

AUTOMATIC LIEUTENANT GUBERNATORIAL SUCCESSION:
PREVENTING LEGISLATIVE GRIDLOCK WITHOUT
SACRIFICING THE ELECTIVE PRINCIPLE

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I. INTRODUCTION

In June of 2009 the government of the State of New York came to a shuddering halt.¹ Two candidates for Temporary President of the Senate, the office that represents party control, commanded equal votes for the position.² The tie-breaking vote would ordinarily have been cast by the lieutenant-governor, but due to the resignation of Eliot Spitzer and elevation of David Paterson, that position was vacant.³ The uncertainty as to who held the position paralyzed Senate operations and left open a very real question as to who would succeed to the governorship should something happen to then-Governor Paterson.⁴ The delay caused by the impasse cost state and local governments \$2.9 billion.⁵ The deadlock prompted Paterson to appoint Richard Ravitch to lieutenant-governor, marking the first time in New York history that any governor had attempted to fill that post despite numerous historical vacancies.⁶

* Patrick A. Woods, J.D. Albany Law School, 2012. The author would like to thank Professors Robert A. Emery and Robert C. Batson for their assistance and sound advice during the researching and writing of this article. I am also grateful to Mary L. D'Agostino, Grace B. Atwater, and Robert McIver for their excellent editorial work.

¹ Eric Lane & Laura Seago, *Albany's Dysfunction Denies Due Process*, 30 PACE L. REV. 965, 965 (2010) [hereinafter "*Albany's Dysfunction*"] ("The coup that shut down the New York State Senate for over a month last summer brought the State Legislature's dysfunction to the forefront of public consciousness.")

² *Skelos v. Paterson*, 915 N.E.2d 1141, 1142 (N.Y. 2009) (Lippman, C.J.).

³ *Id.*

⁴ Jeremy W. Peters, *Who Would Lead New York if Paterson Left? Who Knows?*, N.Y. TIMES, July 7, 2009, at A16, available at <http://www.nytimes.com/2009/07/07/nyregion/07succession.html>.

⁵ Richard Briffault, *Skelos v. Paterson: The Surprisingly Strong Case for The Governor's Surprising Power to Appoint a Lieutenant Governor*, 73 ALB. L. REV. 675, 680 (2010) (citing Press Release, Office of the N.Y. 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>).

⁶ Briffault, *supra* note 5, at 676 (citing *Skelos*, 915 N.E.2d at 1152 (Pigott, J., dissenting)).

Litigation as to the propriety of the appointment immediately ensued, eventually resulting in the New York Court of Appeals upholding the legitimacy of the appointment.⁷ Had the situation not resolved itself politically on the day of the appointment,⁸ the deadlock could have continued for more than an additional two months during the pendency of the appeal.⁹

Although the crisis was in no small measure a result of the fact that “New York’s [legislature] was, by far, the most dysfunctional legislature in the nation,”¹⁰ the impasse could have been solved in a day had there been an effective constitutional mechanism for succession to the office of lieutenant-governor in the case of a vacancy. The absence of such a mechanism led to unprecedented gubernatorial action and the New York Court of Appeals’s authorization, by a slim majority and in a decision that has been heavily criticized,¹¹ of Ravitch’s appointment via a statutory catch-all provision typically used only for minor officials.¹² That decision also left in place many of the structural problems that allowed the crisis to come to a head in the first place, such as when a replacement lieutenant-governor must be appointed.

This article is an attempt to find a solution to the problem of lieutenant gubernatorial succession in New York. Part II will discuss the problems created by allowing appointment pursuant to Public Officers Law section 43 and the structural issues that remain unresolved even with the present judicially approved method of appointment. Part III will consider several alternative methods of gubernatorial succession and to filling a vacancy in the office of lieutenant-governor. It will discuss whether any of those approaches would suffice to meet the policy goals of the lieutenant-governor’s office in New York’s constitutional structure. Part IV will offer a potential solution, which avoids the risk of legislative gridlock and preserves some electoral input into which candidates may be chosen to succeed to the office of lieutenant-governor.

⁷ Briffault, *supra* note 5, at 681–82.

⁸ Danny Hakim, *Albany Impasse Ends as Defector Rejoins Caucus*, N.Y. TIMES, July 10, 2009, at A1, available at <http://www.nytimes.com/2009/07/10/nyregion/10albany.html>.

⁹ Briffault, *supra* note 5, at 681–82 (summarizing the procedural history of the *Skelos* case).

¹⁰ *Albany’s Dysfunction*, *supra* note 1, at 966 (citations omitted).

¹¹ See, e.g., *id.* at 984 (describing the *Skelos* decision as being on “thin law”).

¹² *Skelos*, 91 N.E.2d at 1146–47 (Lippman, C.J.) (upholding the appointment through the use of New York Public Officers Law section 43); *id.* at 1147, (Pigott, J., dissenting) (“Until now [Public Officers Law section 43] had been used to fill vacancies in local offices but, in no instance, the second most important executive office in the state.”).

II. THE UNACCEPTABLE *SKELOS* SOLUTION

The Court of Appeals's decision in *Skelos v. Paterson* removes any electoral check from those selected to fill the position of lieutenant-governor and leaves several structural problems unresolved. Chief Judge Lippman's opinion recognized that the *Skelos* solution is not necessarily the best solution to the issue of succession, and held only that the present constitutional and statutory scheme permits the governor to appoint a lieutenant-governor in case of a vacancy.¹³ Three major flaws with the present structure are discussed below.

A. *Appointment Without Limitations Violates the Elective Principle*

The present structure permits the possibility that an entirely unelected person could succeed to the office of governor without ever facing any elective check or second-hand elective scrutiny. Appointment through the mechanism of Public Officers Law section 43 does not permit any check, either by ratification or special election, on the authority of the governor to choose whomever he or she likes for the position.¹⁴ Moreover, because Article VI of the New York State Constitution provides that “[n]o election of a lieutenant-governor shall be had in any event except at the time of electing a governor,”¹⁵ it seems as though this appointee would be eligible to serve the remaining balance of the previous, elected lieutenant-governor's term, however long that may be. Accordingly, the office of lieutenant-governor could be occupied by an individual beyond scrutiny by anyone other than the governor himself for nearly a full four-year term.

Occupation of the office of lieutenant-governor by an unelected person runs contrary to the office as viewed through the lens of the other relevant constitutional provisions. The principle that the lieutenant-governor be elected has been with us since New York's first constitution in 1777 and remained unchanged since.¹⁶ In the

¹³ *Id.* at 1146 (Lippman, C.J.) (“Before us . . . is not the abstract question of whether it would be better [to have some other system]. For now, the Legislature, pursuant to an express grant of constitutional authority, has specified that the vacancy is to be filled not by election but by gubernatorial appointment alone—a determination that the Legislature is always free to revisit.”).

¹⁴ See N.Y. PUB. OFF. LAW § 43 (McKinney 2013) (containing no limitations on candidate selection and no provision for ratification of the decision).

¹⁵ N.Y. CONST. art. IV, § 6.

¹⁶ See generally Peter Galie, Remarks at the Nelson A. Rockefeller Institute of Government (May 29, 2008), in GUBERNATORIAL SUCCESSION AND THE POWERS OF THE LIEUTENANT

two vacancy instances directly addressed by the New York Constitution, the lieutenant-governor is succeeded by someone who has faced election. Where only the lieutenant-governor's office is vacant, "the temporary president of the senate shall perform all the duties of lieutenant-governor during such vacancy or inability."¹⁷ Prior to the *Skelos* decision, this section had meant that the Temporary President was lieutenant-governor as far as mattered. No distinction between being a placeholder and permanent occupant of the office was necessary because no governor had ever attempted to appoint a replacement.¹⁸ As Judge Pigott noted in his dissent, this practice ensures that the elective principle is assured by "plac[ing] the duties of Lieutenant Governor in the hands of a duly elected state Senator—one who is elected president of that body by the entire Senate, representing all citizens of this state."¹⁹ The other instance constitutionally addressed is when both the governor's and lieutenant-governor's offices are vacant, requiring a special election at the next general election if one is not too close in time to be practicable.²⁰ The appointment, potentially for the majority of a gubernatorial term, of someone never subjected to elective scrutiny runs contrary to this clear principle.

More worrying than the potential occupation of the lieutenant-governor's office by an unelected person is the possibility, created by the *Skelos* decision, that an unelected person could occupy the office of governor itself.²¹ As observed by Attorney General Nathaniel

GOVERNOR: A PUBLIC POLICY FORUM 20–24 (2008) [hereinafter LIEUTENANT GUBERNATORIAL SUCCESSION FORUM], available at http://www.rockinst.org/pdf/public_policy_forums/2008-05-29-

[public_policy_forum_gubernatorial_succession_and_the_powers_of_the_lieutenant_governor.pdf](#) (providing a brief history of the constitutional provisions relating to the office of lieutenant-governor).

¹⁷ N.Y. CONST. art. IV, § 6.

¹⁸ Briffault, *supra* note 5, at 676 (citing *Skelos*, 915 N.E.2d at 1152 (Pigott, J., dissenting)).

¹⁹ *Skelos*, 915 N.E.2d at 1150 (Pigott, J., dissenting). See also Gerald Benjamin, Remarks at the Nelson A. Rockefeller Institute of Government (May 29, 2008), in LIEUTENANT GUBERNATORIAL SUCCESSION FORUM, *supra* note 16, at 27 (noting that elective bodies act as "surrogates of the people" and function as a "secondary electorate" when they perform elections among themselves).

²⁰ N.Y. CONST. art. IV, § 6 ("In case of vacancy in the offices of both governor and lieutenant-governor, a governor and lieutenant-governor shall be elected for the remainder of the term at the next general election happening not less than three months after both offices shall have become vacant.").

²¹ The *Skelos* majority acknowledges this possibility. 91 N.E.2d at 1146 (Lippman, C.J.) ("To be sure, the subordination of the elective principle in this context is not entirely unproblematic. It does create the possibility that an unelected individual will, for a time, occupy the State's highest office.").

Goldstein more than sixty years ago, the application of Public Officers Law section 43 to the office of lieutenant-governor “lead[s] to the anomalous result that a Governor by appointing a Lieutenant-Governor and then resigning could impose upon the people his own choice as their Governor.”²² This section was, as observed by Judge Pigott, written to decry the use of Public Officers Law section 43 to fill Lieutenant Gubernatorial vacancies, rather than endorse it.²³ The Attorney General’s opinion made its reason clear as well; it argued that “[t]his special treatment not only maintains uninterrupted functioning of government but seeks to make certain that the State’s Chief Executive be chosen only after opportunity for the full and free expression of the people’s will.”²⁴ The people’s will would obviously be thwarted in the “anomalous” situation identified above. Moreover, the governor need not make a calculated appointment and then resign to effect the possibility of an unelected governor, the office need only become vacant by whatever means. Had, for example, Governor Paterson died on September 23, 2009 (the day after the *Skelos* decision was issued), then Richard Ravitch would have succeed to the office of governor under our constitutional scheme without ever having been subject to elective scrutiny. He could then, entirely permissibly, have appointed an additional lieutenant-governor, creating an entirely unelected executive branch of the New York State Government.²⁵

It is difficult to imagine a situation more disconcerting than the second one outlined above. The *Skelos* majority’s nonchalance when faced with this possibility is puzzling.²⁶ Any system admitting the possibility of an unelected chief executive of a state after only two vacancies is a cause for serious concern.²⁷ A functional system that

²² 1943 N.Y. Op. Att’y Gen. 378, 1943 WL 54210.

²³ *Skelos*, 91 N.E.2d at 1155 (Pigott, J., dissenting).

²⁴ 1943 N.Y. Op. Att’y Gen. 378, 1943 WL 54210. The notion that governors must be popularly elected is, of course, not a New York specific phenomenon. By 1866 every state in the union had a popularly elected governor and no state admitted since has failed to have one. THOMAS SCHICK, *THE NEW YORK STATE CONSTITUTIONAL CONVENTION OF 1915 AND THE MODERN STATE GOVERNOR* 7 (1978).

²⁵ To take the theoretical exercise to its utmost extreme, Ravitch could then have resigned or died, making his appointee governor, allowing the appointment of another lieutenant-governor, and creating an entire executive branch that was neither elected nor even appointed by someone who was elected.

²⁶ See *Skelos*, 915 N.E.2d at 1146 (Lippman, C.J.) (“Rules of succession are inevitably imperfect and, at some stage of devolution they direct, invariably compromise elective principles.”).

²⁷ It is worth noting that without the appointment of a replacement lieutenant-governor, the devolution of office would have to go through six elected officials prior to reaching an

does not pose such grave risks to the elective principle can certainly be devised.

B. The Possibility for Gridlock Still Exists

Because the appointment mechanism now in place does not require the governor to appoint a successor within any particular time frame, the possibility for legislative gridlock still remains. It was not until a crisis of arguably constitutional proportions arose as to who occupied the office of Temporary President that any governor in the history of New York attempted to fill a vacancy in the office of lieutenant-governor.²⁸ Moreover, Paterson did not attempt to do so until more than a year after he was elevated to governor and probably would not have done so but for the crisis itself.²⁹ Legislative leaders, when alerted to the ambiguity of constitutional provisions relating to lieutenant gubernatorial succession, have not considered appointment of a successor or clarification of the method of filling the position to be particularly important.³⁰ Additionally, given the seeming unimportance of appointing a replacement lieutenant-governor and the potential political ramifications of doing so, it is entirely possible that future governors when faced with a vacancy may delay appointment until after a crisis has begun and the need to have a replacement lieutenant governor in place has already arisen. In fact, the argument that prior vacancies “were [potentially] left unfilled [as] the result of political considerations” was among the reasons the *Skelos* majority rejected the argument that lieutenant gubernatorial vacancies must remain unfilled for the duration of the term.³¹

appointee. See N.Y. UNCONSOL. LAW § 9105 (McKinney 2013) (adding “attorney general, comptroller, commissioner of transportation, commissioner of health, commissioner of commerce, industrial commissioner, chairman of the public service commission, secretary [sic] of state” to the line of succession after governor, lieutenant-governor, Temporary President of the Senate, and Speaker of the Assembly).

²⁸ Briffault, *supra* note 5, at 676 (citing *Skelos*, 915 N.E.2d at 1152 (Pigott, J., dissenting)).

²⁹ *Skelos*, 915 N.E.2d at 1142 (Lippman, C.J.) (noting that Paterson was elevated to governor upon the March 17, 2008 resignation of Eliot Spitzer).

³⁰ See, e.g., Joseph L. Bruno, Remarks at the Nelson A. Rockefeller Institute of Government (May 29, 2008), in LIEUTENANT GUBERNATORIAL SUCCESSION FORUM, *supra* note 16, at 14–20 (stating that a pending proposed constitutional amendment to create an appointment and confirmation system for the lieutenant-governor’s office would probably not pass, downplaying the importance of the issue, and suggesting that other amendments—such as a constitutional spending cap—are more pressing); see also Galie, *supra* note 16, at 22 (discussing that the issue had not been taken seriously at other constitutional conventions).

³¹ Rose Mary Bailly, *Administrative Law*, 61 SYRACUSE L. REV. 557, 564 (2011) (citing

The likelihood of a delay in appointment creates the possibility of additional gridlock scenarios. Consider a scenario where Governor Paterson dies during the first few days of the 2009 gridlock. In such a case, “the temporary president of the senate shall act as governor until the inability shall cease or until a governor shall be elected.”³² However, at that time the very question causing the crisis had been just who the Temporary President of the Senate *was*. It is also not clear whether such a situation would qualify as one in which the office of Temporary President is deemed “vacant,” passing governance down to the Speaker. There is also the possibility that a future governor could purposefully choose to delay appointing a successor, and prolong gridlock, for some situational political purpose.³³

The present appointment power does no more to mitigate these two possibilities than any other procedure that allows the timing of the appointment of a replacement to be discretionary. A proper scheme for filling a vacancy in the office of lieutenant-governor should be able to incorporate mechanisms that prevent the very possibility of 2009 style gridlock reoccurring. As discussed below, several of the systems employed by other states are structured such that gridlock is not possible.³⁴

C. Unchecked Appointment Gives Too Much Discretion to the Governor

Allowing a governor to, without any outside input, select a replacement goes too far toward ensuring a unified executive branch. At least as a constitutional matter, New York does not give a gubernatorial candidate the discretion to pick his own running-mate. The constitution requires that a governor and lieutenant-governor “shall be chosen jointly, by the casting by each voter of a single vote applicable to both offices.”³⁵ However, this joint ticket is comprised of the two most successful party candidates for each position, not the most successful gubernatorial candidate and his chosen lieutenant-gubernatorial candidate.³⁶ Of course, a

Skelos, 915 N.E.2d at 1146 (Lippman, C.J.).

³² N.Y. CONST. art. IV, § 6.

³³ This possibility when paired with the possibility of an unelected governor is particularly troubling.

³⁴ See *infra* Part III.

³⁵ N.Y. CONST. art. IV, § 1.

³⁶ See, e.g., Adam Nagourney, *Democrats Hope to Trim Their Pool of Candidates*, N.Y.

particularly strong or influential gubernatorial candidate may, as a matter of practical politics, get to select their running mate.³⁷ However, that they can do so is by no means constitutionally or legally mandated and “guarantees only compatible political parties but not necessarily personal or political compatibility.”³⁸ This disjunction serves as an elective check on a governor with a weak mandate.

There are, of course, good reasons to want a unified executive branch of state government. The constitutional provision requiring a joint ticket itself was put into place to help ensure that there would be a unified executive.³⁹ Prior to a 1953 amendment, New York did not require that the two offices be elected together and “candidates for different parties could be—and were—elected.”⁴⁰ But allowing direct appointment of a replacement lieutenant-governor goes farther than our constitutional structure was intended to allow by ensuring that a governor gets exactly who they want, rather than the person considered most qualified by the other members of their political party. A well-designed system of gubernatorial succession should be able to account for the need for political unification of the executive branch without giving the governor the ability to select a candidate as his lieutenant who his party and the electorate would never have approved.

III. OTHER APPROACHES

Other states approach the issue of succession and of the position of lieutenant-governor in myriad fashions. While every state has a governor and a plan for gubernatorial succession, five states—Arizona,⁴¹ Maine,⁴² New Hampshire,⁴³ Oregon,⁴⁴ and Wyoming⁴⁵—

TIMES (May 24, 1998), <http://www.nytimes.com/1998/05/24/nyregion/democrats-hope-to-trim-their-pool-of-candidates.html> (discussing the multiple candidates for lieutenant-governor that year and noting that the governor and lieutenant governor run together on a single ticket during the general election, despite having been chosen individually during the primaries).

³⁷ Jacob Gershman, *Cuomo Picks Running Mate*, WALL ST. J. (May 27, 2010), <http://online.wsj.com/article/SB10001424052748704717004575268291912969642.html> (identifying Robert Duffy as the picked running mate of Andrew Cuomo, but also noting that Duffy was “running unopposed.”).

³⁸ PETER J. GALIE, *ORDERED LIBERTY: A CONSTITUTIONAL HISTORY OF NEW YORK* 272 (1996).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *See generally* ARIZ. CONST. art. V (providing for no lieutenant-governor).

⁴² *See generally* ME. CONST. art. V (providing for no lieutenant-governor).

⁴³ *See generally* N.H. CONST. pt. 2, art. 49 (providing for no lieutenant-governor).

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do not have a lieutenant-governor at all. Several states are structured similarly to New York and contain the same pre-*Skelos* ambiguity regarding succession.⁴⁶ The most common approaches are discussed below.

A. *Statutory or Constitutional Provision?*

Of the states that do have succession plans for the office of lieutenant-governor, not all are contained in their constitutions; some are instead delegated to statute.⁴⁷ The *Skelos* decision effectively rendered New York one such state by assigning the appointment of a successor to lieutenant-governor to Public Officers Law section 43 and noting that assignment was “a determination that the Legislature is always free to revisit.”⁴⁸

This raises a question: Why should we correct the problems with succession by constitutional amendment rather than by statute? Peter Galie put the principle underlying why we should constitutionalize the succession provisions well when discussing the purpose of constitutions and constitutional amendments. “Constitutionalism,” he said, “is a struggle to render government immune, as far as possible from human frailties and their political consequence, what the [r]epublican tradition called, ‘corruption,’ in its larger sense, while simultaneously establishing institutions that will be effective and powerful enough to do the job we have asked them to do.”⁴⁹ Whatever else belongs in constitutions, certainly those provisions that lay out its structure and ensure its basic functioning at times of political upheaval are properly constitutional

⁴⁴ See generally OR. CONST. art. V (providing for no lieutenant-governor).

⁴⁵ See generally WYO. CONST. art. IV (providing for no lieutenant-governor).

⁴⁶ See, e.g., ALA. CONST. art. V, § 127 (2011) (containing nearly identical language to New York); IDAHO CONST. art. IV, § 13 (2011) (containing a similar structure and no express provision for filling vacancy.). These similarities should not be all that surprising considering how influential the New York Constitution has been historically. See Jamin Soderstrom, *Back to the Basics: Looking Again to State Constitutions for Guidance on Forming a More Perfect Vice Presidency*, 35 PEPP. L. REV. 967, 967 (2008) (noting the influence that the New York Constitution has had on the Federal Constitution.).

⁴⁷ See, e.g., HAW. CONST. art. V, § 4 (2011); ALASKA STAT. ANN. § 44.19.040 (West 2011); GA. CODE ANN., § 45-5A-3 (West 2011); MICH. COMP. LAWS ANN. § 168.67 (West 2011).

⁴⁸ *Skelos v. Paterson*, 915 N.E.2d 1141, 1146 (Lippman, C.J.).

⁴⁹ Peter J. Galie, Remarks at the Nelson A. Rockefeller Institute of Government (April 20, 2007), in CONSTITUTIONS AND EFFECTIVE GOVERNMENT: THE CASE OF NEW YORK 6–7 (2007), available at http://www.rockinst.org/pdf/public_policy_forums/2007-04-20-public_policy_forum_constitutions_and_effective_government_the_case_of_new_york_presented_by_peter_j_galie.pdf.

provisions. The need to invoke succession provisions, in particular those addressing vacancies in the office of a chief executive, seem almost by definition to be accompanied by periods of political division and uncertainty. The death, resignation, or impeachment of a governor or lieutenant-governor is the most likely cause of a vacancy in the lieutenant-governor's office. However neither of the latter two cases arises so suddenly as to keep the order of succession, if as malleable as a statute, out of the political arena.⁵⁰ It is entirely possible that in the face of an impending gubernatorial impeachment an opposition party would seek to amend the governing succession provisions, whatever they may be, as a means to blunt the new governor or as a political chip to be traded away for other gubernatorial concessions.

The structure of New York's amendment process would keep the order of succession away from political gamesmanship during the periods of leadership crisis likely to accompany a vacancy. Neither of the two methods of amendment permitted in New York can happen quickly as both require the action of a legislative body in addition to a referendum.⁵¹ The first method requires that both houses of the state legislature propose the amendment, the Attorney General issue a recommendation, the houses pass the amendment, and then refer it to the next legislative session after an intervening election.⁵² Only if in the second session both houses pass the amendment again and the people then approve it by referendum will an amendment become effective.⁵³ The second method requires a full-blown constitutional convention followed by a referendum.⁵⁴ Either way, the order of gubernatorial succession would be safe from the politics of the moment, as it ought to be.

B. Gubernatorial Appointment and Legislative Confirmation

By far the most common and most commonly proposed method of lieutenant gubernatorial succession is that the governor nominates a candidate to fill the vacancy and then the legislature confirms the

⁵⁰ See Benjamin, *supra* note 19, at 27 ("Sometimes vacancies occur in a relatively planned way.").

⁵¹ See Burton C. Agata, *Amending and Revising the New York State Constitution*, in *THE NEW YORK STATE CONSTITUTION: A BRIEFING BOOK 9* (Gerald Benjamin, ed. 1994).

⁵² N.Y. CONST. art. XIX, § 1.

⁵³ *Id.*

⁵⁴ N.Y. CONST. art. XIX, § 2.

nomination. Several states use this approach.⁵⁵ The Federal Constitution also follows a similar pattern for filling a vacancy in the office of Vice President.⁵⁶ This method has been suggested several times in New York,⁵⁷ and there is at the time of writing legislation pending to create such a scheme statutorily.⁵⁸ Such a format is not as simple as it appears and, despite its popular appeal, does not actually resolve many of the succession related issues the 2009 crisis brought to light.

As an initial hurdle, there is the question: “Who gets to ratify?” Is it the Senate,⁵⁹ the Assembly, both the Assembly and Senate sitting in joint session,⁶⁰ or both bodies sitting separately and having to ratify separately?⁶¹ There are proponents of all of these views and each has arguments as to why one structure would be better than another.⁶² However, no matter how a confirmation system is set up, the key problems remain the same.

First, a system requiring confirmation is not automatic. As a result, any such system engenders the same potential delayed appointment gridlock identified with appointment under Public Officers Law section 43.⁶³ It similarly does not avoid the problem of an indeterminate Temporary President. In such a case there is no lieutenant-governor to call the Senate into session and the

⁵⁵ See, e.g., CAL. CONST. art. V, § 5 (2011); COLO. CONST. art. IV, § 13 (2011); IND. CONST. art. V, § 10 (2011); LA. CONST. art. IV, § 15 (2011); MD. CONST. art. II, § 6 (2011); N.M. CONST. art. V, § 16 (2011).

⁵⁶ U.S. CONST. amend. XXV (“Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.”).

⁵⁷ *Skelos v. Paterson*, 915 N.E.2d 1141, 1156 (N.Y. 2009) (Pigott, J., dissenting) (listing two examples of similar defeated proposals).

⁵⁸ A.B. 3607, 234th Leg., Reg. Sess. (N.Y. 2011).

⁵⁹ E.g., UTAH CONST. art. VII, § 10 (2011).

⁶⁰ See Robin Schimminger, Remarks at the Nelson A. Rockefeller Institute of Government (May 29, 2008), in LIEUTENANT GUBERNATORIAL SUCCESSION FORUM, *supra* note 16, at 4–5; see also, e.g., MD. CONST. art. II, § 6 (requiring a majority in the General Assembly—which includes the Senate and the House of Delegates—to confirm a nomination by the governor to fill a vacancy in the office of the lieutenant-general).

⁶¹ *Skelos*, 91 N.E.2d at 1156 (Pigott, J., dissenting) (identifying this proposal as having been suggested by the Law Revision Commission in 1985).

⁶² That is, all of these schemas have proponents except, perhaps, for the proposal that Assembly votes alone. I have yet to locate anyone who has proposed this particular approach in a bicameral system. However, there are elective principle and separation of powers arguments that could be made for this structure. For example, having the Assembly only decide would remove a level of self serving bias from asking a senate majority leader and temporary president to get his party to approve a candidate that would effectively oust him from the position of presiding officer over his own chamber.

⁶³ See discussion *supra* Part II.B.

Temporary President cannot do so because the cause of the deadlock itself is uncertainty about who the Temporary President is. Without a presiding officer, the Senate could not convene in order to confirm a nomination. Moreover, even if it did convene, it seems unlikely that the deadlock regarding the present Senate leadership would not spill over into the confirmation vote, resulting in an unbroken tie to confirm the nominee and opening the question as to whether an evenly split vote is a confirmation or disconfirmation of the nominee.

Second, New York's structure makes it unlikely that any nominee from the same party as the governor would be confirmed if the opposing party controls either house of the state legislature. If the system is one that requires confirmation of the Senate only or both houses of the legislature separately then the Senate leadership is likely to block opposition party nominees. Under our present constitutional structure, when there is 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 or inability."⁶⁴ Note that the Temporary President is merely performing the duties of the lieutenant-governor; he does not become lieutenant-governor.⁶⁵ Instead he keeps his position as a member of the Senate and serves as acting lieutenant-governor.⁶⁶ As a practical matter, this means that the party leader of the dominant party in the Senate gets two votes on any particular piece of legislation: one as a member of the Senate and a casting vote in case of a tie.⁶⁷ It is not difficult to see how an opposition party to the governor would not want to give up the tie-breaking vote on key political legislation or important procedural issues.⁶⁸ As a

⁶⁴ N.Y. CONST. art. IV, § 6 (2011).

⁶⁵ Gerald Benjamin & Kim Juszcak, *Filling Vacancies* (August 17, 2011) (unpublished draft) (on file with author); Richard Briffault, Remarks at the Nelson A. Rockefeller Institute of Government (May 29, 2008), in *LIEUTENANT GUBERNATORIAL SUCCESSION FORUM*, *supra* note 16, at 33.

⁶⁶ Briffault, *supra* note 65, at 33.

⁶⁷ *Id.* at 36. Peter Galie believes that although it does seem that the constitution permits the acting lieutenant-governor two votes, that those votes are limited only to procedural matters. Galie, *supra* note 16, at 40. Of course, this would not actually matter in the case of succession, as a confirmation is a procedural or organizational matter and not a bill to become law. *See id.*; *see also* N.Y. CONST. art. III, § 14 (2011). Moreover, although there might be a legal challenge to a law that is passed with a second vote as lieutenant-governor, it is difficult to see how the use of a casting vote to defeat a law could be challenged as a practical matter. *See* Briffault, *supra* note 65, at 42.

⁶⁸ *See* Bruno, *supra* note 30, at 14–15 ("[L]egislation [clearing up the succession issue] is

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consequence, the confirmation in the Senate of an opposition party lieutenant-governor seems unlikely and at a minimum would be subject to significant political gamesmanship prior to confirmation. The gamesmanship alone would result in considerable delay in the appointment process and may forestall appointment altogether.

Although the specific issue of Senate leadership blocking confirmation might be avoided in a confirmation system that has both houses sitting together as one body or the Assembly sitting alone, that alternative only shifts the problem of gamesmanship to the Assembly. An opposition party Assembly is no more likely to approve of a replacement lieutenant-governor than the Senate would be because the appointment remains a bargaining chip. A joint session is no better because as a practical matter, due to the comparative sizes of the houses of the legislature, when the two bodies sit as one the Assembly essentially rules the day.⁶⁹

Finally, although better than a nominee who is subject to no scrutiny, direct or indirect, the confirmation process still leaves something to be desired when taking the elective principle into account. Admittedly, the houses voting can conceptually act as a “stand in” for direct action by the electorate; but the confirmation process still leaves open the possibility that the replacement lieutenant-governor is someone who has never been directly elected to any office.⁷⁰

C. Legislative Appointment

Another alternative to the present system is legislative appointment. Under this system, the two houses of the state legislature convene as one and jointly elect someone to fill the vacancy. New York is no stranger to this method, as it is how we fill vacancies in two other statewide elected offices: Comptroller and

not going to pass in the Senate. . . . [T]he most important vote in the Legislature in either house is the vote that elects the leader. . . . I am happy to have two votes [as acting lieutenant-governor] and I can manage.”)

⁶⁹ Briffault, *supra* note 65, at 34 (“Not surprisingly, the Assembly tends to dominate [the joint voting] process.”).

⁷⁰ See Benjamin, *supra* note 19, at 27. That such a person would be, at least, nominated is not at all farfetched. Although Richard Ravitch had a long career in government and public service, Paterson appointed Ravitch despite the fact that Ravitch “has never held elected office.” Chris Rovzar, *Paterson Names Dick Ravitch Lieutenant Governor*, N.Y. MAG. (July 8, 2009, 4:56 PM), http://nymag.com/daily/intelligencer/2009/07/paterson_to_name_dick_ravitch.html.

Attorney General.⁷¹ There are, however, several problems with this approach.

Two concerns are the same as those expressed with the confirmation process in the section above. Election from a joint session of the legislature means in practice that the office will be elected by the Assembly, and the appointee will probably be a member of the Assembly.⁷² It also permits the risk, if a distant one, that someone who does not and has never held elective office will be appointed to the position.

A more significant concern is that if the Assembly is not of the same party as the governor, odds are good that the replacement lieutenant-governor will not be politically compatible with the existing executive branch. As noted earlier, the purpose of joint election for governor and lieutenant-governor was to avoid exactly such a scenario.⁷³ At least one state that uses legislative appointment for lieutenant-governor—Michigan—has attempted to solve this problem by restricting the potential nominees for the vacancy to members “of the same political party as the governor.”⁷⁴ The provision, however, has never been used.⁷⁵ It is also doubtful how much practical effect a limitation of this kind would have on the appointment. In theory, an aspiring nominee of the opposition party could switch parties long enough to be appointed and then switch back thereafter or simply remain in the position and the party despite having had no real change in beliefs. Even without such shenanigans on the part of potential opposition party nominees, an opposing party is likely to appoint whatever member of the opposition they find politically tolerable, rather than someone who may actually be compatible with the sitting governor. When, due to the primary process, governors and lieutenant-governors of the same party but from opposite ends of the political spectrum have been selected, the results were less than ideal.⁷⁶ Unlike the

⁷¹ N.Y. PUB. OFF. LAW § 41 (McKinney 2011).

⁷² Briffault, *supra* note 65, at 34 (observing that the past two times that a vacancy has been filled by joint Senate-Assembly voting the elected candidate has been an assemblyman).

⁷³ GALIE, *supra* note 38, at 272 (“A responsible, cohesive administration necessitated the election of a governor and lieutenant-governor from the same party.”).

⁷⁴ MICH. COMP. LAWS ANN. § 168.67 (West 2011).

⁷⁵ The provision also may never be used since the Michigan Attorney General has twice issued opinions indicating that it believes the provision violates the Michigan Constitution. See 1968 Mich. Op. Att’y Gen. 4625, at 234, *available at* <http://www.ag.state.mi.us/opinion/datafiles/1960s/op03307.pdf>; 1995 Mich. Op. Att’y Gen. 6849, *available at* 1995 WL 308077.

⁷⁶ GALIE, *supra* note 38, at 272 (“Having governor and lieutenant-governor . . . from

risk of an incompatible lieutenant-governor being selected in a primary, where the lieutenant gubernatorial candidate is selected by members of the governor's own party, here the replacement lieutenant-governor would be selected by the opposition, likely handicapping even a governor with a strong electoral mandate from his party. Finally, it is not impossible that short of some mechanism forcing an opposition legislature to act, they may do nothing rather than appoint a party-opponent, particularly where that opponent could potentially wield considerable influence in a sharply divided Senate.

D. Special Election

Another alternative used by several other states is to hold a special election. The election can be held immediately or as close to immediately as possible,⁷⁷ at the next general election, or the next general election in reasonable proximity to the creation of the vacancy.⁷⁸ New York uses the latter process when there is a simultaneous vacancy in both the governor and lieutenant-governor's offices.⁷⁹ Currently, the New York Constitution expressly prohibits the holding of a special election to fill a lieutenant gubernatorial vacancy.⁸⁰ The present forbiddance is a wise policy, despite its close adherence to the elective principle. Holding a special election contains numerous problems and solves none of the other issues identified.

Far from being automatic, a special election can involve significant delay. A special election, whenever held, takes an extended period of time to complete and, if following a similar structure to that already in place for dual vacancy, could take as long as fifteen months depending the timing of the vacancy.⁸¹ Such a mechanism could potentially allow 2009 style gridlock, disastrous when lasting only a month, to extend for over a year.

ideologically opposed wings of the same party, created serious problems."); Benjamin, *supra* note 19, at 28–29 (discussing recent historical examples of this problem).

⁷⁷ *Stratton v. Priest*, 932 S.W.2d 321 (Ark. 1996) (holding a statutory provision for special election of lieutenant-governor constitutional).

⁷⁸ N.J. CONST. art. V, § 1, ¶ 9.

⁷⁹ N.Y. CONST. art. IV, § 6 (“[A] governor and lieutenant-governor shall be elected for the remainder of the term at the next general election happening not less than three months after both offices shall have become vacant.”).

⁸⁰ *Id.* (“No election of a lieutenant-governor shall be had in any event except at the time of electing a governor.”).

⁸¹ *See id.*; Briffault, *supra* note 65, at 33.

There is also no guarantee that a candidate compatible with the sitting governor would be elected. The special election would, by necessity, have to allow candidates from both political parties and all ends of the political spectrum. The chances of an incompatible candidate being elected may actually be higher than they might otherwise be with a completely independently elected governor and lieutenant-governor if the vacancy was created by the impeachment or disgraceful resignation of the office's former occupant.

E. Automatic Succession

Some states have automatic succession provisions. Unlike in New York, where the Temporary President only becomes acting lieutenant-governor, under these provisions the next person in line becomes lieutenant-governor, usually requiring them to forfeit their prior position.⁸² This is the mechanism by which New York fills a vacancy in the governor's office with the lieutenant-governor, creating a lieutenant gubernatorial vacancy.⁸³ Although this method can have severe flaws if inartfully drafted, a well-crafted automatic succession mechanism can solve many of the problems identified above.

An automatic succession mechanism can prevent gridlock. A mechanism of automatic succession has the benefit of *immediately* moving a party into the vacated position and, if crafted carefully, can avoid problematic ambiguity. By having a successor lieutenant-governor come immediately into place, gridlocks requiring the casting of a tie-breaking vote can be immediately solved. Had someone already been lieutenant-governor in May 2009, there would not have been a month of senatorial inaction.

What offices are chosen to succeed and how specifically they are identified can pose difficulties. The office chosen can potentially run afoul of the elective principle if the party selected is one that has not been elected, directly or indirectly, to some other statewide office. This can happen one of two ways. First, the succeeding party can come from an office not elected in the first place.⁸⁴ This

⁸² *E.g.*, MINN. CONST. art. V, § 5; PA. CONST. art. IV, § 14.

⁸³ N.Y. CONST. art. IV, § 5 (2011) ("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.")

⁸⁴ For example, Alaska's succession provision has the person succeeding to the office of lieutenant-governor coming "from among the officers who head the principal departments of the state government or otherwise." ALASKA STAT. ANN. § 44.19.040 (West 2011).

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problem is easily avoided by choosing only elective positions for the line of succession, or at least doing so before getting too far down the list for it to be practical any longer.

The second way to run afoul of the elective principle is to identify a succeeding party that is occupying an elected office, but, because of a quirk of timing, was not actually elected to that office. This situation could occur where an office is typically elected, but had already been vacated and a replacement appointed. For example, if the New York Attorney General were chosen to be next in the line of succession, but one had already resigned and a replacement been appointed by the Senate and Assembly pursuant to Public Officers Law section 41, the automatic identification of that person would be discordant with the elective principle. Arizona, an automatic succession state that does not have a Lieutenant-governor, demonstrates how to avoid this pitfall. Its succession provision specifically qualifies that the person succeeding shall only do so “if holding by election.”⁸⁵ Otherwise, that office is skipped in the line of succession.⁸⁶

Latent ambiguity in exactly which human being occupies a particular office that is designated to succeed can also be problematic. Identifying an office itself, particularly one that can be in flux, can cause rather than abate succession problems. For example, identifying “Temporary President” or other office that is tied to party control of a particular legislative body can be problematic in several ways. First, automatic succession would be of little help where there is an ongoing leadership dispute, as in 2009. A provision that said that the Temporary President became lieutenant-governor rather than was acting lieutenant-governor would have made little difference in that situation. Additionally, there is some question as to the permanency of those types of positions over periods when the legislature is not in session. Some scholars have argued that leadership positions in the various houses of the legislature expire at the end of each legislative session.⁸⁷ That would mean that between sessions, if a vacancy

⁸⁵ ARIZ. CONST. art. V, § 6 (“[T]he secretary of state, if holding by election, shall succeed to the office of governor until his successor shall be elected and shall qualify.”).

⁸⁶ *Id.* (“If the secretary of state be holding otherwise than by election, or shall fail to qualify as governor, the attorney general, the state treasurer, or the superintendent of public instruction, if holding by election, shall, in the order named, succeed to the office of governor.”).

⁸⁷ Briffault, *supra* note 65, at 41.

occurred, there would be no human being clearly identifiable as the holder of that office, particularly if in between the sessions the balance of power in the chamber had shifted.⁸⁸ Minnesota's succession provision provides an example of how to avoid this problem.⁸⁹ It provides that "[t]he last elected presiding officer of the senate shall become lieutenant governor in case a vacancy occurs in that office."⁹⁰ By adding that temporal component ("last elected") any ambiguity as to which human being occupies the office is avoided.

Another objection to automatic succession is that it can also run contrary to having a unified executive branch in a similar manner to holding a special election. There is absolutely no guarantee that whoever occupies a particular elective office in the order of succession at a given period of time will be compatible with the present administration.⁹¹ The potential inflexibility of automatic succession makes this problem virtually unavoidable if there is simply going to be an enumerated list of offices in an order of devolution. However, a set list of offices in a line of succession does not necessarily need to be the mechanism by which automatic succession takes place.

Alaska has a somewhat ingenious automatic succession scheme with a guarantee that the successor will be politically compatible with the sitting governor. Alaska makes no constitutional provision for the replacement of a lieutenant-governor.⁹² However, statutorily, they have created a backup appointment system. The governor, who is constitutionally required to be elected at the same time as the lieutenant-governor,⁹³ "shall appoint . . . [subject to legislative confirmation] a person to succeed to the office of lieutenant governor if the office of lieutenant governor becomes vacant."⁹⁴ The statute has some other problems⁹⁵ but this added level of forward planning allows a successor to be identified—as a human being thus avoiding ambiguity—far in advance of any

⁸⁸ *Id.* at 33.

⁸⁹ MINN. CONST. art. V, § 5.

⁹⁰ *Id.*

⁹¹ See Benjamin, *supra* note 19, at 28–29 (discussing "automaticity in succession").

⁹² See ALASKA CONST. art. III, §§ 11–13.

⁹³ *Id.* § 13.

⁹⁴ ALASKA STAT. § 44.19.040 (2011).

⁹⁵ It requires legislative confirmation, raising some of the issues discussed *supra* in Part III.B., and may violate the elective principle by appointing from unelected officials, as mentioned *supra* in footnote 84.

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vacancy while also allowing the sitting governor, presumably with some input from the sitting lieutenant-governor, to identify a successor who is politically aligned. If drafted in a manner that limits gubernatorial choice of backups to elected officials such a system could avoid colliding with the elective principle.

IV. A PROPOSED SOLUTION

After review of the succession mechanisms above, it seems that a solution avoiding the lion's share of the potential systemic problems can be devised. A system which requires that a governor, within a short, specific period of time of taking office, to appoint a successor to the lieutenant-governor, drawing only from a pool of those elected directly or indirectly elected to statewide office,⁹⁶ avoids a clash with the elective principle, prevents 2009 style senatorial gridlock, and ensures that the governor can select a politically compatible successor without having unfettered discretion as to who that person is. The language of such an amendment, modeled after the Alaska statute with some modifications to avoid problems identified earlier, which could be added to Article IV, Section 6 could read:

Within twenty (20) days of assuming office, either by election or succession to office in case of vacancy, the governor shall appoint, from among the elected attorney general, the elected comptroller, the most recently elected temporary president of the senate, and the most recently elected speaker of the assembly, a person to succeed to the office of lieutenant-governor if the office of lieutenant-governor becomes vacant. The person designated is next in line for succession to the office of lieutenant-governor, subject to the pleasure of the governor. If the person designated is removed from appointment, vacates the appointment, or ceases to meet the qualifications required for appointment, the governor shall appoint a successor subject to the same qualifications as the person initially appointed.

If a vacancy occurs in the office of governor and the lieutenant-governor succeeds to the office of governor or if the office of lieutenant-governor otherwise becomes vacant,

⁹⁶ As a practical matter, this limits the potential pool to the elected Attorney General, the elected Comptroller, the most recently elected Temporary President of the Senate, and the most recently elected Speaker of the Assembly.

the person designated as next successor to the office of lieutenant-governor as provided in herein succeeds to the office of lieutenant-governor for the remainder of the term vacated. Within twenty (20) days of the appointed successor assuming the office of lieutenant-governor, the governor shall appoint a person to succeed to office of lieutenant-governor in case of subsequent vacancy from among the potential candidates identified in the previous paragraph.

Obviously, this proposal is not perfect and somewhat unorthodox. For example, although a politically compatible lieutenant-governor is likely to be among the four choices, this structure does not guarantee that the successor lieutenant-governor will in fact be politically compatible with or of the same party as the sitting governor. It is possible that between the four choices to succeed to lieutenant-governor, not a single one will be of the same party and politically compatible with the governor. Such a worry is somewhat minor, however, because as a practical matter any governor without a single friend among the other major elected figures in the state is unlikely to be effective regardless of who his lieutenant-governor turns out to be. Moreover, this potential detriment more closely mirrors the possibility that a governor running for office will end up with a politically incompatible lieutenant-governor as a consequence of the primary election and, in that sense, is more compatible with the present structure of the New York Constitution.

The most realistic objection to this format is that it is politically unlikely to happen any way other than through constitutional convention. It would be asking for a lot of statesmanship from the houses of the state legislature to twice pass an amendment that shuts them out of the process for appointing a lieutenant governor.⁹⁷ Mixed alternatives that might be more politically palatable, such as providing a disconfirmation procedure whereby the legislature could reject a nominee to be the successor, reintroduce the horse-trading that must be avoided, and again invite the questions as to how disconfirmation procedure would function as are involved in a confirmation procedure.⁹⁸

⁹⁷ See, e.g., Gerald Benjamin, *When Does a Gambling Prohibition Not Prohibit Gambling? Or an Alternative Mad Hatter's Riddle and How it Helps Us to Understand Constitutional Change in New York*, 75 ALB. L. REV. 739, 744 (2012) (noting that the New York State Legislature almost never even acts on constitutional amendments that would limit itself).

⁹⁸ See *supra* Part III.B.

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Politics aside, the proposed provision addresses all of the major concerns identified in the foregoing discussion. The elective principle is satisfied in that all of the potential appointees have been elected, directly or indirectly, to a statewide office. Confirmation and other sources of legislative gamesmanship have been screened out of the appointment process. Succession to the office is automatic in case of a vacancy, preventing any gridlock caused by delay in a new lieutenant-governor taking office. Finally, a short time limit is in place requiring the governor to swiftly appoint a backup, minimizing the risk that a delay in appointment of a backup could translate into delay in the succession of a lieutenant-governor.

V. CONCLUSION

The foregoing article has been an examination of the problems caused by the decision in *Skelos v. Paterson*, which permitted the governor of New York to appoint the lieutenant-governor pursuant to a catchall, restrictionless statutory section. It has examined various alternative ways to deal with the problem of vacancy in the office of lieutenant-governor and has proposed language that may solve the problem. If the people of the State of New York adopt the provision outlined in section IV, or something similar, we should be able to avoid disastrous government deadlock like that of 2009 without sacrificing the principle that the highest and second highest offices in the state should always be occupied by those who have been, at some stage of things, elected.