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## Maryland's Legislative Appointment Process: Keep It and Reform It

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## ARTICLE

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### MARYLAND'S LEGISLATIVE APPOINTMENT PROCESS: KEEP IT AND REFORM IT

By: Tyler Yeargain<sup>1</sup>

#### I. INTRODUCTION

Starting in the 1930s, Maryland no longer required that state legislative vacancies be filled by special elections, as most states did at the time. Instead, the state provided that legislative vacancies would be filled by gubernatorial appointments. Following several additional constitutional amendments, this system has changed over time, but has largely remained in place. Now, the state party's district committee effectively operates as the body responsible for filling the vacancy, with the governor operating as a *de facto* rubber stamp. Most of the time, this process has quietly operated in the background, churning out replacement legislators as necessary, attracting little attention in the process.

But that's started to change. Though some legislators have pushed in recent years to instead require special elections,<sup>2</sup> the push has intensified in the last year following the nomination of Chanel Branch to fill a State House seat. Branch, the daughter of House Majority Whip Talmage Branch, was narrowly elected by the Democratic Central Committee for the 45th Legislative District to fill the vacancy left by State Delegate Cheryl Glenn, who was charged with bribery and wire fraud.<sup>3</sup> Branch's nomination, already mired by allegations of nepotism, was made worse by the fact that she sat on the central committee in charge of filling the vacancy and cast the deciding vote for herself,<sup>4</sup> and that reporters were removed from the central committee's meeting.<sup>5</sup> Despite the controversy, however, Governor Larry

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<sup>2</sup> See, e.g., Len Lazarick, *Delegates Want Voters to Fill Vacancies in Legislature, But GOP Wants to Keep Party Role*, MARYLANDREPORTER.COM (Jan. 30, 2015), <https://marylandreporter.com/2015/01/30/delegates-want-voters-to-fill-vacancies-in-legislature-but-gop-wants-to-keep-party-role/>.

<sup>3</sup> Talia Richman, *Chanel Branch Nominated to Replace Baltimore Del. Cheryl Glenn in Maryland House After Corruption Scandal*, BALT. SUN (Jan. 14, 2020, 5:29 PM), <http://www.baltimoresun.com/politics/bs-md-pol-cheryl-glenn-replacement-20200114-dtixp6qxibcnbksxa6f5aeevy-story.html>.

<sup>4</sup> *Id.*

<sup>5</sup> Fern Shen, *Reporter Booted Out of Meeting Where Chanel Branch Is Voted in*, BALT. BREW (Jan. 14, 2020, 8:02 AM), <https://www.baltimorebrew.com/2020/01/14/reporter-booted-out-of-meeting-where-chanel-branch-is-voted-in/>.

Hogan ended up appointing her, and she will hold the seat until the 2022 election.<sup>6</sup>

The response from lawmakers was swift. State Comptroller Peter Franchot, a candidate for Governor in 2022, called for the state to bring back special elections.<sup>7</sup> State Delegate David Moon, who had previously introduced a constitutional amendment in 2015, again pushed for an amendment to change the way that the state fills legislative vacancies.<sup>8</sup> Though Moon's initial proposal was to require immediate special elections, mirroring Franchot's idea, he backed away from that idea in the face of fierce opposition.<sup>9</sup> His current proposal is to preserve the appointment process, but to have the appointee only serve until the next general election—which, for Branch, would have been 2020.<sup>10</sup>

At first blush, Maryland's system seems inherently antidemocratic—a vestige of a time when votes didn't count equally, and decisions were made by men in smoke-filled back rooms—and therefore worthy of a massive overhaul. But the simplicity of that conclusion belies its accuracy. Special elections, though obviously “democratic” events in a literal sense, are almost always low-turnout affairs held at strange times of the year that ultimately deprive communities of representation for the vast majority of legislative sessions. Legislative appointment systems, like Maryland's, reflect a conscientious decision by Progressive Era reformers to push for accurate, consistent representation and to avoid unnecessary and frequent elections. Though Maryland's system is undoubtedly in need of reform, it should be *reformed*—not scrapped.

This Article proceeds in three parts. First, in Part I, it explains how Maryland's appointment system works and briefly recounts its history, beginning with the state's first constitution in the post-Revolutionary Era and continuing to the twenty-first century. Then, Part II argues that appointment systems are inherently preferable to—and are more democratic than—special

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<sup>6</sup> Talia Richman, *Gov. Hogan Appoints Chanel Branch of Baltimore to Replace Cheryl Glenn in Maryland House*, BALT. SUN (Jan. 28, 2020, 4:10 PM), <http://www.baltimoresun.com/politics/bs-md-pol-chanel-branch-20200127-5eplz5frqnfktplgwpein2jnoe-story.html>; see MD. CONST. art. III, § 13 (1936).

<sup>7</sup> Peter Franchot (@peterfranchot), TWITTER (Jan. 14, 2020, 6:21 PM), <https://twitter.com/peterfranchot/status/1217270535236792323> (“Enough is enough. It's time to do away with the secretive elections that are decided by a handful of votes and violate every recognized principle of democracy. I will happily support legislation to hold special elections when these vacancies occur.”).

<sup>8</sup> Talia Richman, *Maryland Legislators Target Process for Filling General Assembly Vacancies, Say It Needs to Be More Democratic*, BALTIMORE SUN (Jan. 20, 2020, 5:00 AM), <http://www.baltimoresun.com/politics/bs-md-pol-filling-assembly-vacancies-20200120-b666psl3bvh33facglcs7qktyy-story.html>.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

elections because they maximize accuracy and immediacy in representation. Finally, Part III outlines the changes that can, and should, be made to the system that will allow it to better reflect the goals of all legislative appointment systems.

#### I. MARYLAND'S CURRENT SYSTEM

In 1776, Maryland's first constitution provided for a bicameral legislature, each chamber having different election procedures and different mechanisms for filling vacancies. The House of Delegates was popularly elected, with vacancies filled by special elections called by the House Speaker.<sup>11</sup> The Senate was indirectly elected, by an electoral college composed of county-level electors,<sup>12</sup> and vacancies were filled by the Senate itself.<sup>13</sup>

This bifurcated treatment, both of elections and vacancies, wasn't restricted to Maryland. The Senate's selection process served as an inspiration for the indirect election of U.S. Senators in the federal constitution, evidenced by the contemporaneous accounts of the Framers,<sup>14</sup> and for the use of the Electoral College to select the President.<sup>15</sup> Similarly, when Kentucky was admitted as a state in 1792, its first constitution provided for nearly identical procedures for electing state senators and filling senate vacancies.<sup>16</sup>

But despite the influence and initial popularity of Maryland's system, it quickly broke down. Though one-person-one-vote was a concept that

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<sup>11</sup> MD. CONST. art. II (1776).

<sup>12</sup> See *id.* arts. XIV, XV.

<sup>13</sup> See *id.* art. XIX.

<sup>14</sup> Federalist NO. 63 (Hamilton or Madison) ("The constitution of Maryland furnishes the most apposite example. The Senate of that State is elected, as the federal Senate will be, indirectly by the people, and for a term less by one year only than the federal Senate. It is distinguished, also, by the remarkable prerogative of filling up its own vacancies within the term of its appointment, and, at the same time, is not under the control of any such rotation as is provided for the federal Senate. There are some other lesser distinctions, which would expose the former to colorable objections, that do not lie against the latter. If the federal Senate, therefore, really contained the danger which has been so loudly proclaimed, some symptoms at least of a like danger ought by this time to have been betrayed by the Senate of Maryland, but no such symptoms have appeared. On the contrary, the jealousies at first entertained by men of the same description with those who view with terror the correspondent part of the federal Constitution, have been gradually extinguished by the progress of the experiment; and the Maryland constitution is daily deriving, from the salutary operation of this part of it, a reputation in which it will probably not be rivalled by that of any State in the Union."); see also A. Clarke Hagensick, *Revolution or Reform in 1836: Maryland's Preface to the Dorr Rebellion*, 57 MD. HIST. MAG. 346, 347 (1962).

<sup>15</sup> John D. Feerick, *The Electoral College: Why It Was Created*, 54 A.B.A. J. 249, 252 n.34 (1968); Hagensick, *supra* note 14, at 347.

<sup>16</sup> KY. CONST. art. I, §§ 10, 12 (1792).

wouldn't exist for another century and a half, the use of a county-based electoral college necessarily meant that some votes counted more than others. Indeed, it was possible to win the statewide popular vote for state senate electors but to fail to win a majority on the electoral college itself. And being in the minority on the senate's electoral college, even by just a few seats, was devastating. The electoral college picked *every* member of the state senate by majority vote, meaning that a one-vote majority on the electoral college for one political party usually meant a *unanimous* slate of senators for that party.<sup>17</sup> Moreover, the general assembly elected the governor, meaning that the senate's composition directly affected the composition of another branch.<sup>18</sup> And to compound matters, the vacancy-filling procedure was effectively used to alter the composition of the senate altogether—in one term, all but one of the state senators had been selected to fill vacancies and hadn't even been elected by the electoral college.<sup>19</sup>

In the 1836 elections, the Democrats won 53% of the statewide popular vote for senate electors but ended up with only 19 electors to the Whig Party's 21.<sup>20</sup> Hoping to use public pressure to force a more equitable senate composition, the Democratic electors refused to convene, depriving the electoral college of a quorum.<sup>21</sup> Their position eroded, however, the following month in the State House elections, when Whigs won a commanding majority, and the Democratic electors allowed the electoral college to convene, which in turn elected a unanimous Whig Senate.<sup>22</sup> But the new general assembly, though dominated by Whigs, was sympathetic to the process arguments raised by the Democrats. The assembly pushed for transformative constitutional changes, which included making the Governor and State Senate popularly elected and requiring special elections to fill senate vacancies.<sup>23</sup>

This system remained in place for almost a century. But in 1935, the Maryland general assembly decided to switch gears.<sup>24</sup> Beginning two decades prior, a handful of states began amending their constitutions and statutes to

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<sup>17</sup> Hagensick, *supra* note 14, at 347–48. However, in 1826, after the National Republicans won a majority on the senate electoral college based, in part, on their pledge to appoint a bipartisan senate, the Senate was composed of eleven National Republicans and four Federalists. It was the only time that the Senate was not unanimously controlled by one party. Tyler Yeargain, *The Legal History of State Legislative Vacancies and Temporary Appointments*, 28 J.L. & POL'Y 564, 578 n.69 (2020).

<sup>18</sup> MD. CONST. art. XXV (1776).

<sup>19</sup> Hagensick, *supra* note 14, at 347–48.

<sup>20</sup> *Id.* at 350.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 353–56.

<sup>23</sup> MD. CONST. art. III, §§ 6 (amended 1837); HERBERT CHARLES SMITH & JOHN T. WILLIS, *MARYLAND POLITICS AND GOVERNMENT: DEMOCRATIC DOMINANCE 137–38* (2012); Hagensick, *supra* note 14, at 357.

<sup>24</sup> Yeargain, *supra* note 18, at 592–93.

fill legislative vacancies, at least some of the time, through temporary appointments.<sup>25</sup> Many of these appointment procedures had same-party requirements—that is, whomever was granted the power of appointment, be it the governor, county commission, or even local party officials, was required to fill the vacancy with someone of the same party as the previous incumbent.<sup>26</sup> These changes, firmly rooted in the Progressive movement, were adopted with the same vein of thought as the Seventeenth Amendment, the short-ballot movement, unicameralism, proportional representation, and the Model State Constitution.<sup>27</sup>

The Maryland constitutional amendment that was drafted by the general assembly in 1935, and approved by the voters in 1936, provided for a same-party appointment system.<sup>28</sup> When a vacancy occurred, the state party with whom the previous legislator had been “affiliated” was empowered to draft a list of nominees, one of whom would be selected to fill the seat by the Governor.<sup>29</sup> Subsequent amendments in 1966, 1978, and 1986 made small changes to this provision, but largely kept it intact.<sup>30</sup> The 1966 amendment transferred the power from the state party to its county-level central committees,<sup>31</sup> the 1978 amendment clarified what would occur if there was no central committee to draft a list of nominees,<sup>32</sup> and the 1986 amendment clarified that party affiliation was determined “at the time of the last election or appointment.”<sup>33</sup>

The procedure is relatively simple. If a legislator vacates their seat, the county-level central committees nominate a replacement, who is then appointed by the governor and serves out the remainder of the term.<sup>34</sup> Though the constitution implies that the committees are only meant to nominate *one* name, the state attorney general has clarified that if they nominate *more* than one name, the governor must pick one of the two.<sup>35</sup> If the district includes

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<sup>25</sup> *Id.* at 588-89, 591.

<sup>26</sup> *Id.* at 589-93.

<sup>27</sup> *Id.* at 588-89, 593.

<sup>28</sup> MD. CONST. art. III, § 13 (1936).

<sup>29</sup> *Id.*

<sup>30</sup> DAN FRIEDMAN, THE MARYLAND STATE CONSTITUTION: A REFERENCE GUIDE 139-40 (2011).

<sup>31</sup> MD. CONST. art. III, § 13 (1967).

<sup>32</sup> MD. CONST. art. III, § 13 (1979).

<sup>33</sup> MD. CONST. art. III, § 13 (amended 1987).

<sup>34</sup> *Id.*

<sup>35</sup> Friedman, *supra* note 30 at 94 (quoting 62 Op. Md. Att’y Gen. 241 (Oct. 19, 1977)). From context, this may or may not be clear. The constitution merely provides, “the Governor shall appoint a person to fill such vacancy from a person whose name shall be submitted to him in writing[.]” MD. CONST. art. III, § 13. That’s a relatively vague sentence—it could be read to empower the central committee to select one name (“a person”) or more than one, with the Governor picking among them (“the Governor shall appoint a person to fill such vacancy *from*”). If taking into account how other states fill

more than one county, the central committees from each county cast one vote in favor of a nominee—if there’s a tie, all names are forwarded to the governor for selection.<sup>36</sup> And if the previous legislator was elected as an independent or as a member of a minor party without a central committee, the governor can pick whomever they like, so long as the nominee is “from the same political party, if any, as that of the vacating Delegate or Senator[.]”<sup>37</sup>

Despite this simplicity, however, there’s some ambiguity. What happens if the Governor refuses to select the single name submitted to him? Other states, like Kansas and North Carolina, make it clear that the nominee is seated anyway,<sup>38</sup> but Maryland doesn’t. This may not end up being a purely hypothetical question. Though Governor Hogan ended up appointing Chanel Branch to fill the vacancy discussed earlier,<sup>39</sup> some groups urged him not to.<sup>40</sup> Sidestepping altogether the debate about Branch’s qualifications and the propriety of her appointment, this was likely an astute move on Hogan’s part. His public effusiveness about Branch notwithstanding,<sup>41</sup> he may well privately concluded that, despite any doubts about her nomination, it wasn’t worth triggering a small constitutional crisis (especially one with no obvious resolution) and upsetting two members of a politically connected family in the process. But even though the Governor opted against declining to appoint the party committee’s designee in *this* instance, it’s entirely conceivable that another, similar scenario could present itself in the future—especially when there’s divided government again.

## II. THE MERITS OF LEGISLATIVE APPOINTMENT SYSTEMS

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legislative vacancies through same-party appointments, both interpretations have points in their favor.

<sup>36</sup> *Id.*; Friedman, *supra* note 30 at 94.

<sup>37</sup> MD. CONST. art. III, § 13(a)(3).

<sup>38</sup> KAN. STAT. ANN. § 25-3902(g) (“In the event the governor or lieutenant governor fails to appoint any person as required by this subsection after receiving a lawfully executed certificate hereunder, such person shall be deemed to have been so appointed notwithstanding such failure.”); N.C. GEN. STAT. § 163-11(a) (“If the Governor fails to make the appointment within the required period, he shall be presumed to have made the appointment and the legislative body to which the appointee was recommended is directed to seat the appointee as a member in good standing for the duration of the unexpired term.”).

<sup>39</sup> Press Release, Office of Governor Larry Hogan, Governor Hogan Appoints Chanel Branch to the Maryland House of Delegates (Jan. 27, 2020), <https://governor.maryland.gov/2020/01/27/governor-hogan-appoints-chanel-branch-to-the-maryland-house-of-delegates/>; see also Richman, *supra* note 6.

<sup>40</sup> Richman, *supra* note 6.

<sup>41</sup> Press Release, *supra* note 40 (“I am confident that Chanel Branch will represent the citizens of Baltimore City admirably in her new role as state delegate,” said Governor Hogan. “I offer Ms. Branch my sincere congratulations and look forward to working with her during this legislative session.”).

It may seem counterintuitive to argue that legislative appointment systems are *more* protective of the right to vote than *actual* elections where *actual* voters vote. But they are, as this Part argues. One of the best measures of the strength of a country's democratic institutions is whether the results of an election match the intent of the voters. Admittedly, there is no federal constitutional requirement that all election results match voter intent—a conclusion made painfully clear by the Supreme Court's recent abstention in *Rucho v. Common Cause*, when it dismissed partisan gerrymandering as a non-justiciable “political question.”<sup>42</sup> But it's significant that international human rights agreements generally frame the right to democratic governance as results matching intent,<sup>43</sup> which reflects “the interconnections between the exercise of individual rights of equal participation in the political process and an outcome of a political process that allows a relatively full, free, and equal participation – the aggregate will of individual participants.”<sup>44</sup>

Moreover, landmark Supreme Court cases involving the application of one-person-one-vote, like *Gray v. Sanders* and *Reynolds v. Sims*, have effectively mandated that results match intent, insofar as they require the winner of the popular vote to be the winner of the election.<sup>45</sup> Obviously,

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<sup>42</sup> See generally *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019).

<sup>43</sup> Universal Declaration of Human Rights, art. 21, § 3, G.A. Res. 217 (III)A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) (“The will of the people *shall be the basis of the authority of government*; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.”) (emphasis added). This connection of the “authority of government” to the “will of the people” inherently recognizes, as it must, that a government's authority stems from voter intent.

<sup>44</sup> Jordan J. Paust, *The Human Right to Participate in Armed Revolution and Related Forms of Social Violence: Testing the Limits of Permissibility*, 32 EMORY L.J. 545, 566 (1983); see also Steven Wheatley, *Democracy in International Law: A European Perspective*, 51 INT'L & COMPARATIVE L.Q. 225, X (2002) (“The key test for the validity of an electoral system, in the phraseology of the American Convention on Human Rights (1969), is that they must be ‘genuine,’ in the sense that they accurately reflect the will of the people[.]”); Hallie Ludsin, *Returning Sovereignty to the People*, 46 VAND. J. TRANSNAT'L L. 97, 146 (2013) (“Under classical democratic theory and in line with Rousseau, the will of the people is expressed through elections in which the majority determines the outcome.”).

<sup>45</sup> See *Reynolds v. Sims*, 377 U.S. 533, 563 (1964) (“Overweighting and overvaluation of the votes of those living here has the certain effect of dilution and undervaluation of the votes of those living there. The resulting discrimination against those individual voters living in disfavored areas is easily demonstrable mathematically. Their right to vote is simply not the same right to vote as that of those living in a favored part of the State. Two, five, or 10 of them must vote before the effect of their voting is equivalent to that of their favored neighbor.”); *Gray v. Sanders*, 372 U.S. 368 (1963) (“The Court has consistently recognized that all qualified voters have a constitutionally protected right ‘to cast their ballots and have them counted at Congressional elections.’ . . . [T]he right to have one's vote counted' has the same dignity as 'the right to put a ballot in a box.' . . . And these



beyond just the impact of gerrymandering, the continued presence of the Electoral College and the undemocratic nature of the U.S. Senate all-too-frequently means that election results *don't* match voter's intent. But those procedures are spelled out by the Constitution and don't run afoul of the Fourteenth Amendment for that reason—if they were implemented at the state level, they'd almost assuredly be struck down as one-person-one-vote requirements.<sup>46</sup>

So, if the goal of an election outcome is for it to match the intent of the voters, same-party legislative appointment systems do a substantially better job than special elections. On a practical level, appointment systems capture the most important parts of representation: partisan affiliation and ideology. Though it's oft repeated that voters "vote for the person, not the party,"<sup>47</sup> it's an aphorism that simply isn't true. Though ticket-splitting

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rights must be recognized in any preliminary election that in fact determines the true weight a vote will have. The concept of political equality in the voting booth contained in the Fifteenth Amendment extends to all phases of state elections . . . once the class of voters is chosen and their qualifications specified, we see no constitutional way by which equality of voting power may be evaded."); *see also*; Gordon E. Baker, *One Man, One Vote, and "Political Fairness"—Or, How the Burger Court Found Happiness by Rediscovering Reynolds v. Sims*, 23 EMORY L.J. 701, 707 (1974) (discussing the Supreme Court's goal of "representative equality"); Robert G. Dixon, Jr., *The Warren Court Crusade for the Holy Grail of "One Man-One Vote"*, 1969 SUP. CT. REV. 219, 268-69 (1969) (discussing the goal of "voter equality").

<sup>46</sup> *See, e.g., Sims*, 377 U.S. at 574 ("[T]he so-called federal analogy is inapplicable as a sustaining precedent for state legislative apportionments."); *Sanders*, 372 U.S. at 378 ("The inclusion of the electoral college in the Constitution, as the result of specific historical concerns, validated the collegiate principle despite its inherent numerical inequality, but implied nothing about the use of an analogous system by a State in a statewide election."); Grant M. Hayden, *The False Promise of One Person, One Vote*, 102 MICH. L. REV. 213, 230 (2003) (noting that "the equiproportional standard" of one-person-one-vote "does not apply to many important political institutions," like the Electoral College and the U.S. Senate); James Shinn Graham, Note, *One Person-One Vote: The Presidential Primaries and Other National Convention Delegate Selection Processes*, 24 HASTINGS L.J. 257, 268 (1972-73) ("It is only because the electoral college is engrained in the Constitution that it escapes scrutiny under one person-one vote standards."); Michael J. O'Sullivan, Note, *Artificial Unit Voting and the Electoral College*, 65 S. CAL. L. REV. 2421, 2433-36 (1992) (noting that the "unit system" used by the Electoral College is unconstitutional at the state level). MSNBC host Chris Hayes made a similar point more recently, *see All in with Chris Hayes* (MSNBC television broadcast Aug. 30, 2019) ("The weirdest thing about the Electoral College is the fact that if it wasn't specifically in the Constitution for the presidency, it would be unconstitutional."), and was attacked by some conservative historians for it. *See, e.g., Jay Cost, Chris Hayes and Progressives' Lack of Respect for the Constitution*, NAT'L REV. (Sept. 3, 2019, 3:38 PM), <https://www.nationalreview.com/2019/09/chris-hayes-and-progressives-lack-of-respect-for-the-constitution/>.

<sup>47</sup> *E.g., Paul H. Rubin, Vote for the Party, Not the Person*, WALL ST. J. (Oct. 27, 2008, 12:01 AM ET), <https://www.wsj.com/articles/SB122506895498170731>.

increased by *some* measures in the 1980s and 1990s, it unequivocally started decreasing by the early 2000s,<sup>48</sup> and in most recent U.S. elections, it's been virtually nonexistent.<sup>49</sup> This is because party identification is “one of the most important factors, if not the single most important factor, in models of voting behavior in the American public,” and voters vote based on their partisanship and ideology in all elections—even in ostensibly nonpartisan ones.<sup>50</sup>

All of this is to say that same-party legislative appointment procedures guarantee, with near-total accuracy, that most voters will be accurately represented in the ways that matter *most* following a state legislative vacancy. If voters voted for a Democrat in the last regularly scheduled general election, they will continue to be represented by a Democrat in the legislature—regardless of whether the specific person for whom they voted lives, dies, or is elected to another office. It is unlikely that the replacement will differ from her predecessor ideologically,<sup>51</sup> though it may be the case that party committees, as in Maryland's case, will sometimes select individual legislators that their primary voters wouldn't pick in a primary. But it's improbable that a party committee would select a replacement legislator that its party's primary voters, or the district's electorate as a whole, would reject as ideologically incompatible.<sup>52</sup> Little data exists on this question, but that which does suggests that party-selected legislative replacements are actually

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<sup>48</sup> 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, 161 (Herbert F. Weisberg & Clyde Wilcox eds., 2004).

<sup>49</sup> *E.g.*, Drew Desilver, *Split-Ticket Districts, Once Common, Are Now Rare*, PEW RES. CTR. (Aug. 8, 2016), <https://www.pewresearch.org/fact-tank/2016/08/08/split-ticket-districts-once-common-are-now-rare/>; Geoffrey Skelley, *Split-Ticket Voting Hit a New Low in 2018 Senate and Governor Races*, FIVETHIRTYEIGHT (Nov. 19, 2018, 6:00 AM), <https://fivethirtyeight.com/features/split-ticket-voting-hit-a-new-low-in-2018-senate-and-governor-races/>.

<sup>50</sup> *E.g.*, Chris W. Bonneau & Damon M. Cann, *Party Identification and Vote Choice in Partisan and Nonpartisan Elections*, 37 *POLITICAL BEHAV.* 43, 44, 61–62 (2015).

<sup>51</sup> See Seth Masket & Boris Shor, *Primary Electores vs. Party Elites: Who are the Polarizers?* (May 8, 2013) (unpublished manuscript) (on file with author (concluding that there is no ideological difference between elected and appointed legislators in Colorado and Illinois). A rare case may be seen in the how the vacancy in Illinois's 116th State House District was filled. The incumbent, Jerry Costello II, a conservative Democrat, was appointed to Governor J.B. Pritzker's administration and Nathan Reitz was appointed to replace him. Joseph Bustos, *New State Rep. Nathan Reitz Will Be a Pivotal Vote on the Graduated Income Tax*, BELLEVILLE NEWS-DEMOCRAT (May 24, 2019, 10:38 AM), <https://www.bnd.com/news/local/article230748774.html>. Reitz ended up supporting a graduated income tax, which Costello had opposed, triggering allegations from the state Republican Party that Reitz was appointed to replace Costello in a “conservative vote replacement.” *Illinois Moves Closer to Graduated Income Tax*, WSIL TV NEWS (May 28, 2019, 1:17 AM), <https://wsilv.com/2019/05/28/illinois-moves-closer-to-graduated-income-tax/>; Bustos, *supra*.

<sup>52</sup> See generally Masket & Shor, *supra* note 47 at 61-62.

*likelier* to be re-elected than voter-selected candidates.<sup>53</sup> This conclusion is true even when controlling for uncontested elections and even when comparing elected and appointed first-term legislators seeking re-election.<sup>54</sup>

Special elections, meanwhile, are likelier to have results inconsistent with the desires of the district's electorate. When special elections are scheduled, they're usually required to take place within a statutorily established period of time,<sup>55</sup> which places them at bizarre and seemingly random times during the year. Some states have moved to consolidate elections, to provide more predictability as to when elections occur,<sup>56</sup> but these states are far in the minority. Instead, in most cases, special elections are scheduled for otherwise-random Tuesdays.<sup>57</sup> This randomness can be exacerbated by scheduling special elections for days of the week other than Tuesday, as governors in several Midwestern states have done in the past few years.<sup>58</sup>

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<sup>53</sup> See generally Seth E. Masket, *Do Voters and Insiders Nominate the Same Sort of Candidates? A Look at Legislative Vacancy Appointments in Illinois and Colorado*, in Presentation at the UCLA Department of Political Science (May 11, 2015) (unpublished manuscript) (on file with author). But see Keith Hamm & David M. Olson, *Midsession Vacancies: Why Do State Legislators Exit and How Are They Replaced?*, in CHANGING PATTERNS IN STATE LEGISLATIVE CAREERS 127, 144–45 (Gary F. Moncrief & Joel A. Thompson eds., 1992) (noting that, based on 1981–86 dataset, “legislators who first attain office by special election are somewhat more likely to be able to retain the seats than if they acquired them by political appointment”). Masket’s dataset is likely preferable here, because it was a twenty-year dataset with newer data and specifically excluded uncontested elections, unlike Hamm’s and Olson’s.

<sup>54</sup> Masket, *supra* note 53, at 8–9.

<sup>55</sup> See, e.g., MD. ELECTION LAW CODE ANN. § 8-710 (relating to special congressional elections).

<sup>56</sup> E.g., Connor Phillips, *The Effect of Election Consolidation on Turnout*, MEDIUM (July 12, 2019) (“Several states, including Michigan, California, Kentucky, and Nevada, are considering or have implemented legislation that moves . . . lower-level contests to coincide with the federal elections held in November of even-numbered years.”).

<sup>57</sup> See Harvey J. Tucker, *Low Voter Turnout and American Democracy 2* (Apr. 2004) (on file with the European Consortium for Political Research) (“Most special elections occur at unusual times and are the only contests on the ballot. Turnout is unusually low because contests are poorly publicized and potential voters receive little or no stimulus.”); see also Marc Meredith, *The Strategic Timing of Direct Democracy*, 21 ECON. & POL. 159 (2009) (discussing the year-round scheduling of special school board elections).

<sup>58</sup> E.g., Briana Bierschbach, *Special Election Results: Keeping the Status Quo at the Minnesota Capitol*, MINN. POST (Feb. 13, 2018), <https://www.minnpost.com/politics-policy/2018/02/special-election-results-keeping-status-quo-minnesota-capitol/> (noting that special elections for the Minnesota Legislature were held on Monday, February 12, 2018); Mitchell Schmidt, *Robin Vos Requests Tony Evers Reschedule Special Election, Citing Jewish Holiday*, WIS. ST. J. (Sept. 28, 2019), [https://madison.com/wsj/news/local/govt-and-politics/robin-vos-requests-tony-evers-reschedule-special-election-citing-jewish/article\\_c79696a6-7487-5141-b96f-e8eb927c967d.html](https://madison.com/wsj/news/local/govt-and-politics/robin-vos-requests-tony-evers-reschedule-special-election-citing-jewish/article_c79696a6-7487-5141-b96f-e8eb927c967d.html) (noting that the originally selected primary election date for the special election in Wisconsin’s 7th congressional

The randomness of special elections' scheduling is more than just an interesting piece of political trivia—it affects turnout<sup>59</sup> and results. When special elections are held at unusual times of the year, as most are, it increases the potentiality for unexpected, inconsistent results.<sup>60</sup> Consider a few examples. In Georgia, Democrats won special elections for the state House in otherwise-conservative areas in 2015 and 2017,<sup>61</sup> which they promptly lost in the next general election for each seat.<sup>62</sup> Similarly, a Republican narrowly won a special state Senate election in a dark-blue area in 2015, but lost re-election by a wide margin in 2016.<sup>63</sup> Much more notably, Democrats won several heavily-Republican seats in the Oklahoma Legislature in 2017 special elections,<sup>64</sup> but lost several of them in the regularly scheduled 2018 general election.<sup>65</sup>

While a handful of special elections serve more as anecdotes than meaningful data points, the basic principles at play are clear: Low-turnout

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district was Monday, December 30, 2019, the final day of Hanukkah).

<sup>59</sup> See, e.g., Tucker, *supra* note 57, at 2 (noting that special elections see low turnout).

<sup>60</sup> For example, in Minnesota, special elections for school funding projects, like special bonds, are statutorily mandated to occur at certain times of the year, unlike in Wisconsin, where they happen at the local school board's discretion. As a result, turnout in Minnesota special elections for school bonds is higher than it is in Wisconsin. See Meredith, *supra* note 53, at 71.

<sup>61</sup> See Maya Prabhu, *Georgia Democrats Pick Up Three Legislative Seats in Special Elections*, ATLANTA J. CONST. (Nov. 7, 2017), <https://www.ajc.com/news/state--regional-govt--politics/georgia-democrats-pick-up-three-legislative-seats-special-elections/9KdkpqNX1CrVKyfa14qj7N/> (noting that Deborah Gonzalez and Jonathan Wallace won special elections to the Georgia House in 2017); Mark Woolsey, *Taylor Bennett Wins District 80 Special Election Runoff*, ATLANTA J. CONST. (Aug. 12, 2015), <https://www.ajc.com/news/local/taylor-bennett-wins-district-special-election-runoff/tKDtptodsYMROfDX4sgmVN/> (noting that Taylor Bennett won a special election to the Georgia House in 2015).

<sup>62</sup> Sofi Gratas, *Republicans Retake State House Districts 117, 119 After Just a Year of Democratic Control*, RED & BLACK (Nov. 8, 2018), [https://www.redandblack.com/athensnews/republicans-retake-state-house-districts-after-just-a-year-of/article\\_cad9d68e-e314-11e8-99be-c7cf3c70b2a1.html](https://www.redandblack.com/athensnews/republicans-retake-state-house-districts-after-just-a-year-of/article_cad9d68e-e314-11e8-99be-c7cf3c70b2a1.html) (noting that Gonzalez and Wallace lost re-election in 2018); Ken Sugiura, *Taylor Bennett Loses State House Race by Narrowest of Margins*, ATLANTA J. CONST. (Nov. 9, 2016), <https://www.ajc.com/sports/college/taylor-bennett-loses-state-house-race-narrowest-margins/K08YNG2Iv24UguEQqu8MCL/> (noting that Bennett lost re-election in 2016).

<sup>63</sup> Mark Niesse, *Anderson Unseats Van Ness for Georgia Senate*, ATLANTA J. CONST. (Nov. 8, 2016), <https://www.ajc.com/news/local-govt--politics/anderson-unseats-van-ness-for-georgia-senate/98r7ieq2x3fop7MONohaWO/>.

<sup>64</sup> See, e.g., David Weigel, *Democrats See Hope in Oklahoma Special Elections*, WASH. POST (July 12, 2017, 6:05 PM EDT), <https://www.washingtonpost.com/news/powerpost/wp/2017/07/12/democrats-see-hope-in-oklahoma-special-elections/>.

<sup>65</sup> See, e.g., David Blatt, *Oklahoma's 2018 Elections Were Different in Many Ways*, OKLA. POL'Y INST. (Nov. 15, 2018), <https://okpolicy.org/oklahomas-2018-elections-were-different-in-many-ways/>.

elections are likely to be decided by the *most* intensely interested voters, who may not always reflect the electorate as a whole.<sup>66</sup> When that's the case, and the most interested voters achieve a result that wouldn't have been possible at the most recently scheduled general election—which likelier had higher turnout than the special—the district is effectively misrepresented in the legislature until it can correct the mistake at the next election. Legislative appointment systems don't have that problem. Instead, they guarantee that the results of the *previous* general election remain in place until the *next* general election—and they avoid control of the entire state government coming down to a single special election, as has happened too many times.<sup>67</sup>

Moreover, appointment systems are better than special elections at efficiently guaranteeing representation. When a legislative vacancy occurs in a state with special elections, it can take months to fill it—if it's filled at all prior to the next election.<sup>68</sup> If the vacancy occurs while the legislature is in session, it's possible that the vacancy won't be filled until it's adjourned—resulting in a total deprivation of representation for the vacant district's constituents during that time.<sup>69</sup> This delay in scheduling special elections can be done vindictively or to score political points. For example, Republican Governors in Michigan and North Carolina delayed scheduling special congressional elections to fill safely Democratic seats to deprive House Democrats of two additional members.<sup>70</sup> Governors in Missouri, New York,

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<sup>66</sup> See SARAH F. ANZIA, TIMING AND TURNOUT: HOW OFF-CYCLE ELECTIONS FAVOR ORGANIZED GROUPS 82 (2013).

<sup>67</sup> See, e.g., Ralph Jimenez, *With Election Defeat, N.H. Democrats Lose Majority in Senate*, BOSTON GLOBE, Dec. 9, 1999, at B19 (noting that a special election for the New Hampshire State Senate resulted in Democrats losing control of the chamber); See also Joseph O'Sullivan, *With Manka Dhingra's Washington State Senate Win, Democrats Plot Ambitious Course in Olympia*, SEATTLE TIMES (Nov. 8, 2017), <https://www.seattletimes.com/seattle-news/politics/manka-dhingras-double-digit-lead-in-45th-district-senate-race-sends-message-to-trump-gov-inslee-says/> (noting that a special election for the Washington State Senate resulted in Democrats gaining full control of the state government).

<sup>68</sup> In neighboring Virginia, for example, a special election can take months to schedule, if it ever happens at all. See, e.g., VA. CODE ANN. §§ 24.2-226, 24.2-228.1, 24.2-682 (2014). In Maryland, it can take up to 5 months to fill a congressional vacancy if a special election is called; see also MD. ELEC. LAW CODE ANN. § 8-710 (2020).

<sup>69</sup> E.g., Jim Turner, *Vacant Seats Will Dot Florida Legislature During Session*, ORLANDO WEEKLY (Dec. 30, 2017, 7:38 AM), <https://www.orlandoweekly.com/Blogs/archives/2017/12/30/vacant-seats-will-dot-florida-legislature-during-session> (“More than 1.1 million Florida voters won't have a representative in one of the legislative chambers when the 2018 session begins next month. Resignations and a recent death have created six open seats, with most expected to remain vacant through the 60-day session because of scheduling requirements for special elections.”).

<sup>70</sup> Gus Burns, *Judge Orders State to Explain Why Election to Replace Conyers Won't Be Sooner*, MICH. (Mar. 16, 2018), <https://www.mlive.com/news/detroit/2018/03/>

and Wisconsin have engaged in similarly manipulative behavior when calling special elections to fill state legislative vacancies. New York Governor Andrew Cuomo held off on scheduling *eleven* special elections to the state legislature to avoid adding uncertainty into budget negotiations and to avoid upsetting the power-sharing arrangement between State Senate Republicans and Independent Democrats.<sup>71</sup> Following an unexpected loss in a special election to the Wisconsin State Senate in 2018, which narrowed the Republican majority in that chamber, then-Governor Scott Walker announced that he wouldn't hold any special elections to fill two additional vacancies,<sup>72</sup> only relenting when ordered to do so by the Wisconsin Court of Appeals.<sup>73</sup> And Missouri Governor Mike Parson appointed two Democratic State Senators to his administration, triggering vacancies in the State Senate, which he announced that he would not fill—perhaps to further reduce the Democratic minority.<sup>74</sup>

This sort of gamesmanship can work in the opposite direction, too, where governors deliberately schedule special elections months or weeks before general elections. This sort of decision wastes millions of dollars, burdens county election offices, and increases voter fatigue—so why do it? The most compelling answer is partisan gain. When U.S. Senator Frank Lautenberg, a Democrat from New Jersey, died in 2013, Governor Chris Christie was required to schedule a special election to replace him. Despite the fact that the state was having its regularly scheduled gubernatorial election in November 2013, Christie scheduled the election for *October*, incurring nearly \$24 million in election administration costs.<sup>75</sup> Democrats alleged that Christie, who was running for re-election and was favored to win, wanted to

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lawsuit\_says\_gov\_snyder\_is\_del.html; Jim Morrill, *Mel Watt's Seat in Congress to Sit Empty Until November*, NEWS & OBSERVER (Jan. 6, 2014, 5:08 PM), <https://www.newsobserver.com/news/politics-government/politics-columns-blogs/under-the-dome/article10289234.html>.

<sup>71</sup> Bill Mahoney, *More Legislative Vacancies: Nothing Special for Cuomo*, POLITICO N.Y. (Feb. 16, 2017, 5:22 EST), <https://www.politico.com/states/new-york/albany/story/2017/02/the-past-is-no-guide-for-cuomo-and-special-elections-109655>; John Nichols, *Republicans Have an Ingenious Plan to Stop Losing Special Elections*, THE NATION (Feb. 22, 2018), <https://www.thenation.com/article/archive/republicans-have-an-ingenious-plan-to-stop-losing-special-elections/>.

<sup>72</sup> *Id.*

<sup>73</sup> Shawn Johnson, *Walker Won't Ask Wisconsin Supreme Court to Block Special Elections Order*, WIS. PUB. RADIO (Mar. 28, 2018, 3:40 PM), <https://www.wpr.org/walker-wont-ask-wisconsin-supreme-court-block-special-elections-order>.

<sup>74</sup> See Jason Hancock, *Group Vows Lawsuit if Gov. Parson Won't Call Special Election for KC Senate Seats*, KANSAS CITY STAR (Jan. 21, 2020, 3:56 PM), <https://www.kansascity.com/news/politics-government/article239493293.html>.

<sup>75</sup> Emily Schultheis & Maggie Haberman, *Christie Slammed for Special Election*, POLITICO (June 4, 2013, 2:09 EDT), <https://www.politico.com/story/2013/06/chris-christie-frank-lautenberg-special-election-092211>.

avoid sharing the ballot with then-Newark Mayor Cory Booker, which would gin up Democratic turnout and imperil his re-election.<sup>76</sup>

Similarly, in 2018, Texas Governor Greg Abbott opted to schedule a special election for the Texas State Senate for late July rather than on the regularly scheduled Election Day in November.<sup>77</sup> When no candidate received a majority, Abbott scheduled the runoff election for September 18—less than two months before the general election.<sup>78</sup> The result was a surprise Republican victory, which padded the Republican Party’s majority in the Texas Senate until 2021, when the seat was next scheduled to be up.<sup>79</sup>

This sort of gamesmanship—both in declining to schedule special elections at all and in scheduling them for inconvenient times—could be remedied with constitutional amendments or laws that *require* the calling of special elections within a certain period of time and that require consolidation with regularly scheduled general elections.<sup>80</sup> But most states (and the Constitution) lack these sort of procedures and protections, instead granting their governors standardless discretion for scheduling elections.<sup>81</sup> And in any event, temporary legislative appointments followed by special elections scheduled for the next general election solve almost all of those problems.

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<sup>76</sup> *Id.*

<sup>77</sup> Patrick Svitek, *Gov. Greg Abbott Announces July 31 Special Election for State Sen. Carlos Uresti’s Seat*, TEX. TRIB. (June 20, 2018), <https://www.texastribune.org/2018/06/20/abbott-announces-july-31-special-election-uresti-seat/>.

<sup>78</sup> Patrick Svitek, *Abbott Sets Runoff to Replace State Sen. Carlos Uresti for Sept. 18*, TEX. TRIB. (Aug. 13, 2018), <https://www.texastribune.org/2018/08/13/gov-greg-abbott-sets-sd-19-runoff-sept-18-lawyers-say/>.

<sup>79</sup> Patrick Svitek, *Republican Pete Flores Upsets Democrat Pete Gallego in Race for Uresti Seat*, TEX. TRIB. (Sept. 18, 2018), <https://www.texastribune.org/2018/09/18/republican-pete-flores-track-upset-race-democratic-friendly-uresti-seat/>.

<sup>80</sup> The State of Washington, for example, automatically schedules special elections for the next regularly scheduled general election, which is in November of each year. *See generally* WASH. REV. CODE § 29A.04.321 (2015).

<sup>81</sup> *See, e.g.*, *Rhodes v. Snyder*, 302 F. Supp. 3d 905, 909-10 (E.D. Mich. 2018) (“This statute provides broad discretion to the governor. It does not contain any particular requirement when the special election is to be held; it only mandates that the governor ‘shall call a special election’ when a vacancy occurs. Relevant here, the statute expressly allows the governor to schedule the special election ‘at the next general election,’ provided that the general election is held at least thirty days after the vacancy occurs.”) (citing MICH. COMP. LAWS § 168.633); *Fox v. Paterson*, 715 F. Supp. 2d 431, 442 (W.D.N.Y. 2010) (“[The Constitution] provides that the Governor must call for a special election, but that the timing of that election is up to the Governor and the state to decide. Although there may be cases in which such an extraordinary amount of time passes from the existence of the vacancy to the issuance of the proclamation that it amounts to a de facto refusal to call a special election at all, that is not the situation before me. The winner of the November 2 special election will presumably take office almost immediately after that date, and although plaintiffs might prefer that to occur sooner, I do not believe that the delay here is so long as to amount to a constitutional violation.”).

## III. HOW TO REFORM MARYLAND'S SYSTEM

All of this is to say that Maryland's current system likely functions better than a special-election system would—all Marylanders are fully represented during legislative sessions; the state avoids the inconvenience and cost of special elections; and the ideological differences between appointed and elected legislators are likely minimal.

But that doesn't mean that changes aren't needed. Maryland's current system is unlike most others in the country in terms of the absolute power given to local party committees, the lack of practical oversight by any elected official, and the permanency of the appointment. These characteristics make the current system sometimes veer concerningly close to the eighteenth and nineteenth century system that the state abolished in 1837 and are worthy of change. Several pragmatic solutions, some of which mirror what already works in other states, would satisfactorily improve these failings and create an even more representative system.

First, under Maryland's current constitution, party committees have virtually unchecked and absolute power. For all practical purposes, they are the ones making appointments to fill legislative vacancies. Though, as mentioned previously, the constitution is ambiguous as to whether the governor is *required* to accept the party committees' single nominee,<sup>82</sup> that appears to be the agreed-upon interpretation. If that is the case, it's wrong—it inappropriately consolidates power in an unelected and unaccountable organization. Party committees having *some* say in same-party legislative appointment systems isn't unusual—most states grant them at least some power—but absolute control is rare.

This characteristic of Maryland's current system should be changed. It's possible to maintain the current system's deference to party members without granting them *total* power. For example, the power doesn't have to be concentrated in the party committee members themselves. Some states, like Kansas and Wyoming, instead require that a district-wide convention, attended by the party's precinct committee members, be held to select a replacement.<sup>83</sup> Moving to this sort of system, while depriving voters in the legislative district of representation for a short period of time, would introduce more democratic accountability to the process—and would make the process more public and transparent.<sup>84</sup>

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<sup>82</sup> See *supra* text accompanying notes 34-39.

<sup>83</sup> KAN. STAT. ANN. § 25-3902 (2020); WYO. STAT. § 22-18-111(iii)(A) (2020). Though Kansas calls this process a "convention," see § 25-3902, Wyoming doesn't, instead referring to it as a "meeting of [the party's] precinct committeemen and committeewomen," see § 22-18-111(iii)(A). Nonetheless, the procedure is essentially the same.

<sup>84</sup> *Cf.* Shen, *supra* note 5.



Second, regardless of which division of the party has the power to nominate a replacement, the party's nominee should be approved by another political actor. Under Maryland's current system, the party doesn't pick a *nominee*; it picks a *designee*. In so doing—unless it can't agree on a single name and sends the governor more than one name<sup>85</sup>—the party's decision is virtually unreviewable. Very few other states have such a party-focused system,<sup>86</sup> and most grant the formal and practical selection power to an elected actor. Some states allow the governor to make the final selection from a small group of nominees,<sup>87</sup> while others allow the county commissions where the district was located to make the final selection.<sup>88</sup>

Maryland should implement a similar system. It makes little sense to grant the governor an effectively illusory power—namely, to make an appointment—if he has no *practical* power. Moreover, adding another layer of review to the established procedure can help prevent abuses and insider-driven selection processes. Under the current system, if a party committee selected a candidate to fill a vacancy who was otherwise-constitutionally eligible to serve in the general assembly, but was corrupt, or had repeatedly been rejected by the district's voters, or held ideologically extreme and unpalatable views, it is unclear what recourse *anyone*, much less a dissatisfied voter in the district, would have. But if another step were added to the process, dissatisfied voters could appeal to the governor or county commission to reject the nominee.<sup>89</sup>

Third, Maryland should provide for a system that combines legislative appointments *and* special elections by providing that an appointee only serves until the next regularly scheduled general election. Such a system pulls the best of both systems—immediate, effective representation and popular

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<sup>85</sup> See *supra* text accompanying notes 38-39.

<sup>86</sup> MD. CONST. art. III, § 13; N. MAR. I. CONST. art. II, § 9; KAN. STAT. ANN. § 25-3902 (2020); N.C. GEN. STAT. § 163-11 (2020); UTAH CODE ANN. §§ 20A-1-503 (2020); V.I. CODE ANN. tit. 2, § 111 (2020).

<sup>87</sup> HAW. REV. STAT. ANN. §§ 17-3, 17-4 (2020); IDAHO CODE § 59-904A (2020); W. VA. CODE § 3-10-5 (2020). In New Mexico's system, the county commission usually has appointment power—but if the legislative district encompasses more than one county, then each county commission nominates a replacement to the governor, who makes the final selection. However, this is not a same-party appointment system. See N.M. STAT. ANN. §§ 2-7C-5, 2-8D-4 (2020).

<sup>88</sup> WASH. CONST. art. II, § 15; ARIZ. REV. STAT. ANN. § 41-1202 (2020); MONT. CODE ANN. § 5-2-402 (2020); OR. REV. STAT. §§ 171.060 (2020); WYO. STAT. § 22-18-111(a)(iii) (2020).

<sup>89</sup> On a practical level, it likely makes the most sense to add county commissions, not the governor, to this process. County commissions are closer to the voters and are more likely to be representative of district voters' views. A county commission in western Maryland or on the Eastern Shore, for example—both of which being places that don't regularly elect governors or have power in state government—is likelier to be attuned to the conservative views of districts in their communities than the governor of an otherwise-liberal state.

input—while pulling from the worst of neither. One of the biggest complaints with Maryland's current system has been the permanency of the appointments. If a vacancy occurs, say, a day after a legislator is sworn into her four-year term, her replacement will serve the remainder of the term. By that point, any antipathy toward the process used to appoint the replacement legislator may well have dissipated, and by that point, the replacement will have all of the benefits of incumbency. It is likely for that reason that most states with legislative appointments make them *temporary*—the replacement only serves until the next general election, unless the vacancy occurs too close to then.<sup>90</sup>

Though the permanency of the appointment has *some* appeal to it—Maryland is one of only two states to elect its legislators to four-year terms,<sup>91</sup> so consolidating all legislative elections on the same day *may* be defensible—it effectively neuters one of the most compelling justifications for same-party legislative appointments. The principle behind these sorts of appointments is that the voters' preference from the most recent general election should be respected.<sup>92</sup> But gliding over an opportunity to solicit the voters' preference at the *next* general election, regardless of whether the legislative seat would ordinarily be up for election, is simply illogical. If nothing else, in Maryland's case, voter turnout is usually *higher* in presidential elections,<sup>93</sup> when *no* legislators are elected,<sup>94</sup> so it makes *more* sense to have legislative

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<sup>90</sup> NEV. CONST. art. IV, § 12; N.J. CONST. art. IV, § 4, para. 1; WASH. CONST. art. II, § 15; COLO. REV. STAT. § 1-12-203 (2020); HAW. REV. STAT. ANN. §§ 17-3, 17-4 (2020); MONT. CODE ANN. § 5-2-406 (2020); N.M. STAT. ANN. §§ 2-7C-5, 2-8D-4 (2020); UTAH CODE ANN. §§ 20A-1-503(3) (2020); WYO. STAT. ANN. § 22-18-111(a) (2020); see Nev. Op. Att'y Gen. No. 1955-84 (1955). Maryland is one of only four states or territories—the others being Indiana, Kansas, and Puerto Rico—where legislative appointees “serve the full remainder of the term in all circumstances.” Yeagain, *supra* 24 note at 31.

<sup>91</sup> *Number of Legislators and Length of Terms in Years*, NAT'L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/research/about-state-legislatures/number-of-legislators-and-length-of-terms.aspx> (last accessed Jan. 27, 2020).

<sup>92</sup> *Supra* PART II.

<sup>93</sup> Turnout is generally higher in presidential elections than midterm elections. See generally Robert A. Jackson, *Differential Influences on Participation in Midterm Versus Presidential Elections*, 37 SOC. SCI. J. 385 (2000). This is true for Maryland as well. Compare, e.g., Official Turnout (By Part and County), Election: 2016 Presidential General Election, MD. ST. BD. OF ELECTIONS, <https://elections.maryland.gov/elections/2016/turnout/general/Official%20by%20Party%20and%20County.pdf> (statewide turnout for the 2016 election was 71.98%) (last accessed Jan. 27, 2020), with Official Turnout (By Part and County), Election: 2018 Gubernatorial General Election, MD. ST. BD. OF ELECTIONS, <https://elections.maryland.gov/elections/2018/turnout/general/Official%20by%20Party%20and%20County.pdf> (statewide turnout for the 2018 election was 59.06%). (last accessed Jan. 27, 2020).

<sup>94</sup> MD. CONST. art. III, § 7 (“The election for Senators and Delegates shall take place on the Tuesday next, after the first Monday in the month of November, nineteen hundred and fifty-eight, and in every fourth year thereafter.”).

appointments expire in presidential-election years if that's the next general election.

Indeed, this third recommendation is the same proposal crystallized in State Delegate David Moon's proposed constitutional amendment, which requires "a special primary and a special general election [] be held at the same time as the regular statewide primary election and the regular statewide general election" if a vacancy occurs prior to the next general election.<sup>95</sup> However, Delegate Moon's proposal goes no further—it does not alter the party committees' nomination and appointment power and provides no meaningful confirmation or appointment power to any other political actor. Piecemeal approaches are understandable in other contexts, but given the difficulty of amending the state constitution,<sup>96</sup> it makes substantially less sense here. While public attention is focused on the issue, the general assembly should use this opportunity to go big and enact meaningful structural change to the appointment process.

#### CONCLUSION

Maryland's method of filling legislative vacancies has come a long way—from an inherently undemocratic system that stifled public accountability over the State Senate to a system that seeks to balance both the desires of the electorate and the need for efficient, accurate representation. But as Chanel Branch's nomination has shown, the current approach needs rebalancing. Maryland can borrow what works from other states—spreading out the power currently held by the party committees in an absolute monopoly, adding a meaningful step of review to the appointment process, and making appointments temporary—and breathe democratic life into a system that has largely remained unaltered since its adoption in 1936.

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<sup>95</sup> H.B. 103, 2019 Leg., 438th Sess. (Md. 2019).

<sup>96</sup> *See generally* MD. CONST. art. XIV, § 1 (noting that the Maryland Constitution requires a three-fifths majority vote in both houses of the assembly and approval from the electorate).