

ARTICLES

SKELOS V. PATERSON: THE SURPRISINGLY STRONG CASE FOR THE GOVERNOR'S SURPRISING POWER TO APPOINT A LIEUTENANT GOVERNOR

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On July 8, 2009, Governor David Paterson surprised New York's legal and political world by announcing his intention to appoint Richard Ravitch to fill the vacancy in the office of lieutenant governor. No New York governor had ever appointed a lieutenant governor before. Paterson's action was widely denounced as unauthorized and unconstitutional. Four months later, observers were even more astonished when the Court of Appeals in Skelos v. Paterson upheld the governor's action. This article explains why the governor and Court of Appeals were right to conclude that the governor had statutory and constitutional authority for his action. Indeed, the case for the governor's action is quite straightforward and surprisingly strong. That authority follows from the plain text of a statute, the leading judicial precedent, and the relevant provisions of the state constitution. By contrast, the case against the governor's action was quite weak, relying more on extra-textual and policy concerns than the law itself.

I. INTRODUCTION

On July 8, 2009, Governor David Paterson surprised New York's political and legal world by announcing his intention to appoint Richard Ravitch as lieutenant governor, thereby filling the vacancy in that office created on March 17, 2008, when Governor Eliot Spitzer resigned and Paterson, then lieutenant governor, became governor. As Court of Appeals Judge Eugene Pigott later put it,

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when Paterson became governor, “no one gave a thought or harbored a suggestion that he had the ability to appoint a Lieutenant Governor.”¹ No provision of the state constitution expressly authorizes the governor to appoint a lieutenant governor.² Instead, the constitution provides that “the temporary president of the senate shall perform all the duties of lieutenant-governor” if there is a vacancy in that office.³ There have been at least ten vacancies in the office of lieutenant governor,⁴ and at no time before July 2009 did a governor ever attempt to appoint a lieutenant governor to fill the vacancy.⁵ Indeed, at the time Governor Paterson acted, the office of lieutenant governor had been vacant for fifteen months and he had made no previous attempt to fill it. On the eve of Governor Paterson’s action, Attorney General Andrew Cuomo announced that such an appointment was “not constitutional.”⁶ The constitutionality of Governor Paterson’s move was subsequently denounced by a former chief judge, a former lieutenant governor, a former attorney general, and a leading academic expert on the state constitution.⁷ When the inevitable court challenge resulted, a state supreme court justice and a unanimous four-judge appellate division panel in rapid succession held the governor’s action unconstitutional.⁸

¹ *Skelos v. Paterson*, 13 N.Y.3d 141, 154, 915 N.E.2d 1141, 1147, 886 N.Y.S.2d 846, 852 (2009) (Pigott, J., dissenting).

² *Id.* at 157, 915 N.E.2d at 1150, 886 N.Y.S.2d at 854 (Pigott, J., dissenting).

³ N.Y. CONST. art. IV, § 6.

⁴ Judge Pigott’s dissent in *Skelos* refers to ten prior vacancies that occurred in the following years: 1811, 1828, 1829, 1847, 1885, 1910, 1913, 1943, 1973 and 1985. *Skelos*, 13 N.Y.3d at 161, 915 N.E.2d at 1153, 886 N.Y.S. 2d at 857 n.3 (Pigott, J., dissenting). There was likely an additional, eleventh vacancy, however—that created on September 29, 1953, by the resignation of Lieutenant Governor Frank Moore. Moore left office to become president of the Government Affairs Foundation created by Nelson Rockefeller, who was ultimately to run for governor. See Nicholas Webb, *Finding Aid for the Frank C. Moore PAPERS, 1881–1978*, Biographical Note (July 2009), available at <http://library.albany.edu/speccoll/findaids/apap223.htm>.

⁵ See *Skelos*, 13 N.Y.3d at 161, 915 N.E.2d at 1152, 886 N.Y.S.2d at 857 (Pigott, J., dissenting).

⁶ Statement of Attorney General Andrew Cuomo Regarding Lieutenant Governor Appointment Proposal (July 2008), available at http://www.ag.ny.gov/meida_center/2009/july/july6a_09.html.

⁷ See Brief of Gerald Benjamin, Peter J. Galie, Michael J. Hutter & Stan Lundine as Amici Curiae at 11–13, *Skelos v. Paterson*, 65 A.D.3d 339, 885 N.Y.S.2d 92 (App. Div. 2d Dep’t 2009) (No. 2009-00678), available at [http://www.courts.state.ny.us/courts/ad2/pdf/SkelosvPaterson/Hutter\(Skelos%20v.%20Paterosn\)080609-Brief.pdf](http://www.courts.state.ny.us/courts/ad2/pdf/SkelosvPaterson/Hutter(Skelos%20v.%20Paterosn)080609-Brief.pdf) (noting the opinions of former Chief Judge Wachtler, former Attorney General Vacco, former Lieutenant Governor Lundine, and Jerry H. Goldfeder, the Chair of the Committee on Election Law of the Association of the Bar of the City of New York).

⁸ *Skelos v. Paterson*, 25 Misc. 2d 347, 360, 884 N.Y.S.2d 812, 825 (Sup. Ct. Nassau County 2009), *aff’d*, 65 A.D.3d 339, 348, 885 N.Y.S.2d 92, 98–99 (App. Div. 2d Dep’t 2009), *rev’d*, 13

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Yet the Court of Appeals ultimately upheld the governor's appointment⁹—and the Court of Appeals was right. The governor's action was authorized by the plain meaning of a state statute, supported by judicial precedent, and consistent with both the text and structure of the state constitution. The legal grounds for challenging the governor's action were weak and inconsistent, ultimately relying more on the arguments that “it's never been done before” and extra-textual concerns about undue gubernatorial power than legal texts. Although no constitutional provision expressly authorized the governor's action, no constitutional or statutory provision barred it, either. A gubernatorial action authorized by statute and not precluded by the constitution or any other law is presumptively valid.

The Ravitch litigation is a reminder that even when it comes to constitutional questions, widely held but untested assumptions and reliance on traditions and past practices (or the lack of them) is no substitute for close and careful reading of the relevant constitutional and statutory texts and case law. The fact that something has never been done before may only mean that it “present[s] an open legal question,”¹⁰ not that it is unauthorized or prohibited.

The Ravitch litigation underscores the continuing importance of the longstanding view of a state constitution as a limitation, and not a grant of powers, so that the legislature has plenary authority to exercise a power as long as it is not limited by the New York State Constitution.¹¹ So, too, the Ravitch dispute reminds us just how problematic are some of our laws dealing with the filling of vacancies in statewide elective office. One benefit of this dispute could be closer attention to the vacancies issue. Certainly, the scandals that engulfed Governor Paterson in early 2010 only further underscored the value of having a lieutenant governor in place and the uncertainty about gubernatorial succession removed.

N.Y.3d 141, 153, 915 N.E.2d 1141, 1147, 886 N.Y.S.2d 846, 852 (2009). The state supreme court opinion was issued July 21, 2009, less than two weeks after the governor's action. The appellate division decision came down one month later, on August 20th.

⁹ *Skelos*, 13 N.Y.3d at 153, 915 N.E.2d at 1147, 886 N.Y.S.2d at 852.

¹⁰ *Id.* at 153, 915 N.E.2d at 1146–1147, 886 N.Y.S.2d at 851 (2009).

¹¹ *See, e.g.*, RICHARD BRIFFAULT & LAURIE REYNOLDS, *CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW* 52 (7th ed. 2009) (noting that, with respect to state constitutional jurisprudence, the legislature may embrace all powers not restricted by the state constitution); *see also* ROBERT F. WILLIAMS, *STATE CONSTITUTIONAL LAW: CASES AND MATERIALS* 793–94 (3d ed. 1999) (summarizing the traditional view that state sovereign power rests with the legislature pursuant to limitations imposed by the state constitution).

Part II of this comment provides a brief chronology of the events leading to Governor Paterson's naming of Richard Ravitch as lieutenant governor, and of the litigation that followed. Part III analyzes the legal issues raised by the governor's action. Part IV concludes by considering the implications for state constitutional law and for the specific question of filling vacancies in state office.

II. A TUMULTUOUS TERM: FROM THE ELECTION OF ELIOT SPITZER TO THE JUDICIAL VALIDATION OF THE APPOINTMENT OF RICHARD RAVITCH

In November 2006, Eliot Spitzer, then the state attorney general, and David Paterson, then a state senator and senate minority leader, both Democrats, were together elected governor and lieutenant governor of the State of New York by an overwhelming 65.7% of the vote.¹² Less than fifteen months into his term, Governor Spitzer, engulfed by scandal, resigned, and on March 17, 2008, Lieutenant Governor Paterson, by virtue of article IV, section 5 of the state constitution,¹³ became New York's 55th governor.¹⁴ Thereafter, the position of lieutenant governor remained vacant until the summer of 2009. Article IV, section 6 provides that in the event of a vacancy in that office, the temporary president of the senate "shall perform all the duties of lieutenant-governor during such vacancy."¹⁵ When Paterson became governor, the senate majority leader and temporary president of the senate was Joseph Bruno, a Republican. At that time, Senator Bruno became acting lieutenant governor.¹⁶ On June 24, 2008, Senator Bruno, also buffeted by scandal, stepped down from his leadership post (he quit the senate altogether on July 18, 2008)¹⁷ and Senator Dean Skelos, another Republican, became majority leader, temporary senate president, and acting lieutenant governor.¹⁸ In the November 2008

¹² Jonathan P. Hicks, *Spitzer Vote Total Is Slightly Lower in Official Count*, N.Y. TIMES, Jan. 11, 2007, at B5.

¹³ N.Y. CONST. art. IV, § 5 ("In case of the removal of the governor from office or of his or her death or resignation, the lieutenant-governor shall become governor for the remainder of the term.")

¹⁴ Nicholas Confessore, *Pledging Unity, Paterson Takes Albany's Helm*, N.Y. TIMES, Mar. 11, 2008, at A1.

¹⁵ N.Y. CONST. art. IV, § 6.

¹⁶ Nicholas Confessore, *'I Apologize to the Public, to Whom I Promised Better.'*, N.Y. TIMES, Mar. 11, 2008, at B1.

¹⁷ Jeremy W. Peters, *Bruno Says He Will Leave State Senate by Week's End*, N.Y. TIMES, July 16, 2008, at B4; Danny Hakim, *Bruno Declines Re-election Bid*, N.Y. TIMES, June 24, 2008, at B1.

¹⁸ Danny Hakim & Jeremy W. Peters, *New Day in Albany Opens as the Senate Selects*

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elections, for the first time since 1965, the Democratic Party won a majority of senate seats¹⁹ and on January 7, 2009, the Democratic leader, Malcolm Smith, became senate majority leader, temporary president of the senate, and, as a result, acting lieutenant governor.²⁰

Senator Smith's hold on power was a precarious one, however. His party held a slender 32–30 majority,²¹ and even before the Democrats took control of the senate in January 2009, a group of four Democrats had temporarily withheld their support from the party leadership while they negotiated terms for their votes.²² On June 8, 2009, the Democratic majority broke apart as two Democrats—Senators Pedro Espada and Hiram Monserrate—bolted their party and joined the thirty Republicans in an effort to remove Senator Smith as temporary president.²³ They adopted a resolution electing Senator Espada temporary president and Senator Skelos majority leader.²⁴ The rest of the Democratic Senators refused to accept the legitimacy of this action and went to state supreme court, Albany County, seeking a declaration that Smith was still temporary president.²⁵ That action was dismissed as an “improvident intrusion into the affairs of the senate” by the court on June 16.²⁶ In the meantime, Senator Monserrate had returned to the Democratic fold on June 15, leaving the senate evenly split between two groups of thirty-one, each claiming control, including the right to choose the senate's leadership and determine its agenda.²⁷ During this period, it was unclear who was temporary president of the senate and acting lieutenant governor—Senator Espada or Senator Smith—so that it was unclear who could preside

Bruno's Successor, N.Y. TIMES, June 25, 2008, at B1.

¹⁹ Nicholas Confessore, *The Democratic Hand Waiting to Grasp the Senate's Gavel*, N.Y. TIMES, Nov. 28, 2009, at A35.

²⁰ Jeremy W. Peters, *Role Reversal in the Senate, and Emotions Run High*, N.Y. TIMES, Jan. 8, 2009, at A27.

²¹ Brief of Defendant-Appellants at 11, *Skelos v. Paterson*, 13 N.Y.3d 141, 915 N.E.2d 1141, 886 N.Y.2d 846 (2009) (No. 2009-0183), 2009 WL 3362061.

²² Danny Hakim, *Celebration Interrupted: 4 Dissidents Risk Democrats' Gain in Senate*, N.Y. TIMES, Nov. 6, 2008, at A27.

²³ *Skelos v. Paterson*, 13 N.Y.3d 141, 153, 915 N.E.2d 1141, 1147, 886 N.Y.S.2d 846, 852 (2009).

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*; see also *Smith v. Espada*, No. 4912-09, slip op. at 4 (N.Y. Sup. Ct., Albany County, June 16, 2009), <http://www.nycourts.gov/whatsnow/pdf/Smith%20v.%20Espada%20Revised.1ast.pdf>.

²⁷ *Skelos*, 25 Misc. 3d at 351, 884 N.Y.S.2d at 819, *aff'd*, 65 A.D.3d at 348, 885 N.Y.S.2d at 98–99 (App. Div. 2d Dep't 2009), *rev'd*, 13 N.Y.3d at 153, 915 N.E.2d at 1147, 886 N.Y.S.2d at 852 (2009).

over the senate or who would take over as governor should Governor Paterson become incapacitated.²⁸

That 31–31 division persisted for nearly a month, leaving the senate stalled and unable to do any business.²⁹ Mid-June 2009 was a particularly unfortunate time for such deadlock. A number of significant laws, including the one giving the mayor of New York City control over the city's schools, were set to expire on June 30.³⁰ Similarly, a number of laws authorizing state and local taxes were due to expire on June 30, and other laws authorizing new revenue measures were needed by June 30th if taxes—essential for the local revenue collections needed to balance local budgets—were to be in place at the start of the local government fiscal year on July 1.³¹ The senate was unable to take action on any of these measures.³² Governor Paterson repeatedly called the senate into extraordinary session to address these matters. The senate met in special session eighteen times, with the two contending groups meeting separately within the chamber, “gaveling in and minutes later gaveling out without conducting any meaningful legislative business.”³³ As a result, tens of millions of dollars of state and local revenues were lost, and “the tax structures and budgets of towns and cities across the state were in shambles.”³⁴ The senate's failure to approve tax measures required New York City to postpone the hiring of 250 police officers, 150 firefighters, 175 school safety agents, 150 crossing guards, and thirty-four emergency operators.³⁵ The state comptroller estimated that the total direct cost of the senate stalemate to the state and to local governments was \$2.9 billion.³⁶ Moreover, on July 1, the old New York City Board of Education—

²⁸ *Skelos*, 13 N.Y.3d at 146–47, 915 N.E.2d at 1142, 886 N.Y.S.2d at 847.

²⁹ *Id.*

³⁰ Editorial, *New York's Defective Legislators*, N.Y. TIMES, July 2, 2009, at A22.

³¹ Nicholas Confessore, *Senate Inaction is Hurting Many Towns Across State*, N.Y. TIMES, July 2, 2009, at A17.

³² See David King, *As Time Runs Out, Paterson Tries to End the Deadlock*, GOTHAM GAZETTE, June 22, 2009, available at <http://www.gothamgazette.com/print/2948>.

³³ Brief of Citizens Union of the City of New York et al. as Amici Curiae Supporting Defendants-Appellants at 2, *Skelos*, 13 N.Y.3d 141, 915 N.E.2d 1141, 886 N.Y.S.2d 846 (No. 2009-0183), 2009 WL 3362068.

³⁴ Brief of United Federation of Teachers, et al. as Amici Curiae Supporting Defendants-Appellants at 1, *Skelos*, 13 N.Y.3d 141, 915 N.E.2d 1141, 886 N.Y.S.2d 846 (No. 2009-0183), 2009 WL 3362070.

³⁵ James Barron, *Senate Impasse in Albany Forces City to Impose Hiring Freeze*, N.Y. TIMES, July 7, 2009, at A22; see also Brief of Citizens Union of the City of New York et al., *supra* note 33, at 29.

³⁶ Press Release, Office of the New York State Comptroller, Cost of State Senate Inaction to New Yorkers (July 2, 2009), available at <http://www.osc.state.ny.us/press/releases/jul09/070209factsheet.htm>.

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defunct since 2002—sprang back to life, unsettling the governance structure for New York City's public schools.³⁷

Finally, on July 8th, Governor Paterson moved to break the senate impasse by naming Richard Ravitch—a distinguished senior civic and business leader, who had previously served as chair of the state Urban Development Corporation and as head of the Metropolitan Transportation Authority—as lieutenant governor.³⁸ Under the constitution, the lieutenant governor not only presides over the senate but can cast a “casting vote,” that is, he can break ties on procedural matters.³⁹ Ravitch's appointment would have enabled the senate to organize itself and get back to business. Indeed, even though the legal status of Ravitch's appointment was immediately clouded by litigation, and Ravitch was not cleared to preside over the senate until the Court of Appeals's decision in late September, the governor's action had an immediate effect. On July 9th, Senator Espada returned to the Democratic fold, giving the Democrats a working majority in the senate⁴⁰ and making Malcolm Smith once again temporary senate president.

Governor Paterson had barely announced Ravitch's appointment when Senators Skelos and Espada sued to block Ravitch from taking office. The two senators sought a temporary restraining order from state supreme court, Nassau County, barring the appointment.⁴¹ A temporary restraining order was issued on July 9th, but was vacated later the same day by the Appellate Division, Second Department.⁴² Thereafter the litigation moved swiftly through three levels of the state judiciary. After briefing and oral argument, Supreme Court, Nassau County, on July 22 granted a preliminary injunction barring Ravitch from exercising any of the powers of the office of lieutenant governor.⁴³ That injunction was affirmed by a unanimous four-judge panel of the Appellate Division, Second Department on August 20th.⁴⁴ While the case was pending

³⁷ Brief of Citizens Union of the City of New York et al., *supra* note 33, at 29.

³⁸ *Id.* at 28.

³⁹ N.Y. CONST. art. IV, § 6.

⁴⁰ *Espada Returns to Democratic Party, Senate Gets Back to Work*, NY1.COM, July 9, 2009, http://ny1.com/-all-boroughs-news-content/top_stories/102009/espada-returns-to-democratic-party/Default.aspx.

⁴¹ James T. Madore, *LI Judge Blocks Ravitch from Lieutenant Governor Post*, NEWSDAY, July 22, 2009, at A06.

⁴² *Id.*

⁴³ *Skelos v. Paterson*, 25 Misc. 3d 347, 361, 884 N.Y.S.2d 812, 826 (Sup. Ct. 2009), *aff'd*, 65 A.D.3d 339, 348, 885 N.Y.S.2d 92, 98–99 (App. Div. 2d Dep't 2009), *rev'd*, 13 N.Y.3d 141, 153, 915 N.E.2d 1141, 1147, 886 N.Y.S.2d 846, 852 (2009).

⁴⁴ *Skelos*, 65 A.D.3d 339, 348, 885 N.Y.S.2d 92, 99, *rev'd*, 13 N.Y.3d 141, 153, 915 N.E.2d

before the appellate division, Senator Espada dropped out, leaving Senator Skelos to carry the challenge alone. Relying on somewhat different reasoning and turning aside a host of technical questions⁴⁵ in order to resolve the central question of gubernatorial power, both the supreme court and the appellate division concluded that the governor's action was unauthorized by law and unconstitutional.⁴⁶ On September 22nd, a closely divided Court of Appeals reversed, in an opinion by Chief Judge Lippman, joined by Judges Ciparick, Read, and Jones.⁴⁷ Judge Pigott, joined by Judges Graffeo and Smith, issued a strong dissent.⁴⁸

III. LEGAL ANALYSIS: WHY THE COURT OF APPEALS WAS RIGHT

A. *The Case for the Governor's Power to Appoint a Lieutenant Governor*

The case for the governor's power to appoint a lieutenant governor is surprisingly straightforward, relying on the plain meaning of a state statute, clear judicial precedent, and state constitutional provisions dealing with the lieutenant governor, along with some traditional norms of statutory construction and constitutional interpretation.

1. The Statutory Authorization

The statute is section 43 of the Public Officers Law, which provides that when a vacancy occurs in an "elective" office, "otherwise than by expiration of term," and there is "no provision of law for filling" that vacancy, the governor "shall appoint a person to execute the duties thereof until the vacancy shall be filled by an election."⁴⁹ The office of lieutenant governor is an elective office. The vacancy in it was created otherwise than by expiration of term. And there is no other provision for filling that vacancy.

1141, 1147, 886 N.Y.S.2d 846, 852.

⁴⁵ See *id.* (holding that the case was properly brought in Nassau County and did not have to be brought in Albany County; that a *quo warranto* proceeding instituted by the attorney general was not the exclusive legal means available for testing the governor's authority to appoint Ravitch to be lieutenant governor; and that two individual legislators had standing to bring the claim against the governor).

⁴⁶ See *Skelos*, 25 Misc. 3d at 360, 884 N.Y.S.2d at 825, *aff'd*, 65 A.D.3d at 348, 885 N.Y.S.2d at 99. *rev'd*, 13 N.Y.3d at 153, 915 N.E.2d at 1147, 886 N.Y.S.2d at 852 (2009).

⁴⁷ *Skelos*, 13 N.Y.3d at 153, 195 N.E.2d at 1147, 886 N.Y.S.2d at 852.

⁴⁸ *Id.* at 153, 915 N.E.2d at 1147, 886 N.Y.S.2d at 852 (Pigott, J., dissenting).

⁴⁹ N.Y. PUB. OFF. LAW § 43 (McKinney 2008).

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Other provisions of the Public Officers Law address the filling of other vacancies. Section 41 provides a mechanism for filling vacancies in the offices of attorney general and comptroller.⁵⁰ Section 42 provides generally for the filling of vacancies in elective office, primarily by election, including special elections.⁵¹ Section 42, however, specifically excludes the governor and lieutenant governor from its scope.⁵² With the office of lieutenant governor not covered by section 41 and expressly excluded from section 42, it falls within the “catchall”⁵³ language of section 43.

2. The Precedent

The applicability of section 43 to the office of lieutenant governor is confirmed by an older decision of the appellate division, affirmed by the Court of Appeals, *Ward v. Curran*.⁵⁴ The *Ward* case arose after the death of Lieutenant Governor Thomas Wallace in 1943.⁵⁵ At that time, section 42 of the Public Officers Law did not contain the exclusion of the office of lieutenant governor from its directive that a special election be used to fill a vacancy in elective office—that exclusion was added in response to *Ward*.⁵⁶ The secretary of state, however, resisted ordering a special election to fill the vacancy created by Wallace's death.⁵⁷ The attorney general agreed with the secretary of state that an election was not needed.⁵⁸ He argued that section 42 did not apply to the office of lieutenant governor, and that the question of vacancies in the office of lieutenant governor was fully taken care of by the constitutional provision authorizing the temporary president of the senate to act as lieutenant governor in the event of a vacancy in that office.⁵⁹ According to the attorney general, with the temporary president so acting, the office was not vacant and an election was not needed.⁶⁰ The appellate division rejected the attorney general's argument⁶¹

⁵⁰ § 41.

⁵¹ § 42.

⁵² *Id.*; see also *Skelos*, 13 N.Y.3d at 148, 915 N.E.2d at 1143, 886 N.Y.S.2d at 848.

⁵³ *Skelos*, 13 N.Y.3d at 148, 915 N.E.2d at 1143, 886 N.Y.S.2d at 848.

⁵⁴ 266 A.D. 524, 526, 527, 44 N.Y.S.2d 240, 241–42 (App. Div. 3d Dep't 1943), *aff'd*, 291 N.Y. 642, 644, 50 N.E.2d 1023, 1023 (1943).

⁵⁵ *Skelos*, 13 N.Y.3d at 162, 915 N.E.2d at 1153, 886 N.Y.S.2d at 858 (Pigott, J., dissenting).

⁵⁶ *Id.* at 151, 915 N.E.2d at 1145, 886 N.Y.S.2d at 850.

⁵⁷ *Id.* at 162, 915 N.E.2d at 1153, 886 N.Y.S.2d at 858 (Pigott, J., dissenting).

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Ward v. Curran*, 266 A.D. 524, 526–27, 44 N.Y.S.2d 240, 241–42 (App. Div. 3d Dep't

and the Court of Appeals agreed.⁶² Although section 42 was subsequently amended to exclude the lieutenant governor from the special election provision,⁶³ the legislature did not so modify section 42's companion provision, section 43.

The *Ward* decision confirms the applicability of the Public Officers Law vacancy-filling provisions to the office of lieutenant governor even though the office is not specifically mentioned; it was not mentioned in section 42 when *Ward* held that section 42 applied to the lieutenant governor. *Ward* also confirms that the legislature was aware of the fact that broadly-phrased Public Officers Law provisions apply to the lieutenant governor when, after *Ward*, it amended section 42 but not section 43. The interpretative canon of "[m]eaningful [v]ariation,"⁶⁴ and the related rule of *expressio unius est exclusio alterius*⁶⁵ indicate that the exclusion of the lieutenant governor from one section of the Public Officers Law but not from the next complementary section, section 43, was intentional. As the United States Supreme Court once observed, "[w]here Congress includes particular language in one section of the statute but omits it in another . . . it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."⁶⁶ The Court of Appeals has similarly concluded that "where the Legislature lists exceptions in a statute, items not specifically referenced are deemed to have been intentionally excluded."⁶⁷

In light of *Ward* and these traditional canons of construction, Chief Judge Lippman was plainly correct in concluding that "in amending the Public Officers Law to remove the office of lieutenant governor from the election mandate of Public Officers Law § 42, the Legislature did not alter section 43, which, in the aftermath of *Ward* is logically understood as applying to a vacancy in the

1943), *aff'd*, 291 N.Y. 642, 644, 50 N.E.2d 1023, 1023 (1943).

⁶² *Ward*, 291 N.Y. at 643–44, N.E.2d at 1023.

⁶³ *Skelos*, 13 N.Y.3d at 163–64, 915 N.E.2d at 1154, 886 N.Y.S.2d at 859.

⁶⁴ WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 866 (4th ed. 2007).

⁶⁵ N.Y. STAT. LAW § 240 (McKinney 1971) ("The maxim *expressio unius est exclusio alterius* is applied in the construction of the statutes, so that where a law expressly describes a particular act, thing or person to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded.")

⁶⁶ *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

⁶⁷ *Weingarten v. Bd. of Trustees of N.Y. City Teachers' Ret. Sys.*, 98 N.Y.2d 575, 583, 785 N.E.2d 174, 179, 750 N.Y.S.2d 573, 578 (2002).

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lieutenant governorship.”⁶⁸

3. The Constitutional Provisions

The Ravitch decision is also supported by two constitutional provisions: the sentence of article IV, section 1, which was given its current form as a result of an amendment to the constitution adopted in 1953,⁶⁹ and a sentence added to article IV, section 6 in 1945.⁷⁰ The critical language in article IV, section 1 states:

The executive power shall be vested in the governor who shall hold office for four years; the lieutenant-governor shall be chosen at the same time, and for the same term. . . . They shall be chosen jointly, by the casting by each voter of a single vote applicable to both offices.⁷¹

The key language in article IV, section 6 is: “No election of a lieutenant governor shall be had in any event except at the time of electing a governor.”⁷²

These provisions that the governor and lieutenant governor “shall be chosen at the same time, and for the same term,”⁷³ and that the lieutenant governor shall not be separately elected,⁷⁴ were added at the request of Governor Dewey in direct response to the *Ward* decision.⁷⁵ Dewey had been governor at the time of Lieutenant Governor Wallace’s death⁷⁶ and had been gearing up to run for president in 1944. He had sought to avoid the special election because it raised the possibility of a Democrat being elected lieutenant governor and succeeding to the governorship in the event Dewey won the presidency.⁷⁷ With the state senate safely in Republican hands, having the temporary senate president serve as the acting lieutenant governor, and succeeding to the governorship,

⁶⁸ *Skelos*, 13 N.Y.3d at 151–52, 915 N.E.2d at 1145–46, 886 N.Y.S.2d at 850. Subsection (3) of section 42, which deals with the consequences of the failure to elect to any office in an election held to fill a vacancy, and also expressly exempts the office of lieutenant governor, provides further support for the *expressio unius* argument. N.Y. PUB. OFF. LAW § 42(3) (2008).

⁶⁹ N.Y. CONST. art. IV, § 1 (amended 1953).

⁷⁰ N.Y. CONST. art. IV, § 6 (amended 1945).

⁷¹ N.Y. CONST. art. IV, § 1.

⁷² N.Y. CONST. art. IV, § 6.

⁷³ N.Y. CONST. art. IV, § 1.

⁷⁴ N.Y. CONST. art. IV, § 6.

⁷⁵ *Skelos v. Paterson*, 13 N.Y.3d 141, 163–64, 915 N.E.2d 1141, 1154, 886 N.Y.S.2d 846, 859 (2009) (Pigott, J., dissenting).

⁷⁶ *Id.* at 162, 915 N.E.2d at 1153, 886 N.Y.S.2d at 858 (Pigott, J., dissenting).

⁷⁷ Brief for Plaintiff-Respondent at 49, *Skelos*, 13 N.Y.3d at 141, 915 N.E.2d 1141, 886 N.Y.S.2d 846 (No. 2009-0183), 2009 WL 3362063.

was preferable.

Upset by the *Ward* decision, Governor Dewey “urged the Legislature to begin the process of amending the constitution and to change Public Officers Law § 42 to preclude an election for the office of Lieutenant Governor. . . . The Legislature heeded the Governor’s call on both counts.”⁷⁸ Public Officers Law section 42 was amended to exclude the lieutenant governor,⁷⁹ and the constitution was amended, by the language just quoted, to bar the separate election of the lieutenant governor.

As Governor Dewey explained in his *Messages to the Legislature* concerning the amendment to article IV, section 1:

Executive responsibilities in our government are so interwoven that the election of a Governor and a Lieutenant Governor politically opposed to each other involves serious problems.

. . . .

. . . [T]here is a great advantage in being able to entrust many of the complex administrative tasks of the Governor to an able Lieutenant Governor. . . . This would not have been possible if the Lieutenant Governor was required, as a matter of party loyalty, to lead the minority party.⁸⁰

As amended, article IV establishes the principle that the governor and lieutenant governor are partners, united by “party loyalty” and a common purpose, with the governor entitled to “entrust many of the complex administrative tasks of [state]” to his teammate, the lieutenant governor.⁸¹ As Governor Dewey put it, “[g]ood government requires responsible cohesive administration.”⁸²

Gubernatorial appointment of a lieutenant governor to fill a vacancy in that office, pursuant to Public Officers Law section 43, is entirely consistent with the structure established by article IV, sections 1 and 6, making the governor and lieutenant governor political teammates and enabling the governor to look to a loyal lieutenant governor for assistance. It is certainly far more consistent with this constitutional vision than leaving the acting

⁷⁸ *Skelos*, 13 N.Y.3d at 163, 915 N.E.2d at 1154, 886 N.Y.2d at 859 (Pigott, J., dissenting) (citation omitted).

⁷⁹ Public Officers Law, ch. 3, 1944 N.Y. Laws 3 (codified as amended at N.Y. PUB. OFF. LAW § 42 (McKinney 2008)).

⁸⁰ Thomas E. Dewey, *Governor’s Messages to the Legislature, Governor, Lieutenant Governor, Joint Election*, S.I. 13, reprinted in 1953 NEW YORK STATE LEGISLATIVE ANNUAL 318–19 (1953).

⁸¹ *Id.* at 319.

⁸² *Id.*

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lieutenant governorship in the hands of a legislator, like Senator Bruno or Senator Skelos, who is the leader of the opposition party in the senate, or in the hands of someone like Senator Espada, who displays no discernable party loyalty at all.

Taken together, then, the case for the governor's action is extremely clear. Public Officers Law section 43 gives the governor authority to make an appointment to fill a vacancy in elective offices, including lieutenant governor. *Ward v. Curran* confirms that the Public Officers Law applies to the office of lieutenant governor,⁸³ and traditional canons of interpretation require the conclusion that by amending section 42 to exclude the lieutenant governor without so amending section 43, the legislature intended the lieutenant governor to be covered by section 43. So, too, gubernatorial appointment fulfills the vision expressed by the post-*Ward* constitutional amendments that the lieutenant governor is to be the governor's political partner.

B. Rejecting the Unpersuasive Case Against the Governor's Power to Appoint a Lieutenant Governor

The case against the governor's power to appoint a lieutenant governor is more complex, relying on inconsistent and insubstantial theories, strained readings of the relevant legal texts, and ultimately on non-textual policy arguments. These arguments can be boiled down to six points: (1) section 43 does not apply because the office of lieutenant governor is not elective; (2) section 43 does not authorize gubernatorial appointment; (3) section 43 does not apply because the office of lieutenant governor is not vacant; (4) section 43 is invalid because the legislature's authority to enact the vacancy-filling measure is based on article XIII, section 3 of the constitution, and section 43 is inconsistent with that provision of the constitution; (5) gubernatorial appointment is inconsistent with "the elective principle";⁸⁴ and finally, (6) the governor cannot make an appointment because no governor has ever made such an appointment before.

The first and second points are flatly inconsistent with the

⁸³ See *Ward v. Curran*, 291 N.Y. 642, 643, 50 N.E.2d 1023, 1023 (1943). The conclusion that the Public Officers Law applies to the lieutenant governor—unless the office is specifically excluded—is buttressed by section 31, which is part of the same article as section 43. N.Y. PUB. OFF. LAW § 31 (McKinney 2008). It is article 3 which deals with the creation and filling of vacancies, and expressly provides the procedure for the resignation of the lieutenant governor as part of the article's general treatment of resignations. See § 31(1)(a).

⁸⁴ See *infra* notes 112–114 and accompanying text.

governing texts. The third and fourth points have some merit, but the third fails to account for the constitution's specific language while the fourth relies on an unduly crabbed reading of the constitutional text. The fifth point is inconsistent with the claim that the lieutenant governor is not elected,⁸⁵ and is belied by the constitution's prohibition of a special election for lieutenant governor. The final point is not a legal argument at all. These points are addressed below.

1. Lieutenant Governor Is an Elective Office

The principal argument addressed by the supreme court, Nassau County against the governor's power to act pursuant to section 43 is that the "office of lieutenant-governor is not an 'elective office' within the meaning of § 43" since the lieutenant governor is elected on a joint ticket with the governor.⁸⁶ But that is nonsense. The constitution provides for the election of a lieutenant governor.⁸⁷ This argument was dropped even by the appellate judges who opposed the governor.⁸⁸ Chief Judge Lippman's opinion for the Court of Appeals properly assumed without discussion that the lieutenant governor is an elective office.⁸⁹

2. Section 43 Authorizes the Governor to Fill Vacancies in Elective Office

The second contention, discussed by both the appellate division and the Court of Appeals, that section 43 does not actually authorize the governor to fill vacancies,⁹⁰ is equally nonsensical. To be sure, it relies on the language of section 43, which provides that "the governor shall appoint a person to execute the duties" of the offices to which it applies, and does not say something like "shall appoint someone to fill the vacancy."⁹¹ But this hyper-technical

⁸⁵ Senator Skelos's Court of Appeals brief contended both that the governor's action "violated the elective principle," and that "the office of Lieutenant Governor is not an elective office." Brief for Plaintiff-Respondents, *supra* note 77, at 31, 57–60.

⁸⁶ *Skelos v. Paterson*, 25 Misc. 3d 347, 360, N.Y.S.2d 812, 825 (Sup. Ct. Nassau County 2009), *aff'd*, 65 A.D.3d 339, 348, 885 N.Y.S.2d 92, 98–99 (App. Div. 2d Dep't 2009), *rev'd*, 13 N.Y.3d 141, 153, 915 N.E.2d 1141, 1147, 886 N.Y.S.2d 846, 852 (2009).

⁸⁷ N.Y. CONST. art. IV, § 1.

⁸⁸ The argument was not, however, dropped by Senator Skelos's lawyers. *See supra* note 85.

⁸⁹ *Skelos*, 13 N.Y.3d at 148, 915 N.E.2d at 1143, 886 N.Y.S.2d at 848.

⁹⁰ *Skelos*, 65 A.D.3d at 347, 885 N.Y.S.2d at 98, *rev'd*, 13 N.Y.3d at 149, 915 N.E.2d at 1144; 886 N.Y.S.2d at 852.

⁹¹ N.Y. PUB. OFF. LAW § 43 (McKinney 2008); *see also Skelos*, 65 A.D.3d at 347, 885

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argument ignores the fact that section 43 is titled “filling other vacancies,” much as section 41 is entitled “vacancies filled by legislature” and section 42 is entitled “filling vacancies in elective offices.”⁹² Plainly, the legislature assumed that all three consecutive sections within the article of the Public Officers Law entitled “creation and filling of vacancies” dealt with filling vacancies. Although the title of a legislative section is not controlling, it is surely relevant to the interpretation of the statute.⁹³ Moreover, this argument is not limited to the office of lieutenant governor, but potentially could be used against the power to appoint to fill a vacancy in any elective office covered by section 43, in effect nullifying the statute. Again, Chief Judge Lippman was plainly correct in treating section 43, with sections 41 and 42, as part of a package of “vacancy-filling provisions.”⁹⁴

3. The Office of Lieutenant Governor Was Vacant

The claim that section 43 is inapplicable to the lieutenant governor position because there is no vacancy to fill is somewhat more substantial. The constitution directs that in the event of a vacancy in the office of lieutenant governor, “the temporary president of the senate shall perform all the duties of lieutenant-governor during such vacancy.”⁹⁵ Arguably, then, the office is not vacant. But “perform[ing] the duties” is not quite the same thing as filling the vacancy. The distinction is highlighted by comparing this language with the provision of the constitution directing that, in the event of the governor’s death, resignation, or removal from office, the lieutenant governor “shall become governor for the remainder of the term.”⁹⁶ By that language, the lieutenant governor fills the vacancy in the office of governor. By contrast, the temporary president of the senate is merely acting as lieutenant governor.

The difference between filling a vacancy and merely acting as lieutenant governor is underscored by the fact that the lieutenant governor gives up his former post to become governor while the temporary senate president remains temporary senate president while “perform[ing] the duties” of lieutenant governor. Dual office-

N.Y.S.2d at 98, *rev'd*, 13 N.Y.3d at 159, 915 N.E.2d at 1150–51, 885 N.Y.S.2d at 855.

⁹² N.Y. PUB. OFF. LAW §§ 41–43.

⁹³ ESKRIDGE ET. AL., *supra* note 64, at 862–63.

⁹⁴ *See id.* (espousing a method of statutory interpretation that interprets each section “in the context of the whole enactment”).

⁹⁵ N.Y. CONST. art. IV, § 6.

⁹⁶ N.Y. CONST. art. IV, § 5.

holding is highly unusual in our system, and the presumption ought to be that the temporary senate president is merely “perform[ing] the duties” of lieutenant governor, not actually becoming lieutenant governor. So, too, the identity of the person “perform[ing] the duties” of lieutenant governor can keep changing. There were four people “perform[ing] those duties” between 2008 and 2009—Joseph Bruno, Dean Skelos, Malcolm Smith, and Pedro Espada. This is hardly consistent with any one of them filling the vacancy. In addition, the temporary president of the senate’s “perform[ance of] the duties” of lieutenant governor raises the uneasy possibility that he will be able to cast two votes in the senate—his own vote as a senator, and, in the event of a tie, the casting vote of the lieutenant governor.⁹⁷ With a 31–31 or even a 32–30 senate, the prospect of a tie and a casting vote by the senate majority leader/acting lieutenant governor is not at all farfetched. Then-Majority Leader Joseph Bruno chuckled at a 2008 forum that he would be “happy to have two votes.”⁹⁸ Double-voting is even more troubling than dual office-holding. While the constitution may be read to permit it in this instance, given the problematic nature of double-voting it makes sense to treat the authorization of double-voting as only a temporary measure, rather than one locked in for the duration of the lieutenant governor’s term.

These concerns growing out of the temporary senate president’s continuing role in the senate while also acting as lieutenant governor confirm that the better reading of article IV, section 6 is the one adopted by the Court of Appeals majority, that the temporary senate president does not fill the vacancy but provides “only stopgap coverage of the function of the Lieutenant Governor.”⁹⁹ As Chief Judge Lippman’s opinion explained:

Properly understood, then, the two provisions—article IV, § 6 and Public Officers Law § 43—are complementary rather than duplicative and, accordingly, article IV, § 6 should not be construed, as it was by the Appellate Division, as a limitation upon gubernatorial appointment pursuant to

⁹⁷ N.Y. CONST. art. IV, § 6.

⁹⁸ Senator Joseph L. Bruno, Remarks at the Nelson A. Rockefeller Institute of Government, Gubernatorial Succession and the Powers of the Lieutenant Governor: A Public Policy Forum 15 (May 29, 2008), available at http://www.rock.inst.org/pdf/publicpolicy_forums/2008-05-29-public_policy_forum_gubernatorial_succession_and_the_powers_of_the_lieutenant_governor.pdf.

⁹⁹ Skelos v. Paterson, 13 N.Y.3d 141, 149, 915 N.E.2d 1141, 1144, 886 N.Y.2d 846, 849 (2009).

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Public Officers Law § 43.¹⁰⁰

4. Application of Section 43 to the Office of Lieutenant Governor Is Not Inconsistent with Article XIII, Section 3.

Probably the strongest argument against the governor's action is the one based on article XIII, section 3. That provision authorizes the legislature to

provide for filling vacancies in office, and in case of elective officers, no person appointed to fill a vacancy shall hold his or her office by virtue of such appointment longer than the commencement of the political year next succeeding the first annual election after the happening of the vacancy.¹⁰¹

Article XIII, section 3 is apparently the source of the legislature's authority to enact the vacancy-filling provisions of the Public Officers Law, but its requirement that the appointee filling a vacancy cannot serve "longer than the commencement of the political year next succeeding the first annual election after the happening of the vacancy"¹⁰² is arguably inconsistent with the governor's power to appoint a lieutenant governor to fill out the remainder of the lieutenant governor's term. The language suggests that any appointee's term should have ended after the 2008 election as the lieutenant governor position became vacant in March 2008, or for an appointment made in July 2009, the 2009 election.

But this argument is also unpersuasive. The constitution does not define the term "political year." All it says, in article XIII, section 4, is that "[t]he political year and legislative term shall begin on the first day of January,"¹⁰³ but that does not indicate which January—2009, 2010, or 2011—or whether, given section 4's focus on the legislative term, that the "political year" is the same for all offices. Certainly, it is not the general case that appointments to fill vacancies in elective offices are good only until the first of January in the year after the appointment is made. Indeed, that is not the rule for filling any of the vacancies in statewide office. Section 42 (4-a) of the Public Officers Law provides that if a vacancy occurs in the elective office of United States Senator in an even-numbered year within sixty days before the annual primary day, which is

¹⁰⁰ See *id.* at 146, 915 N.E.2d at 1142, 886 N.Y.S.2d at 847.

¹⁰¹ N.Y. CONST. art. XIII, § 3.

¹⁰² *Id.*

¹⁰³ N.Y. CONST. art. XIII, § 4.

usually in September, the governor can appoint someone who will serve until “the third day of January in the year following the next even numbered calendar year.”¹⁰⁴ In other words, someone appointed, say, “in late August 2010, would serve until January 2013, or nearly two and a half years,”¹⁰⁵ while “someone appointed in an odd-numbered year would hold office until ‘the third day of January in the next odd numbered calendar year.’”¹⁰⁶ Thus, pursuant to section 42 (4-a), Senator Kirsten Gillibrand’s appointment could last “nearly two years.”¹⁰⁷

Section 41 of the Public Officers Law goes even further, authorizing “the Legislature to fill vacancies in the elective offices of Attorney General and Comptroller for the duration of the vacant term.”¹⁰⁸ Therefore, Comptroller DiNapoli’s legislative appointment in early 2007 means his term will not expire until January 2011, lasting almost four years.¹⁰⁹

Therefore, “[i]n light of the uncertain meaning of ‘political year’ in the context of filling vacancies in statewide offices,”¹¹⁰ like United States Senator, attorney general, and comptroller, and given the “‘same time, same term’ provision of Article IV, § 1,”¹¹¹ it is probably best to treat the term “political year” for appointment to fill the vacancy in the office of lieutenant governor, as one that runs with the Governor’s and Lieutenant Governor’s constitutional four-year term of office. That would be consistent with the legislature’s power to appoint an attorney general or comptroller for the duration of those offices’ four-year terms, as well as with article IV’s evident desire to treat the governor and lieutenant governor as a team.¹¹²

The Court of Appeals was, thus, consistent with longstanding state practice in holding that the purpose of the political year provision is “to assure that appointments to elective offices extend no longer than is reasonably necessary to fill such offices by election.”¹¹³ Given article IV’s directive that the lieutenant governor can be elected only at an election for governor, article XIII

¹⁰⁴ Brief of Citizens Union of the City of New York et al., *supra* note 33, at 19 (quoting N.Y. PUB. OFF. LAW § 42(4-a) (McKinney 2008)).

¹⁰⁵ *Id.* at 19.

¹⁰⁶ *Id.* (quoting N.Y. PUB. OFF. LAW § 42 (4-a) (McKinney 2008)).

¹⁰⁷ *Id.* at 20.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* (quoting N.Y. CONST. art. IV, § 1).

¹¹² *Id.*

¹¹³ *Skelos v. Paterson*, 13 N.Y.3d 141, 150, 915 N.E.2d 1141, 1144, 886 N.Y.S.2d 846, 849 (2009).

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would be satisfied if the appointive term ran until “the next election at which the office may be legally filled.”¹¹⁴ Consistent with the “whole act” rule,¹¹⁵ this nicely and appropriately harmonizes the relevant constitutional provisions and also reflects “the main object of article XIII, § 3, expressed unequivocally in its first clause, which, of course, is to assure that vacancies are filled.”¹¹⁶

5. The “Elective Principle” Does Not Bar a Gubernatorial Appointment

Diametrically opposed to the claim that section 43 does not apply because the lieutenant governor is not elected is the argument that gubernatorial appointment violates the so-called “electoral principle.” This argument was put forward with great rhetorical force by the plaintiffs and by Judge Pigott’s dissent. Judge Pigott stressed that the appointed lieutenant governor could succeed to the governorship in the event of the latter’s death or resignation with “the possibility exist[ing] that the citizens of this state will one day find themselves governed by a person who has never been subjected to scrutiny by the electorate.”¹¹⁷

In early March 2010, with Governor Paterson mired in scandals, Judge Pigott’s concern proved prescient, but the legal argument that an “electoral principle” limits the appointive power is weak. The “electoral principle phrase” draws on language in the *Ward* opinion, which in turn quoted an earlier case, to the effect that “[i]t is a fundamental principle of our form of government than a vacancy in an elective office should be filled by election as soon as practicable after the vacancy occurs.”¹¹⁸ But whatever the power of the “elective principle” idea in *Ward*, it was displaced by the people and the legislature when the constitution and the Public Officers Law were amended to bar a special election to fill a vacancy in the office of lieutenant governor. As the Court of Appeals put it, “the elective principle, upheld by the judiciary in *Ward*, was thus legislatively subordinated to assure the structural integrity and

¹¹⁴ *Id.* at 150, 915 N.E.2d at 1145, 886 N.Y.S.2d at 850.

¹¹⁵ ESKRIDGE ET AL., *supra* note 64, at 862.

¹¹⁶ *Skelos*, 13 N.Y.3d at 150, 915 N.E.2d at 1144–45, 886 N.Y.S.2d at 849.

¹¹⁷ *Id.* at 153, 915 N.E.2d at 1147, 886 N.Y.S.2d at 852 (Pigott, J., dissenting).

¹¹⁸ *Ward v. Curran*, 266 A.D. 524, 526, 44 N.Y.S.2d 240, 242 (App. Div. 3d Dep’t 1943), *aff’d*, 291 N.Y. 642, 644, 50 N.E.2d 1023, 1023 (1943). (quoting *Wing v. Ryan*, 255 A.D. 163, 167, 6 N.Y.S.2d 825, 829 (App. Div. 3d Dep’t 1938), *aff’d*, 278 N.Y. 10, 10, 17 N.E.2d 133, 133 (1938)).

efficacy of the executive branch.”¹¹⁹

The elective principle, including the filling of vacancies in elective office by election is, of course, a sound idea. But for a host of offices—attorney general and comptroller, whose vacancies are filled by legislative selection; the office of United States Senator, for which the governor can make a two-year appointment followed by a special election; and all the elective offices covered by section 43—the elective principle has been superseded by other provisions.¹²⁰ As the Court of Appeals explained, “[r]ules of succession are . . . inevitably imperfect and . . . invariably compromise elective principles.”¹²¹

The elective principle objection is, thus, really a policy argument which must fall given the many constitutional and statutory provisions that accept, or require, other means of filling vacancies.

6. The Fact That No Governor Before Ever Sought to Appoint a Lieutenant Governor Is Irrelevant

Even more than the elective principle, the central concern driving Judge Pigott’s dissent, and much of the opposition to the governor’s action, is that the appointment of a lieutenant governor is “unprecedented.”¹²² Judge Pigott stressed that on “at least 10 occasions since the first New York Constitution was adopted in 1777 . . . the position of Lieutenant Governor has been vacant, but no Governor has ever seen fit to assert that he had the power to appoint a Lieutenant Governor to fill the vacancy.”¹²³ For the governor’s opponents and the Court of Appeals dissenters, the objection was two-hundred-and-thirty years of non-action.

Judge Pigott’s dissent overstates the history of non-action. New York did not adopt a four-year term for governor and lieutenant governor until 1938, so that for more than 160 years the lieutenant governor served for a two-year term (or in some periods a three-year term). With that shorter term, some period of vacancy in office might have been acceptable. Also, for at least two different eras, legislation provided for filling the vacancy by election, and two

¹¹⁹ *Skelos*, 13 N.Y.3d at 151, 915 N.E.2d at 1145, 886 N.Y.S.2d at 850.

¹²⁰ Brief of Citizens Union of the City of New York et al., *supra* note 33, at 19–20 (citing N.Y. PUB. OFF. LAW § 42(4–a), which specifies the procedure for filling a vacancy in the office of United States Senator from N.Y.).

¹²¹ *Skelos*, 13 N.Y.3d at 153, 915 N.E.2d at 1146, 886 N.Y.S.2d at 851.

¹²² *Id.* at 153, 915 N.E.2d at 1146, 886 N.Y.S.2d at 851 (Pigott, J., dissenting).

¹²³ *Id.* at 153, 915 N.E.2d at 1147, 886 N.Y.S.2d at 852 (Pigott, J., dissenting).

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vacancies—in 1847 and 1943—were filled by election.¹²⁴

As a result, the relevant period for non-action is just the roughly six decades since the post-*Ward* amendments to the Public Officers Law and the constitution. During that time, there were three vacancies in the office of lieutenant governor prior to the present one—in 1953, 1973, and 1985. When the first two vacancies occurred, the senate was controlled by the same party as the governor, so there was no partisan conflict between the governor and the acting lieutenant governor.¹²⁵ The only time in modern New York history when the lieutenant governorship was vacant and the governor and temporary senate president were of opposing political parties was the not-quite two-year period between the resignation of Lieutenant Governor DelBello in February 1985 and the end of the term to which he had been elected in December 1986.¹²⁶ That is not an overwhelming negative precedent against the governor's action.

More importantly, “the mere fact that a constitutional power has not been exercised does not prove the power does not exist.”¹²⁷ A power may exist but lie dormant until circumstances remind us of its existence and justify or require its use. The objection from lack of prior use is like the claim about the elective principle—ultimately not a legal argument at all. Judge Pigott acknowledged this when he observed “the fact that no Governor has previously attempted to appoint a Lieutenant Governor . . . does not resolve the legal issue.”¹²⁸ It just shows that prior governors—and, in some sense, really just Governor Mario Cuomo in 1985—either did not think they had the authority, or for political reasons, chose not to exercise the authority they had. But that is not much of a reason to discount a statute plainly supplying the necessary authority.

In short, the plain meaning of section 43 of the Public Officers Law, supported by the *Ward* decision and the legislature's post-*Ward* exclusion of the lieutenant governor from section 42 but not section 43, provided the authority for the governor's action, which was congruent with article IV's structural commitment to a vision of the governor and the lieutenant governor as political partners. The

¹²⁴ *Id.* at 161, 915 N.E.2d at 1152, 886 N.Y.S.2d at 857. As was suggested at *supra* note 4, there were probably eleven such vacancies.

¹²⁵ *Id.* at 161 n.3, 915 N.E.2d at 1153 n.3, 886 N.Y.S.2d 857 n.3 (Pigott, J., dissenting).

¹²⁶ Nancy Connell, *Lundine Only Wants a Portion of the Job, Would Seek Senate Reprieve*, TIMES UNION (Albany, N.Y.), Oct. 24, 1986, at A1.

¹²⁷ *In re Advisory Opinion to the Governor*, 688 A.2d 288, 291 n.1 (R.I. 1997).

¹²⁸ *Skelos*, 13 N.Y.3d at 166, 915 N.E.2d at 1155, 886 N.Y.S.2d at 860 (Pigott, J., dissenting).

internal objections to the use of section 43—that the lieutenant governor is not “elective” and that section 43 does not authorize the filling of vacancies—are specious. The constitutional objections—that article IV effectively fills the vacancy with the temporary senate president, and that a gubernatorial appointment of a lieutenant governor is inconsistent with article XIII’s “next election” language—are more substantial, but also fail. The text of article IV indicates that the temporary senate president only performs the duties and does not fill the vacancy, while the fact of dual office-holding and the prospect of double voting support the need for someone to actually fill the vacancy. The practice reflected in other vacancy-filling statutes is to treat the “next election” requirement to mean the next election at which the office may be legally filled. The “elective principle” and “unprecedented” arguments were rhetorically the most potent, but were really no more than policy arguments and, as such, inadequate to modify the plain meaning of the statutory text.

IV. CONCLUSION

This article will conclude with two points, one about state constitutional interpretation, and the other about filling vacancies in state offices.

A. State Constitutional Interpretation

One reason why the governor’s action and the Court of Appeals’s decision upholding it came as such a surprise to many legal and political observers is that they approached the problem as if it were a question of federal constitutional law, not state constitutional law. It is a longstanding rule of constitutional interpretation that, whereas Congress must justify its actions in terms of one of the specific enumerated powers granted to it by the United States Constitution, the state legislature has plenary authority to make laws unless it is specifically limited by the state constitution. This grant-versus-limitation distinction was most famously articulated by nineteenth century jurist and scholar Thomas McIntyre Cooley in his book, *A Treatise on the Constitutional Limitations*, which observed:

We look in the Constitution of the United States for *grants* of legislative power, but in the constitution of the State to ascertain if any *limitations* have been imposed upon the complete power with which the legislative department of the

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State was vested in its creation. . . . [T]he State legislature has jurisdiction of all subjects on which its legislation is not prohibited.¹²⁹

This grant-versus-limitation distinction, and its implication that a state legislature may act unless limited by its constitution, continues to be part of state constitutional law today.¹³⁰

From the state constitutional perspective, then, the key question is not the one asked by Judge Pigott: Is there anything in the constitution authorizing the governor's action? That might be the central issue in a federal constitutional dispute. In a state case, the question is whether anything in the constitution barred the legislature's decision to give the governor the power to make an appointment to fill the vacancy. The Court of Appeals's decision is consistent with this approach and reminds us of its significance.

B. Filling Vacancies in State Office

The Ravitch litigation also reminds us just how problematic our laws governing the filling of vacancies in statewide elective office are, and just how much the law has departed from the "elective" principle. As of March 2010, of the six statewide elective offices—governor, lieutenant governor, attorney general, comptroller, and New York's two United States Senators—four are occupied by individuals who were not elected to them. Three—Lieutenant Governor Ravitch, Comptroller DiNapoli, and Senator Gillibrand—were not elected at all, but were appointed to their positions. The case of Comptroller DiNapoli is particularly egregious. He was appointed by the legislature pursuant to Public Officers Law section 41 on February 7, 2007 to complete the term—which started on January 1, 2007—to which Alan Hevesi had been elected in November 2006.¹³¹ DiNapoli's term runs until the end of 2010. In other words, for forty-seven of his forty-eight-month term, we will have an unelected comptroller. Senator Gillibrand, who was appointed on January 26, 2009, will not face the voters until November 2010, so she will have more than twenty-one months in

¹²⁹ THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 355 (8th ed. 1927).

¹³⁰ See, e.g., BRIFFAULT & REYNOLDS, *supra* note 11, at 52; (discussing the state constitution's role as a limitation on legislative power and the factors that differentiate state from federal constitutional power); WILLIAMS, *supra* note 11, at 577–80 (noting, *inter alia*, that powers not restricted by the state constitution remain with the state legislature).

¹³¹ Michael Cooper, *Legislators Pick a Comptroller, Defying Spitzer*, N.Y. TIMES, Feb. 8, 2007, at A1.

office without an election. Lieutenant Governor Ravitch will actually hold the shortest unelected time in office—just eighteen months from his appointment until the end of 2010.

Nor do these appointments reflect broad support from the institutions of state government. Senator Gillibrand, like Lieutenant Governor Ravitch, was appointed by Governor Paterson unilaterally. While the “teammate” model of governor-lieutenant governor relations adopted by the state constitution provides some support for this, there is no reason for a United States Senator to be the partner of the governor. And while the appointment of the comptroller—like the appointment to fill a vacancy in the office of attorney general—is nominally by the entire legislature, the much greater size of the assembly relative to the senate means that, as a practical matter, these appointments are made by the assembly and, ultimately, determined by the assembly leadership.¹³²

Those who were troubled by the departure from the “elective principle” and the unilateral power vested in one state official, reflected by the appointment of Lieutenant Governor Ravitch, should examine the vacancy-filling provisions more broadly. Surely, there is no reason for the office of comptroller to be held by an appointee for four years. Nor was there any reason there could not have been a special election for United States Senator in 2009, rather than 2010. Although an appointment may be a necessary or desirable “stopgap” until an election can be held, there is no need for these stopgap periods to last so long. And, if the law is going to permit an appointee to hold office for two or four years, there is a good case for requiring the participation of more branches of government—the governor and both houses of the legislature—in some of these decisions.

The events following the Court of Appeals’s decision have served to underscore both the political benefits of its action and the need for further attention to the question of filling vacancies. As readers of this article know, the political tumult that followed Governor Spitzer’s resignation and the June–July 2009 senate stalemate did not end with Lieutenant Governor Ravitch’s appointment. On February 9, 2010, the senate, by a 53–8 vote, expelled Senator Monserrate for misconduct growing out of an incident of domestic violence. Until a special election set for mid-March to fill his seat,

¹³² It comes as no surprise that the last two statewide officials appointed pursuant to section 41 of the Public Officers Law—Comptroller DiNapoli and G. Oliver Koppell, who was appointed attorney general in 1994 to fill the vacancy created by the resignation of Robert Abrams—were both members of the assembly when they were appointed.

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that left the Democrats with a 31–30 margin in the senate and, thus, without an actual majority. On February 26, 2010, amid an outcry over his participation in an effort to persuade a woman who had brought charges of domestic violence against one of his closest aides to drop her case, Governor Paterson ended his campaign to be elected to a full term and called on the attorney general to investigate the case. On March 3, 2010, the governor's legal difficulties worsened when the Commission on Public Integrity charged him with violating the state's ethics laws for soliciting and securing free tickets to the first game of the 2009 World Series from the New York Yankees, and found that he had given false testimony to the Commission while under oath. The Commission referred these charges to the attorney general and the Albany County District Attorney for further investigation. From the vantage point of early March 2010, with the governor facing calls for his resignation, with the possibility of impeachment not out of the question, and with the senate lacking a clear majority party, the value of having an undisputed full-time lieutenant governor in place and ready to take over as governor should the need arise could not be clearer.

New York's ongoing political turmoil underscores the need for a careful and comprehensive consideration of our laws for filling vacancies in office. One added benefit of the *Skelos v. Paterson* decision is that we now know that curing the "democracy deficit" in our vacancy-filling laws does not require the extraordinary effort of a constitutional amendment, but can be accomplished by ordinary legislation. Although Governor Paterson's appointment of Richard Ravitch as lieutenant governor was characterized by critics as a gubernatorial power-grab, Paterson relied entirely on authority given to him by the legislature. If the legislature thinks section 43 gives him too much power, it can take it back.

So, too, if the legislature thinks that the better approach to filling the vacancy in the office of lieutenant governor is to follow the model provided by the Twenty-Fifth Amendment to the United States Constitution for filling a vacancy in the office of vice president—presidential nomination subject to confirmation by both houses of Congress—the legislature can do so.¹³³ As we have learned, Judge Pigott was right to worry that an unelected lieutenant governor could become an unelected governor. Requiring a lieutenant governor appointee to secure the approval of the

¹³³ U.S. Const. amend. XXV (codified as amended at 3 U.S.C. § 19 (2006)).

legislature would surely give the appointee enhanced legitimacy, both as lieutenant governor and as a potential future governor. The legislation should give serious consideration to reforming the lieutenant governor appointment process. From that perspective, *Skelos v. Paterson* should not be read—or not read only—as an endorsement of gubernatorial power. It is an affirmation of legislative authority as well.