the seat—creates a procedure that is, in all likelihood, the closest replica of the same-party replacement procedure for party-affiliated candidates. An
independent legislator’s allies, friends are likely the best-situated to understand and appreciate the nuances of the legislator’s ideological views and would be best-positioned to select a replacement candidate. At best, an ideologically similar lawmaker is selected as a replacement; at worst, an ideologically dissimilar replacement is selected. These best- and worst-case scenarios are no different than those of the states that merely require the appointment of another independent—and likely have a better chance of getting it right. Moreover, procedures like this are trusted in the emergency succession context, which enhances their credibility here. States that have adopted emergency-succession statutes allow legislators to designate a list of their emergency successors, ranked in order of preference.129

2. Third-Party Legislators

Replacing third-party legislators does not trigger the same sort of concerns as replacing independent legislators. There is no reason to believe that, if the same procedures are in place for minor parties as there are for major parties and if the parties have the infrastructure to give force to those procedures, that the end result would be unrepresentative. The difficulty is the frequent absence of party infrastructure that would make those end results possible.

Colorado’s approach, rather than attempting to hold third parties to requirements that they have no hope of meeting, is to take account of that inability and alter the procedure. Ordinarily, district-level committees are tasked with replacing party-affiliated legislators.130 However, for third parties, “the vacancy committee designated in the constitution or bylaws of the minor political party” is instead responsible for filling the vacancy.131 Moving the process to a statewide committee, rather than a district-level committee, might mean that the choice is taken away from local voters—but this is unequivocally better than holding third parties to following procedures that they lack the practical ability to execute,132 and ensures that the district’s intent in voting for a legislator of a third party is respected in the replacement process. While district-based representation is, undoubtedly, a more desirable method of selecting a

130 COLO. REV. STAT. ANN. § 1-12-203(1).
131 Id.
132 It is unclear how this procedure might apply to a minor party that was organized at the time of the legislator’s election but is defunct at the time of the vacancy. This is an incredibly unlikely scenario—it stands to reason that a political party that managed to elect one of its members to the state legislature would have a strong incentive to stay registered—but it may be beneficial for a state that adopts a Colorado-style model to have as a backup the sort of vacancy committee provided for independent candidates.
replacement legislator, the desirability of a local approach is surely not as important as selecting a replacement in the first place.

V. CONCLUSION

Independent and third-party legislators are rarely elected. But states with same-party replacement procedures for filling state-legislative vacancies have poor or wholly inadequate methods of replacing those legislators. The stakes of failing to get it right—and sticking voters with an ideologically unrepresentative legislator—are high, regardless of the low likelihood that the situation would present itself. Accordingly, states should adopt systems like Colorado’s for replacing independent and third-party legislators. Doing so would prevent an untimely vacancy from disrupting the partisan makeup of the legislature and would allow voter intent to be honored in the replacement process.