

# Short of a Full House: The Increasing Length of Vacancies in the U.S. House of Representatives, 1997–2021

TYLER RITCHIE\*

*Members of the U.S. House of Representatives provide the most immediate and localized connection between their constituents and the federal government. When those positions are left vacant for extended periods of time, Americans are deprived of an agent to advocate for their interests at the national level. Article I of the Constitution gives state executives authority to set dates for special elections to Congress. In some instances, governors have taken advantage of this nearly unlimited power to deny these seats to their partisan rivals. This Note presents the data from every open seat in the House over twenty-five years and shows that the average vacancy has become substantially longer during that period—almost twice as long on average. This Note then uses the seat in the 20th District of Florida, which was left open for 287 days in 2021 and 2022, as a case study to show the negative impacts of such vacancies. To avoid these increasingly common outcomes, this Note urges the adoption of an upper limit on the length of a vacancy in the House of Representatives. Article I also provides the U.S. Congress with authority to overrule the states and pass laws to regulate the times of congressional elections. Congress should use this power to pass a new law regulating vacancies. Such action is necessary to address potentially severe harms to representative democracy.*

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\* Design & Layout Editor, Colum. J.L. & Soc. Probs., 2022–23. J.D. Candidate 2023, Columbia Law School. The author dedicates this Note to his father and his mother for the many ways in which they each supported his education. The author thanks Professor Maeve Glass for her encouragement and her thoughtful feedback. Finally, the author owes many thanks to Hunter Baehren and the staff of the *Journal of Law and Social Problems* for the many improvements that they have suggested at every stage of the editing process.

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## INTRODUCTION

For most of a year, more than 750,000 Americans in southeast Florida lived in something less than a full democracy.<sup>1</sup> After the death of their representative on April 6, 2021, the constituents of Florida's 20th Congressional District went unrepresented in the U.S. House of Representatives until January 18, 2022.<sup>2</sup> The seat remained vacant for nine months, a circumstance that was nearly unheard of just a generation ago but which has now become all too common.<sup>3</sup> When the 20th District lost its representative, it joined five other congressional districts with seats open at that time.<sup>4</sup> One such district saw voters in northeast Ohio denied representation for nearly eight months.<sup>5</sup> In recent years, two other seats have been left open for close to a full year.<sup>6</sup> At no point during the 117th Congress were all 435 House seats filled.<sup>7</sup>

Denial of representation in the House is a major breach of this nation's republican guarantee.<sup>8</sup> Indeed, the very founding of this nation came about as a result of protests against a denial of legislative representation.<sup>9</sup> The framers were content to create a constitution that included no enumerated right for Americans to vote for president, but they would not compromise when it came to

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1. *My Congressional District*, U.S. CENSUS BUREAU, <https://www.census.gov/mycd/?st=12&cd=20> [<https://perma.cc/384H-R2VC>].

2. *See infra* Appendix.

3. *See infra* Figure 1.

4. *See infra* Appendix. The other five districts were the New Mexico 1st (open for 90 days), the Louisiana 5th (open for 101 days), the Louisiana 2nd (open for 116 days), the Texas 6th (open for 173 days), and the Ohio 11th (open for 239 days).

5. *Id.*

6. The California 50th District was open from January 13, 2020, until January 3, 2021 (356 days). The Michigan 13th District was open from December 5, 2017, until November 29, 2018 (359 days). *Id.*

7. Geoffrey Skelley, *The House Is About to Have 435 Members. That's Pretty Rare.*, FIVETHIRTYEIGHT (Mar. 7, 2023), <https://fivethirtyeight.com/features/house-435-members-pretty-rare/> [<https://perma.cc/F7NA-4UMD>]. The same was true of the 115th Congress. During the 116th Congress, the House was full for 7 days in September 2019. *Id.*

8. "The United States shall guarantee to every State in this Union a Republican Form of Government. . . ." U.S. CONST. art. IV, § 4.

9. "The Supreme power cannot take from any man any part of his property, without his consent in person or by representation. . . . Now let it be shewn how it is reconcilable with these principles, or to many other fundamental maxims of the British constitution, as well as the natural and civil rights, which by the laws of their country, all British subjects are entitled to, as their best inheritance and birth-right, that all the northern colonies, who without one representative in the house of Commons, should be taxed by the British parliament." JAMES OTIS, *THE RIGHTS OF THE BRITISH COLONIES ASSERTED AND PROVED* 55–56 (1764).

the People's House.<sup>10</sup> Representatives are unique in that the Constitution demanded they be chosen by a popular vote from the start.<sup>11</sup>

Nevertheless, state governors have increasingly disregarded this principle to keep certain seats open as long as possible, thus denying a House seat to the opposing party for political advantage.<sup>12</sup> It is easy to see the political calculus that accounts for this trend: in an era of big data, geographic sorting, and partisan gerrymandering, it is possible to predict far in advance which party will win the election in the vast majority of House districts.<sup>13</sup> This tactic is especially beneficial when one party has a narrow advantage, as the Democrats did in the 117th Congress and the Republicans do in the 118th.<sup>14</sup> The Democrats' slight edge in the House during 2021 was made a bit tighter because they spent most of a year missing a member to represent the reliably Democratic Florida 20th District.<sup>15</sup> Even beyond the partisan

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10. "In both Britain and colonial America, the lower house had been conceptualized as democracy's cornerstone—the main 'democratic' element of a mixed constitution whose upper house represented the aristocratic element and whose executive branch embodied the monarchy." AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 78–79 (Random House, 2005).

11. "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." U.S. CONST. art. I, § 2, cl. 1.

12. See Nathaniel Rakich, *Why Some House Districts Won't Have a Representative for Almost a Year*, FIVETHIRTYEIGHT (May 25, 2021), <https://fivethirtyeight.com/features/why-some-house-districts-wont-have-a-representative-for-almost-a-year/> [https://perma.cc/K5YU-GQZP] (finding that, from 2011 to 2021, House seats with an opposing-party governor have remained vacant longer than House seats with a same-party governor).

13. Nicholas Riccardi, *Redistricting Is Resulting in Fewer Congressional Swing Seats – and More Political Polarization*, PBS NEWSHOUR (Dec. 1, 2021), <https://www.pbs.org/newshour/politics/redistricting-is-resulting-in-fewer-congressional-swing-seats-and-more-political-polarization> [https://perma.cc/M949-6MKC] ("[C]ompetitive congressional districts are becoming rarer and rarer. Lawmakers in both parties, but especially Republicans, are creating districts that shore up their vulnerable members and trying to ensure easy reelections. . . . An even bigger factor is that voters are choosing to live in places where they are surrounded by like-minded neighbors . . . . That makes it more likely that districts will be dominated by voters of just one party.").

14. JENNIFER E. MANNING, CONG. RSCH. SERV., R46705, MEMBERSHIP OF THE 117TH CONGRESS: A PROFILE 1 (2022), <https://crsreports.congress.gov/product/pdf/R/R46705>; *Party Breakdown*, U.S. HOUSE OF REPRESENTATIVES PRESS GALLERY, <https://pressgallery.house.gov/member-data/party-breakdown> [https://perma.cc/NR8U-6B3E].

15. The Florida 20th District had a 2022 Cook Partisan Voting Index of D+25, meaning that the district was approximately 25 points more Democratic than the nation as a whole. By this measure, it was the 37th most Democratic district in the nation. *2022 Cook PVI: District Map and List*, COOK POL. REP. (July 12, 2022), <https://www.cookpolitical.com/cook-pvi/2022-partisan-voting-index/district-map-and-list> [https://perma.cc/2NQX-U9PY].

implications of such moves, delays created a host of negative consequences for the district's residents.<sup>16</sup>

Long vacancies risk undermining faith in the government,<sup>17</sup> contributing to a trend wherein many voters believe that the political system is broken and unlikely to produce positive results.<sup>18</sup> They may also weaken voters' belief in their own political efficacy, causing voters to skip future elections.<sup>19</sup> When voting is already difficult and cumbersome, the knowledge that voters' choices can be undone by nothing more than an ill-timed resignation creates one more obstacle to future participation. The lack of representation also means that the people living in that district are denied an advocate for important issues affecting their community. During a vacancy, the representative's former staff members are prohibited by the rules of Congress from working to advance the deceased member's policy goals.<sup>20</sup> And while the staffers often stay on with the district office until a new member is elected, the office is placed into what is called "interim vacant" status, with limited duties and under the supervision of the Clerk of the House.<sup>21</sup> Thus, constituent services, that other great responsibility of congressional offices, are likely to be less effective. Perhaps most troubling of all, the national conversation will suffer from the absence of the perspectives that the district and its

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16. See *infra* Part III.C.

17. See *Rossito-Canty v. Cuomo*, 86 F. Supp. 3d 175, 181 (E.D.N.Y. 2015) ("To cut off representation in the House of Representatives will increase the sense of disaffection and alienation that can seriously weaken the fabric of society.").

18. A poll conducted December 17–20, 2021 found 70% of respondents agreed that "America is in crisis and at risk of failing." Mallory Newall et al., *Seven in Ten Americans Say the Country Is in Crisis, at Risk of Failing*, IPSOS (Jan. 3, 2022), <https://www.ipsos.com/en-us/seven-ten-americans-say-country-crisis-risk-failing> [<https://perma.cc/2438-4VF5>].

19. People defined as politically engaged (regular voters who follow the news) were more likely to report perceptions of high political efficacy than people not considered politically engaged (43% to 36%). PEW RSCH. CTR., *BEYOND DISTRUST: HOW AMERICANS VIEW THEIR GOVERNMENT* 97 (2015), <https://www.pewresearch.org/wp-content/uploads/sites/4/2015/11/11-23-2015-Governance-release.pdf> [<https://perma.cc/HV8X-TY3M>]. See also Jennifer Wolak, *Feelings of Political Efficacy in the Fifty States*, 40 POL. BEHAV. 763, 764 ("Those who are low in efficacy are less likely to engage in civic life and participate in politics. . . . Having voice in political processes is important to citizens, and feelings of having voice and influence contribute to people's trust and satisfaction with political outcomes.") (citations omitted).

20. See Jeff Barker, *After 'Unfathomable Loss,' Elijah Cummings' Congressional Staff Is in Limbo as It Carries on Without Him*, BALT. SUN (Nov. 21, 2019), <https://www.baltimoresun.com/politics/bs-md-cummings-staff-carries-on-20191121-me54risjc5gnaqi2257fy7hme-story.html> [<https://perma.cc/46WW-6VJS>].

21. 2 U.S.C. § 5325; *Rules of the House of Representatives, Rule II, cl. 2(i)*, 118TH CONG. (Jan. 10, 2023) <https://ethics.house.gov/sites/ethics.house.gov/files/documents/117-House-Rules-Clerk.pdf> [<https://perma.cc/C6ZP-93RR>].

representatives could offer.<sup>22</sup> Denial of representation anywhere is a threat to representation everywhere.

This Note aggregates data for twenty-five years of empty seats to demonstrate the scale of the problem as it exists today. Each vacancy, when considered on its own, is idiosyncratic. Almost by definition, a vacant seat is the result of an unexpected development, usually a death or a resignation that was unforeseen less than two years prior.<sup>23</sup> At any given time, only a few seats are empty, for disparate reasons, and with great variability in the length of each vacancy. By compiling a comprehensive list of every vacancy in the U.S. House of Representatives from 1997 to 2021, along with the dates and circumstances of the vacancy, this Note shows how much the situation has escalated in just twenty-five years.<sup>24</sup> After that, this Note proposes a federal law to protect the voters' right to representation by placing limits on the discretion of governors in setting the schedules for special elections.

Part I notes the unique position of the House of Representatives in federal government and explains the constitutional grant of election powers to both the federal and state governments. Part II describes the way that relevant government institutions—Congress, state legislatures, and federal courts—have applied and interpreted the sparse text of the Constitution regarding House vacancies. Supported by the evidence in the Appendix, Part III illustrates the scope of the problem today, then analyzes two significant developments that may have exacerbated the trend in recent years. It concludes with a detailed account of the incidents that produced the 2021–2022 Florida vacancy. Part IV explains why federal legislation represents the best path to eliminating

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22. See *Rossito-Canty*, 86 F. Supp. 3d at 181, 182 (describing “the loss to the nation as a whole which gives up the input from a unique group of people represented by an individual with the opportunity to contribute meaningfully to national debates and policy,” and, in turn, “increases the risk of unsound national public policy and legislation”).

23. Out of 136 vacancies from 1997 to 2021, 101 were caused by resignations, 32 by deaths, 1 by expulsion, and 2 because the election had not been certified. See *infra* Appendix.

24. The author was alerted to this issue by Rakich, *supra* note 12. Bloomberg Government reporter Greg Giroux has also compiled a useful spreadsheet with all House special elections dating back to 1957. Greg Giroux, U.S. House Special Elections, 1957–Present, [https://docs.google.com/spreadsheets/d/1DX4nvZ32rOQeU6B-zc\\_khCFg7b35ezeXtJYG3bIIOUDo/edit#gid=0](https://docs.google.com/spreadsheets/d/1DX4nvZ32rOQeU6B-zc_khCFg7b35ezeXtJYG3bIIOUDo/edit#gid=0) [https://perma.cc/HT63-KPVY]. By focusing on special elections, that resource excludes a considerable number of vacancies in the House that did not lead to a special election, a category that represents 23 of the 136 vacancies from 1997 to 2021. For instance, the spreadsheet does not include the second-longest vacancy in that time (the California 50th District in 2020–2021).

these excessively long vacancies and details the provisions that such legislation should include.

Voting rights activists should not overlook the serious threat caused by the outright denial of representation. In recent years, members of Congress have introduced multiple landmark bills on voting rights which include provisions that exert national control over state election decisions.<sup>25</sup> Members of Congress ought to add a comparable provision—a time limit on House vacancies—to the next proposed voting rights legislation.

## I. THE CONSTITUTIONAL BASIS OF ELECTION POWERS

Since the nation's founding, an active House of Representatives chosen by the people has been central to the structure of the U.S. federal government. This Part begins by illustrating the ways that the framers of the Constitution conceptualized the House of Representative as the most democratic part of the federal government. It addresses the constitutional language that governs federal elections by analyzing the dual roles of the states and Congress. It further explains that the Constitution established the states as the primary sources of federal election law, but also provided the national government with the ultimate power to overrule the states' election laws.

### A. THE HOUSE OF REPRESENTATIVES IN THE CONSTITUTION

Representatives occupy a special place in the constitutional structure. When the framers established a new Constitution for the United States, they declined to give the people a direct voice in most of the bodies of the federal government.<sup>26</sup> But they did carve out one place in the federal government where the voice of the people could be heard unadulterated: the House of Representatives.

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25. See, e.g., H.R. 5746, 117th Cong. (2022); H.R. 4, 117th Cong. (2021); H.R. 1, 117th Cong. (2021).

26. The president is chosen indirectly by the states through the electoral college. U.S. CONST. art. II, § 1, cl. 2–3. Senators were originally selected by state legislators. U.S. CONST. art. I, § 3, cl. 1. Federal judges and Supreme Court justices were appointed to lifetime terms by the presidents and senators that had been selected through those undemocratic processes. U.S. CONST. art. II, § 2, cl. 2; art. III, § 1.

No representative can ever join the House of Representatives without being elected by the voters of the district.<sup>27</sup> That unbending rule is unique among constitutional offices, and serves as a potent reminder of the special value of direct representation in the lower house.<sup>28</sup> The president can be succeeded by the vice president, and, in theory, by a long list of unelected cabinet secretaries designated by law;<sup>29</sup> open Senate seats can be filled, at least temporarily, by governors.<sup>30</sup> In contrast to the efficiency of a gubernatorial appointment to quickly fill a Senate vacancy, the framers provided that empty House seats could only be filled by special elections.<sup>31</sup> Such elections occurred at the discretion of the states, like most elements of early election administration.<sup>32</sup> Thus, state governors were empowered to set the dates for the special elections, with no other requirements from the Constitution on when or how to do so.<sup>33</sup> Although the Constitution is short on specific instructions for the states, the special status of the House of Representatives as the bastion of democracy ought to be a strong signal to the states that representation is essential to the functioning of the American state.

Consistent with such an important task, the Constitution provides a role for both state and federal governments in controlling election policy.<sup>34</sup> As part of that federal system, the states are empowered to act first and act most often, including through the governors' power to schedule special elections. The Elections Clause provides that the "Times, Places and Manner of holding elections for Senators and Representatives, shall be

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27. U.S. CONST. art. I, § 2, cl. 4.

28. See Paul Taylor, *Proposals to Prevent Discontinuity in Government and Preserve the Right to Elected Representation*, 54 SYRACUSE L. REV. 435, 436-37 (2004) ("[T]he Constitution has always distinguished the House of Representatives from all other parts of the federal government, including the Senate, the Presidency, and the federal courts, in that House members alone cannot be appointed, but must serve solely as a result of democratic elections.").

29. U.S. CONST. art. II, § 1, cl. 6.

30. U.S. CONST. art. I, § 3, cl. 2.

31. "When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies." U.S. CONST. art. I, § 2, cl. 4.

32. See *Ex parte Yarbrough* (The Ku Klux Cases), 110 U.S. 651, 662 (1884) ("[T]he Congress of the United States, through long habit and long years of forbearance, has, in deference and respect to the States, refrained from the exercise of these [Election Clause] powers. . . .").

33. U.S. CONST. art. I, § 2, cl. 4.

34. U.S. CONST. art. I, § 4, cl. 1.



prescribed in each State by the Legislature thereof.”<sup>35</sup> The framers protected the essential position of the national legislature, however, by giving Congress the ultimate power to govern congressional elections, providing that “Congress may at any time by Law make or alter such Regulations.”<sup>36</sup>

## B. STATE POWER OVER ELECTIONS

In the spirit of federalism, the framers of the Constitution left the particulars of election law up to the individual states, so long as they handled the task well enough to avoid congressional intervention.<sup>37</sup> With a few exceptions, Congress has rarely invoked its Election Clause power, instead mostly deferring to state law prior to the Civil War.<sup>38</sup> Consistent with this trend, almost all current laws regulating elections are state laws.<sup>39</sup> The same is true of laws dealing with special elections in particular.<sup>40</sup> The Constitution provides a single sentence detailing the law about special elections to the U.S. House of Representatives: “When vacancies happen in the Representation from any state, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.”<sup>41</sup> The framers did not place any time limit on the executive action in the Constitution, although the Elections Clause provides for either the state or the federal government to pass such a law.

The different procedures of the early House meant there was less urgency to fill an empty seat than there is today.<sup>42</sup> Several

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35. *Id.*

36. *Id.*

37. U.S. CONST. art. I, § 4, cl. 1. The framers were most concerned with the possibility that the states could simply refuse to schedule elections for Congress and thus undermine or destroy the national legislature. See THE FEDERALIST NO. 59, at 292 (Alexander Hamilton) (Lawrence Goldman ed., 2008).

38. Franita Tolson, *The Spectrum of Congressional Authority over Elections*, 99 B.U. L. REV. 317, 341–42 (2019).

39. KENNETH R. THOMAS, CONG. RSCH. SERV., RL30747, CONGRESSIONAL AUTHORITY TO DIRECT HOW STATES ADMINISTER ELECTIONS 12 (2014), <https://crsreports.congress.gov/product/pdf/RL/RL30747> (“[M]odern election law is mostly regulated at the state level.”).

40. 2 U.S.C. § 8(a) (“[T]he time for holding elections in any State, District, or Territory for a Representative or Delegate to fill a vacancy . . . may be prescribed by the laws of the several States and Territories respectively.”). One notable exception places a federally mandated time limit on state action in the “extraordinary circumstances” that there are more than 100 vacancies in the House. 2 U.S.C. §§ 8(b)(2), 8(b)(4)(A).

41. U.S. CONST. art. I, § 2, cl. 4.

42. The early Congress bore only a faint resemblance to the body today. The Constitution called for a House with sixty-five members. U.S. CONST. art. I, § 2, cl. 3.

states did not use single-member districts for at least fifty years, instead selecting a party's general ticket to elect a slate of candidates at-large to represent the entire state.<sup>43</sup> In states with multiple members elected at large, a single vacant seat did not deny representation to any part of the population, as any remaining representatives would count all residents of the state among their constituents. Even the regularly scheduled general elections for each state's House seats were held at wildly different points, taking place at almost any time within the two-year term.<sup>44</sup> In such a situation, the haphazard scheduling of special elections did not stand out. Those differences may help to explain why the framers did not set any time limit in which to fill a vacant seat. The absence of a time limit in the Constitution should not be construed as an implicit endorsement of unlimited delay for state executives to fill a vacancy. Rather, because the circumstances of House elections and vacancies were so different at the founding, it is more likely that the framers did not, and could not, have foreseen the development of this problem into its modern form. Indeed, the constitutional structure did not anticipate the development of political parties,<sup>45</sup> and the competition between parties is a major cause for vacancies today.<sup>46</sup> Old assumptions at the core of our laws (or lack of laws) in this area now require reconsideration.

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Today's House is nearly seven times that size. See Raymond W. Smock, *Institutional Development of the House of Representatives*, in *THE HOUSE AND SENATE IN THE 1790S: PETITIONING, LOBBYING, AND INSTITUTIONAL DEVELOPMENT* 321, 323 (Kenneth R. Bowling & Donald R. Kennon eds., 2002). Although the House has grown a great deal, the U.S. population has grown much more, creating a very different ratio of representatives to represented. The Constitution demands that there be one representative for every 30,000 Americans. U.S. CONST. art. I, § 2, cl. 3. The 2020 Census, however, indicates that there are 761,169 Americans in each district on average, or twenty-five times the maximum number set by the Constitution. SARAH J. ECKMAN, CONG. RSCH. SERV., R45951, APPORTIONMENT AND REDISTRICTING PROCESS FOR THE U.S. HOUSE OF REPRESENTATIVES 2 (2021), <https://crsreports.congress.gov/product/pdf/R/R45951>. With fewer members, there were likely to be fewer vacancies, and any vacancy only impacted a relatively small number of constituents.

43. Bernard Ivan Tamas, *A Divided Political Elite: Why Congress Banned Multimember Districts in 1842*, 28 *NEW POL. SCI.* 23, 29 (2006).

44. Jeffrey M. Stonecash et al., *Congressional Intrusion to Specify State Voting Dates for National Offices*, 38 *PUBLIUS: J. OF FEDERALISM* 137, 144–45 (2008).

45. AKHIL REED AMAR, *AMERICA'S UNWRITTEN CONSTITUTION* 394 (2012) (“The Constitution’s framers did not envision a modern national two-party system. . .”).

46. See *infra* Part III.B.2.

## C. FEDERAL POWER OVER ELECTIONS

While the states have substantial power over the administration of federal elections, the Elections Clause provides Congress with plenary power to overrule state laws in that area.<sup>47</sup> Although the constitutional text is short, it is also explicit in its vast grant of power to Congress. The principal judicial opinions addressing the Elections Clause have relied on the text to unequivocally endorse federal authority.<sup>48</sup>

The Election Clause is comprehensive in its grant of power to Congress. The relevant constitutional phrase provides Congress with the authority to make or alter laws addressing the “Times, Places, and Manner of holding elections for Senators and Representatives.”<sup>49</sup> At the time the Constitution was written, the phrase “manner of election” was in common use in British law with a well-established, and expansive, meaning.<sup>50</sup> This phrase was understood “to encompass the times, places, and mechanics of voting; legislative districting; provisions for registration lists; the qualifications of electors and elected; strictures against election-day misconduct; and the rules of decision (majority, plurality, or lot).”<sup>51</sup>

This provision was a subject of substantial debate during ratification, and that debate makes it apparent that the voters who approved the Constitution understood the original meaning of the text.<sup>52</sup> Responding to anti-Federalist concerns about the Election Clause, Alexander Hamilton stated definitively that the “discretionary power over elections” was “primarily” in the state legislatures and “ultimately” in Congress.<sup>53</sup> His reason was simple: “every government ought to contain in itself the means of

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47. U.S. CONST. art. I, § 4, cl. 1.

48. Note, however, that Justice Thomas has read “Manner” in “Times, Places, and Manner” more narrowly than his colleagues. *Arizona v. Inter Tribal Council of Ariz.*, 570 U.S. 1, 30 (2013) (Thomas, J., dissenting).

49. U.S. CONST. art. I, § 4, cl. 1. The one exception applies to the place of choosing senators because, before the Seventeenth Amendment, senators were selected by state legislatures. Thus, federal power in that arena would have given Congress the power to determine where a state legislature met. Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. PA. J. CONST. L. 1, 19 (2010).

50. Natelson, *supra* note 49, at 10–13.

51. *Id.* at 12.

52. *Id.* at 23 (“During the ratification debates, the Times, Places and Manner Clause proved to be one of the most controversial provisions in the new Constitution.”).

53. THE FEDERALIST No. 59, *supra* note 37, at 292.

its own preservation.”<sup>54</sup> Framers such as Hamilton were concerned that states would simply decline to hold elections for the U.S. Congress and thus deprive the body of a quorum; a federal backstop alleviated such fears.<sup>55</sup>

The U.S. Supreme Court has read the Constitution consistently with Hamilton’s explanation. In 1997, the Court wrote that “The Clause is a default provision; it invests the States with responsibility for the mechanics of congressional elections, but only so far as Congress declines to preempt state legislative choices.”<sup>56</sup> This structure necessarily creates expansive federal authority under which “the power of Congress over the subject is paramount. It may be exercised as and when Congress sees fit to exercise it.”<sup>57</sup> In particular, “the regulations made by Congress are paramount to those made by the State legislature; and if they conflict therewith, the latter, so far as the conflict extends, ceases to be operative.”<sup>58</sup> The Court has even enumerated the many areas covered by Congress’ power, writing in 1932 that “[i]t cannot be doubted that” Congress can legislate “not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns.”<sup>59</sup> The Court found that Congress was empowered to “enact the numerous requirements as to procedure and safeguards” which are required in order to enforce the fundamental right to vote.<sup>60</sup> As the Court has made clear, Congressional power over the time, place, and manner of elections, extends to regulations of each of the many steps in the voting process.

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54. *Id.* at 291.

55. *Id.* at 292 (“[A]n exclusive power of regulating elections for the national government, in the hands of the State legislatures, would leave the existence of the Union entirely at their mercy. They could at any moment annihilate it, by neglecting to provide for the choice of persons to administer its affairs.”).

56. *Foster v. Love*, 522 U.S. 67, 69 (1997) (citation omitted).

57. *Ex parte Siebold*, 100 U.S. 371, 384 (1879).

58. *Id.*

59. *Smiley v. Holm*, 285 U.S. 355, 366 (1932).

60. *Id.*

## II. MODERN APPLICATIONS OF THE CONSTITUTIONAL ELECTION POWER

Across centuries of federal elections, governmental actors have been left to make critical decisions by applying and interpreting the two short sentences of the Elections Clause. While Congress has exercised its ultimate authority over election law when necessary, it has more often left the legislating to the states, just as the framers intended.<sup>61</sup> With fifty jurisdictions creating their own rules for federal elections, there is substantial variance in state law, as evidenced by the range of ways states have addressed the governor's power to schedule special elections.<sup>62</sup> In a few instances, where governors have pushed their scheduling discretion to the limit, federal courts have been called in to adjudicate the rights of citizens to elect a representative in a timely election.<sup>63</sup> In these cases, the courts have generally deferred to governors' executive power, clarifying only the absolute boundaries of such power.<sup>64</sup> The pithy constitutional text has served to guide governmental officials at both the federal and state levels, but the discretion embodied in the Elections Clause has inevitably led to substantial variance in the law. Unlike, say, transportation or housing policy, where differing local conditions may justify such variance, there is no principled basis for representation in a federal legislature to depend upon the vagaries of state law.

### A. CONGRESSIONAL APPLICATIONS OF ELECTION POWER

Throughout its history, Congress has occasionally used its broad power over elections to remedy flaws with the states' administration of federal elections. In most instances, the states

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61. THE FEDERALIST No. 59, *supra* note 37, at 292 (“[The delegates to the Constitutional Convention] have submitted the regulation of elections for the federal government, in the first instance, to the local administration . . . in ordinary cases . . . but they have reserved to the national authority a right to interpose, whenever extraordinary circumstances might render that interposition necessary to its safety.”).

62. Compare, e.g., FLA. STAT. ANN. § 100.101(4) (West 2011) with NEB. REV. STAT. ANN. § 32-564(1)(c) (West 2008).

63. See *Jackson v. Ogilvie*, 426 F.2d 1333 (7th Cir. 1970); *ACLU of Ohio v. Taft*, 385 F.3d 641 (6th Cir. 2004); *Fox v. Paterson*, 715 F. Supp. 2d 431 (W.D.N.Y. 2010); *Rossito-Canty v. Cuomo*, 86 F. Supp. 3d 175 (E.D.N.Y. 2015).

64. See, e.g., *Fox*, 715 F. Supp. 2d at 442 (issuing a declaratory judgment that the Governor must hold a special election but finding the scheduling of such an election to be within the Governor's discretion).

have been free to legislate on election issues, but at various points in American history, the patchwork quilt of competing state laws has created problems for the federal government. In those circumstances, comprehensive federal legislation has provided needed stability for and consistency within the nation's election system.

In the first significant use of its election power, Congress passed a law in 1842 that required states to use single-member districts rather than at-large, statewide elections.<sup>65</sup> The establishment of political parties combined with at-large elections to introduce a perverse incentive: smaller states could have more influence if they elected a statewide ticket made up of one party.<sup>66</sup> Such a problem demanded a national solution that only Congress was likely to provide. In the debate about Congress' power to pass such legislation under the Elections Clause, one representative asked, "what plain unsophisticated man, reading this clause, would for a moment doubt the power of Congress to control the whole subject, whenever, in its discretion, it shall see fit to do so? Could language be more direct, full, and explicit?"<sup>67</sup> The unusual federal intervention into the disorganized state election systems initially caused controversy,<sup>68</sup> but the single-member district remains a national standard today.<sup>69</sup>

After the Civil War, Congress again used its broad Elections Clause power, this time to establish a uniform voting date for all federal elections.<sup>70</sup> In the early 1800s, the states' schedules for federal elections varied widely, with elections for the same two-year term occurring well over a full year apart.<sup>71</sup> Congress was moved to act by multiple trends, including voter fraud in the North and violations of the Reconstruction Amendments in the South.<sup>72</sup> Here too, the initial attempts were unsuccessful; proposed bills setting a standardized date failed eight times in the decade before

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65. *Colegrove v. Green*, 328 U.S. 549, 555 (1946).

66. Martin H. Quitt, *Constitutional (Partisan) Constitutionalism: The Apportionment Act Debates of 1842 and 1844*, 28 J. EARLY REPUBLIC 627, 638 (2008).

67. *Id.* at 639.

68. Four states sent delegations that were chosen in at-large elections to the 28th Congress. *Id.* at 646–50. After substantial debate, the House voted to seat the representatives. *Id.*

69. 2 U.S.C. § 2c.

70. Stonecash et al., *supra* note 44, at 145–46.

71. *Id.* at 144.

72. *See id.* at 145.

one finally passed in 1872.<sup>73</sup> This established the Tuesday after the first Monday in November as Election Day, also the national standard to this day.<sup>74</sup>

More recent federal legislation has specifically addressed special elections. In 2004, Congress passed legislation to create special rules “for extraordinary circumstances” when there are more than 100 vacancies in the House.<sup>75</sup> Passed in the aftermath of the September 11 attacks, the law requires governors to schedule special elections within 49 days of the announcement of the vacancy in order to quickly return the House to full strength after an emergency.<sup>76</sup> This law is a powerful indicator that Congress is empowered to significantly limit the discretion of governors in setting election dates. The extraordinary circumstances provision is listed as an exception in the section of the U.S. Code that grants states the authority to create their own laws about filling vacancies.<sup>77</sup> The language that Congress used in 2 U.S.C. § 8, granting state power over vacancies except in certain circumstances, demonstrates congressional power over special elections. Congress could add another exception or rewrite the grant of power to the states in a way that limits states’ lawmaking.

These laws not only show that Congress has plenary power over elections, but they also signal that Congress ought to reform election laws to adapt to changing conditions in the nation’s election structure.<sup>78</sup> The framers of the Constitution had to imagine a new, untested kind of republican system that they had not seen in action and thus instituted broad grants of power to future congresses to address freshly developed problems as they saw fit.

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73. *See id.* (“Bills that would impose the same November election date for House seats in all states were introduced in 1862, 1863, 1865, 1866, 1867, 1869, 1870, and 1871.”).

74. 2 U.S.C. § 7.

75. 2 U.S.C. § 8(b).

76. R. ERIC PETERSEN, CONG. RSCH. SERV., R40628, CONSTITUTIONAL APPROACHES TO CONTINUITY OF CONGRESSIONAL REPRESENTATION: BACKGROUND AND ISSUES FOR CONGRESS 2–3 (2009), <https://crsreports.congress.gov/product/pdf/R/R40628>.

77. 2 U.S.C. § 8(a).

78. *See Ex parte Yarbough* (The Ku Klux Cases), 110 U.S. 651, 662 (1884) (“[W]hen, in the pursuance of a new demand for action, [Congress], as it did in the cases just enumerated [involving the 1842 and 1872 acts], finds it necessary to make additional laws for the free, the pure, and the safe exercise of this right of voting, they stand upon the same ground and are to be upheld for the same reasons.”).

## B. STATE APPLICATIONS OF ELECTION POWER

While Congress retains the ultimate power over elections, it also depends upon the states to enact most of the numerous rules required to create a functioning electoral system. A special election to fill a House vacancy is no exception to this general framework. The scheduling of a special election has numerous constituent elements.<sup>79</sup> Accordingly, state laws may contain a variety of provisions addressing the determination of a vacancy, a gubernatorial proclamation of a special election, a maximum or minimum time before a special election, the requirements to hold a primary election, and more.<sup>80</sup> The state power over special elections has produced a set of restrictions that vary widely from state to state.

The law controlling the scheduling of elections in Florida's 20th District exemplifies one type of state law that provides the governor with nearly unlimited discretion.<sup>81</sup> When a vacancy occurs,<sup>82</sup> "the Governor, after consultation with the Secretary of State, shall fix the dates of a special primary election and a special election."<sup>83</sup> The law includes certain stipulations mandating, for example, at least two weeks between the primary and general elections, as well as restrictions on when candidates can qualify for the ballot or file campaign expense statements.<sup>84</sup> But Florida's governor is given free rein outside of a vague direction to "consider any upcoming elections in the jurisdiction where the special election will be held."<sup>85</sup> That provision suggests the possibility of combining a special election with a regularly-scheduled election, which has potential advantages by cutting costs and avoiding voter fatigue. Even there, the law only requires consideration, not action, and does not enumerate what factors should be

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79. For instance, registration, voter roll maintenance, distribution of absentee ballots and absentee ballot applications, early voting, election day voting, tabulating votes, recounting, and auditing, among others.

80. See, e.g., FLA. STAT. ANN. §§ 100.101 (West 2011); 100.111 (West 2021); 100.141 (West 2005); 100.191 (West 2008).

81. See *infra* Part III.

82. FLA. STAT. ANN. § 100.101(4) (West 2011).

83. *Id.* § 100.111(2) (West 2021).

84. *Id.*

85. *Id.*



considered.<sup>86</sup> Many other states have substantially similar rules for their special elections.<sup>87</sup>

Other states have much more complicated special election regimes, setting a series of benchmarks that narrowly confine election dates. In New York, for example, a special election must come between 70 and 80 days after a gubernatorial proclamation, which itself must come within 10 days of the occurrence of the vacancy.<sup>88</sup> California stipulates a proclamation shall be issued within 14 days of the vacancy, and an election be held 126 to 140 days after that, with an allowance for up to 200 days to consolidate the special election with a regularly-scheduled one.<sup>89</sup> An election must be held 84 to 120 days after the vacancy in West Virginia.<sup>90</sup> Nebraska sets a maximum of 90 days after the vacancy, but no minimum.<sup>91</sup> Pennsylvania, rather less helpfully, sets a minimum of 60 days but no maximum.<sup>92</sup>

Texas has adopted arguably the most efficient model for its special elections. Texas law establishes uniform dates for all state and federal elections: two possible dates each year, spaced about six months apart.<sup>93</sup> Although both election dates need not be used every year, there is an expectation that any necessary elections will occur on the first Saturday in May or on the first Tuesday after the first Monday in November.<sup>94</sup> When a vacancy arises and a special election needs to be called, it can be easily slotted into the next uniform election date that is at least 36 days away on the schedule.<sup>95</sup> Of course, a system with preset options for scheduling is less responsive to any single event, and is thus likely to make

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86. *Id.*

87. *See, e.g.*, DEL. CODE ANN. tit. 15 §§ 7301–02 (West 2011); IDAHO CODE ANN. § 59-911 (West 1995); LA. STAT. ANN. § 18:1279 (2022); OHIO REV. CODE ANN. § 3521.03 (West 2007); VA. CODE ANN. § 24.-209 (West 2010).

88. N.Y. PUB. OFF. LAW § 42(3) (McKinney 2022). Prior to 2021, New York’s governor was limited in scheduling the election 70 to 80 days after the proclamation, but there were no limits on the timing of the proclamation. 2021 N.Y. Laws ch. 320 (2021) (McKinney).

89. CAL. ELEC. CODE § 10700 (West 2003); *id.* § 10703(a)(1) (West 2020).

90. W. VA. CODE ANN. § 3-10-4(a)(1) (West 2018).

91. NEB. REV. STAT. ANN. § 32-564(1)(c) (West 2008). The MOVE Act requires a forty-five-day period before each election. 52 U.S.C. § 20302(a)(8). *See* discussion *infra* Part III.B.1. Thus, it seems that any Nebraska special election consisting of a primary and a general election phase would violate either state law or federal law. This conflict has not been tested because there has not been a House vacancy in Nebraska since the passage of the MOVE Act in 2009. *See infra* Appendix.

92. 25 PA. STAT. AND CONS. STAT. ANN. § 2777 (West 1964).

93. TEX. ELEC. CODE ANN. § 41.001(a) (West 2021).

94. *Id.*

95. *Id.* § 203.004(a) (West 2021).

short vacancies longer even as it makes long vacancies shorter. Texas law anticipated this problem, however, and provided a procedure to move to an expedited election when there is a vacancy in the state legislature while it is in session.<sup>96</sup> By relying on a well-established structure and anticipating a range of scenarios, the Texas system achieves the rare feat of combining predictability with flexibility. Although the governor's decision as to when to take advantage of the expedited election process is subject to political pressures, at least the constituents have a backstop in the form of the next uniform election date.<sup>97</sup>

Despite its merits, Texas' special elections system would not be directly transferable to a sweeping federal statute, since many states use election schedules for state and local offices that do not conform to a regular pattern. While the states can pass laws to synchronize their state elections with the established November date for federal elections, Congress cannot dictate the dates of state and local elections.<sup>98</sup> As a result, a federal law to establish uniform federal election dates would be inefficient, as such elections would not have the advantage of matching previously scheduled state elections.

Although laws at the state level are unlikely to solve the problem, states with an interest in good governance and full representation of their voters ought to act on their own in the absence of federal legislation. States without a time limit would be well-served to adopt the Texas model or to follow the lead of any of the states that places such restraints on gubernatorial power.

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96. *Id.* § 203.013 (West 2015); *see also id.* § 204.021 (West 1986). This exception does not apply to vacancies in Congress, but states using Texas' Election Code as a model would be wise to fill that gap.

97. The Texas system is also afflicted with significant gubernatorial discretion. Special elections are scheduled for the next uniform election date at least 36 days after the election is ordered. *Id.* § 203.004(a) (West 2021). However, there is no time limit on when the governor can order an election, with the statute merely saying it must be "as soon as practicable after the vacancy occurs." *Id.* § 201.051(a) (West 2011). In 2020–2021, Governor Greg Abbott declined to call a special election in Texas' 4th District, leaving the seat vacant for 226 days. *See infra* Appendix; Patrick Svitek, *Local GOP Officials Poised to Select Texas' Newest Member of Congress, Replacing John Ratcliffe in Atypical Election*, TEX. TRIBUNE (Aug. 7, 2020), <https://www.texastribune.org/2020/08/07/texas-4th-congressional-district/> [<https://perma.cc/YK7U-2DRL>].

98. 2 U.S.C. § 7 (setting the date for elections to the U.S. House of Representatives).

## C. FEDERAL COURTS' INTERPRETATION OF ELECTION POWER

Confronted with little guidance from the Constitution and a range of divergent state laws, frustrated voters might understandably look to the federal courts to vindicate their right to vote. Yet vacancies in the U.S. House of Representatives are not especially common, and litigation about those vacancies is even rarer. Only a few federal court cases have directly addressed the power of governors to set special election dates. Courts in these cases are essentially in agreement that the governor's constitutional duty under Article I, § 2 is mandatory—the state executive officer must issue a writ of election to fill an empty seat.<sup>99</sup> The implications of that mandatory duty, however, are less clear. The Constitution does not place any limits on the governor's discretion, and courts disagree about what to do if a governor refuses to issue a writ of election altogether.<sup>100</sup>

In *Jackson v. Ogilvie*, the first federal case to take up this question, Illinois Governor Richard B. Ogilvie appeared ready to leave a seat open for well over a year until the federal court stepped in.<sup>101</sup> The Representative for the 6th District of Illinois died in August 1969, but Governor Ogilvie did not schedule a special election, which would have left the seat vacant for 508 days until the next Congress began in January 1971.<sup>102</sup> Defending his decision in court, Ogilvie argued that the constraints of Illinois state law would leave a little less than a year for a new representative to serve and that he had used his discretion to determine that such a vacancy was not worth an election.<sup>103</sup> The district court, issuing its ruling in March 1970, agreed. It found

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99. See, e.g., *Jackson v. Ogilvie*, 426 F.2d 1333, 1336 (7th Cir. 1970) (“The language is mandatory. . . .”); *ACLU of Ohio v. Taft*, 385 F.3d 641, 649 (6th Cir. 2004) (“[W]e conclude that Article I, section 2, clause 4 is mandatory, requiring the state’s executive to issue a writ to fill a vacancy in the House.”); *Fox v. Paterson*, 715 F. Supp. 2d 431, 437 (W.D.N.Y. 2010) (“Article I, § 2, clause 4 mandates the calling of a special election to fill the vacancy.”); *Rossito-Canty v. Cuomo*, 86 F. Supp. 3d 175, 195 (E.D.N.Y. 2015) (citing *Fox*).

100. The Supreme Court of Ohio found that the governor had a mandatory duty under Ohio state law to set a special election but refused to issue a writ of mandamus to change those dates. The court noted that it would be improper to use mandamus in an area of an official’s discretionary duty. *State ex rel. Armstrong v. Davey*, 198 N.E. 180, 181 (Ohio 1935); but see *Rossito-Canty*, 86 F. Supp. 3d at 180 (promising to set the date for a special election if the governor did not set the date or justify his delay by a certain time).

101. *Jackson*, 426 F.2d at 1334–35.

102. *Id.* at 1334. If there had been no special election, the seat would have been open from August 13, 1969, until the end of the term on January 3, 1971.

103. *Id.* at 1334–35.

that the remaining time left in the term was de minimis, so there was no constitutional violation.<sup>104</sup> The Court of Appeals for the Seventh Circuit reversed, however, and held that the amount of time left after the March 16 ruling was not de minimis.<sup>105</sup> The court went further, stating that a special election held concurrently with the regular election that November would be proper because the two months that the winner of that election could serve between November and January would not be de minimis.<sup>106</sup> The delay during the appeal process only heightened the disparity between the findings of the two courts: the district court had not required an election with eleven months left in the term, whereas the appellate court found that even two months was long enough to justify the cost. Upon remand, the district court judge threatened to hold Governor Ogilvie in contempt until he relented and scheduled the special election for November 3, as the appellate court had previously suggested.<sup>107</sup>

The appellate court's reasoning included a counterintuitive admission that "delay may eventually render the calling of a special election of so little use that the [governor's] duty will no longer be enforceable."<sup>108</sup> The declaration is curious in two ways. First, there is some tension in the court finding an actionable interest in representation during the two-month lame duck period after the regular election while also acknowledging that a special election would be basically useless if it came late enough in that lame duck period. Perhaps the analysis of the Seventh Circuit turned on the relatively low cost of a second November election to be held at the same time as the regularly scheduled election. Thus, the voters' interests would be strong enough to justify a ballot with a second simultaneous election for the same seat, but not so strong to require the greater expenditure needed to set up the election infrastructure separately. The second oddity is more concerning. The court's declaration creates perverse incentives for an unscrupulous governor to meet the Article I obligation by setting an election date far in the future, shortly before the end of the term. As that date approached, any further actions by the

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104. *Id.* at 1335.

105. *Jackson v. Ogilvie*, 426 F.2d 1333, 1335, 1338 (7th Cir. 1970). 293 days remained in the term at the time of the district court's ruling.

106. *Id.* at 1337.

107. *Vote Set for House Vacancy*, CHI. TRIBUNE, July 29, 1970, PROQUEST, Doc. no. 169864376.

108. *Jackson*, 426 F.2d at 1337.

governor to undermine the election, even canceling it, might be found to be beyond the reach of federal courts, as there would be too little time left in the expiring term for a court to enforce the governor's duty.

Deciding *ACLU of Ohio v. Taft* thirty-four years later, the Court of Appeals for the Sixth Circuit held that a vacancy of more than five months was long enough to trigger the governor's mandatory duty to call an election.<sup>109</sup> Noting that "only one case . . . deals with such a situation," the court relied heavily on the Seventh Circuit's decision in *Jackson v. Ogilvie*.<sup>110</sup> The court went on to observe that "We recognize that there may be instances where the time remaining in the congressional term is truly de minimis, thereby excusing the executive from issuing the writ, but the time involved in this case cannot be considered de minimis."<sup>111</sup> The Sixth Circuit's holding is remarkable because many states have laws that require their governors to schedule a special election but include some exceptions if the vacancy occurs near the next election. The timeline varies from state to state, but states commonly have exceptions covering a longer amount of time than five months—the amount of time the court found would exceed the standard for de minimis here.<sup>112</sup> The unavoidable implication of the *Taft* decision is that many state laws providing exceptions from the duty to issue writs of elections are unconstitutional. By the time the case made it to the Sixth Circuit, the next Congress had already been seated. Thus, it was too late for an injunction to bind the governor, but the court still awarded declaratory judgment and attorneys' fees to the ACLU.<sup>113</sup>

In a later case in district court, *Fox v. Paterson*, the plaintiffs hoped to move the date of the special election forward in New York's 29th District.<sup>114</sup> This case is distinct in that it involved a challenge about the timing of a special election that had already been scheduled, at least informally, by the time it was heard in

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109. *ACLU of Ohio v. Taft*, 385 F.3d 641 (6th Cir. 2004).

110. *Taft*, 385 F.3d at 648.

111. *Id.* at 649.

112. *See, e.g.*, ARIZ. REV. STAT. ANN. § 16-222(B) (2018) (six months); 10 ILL. COMP. STAT. ANN. 5/25-7 (West 2015) (240 days); MINN. STAT. ANN. § 204D.29, Subd. 4 (West 2010) (twenty-two weeks); VT. STAT. ANN. tit. 17, § 2621(b) (West 2019) (six months); WASH. REV. CODE ANN. § 29A.28.041(3) (West 2013) (eight months); WYO. STAT. ANN. § 22-18-105 (West 2015) (six months).

113. *Taft*, 385 F.3d at 646–47.

114. *Fox v. Paterson*, 715 F. Supp. 2d 431 (W.D.N.Y. 2010).

court.<sup>115</sup> The plaintiffs filed the case at a time when “the Governor had not issued a formal proclamation for a special election and there had been published reports that he was disinclined to do so.”<sup>116</sup> Because of the specific time limits in New York’s state election law, Governor David Paterson announced in May 2010 that the special election would take place concurrently with the regular election in November but was barred from issuing the official proclamation until at most 40 days before the election.<sup>117</sup> In this unique situation, the plaintiffs sued to obtain an injunction requiring the Governor to hold the election sooner than that date.<sup>118</sup> The court denied injunctive relief but granted a declaratory judgment that the Governor was required to issue the proclamation under state law, as he had indicated he would do.<sup>119</sup>

The court noted that “the Constitution imposes a mandatory duty on a state’s chief executive to call a special election to fill a congressional vacancy, although a governor does have some discretion with respect to the *timing* of that election.”<sup>120</sup> The court acknowledged that “there may be cases in which such an extraordinary amount of time passes from the existence of the vacancy to the issuance of the proclamation that it amounts to a *de facto* refusal to call a special election at all.”<sup>121</sup> It ultimately concluded that the case before it did not qualify as a *de facto* refusal, however.<sup>122</sup> Under the court’s reasoning, it is not clear what amount of time would be required to reach the level of a *de facto* refusal.

In this instance, Governor Paterson scheduled the election immediately before the deadline to file his response to a lawsuit against him.<sup>123</sup> This pattern is comparable to Governor Ogilvie in 1970, who waited until the day before a hearing on the possibility of contempt charges to schedule the election.<sup>124</sup> In each example, the governor’s scheduling of the election occurred at the last moment before the threat of legal action forced his hand, allowing for the maximum possible delay without consequences. This is an

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115. *See id.* at 432–33.

116. *Id.* at 433.

117. *See id.*

118. *Id.* at 432–33.

119. *Fox v. Paterson*, 715 F. Supp. 2d 431, 442 (W.D.N.Y. 2010).

120. *Id.* at 434.

121. *Id.* at 442.

122. *Id.*

123. *Id.* at 433.

124. *Vote Set for House Vacancy*, *supra* note 107.

unfortunate but expected consequence of a legal framework that places a duty upon the governor to act and then provides no conditions under which that duty must take place. The practically boundless level of discretion by a single actor is antithetical to a government structured around separation of powers.

The slow resolution of the three cases just described points to one of the great problems in using litigation as a mechanism to force the scheduling of a special election. By definition, a vacancy in the House of Representatives can never last more than two years, and so it is often difficult to shepherd a case through the federal court system in time to obtain a satisfactory remedy. Indeed, in both *Jackson* and *Taft*, the courts needed to address concerns that the cases were moot or would soon become moot.<sup>125</sup> Only an exception to the mootness doctrine saved the cases and allowed for the few law declarations that exist on this topic, since election cases are often found to be “capable of repetition, yet evading review.”<sup>126</sup> Like other disputes included in the category, adjudication of election issues is often too slow to vindicate the rights at stake. Regardless of their length, vacancies often meet the two requirements for the mootness exception: “(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again.”<sup>127</sup> It is important for courts to fully litigate these issues, even when the time for a special election has passed, so future governors have clearer guidelines about their legal duties and future courts have guiding precedent. Indeed, it is likely that many other cases were mooted or never brought in the first place due to the narrow windows in time where an injury existed for the voters.

These cases show that the courts are ill-suited for resolving delays and can only respond, albeit belatedly, to governors’ outright refusals to schedule special elections. Yet the executive can always resolve the litigation by calling the election while still taking advantage of the waiting periods inherent in the court system. As the Ninth Circuit observed, “The House Vacancy

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125. *Jackson v. Ogilvie*, 426 F.2d 1333, 1337 (7th Cir. 1970); *ACLU of Ohio v. Taft*, 385 F.3d 641, 646–47 (6th Cir. 2004).

126. *Taft* at 647 (quoting *Jackson*, 426 F.2d at 1337).

127. *Fed. Election Comm’n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 462 (2007) (quoting *Spencer v. Kemna*, 523 U.S. 1, 17 (1998)).

Clause does not specify the amount of time that may permissibly elapse between the happening of a vacancy and the vacancy election.”<sup>128</sup> Relying on that standard, a federal district court dismissed a case against Florida Governor Ron DeSantis about the open seat in Florida’s 20th District, finding that the Governor had acted within the scope of his constitutional discretion.<sup>129</sup> Likewise, a federal district court in Michigan in 2018 denied a request for an injunction to schedule an earlier election in an even longer vacancy.<sup>130</sup>

Although the district court in *Fox v. Paterson* opened the door to the possibility that a delay could be so long that it constituted a de facto abdication of the governor’s duty, no court (including the *Fox* court) has found that such a delay violated the law, always reasoning that an even longer delay was possible.<sup>131</sup> Such results spur the question of how long a seat must be left open before it qualifies as a constitutional violation. The absence of a clear standard condemns future cases to languish in the court system while the congressional term runs out. As the adage says, justice delayed is justice denied.

### III. LENGTHENING VACANCIES

The lack of checks, across both state and federal law, on a governor’s scheduling of a special election has become a more serious issue over the last quarter century. Data show an increase in the length of congressional vacancies from 1997 to 2021.<sup>132</sup> Political factors may account for a subset of House seats that have been left vacant for increasingly unusual periods of time.<sup>133</sup> But another important procedural change may help to explain the trend: the passage of the Military and Overseas Voter Empowerment Act (MOVE Act) in 2009, which created additional

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128. *Tedards v. Ducey*, 951 F.3d 1041, 1054 (9th Cir. 2020).

129. Order Granting Defendant’s Motion to Dismiss at 8–9, *Dowling v. DeSantis*, No. 9:21-CV-80796 (S.D. Fla. Dec. 22, 2021), ECF No. 20.

130. *Rhodes v. Snyder*, 302 F. Supp. 3d 905, 914–15 (E.D. Mich. 2018).

131. *Id.* at 914 (“[I]f Congressman Conyers had resigned immediately after his term began in January 2017, the Court would be hard pressed to defer to the Governor’s decision to hold a special election in November 2018; that would likely be a ‘*de facto*’ refusal to call a special election at all.” (citing *Fox v. Paterson*, 715 F. Supp. 2d 431, 442 (W.D.N.Y. 2010))).

132. See *infra* Figure 1.

133. See *Rakich*, *supra* note 12 (finding longer vacancies in House seats in states with a governor of the opposing party from 2011 to 2021).

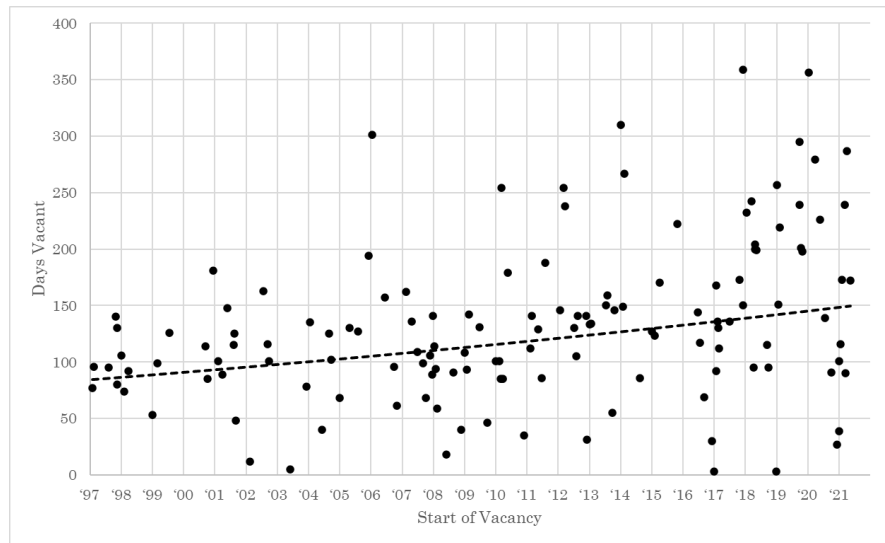


requirements for congressional elections, including special elections.<sup>134</sup>

### A. TRENDS IN HOUSE VACANCIES, 1997–2021

The issue of longer vacancies is most clear when examining data that aggregates all empty House seats in recent years.<sup>135</sup> The House of Representatives keeps a detailed online record of all vacancies in the House dating back to the 105th Congress, which began in 1997.<sup>136</sup> In the twenty-five years between January 1, 1997, and December 31, 2021, there have been 136 vacancies in the House. The lengths of those vacancies are depicted in Figure 1 below.

FIGURE 1: LENGTH OF VACANCIES OVER TIME, 1997–2021<sup>137</sup>



134. National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, §§ 575–589, 123 Stat. 2190, 2318–2335 (2009).

135. See *infra* Appendix.

136. See *Vacancies & Successors, 1997 to Present*, U.S. HOUSE OF REPRESENTATIVES: HISTORY, ART & ARCHIVES, <https://history.house.gov/Institution/Vacancies-Successors/Vacancies-Successors/> [<https://perma.cc/BK63-2ZHQ>].

137. The data underwent a variance stabilizing transformation. The line is slightly curved because it was fitted to logarithmically transformed data.

Some trends are apparent from the graph above. The vacancies are getting longer.<sup>138</sup> Consider the evidence for the first five years of the dataset compared to the last five years: the average length for the twenty-one vacancies that began 1997–2001 was 104 days,<sup>139</sup> while the average length for the thirty-nine vacancies that began 2017–2021 was 173 days.<sup>140</sup> A linear regression showed statistically significant evidence of an increase in the length of vacancies over time ( $T=3.47$ ,  $p<0.001$ ). There was an estimated expected vacancy length of approximately 84 days at the beginning of the period and an expected vacancy length of approximately 150 days at the end of the period.

One driver of the overall trend is the increasing length of the very longest vacancies, which appear to be becoming more extreme.<sup>141</sup> From 1997 to 2001, there was only one vacancy over 150 days, and none over 200 days.<sup>142</sup> From 2017 to 2021, however, there were two vacancies over 350 days, and more than half of the total vacancies lasted over 150 days.<sup>143</sup> There were more vacancies over 150 days in the last five years of the period (twenty-two out of thirty-nine) than there were total vacancies in the first five years (twenty-one).<sup>144</sup> The longest vacancy in the latter set—359 days in the Michigan 13th District in 2017–2018—was nearly twice as long as the longest vacancy in the former set—181 days in the California 32nd District in 2000–2001. Seventeen of the twenty-five longest vacancies in the dataset occurred in its final five years, 2017–2021.<sup>145</sup>

Although there is a general trend toward longer vacancies, the circumstances of those vacancies are widely divergent. When a representative creates a vacancy through resignation, they can sometimes time their departure from office to reduce the length of the vacancy.<sup>146</sup> Of course, the point in the term when the seat

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138. See *supra* Figure 1.

139. See *infra* Appendix.

140. *Id.*

141. See *supra* Figure 1.

142. See *infra* Appendix.

143. *Id.*

144. *Id.*

145. *Id.*

146. See, e.g., Rosalind S. Helderman & Jeffrey H. Birnbaum, *Wynn Decides to Leave Congress Months Before His Term Expires*, WASH. POST (Mar. 28, 2008), <https://www.washingtonpost.com/wp-dyn/content/article/2008/03/27/AR2008032702136.html> [<https://perma.cc/2KRL-8AYY>]. See also Diane Plumberg Clay, *Largent Files Resignation from House*, OKLAHOMAN (Oct. 27, 2001), <https://www.oklahoman.com/story/news/2001/10/27/largent-files-resignation-from-house/>

becomes vacant is responsible for a great deal of variance. A seat that opens up late in the term, for example, usually does not garner a special election at all. Instead, that seat often remains open until the next regularly scheduled general election.<sup>147</sup>

Two common periods for resignations are at the beginning or end of a congressional term. In both instances, departing representatives often take on new positions in government, perhaps in a newly elected presidential administration.<sup>148</sup> In the first few months of 2017, for instance, four representatives resigned to take on roles in the Trump Administration.<sup>149</sup> Even a slight difference in timing, from the end of one congressional term to the beginning of another, can lead to very different results.

Because the circumstances of each vacancy are different, there is no set amount of time that represents the ideal waiting period until a new representative takes over. Some of the vacancies represent truly unusual situations.<sup>150</sup> In certain situations, it might make sense to hold a seat open slightly longer than necessary, so that a special election can match up with an already-scheduled election day. Thus, the data in the graph above are useful only in identifying general trends.<sup>151</sup>

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62125483007/ [https://perma.cc/7DJA-J7KG]. Oklahoma's state legislature passed a special law in 2001 to allow a special election before Representative Steve Largent left office. Senate Bill 7X allowed the scheduling of a special election once Largent had filed an irrevocable resignation from the House of Representatives. This is the only instance in the dataset where the special election occurred before the vacancy existed. *See infra* Appendix.

147. *See infra* Appendix.

148. *Id.* (showing multiple vacancies in 2017 and 2021 corresponding to the beginnings of the Trump and Biden Administrations).

149. The four were then-Representatives Mike Pompeo, Tom Price, Mick Mulvaney, and Ryan Zinke. Nathaniel Rakich, *We've Never Seen Congressional Resignations Like This Before*, FIVETHIRTYEIGHT (Jan. 29, 2018), <https://fivethirtyeight.com/features/more-people-are-resigning-from-congress-than-at-any-time-in-recent-history/> [https://perma.cc/9493-WCKP].

150. For instance, the North Carolina Board of Elections refused to certify the winner of the November 2018 election in the state's 9th District due to allegations of absentee ballot fraud. The Board ordered a new election be held in September 2019, creating a vacancy at the beginning of the term. *See* Laura Barrón-López, *Board Sets Dates for North Carolina Election Redo*, POLITICO (Mar. 4, 2019), <https://www.politico.com/story/2019/03/04/dates-north-carolina-election-redo-1233148> [https://perma.cc/8UV7-X3SX].

151. *See supra* Figure 1.

## B. POTENTIAL CAUSES OF LONGER VACANCIES

The increasing length of vacancies is likely the result of two related trends. Increasing length may be the result of procedural changes as well as new political developments.

### 1. *The MOVE Act*

The Military and Overseas Voter Empowerment (MOVE) Act requires that absentee voters, including but not limited to those serving in the military overseas, have at least 45 days to vote in every federal election.<sup>152</sup> In practice, this statutory requirement necessitates 90 days when there is a primary and a general election. When applied to special elections for the House of Representatives, the requirements of the MOVE Act are in tension with the goal of seating a new representative with minimal delay.

In 2009, the Senate Committee on Rules and Administration conducted a study with the Congressional Research Service to determine how many ballots from overseas voters had gone uncounted in the previous year's presidential election.<sup>153</sup> The results were alarming, suggesting that more than one quarter of the absentee ballots requested by overseas voters were lost, rejected, or never returned.<sup>154</sup> Because many overseas voters are military personnel deployed abroad, Congress framed the solution as a boon to servicemembers. The resulting law, the MOVE Act, amended the 1986 Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA).<sup>155</sup> UOCAVA required that states would allow registration and absentee voting for Americans living overseas, including members of the armed services.<sup>156</sup> The MOVE Act expanded upon that mandate by allowing overseas voters to

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152. 52 U.S.C. § 20302(a)(8).

153. *Schumer Releases Survey Suggesting Ballots of One in Four Troops Deployed Overseas Went Uncounted in '08 Election*, SENATE COMM. ON RULES & ADMIN. (May 13, 2009), <https://www.rules.senate.gov/news/minority-news/schumer-releases-survey-suggesting-ballots-of-one-in-four-troops-deployed-overseas-went-uncounted-in-08-election> [<https://perma.cc/72PE-YUV4>].

154. *Id.* Senator Charles Schumer said, “[it] is the least we can do for our troops to make sure their votes get counted when they are serving overseas.” Ian Urbina, *Congress Approves Bill Helping Overseas Voters*, N.Y. TIMES (Oct. 22, 2009), <https://www.nytimes.com/2009/10/23/us/politics/23vote.html> [<https://perma.cc/3A2K-J6KQ>].

155. Press Release, DOJ, Fact Sheet: Move Act (Oct. 27, 2010), <https://www.justice.gov/opa/pr/fact-sheet-move-act> [<https://perma.cc/99YC-U9CN>].

156. *Id.*

use the internet for registration, delivery of blank ballots, ballot tracking, and to communicate with election officials.<sup>157</sup> The relevant provision required ballot distribution to voters 45 days before an election.<sup>158</sup> The Act was intended to reduce barriers to voting by overseas voters, by simplifying the process to obtain ballots and extending the time to return ballots.<sup>159</sup>

The MOVE Act created new problems for special elections. In a regularly scheduled November election in an even-numbered year, the provision serves to make it as easy as possible for overseas voters to cast their ballots with little apparent downside. In the vast majority of elections, the MOVE Act requires nothing more than a little advance planning. For special elections, however, the law can actually require a delay that leaves the seat open for longer than otherwise necessary. Because ballots must be sent out 45 days before the date of the election, the state must hurry to resolve any issues with the list of candidates on the ballot. Once that task is completed, the state must wait for a month and a half before it can close the polls. The 45-day requirement thus creates an extended interval in the middle of the state's process, at a point when it may not need the time. With this rigid stipulation, the law privileges the convenience of a small portion of the voting population over the interests of all constituents to quickly regain representation.

The restrictions of the MOVE Act do not impact all special elections, of course. When representatives announce their resignation in advance, the state can begin the process while the outgoing legislator is still in office, thus reducing the length of the vacancy. And when the seat becomes empty near the end of the term, there is no need for a special election and thus no MOVE Act-inspired delays.<sup>160</sup> But when it does apply, the MOVE Act can create substantial restrictions on state governments' election administration. In most cases, a special election requires a primary and a general election, essentially setting a 90-day floor on the vacancy. Since the law was amended in 2009, the Department of Justice (DOJ) has initiated lawsuits against at least

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157. National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, §§ 575–589, 123 Stat. 2190, 2318–2335 (2009).

158. 52 U.S.C. § 20302(a)(8).

159. Press Release, *supra* note 155.

160. There was no special election held in 23 of the 136 vacancies between 1997 and 2021. *See infra* Appendix.

thirteen states and two territories for violations of the MOVE Act and UOCAVA.<sup>161</sup> Some of those cases have dealt with regularly scheduled general elections,<sup>162</sup> but it is unsurprising that states have violated these laws more often when faced with an unexpected election. Runoff elections<sup>163</sup> and special elections are thus a particular focus for federal adjudication.

In the 2018 special primary election in Arizona's 8th District, the eligible candidates had not been set in time to send out ballots 45 days before the election.<sup>164</sup> Democratic Party ballots listed three candidates, but one candidate was later challenged and removed from the ballot.<sup>165</sup> Voters who received that ballot therefore had less than 45 days with the correct information to vote.<sup>166</sup> Meanwhile, the state encouraged voters in the Republican, Libertarian, and Green Party primaries to wait to vote until they received an updated ballot, but the state never made any changes to the candidate lists for those races and so never sent updated ballots.<sup>167</sup> The DOJ filed a complaint and simultaneously entered into a consent decree with the state to allow ballots received after the original deadline to be counted.<sup>168</sup> Similarly, in 2015, the Governor of Illinois scheduled a special House election without providing for the ballot to be set 45 days before the primary.<sup>169</sup> As in Arizona, the solution in the consent decree was to require ballots to be accepted after the original deadline.<sup>170</sup> Such an order delays the certification of election and could impact the date on which the new representative is sworn in and begins to represent the district.

Persistent DOJ enforcement has delayed elections even in the absence of litigation. Wisconsin Governor Tony Evers initially

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161. Alabama, Arizona, California, Georgia, Guam, Michigan, New Mexico, New York, Vermont, the Virgin Islands, Virginia, West Virginia, along with Illinois and Wisconsin three times each. *Cases Raising Claims Under the Uniformed and Overseas Citizen Absentee Voting Act*, U.S. DEPT OF JUST., <https://www.justice.gov/crt/cases-raising-claims-under-uniformed-and-overseas-citizen-absentee-voting-act> [<https://perma.cc/UQQ2-RH5X>].

162. See *United States v. New York*, 2012 WL 254263 (N.D.N.Y. Jan. 27, 2012); *United States v. West Virginia*, 2014 WL 7338867 (S.D. W. Va. Dec. 22, 2014).

163. See *United States v. Alabama*, 778 F.3d 926 (11th Cir. 2015); *United States v. Georgia*, 892 F. Supp. 2d 1367 (N.D. Ga. 2012).

164. Consent Decree at 3–4, *United States v. Arizona*, No. CV-18-00505-PHX-DLR (D. Ariz. Feb. 15, 2018), ECF No. 8.

165. *Id.* at 4–5.

166. *Id.* at 4–6.

167. *Id.* at 5–6.

168. *Id.* at 6–7.

169. Consent Decree at 4–5, *United States v. Illinois*, No. 1:15-cv-02997 (N.D. Ill. Apr. 14, 2015), ECF No. 9.

170. *Id.* at 6.

scheduled a special election with its primary and general election less than a month apart in 2019–2020.<sup>171</sup> That timeline was allowed under a state law that mandated 28 days between primary and general elections but would have been short of the 45-day federal MOVE Act requirements.<sup>172</sup> Governor Evers reversed course and called on the legislature to change the state law to synchronize with the federal standards.<sup>173</sup>

## 2. *Partisan Advantages*

Legal mandates and logistical constraints are not the only possible factors to explain the increased length of vacancies. Congress has become more polarized on partisan lines in recent decades, with the parties becoming more ideologically coherent and moving further away from the center.<sup>174</sup> As party becomes a more consistent predictor of a representative's actions, it will become increasingly valuable for each party to deny seats to their opponents altogether.

When Governor Evers changed the election dates in Wisconsin's 7th District, his opponents speculated on his motivations. The executive director of the Republican Party of Wisconsin claimed that both of Evers' dates were chosen for political reasons. "First, Evers sought to hold an election on a Monday during the holiday season under the guise of getting prompt representation for district residents. Now he needlessly pushes off the general election until after the regularly scheduled April 7th election in an effort to stack the deck for his liberal partisan Supreme Court candidates."<sup>175</sup>

While federal law did bind Evers in this instance, it is also likely that he also sought to take advantage of the requirement to secure a partisan gain. As noted,<sup>176</sup> April 7, 2020, was also the date of a

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171. Mitchell Schmidt, *Tony Evers Reschedules Special Election to May, Calls on Legislation to Fix State Rules*, WIS. STATE J. (Oct. 19, 2019), [https://madison.com/wsj/news/local/govt-and-politics/tony-evers-reschedules-special-election-to-may-calls-on-legislation-to-fix-state-rules/article\\_7f91efc8-c340-5c40-b79d-fa351557f3ae.html](https://madison.com/wsj/news/local/govt-and-politics/tony-evers-reschedules-special-election-to-may-calls-on-legislation-to-fix-state-rules/article_7f91efc8-c340-5c40-b79d-fa351557f3ae.html) [https://perma.cc/5U9J-645D].

172. *Id.*

173. *Id.*

174. Drew DeSilver, *The Polarization in Today's Congress Has Roots That Go Back Decades*, PEW RSCH. CTR. (Mar. 10, 2022), <https://www.pewresearch.org/fact-tank/2022/03/10/the-polarization-in-todays-congress-has-roots-that-go-back-decades> [https://perma.cc/3N95-A47B].

175. Schmidt, *supra* note 171.

176. *Id.*

critical race for the state Supreme Court.<sup>177</sup> Evers likely sought to avoid scheduling the congressional special election on the same day, on the assumption that a high-profile House race would draw more voters to the polls in that part of the state.<sup>178</sup> Because the 7th District was rural and reliably Republican, Evers may have assumed that increased turnout there would hurt the liberal candidate in the statewide Supreme Court race.

Another Evers opponent made the opposite critique. House Assembly Speaker Robin Vos, a Republican, suggested that a quick election, in contravention of the MOVE Act, would have taken away the vote from servicemembers and rural Wisconsinites,<sup>179</sup> who Vos may have presumed were disproportionately Republicans. The urban-rural divide has become a significant predictor of political affiliation,<sup>180</sup> a development that was particularly salient in the controversy over this race. It is notable here that Governor Evers was accused of anti-rural bias for his original scheduling *and* for his adjusted scheduling. The director of the Elections Research Center at the University of Wisconsin wrote that “Almost any dates selected by Gov. Evers would [ ] have been seen as partisan by someone.”<sup>181</sup> In the zero-sum game of congressional elections, any chosen date will provide an advantage to one party or the other.

Of course, governors are motivated to schedule special elections based on factors other than partisan gain. When Governor Evers scheduled the special election, he expressed concern over the costs, calling on Vos to allocate state funds to reimburse localities for

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177. Hayley Sperling & Kristian Knutsen, *Another Special Election Fracas and the Question of Representation*, WISCONTEXT (Dec. 11, 2019), <https://www.wiscontext.org/another-special-elections-fracas-and-question-representation> [https://perma.cc/XA5T-JRA4].

178. *Id.* (“Democrats might worry that having the elections on the same day would jeopardize their chances of a liberal candidate winning a Supreme Court race because the 7th District election is likely to favor a Republican candidate and thus bring out more GOP voters.”).

179. Schmidt, *supra* note 171 (“It’s about time that Governor Evers finally corrected his mistake for calling an election that violated the law by disenfranchising military voters and would have suppressed the rural vote.”).

180. See Emily Badger, *How the Rural-Urban Divide Became America’s Political Fault Line*, N.Y. TIMES (May 21, 2019), <https://www.nytimes.com/2019/05/21/upshot/america-political-divide-urban-rural.html> [https://perma.cc/8GEP-TS84]; see also KATHERINE J. CRAMER, *THE POLITICS OF RESENTMENT: RURAL CONSCIOUSNESS IN WISCONSIN AND THE RISE OF SCOTT WALKER* (2016).

181. Sperling & Knutsen, *supra* note 177.



their costs.<sup>182</sup> Special elections can be costly,<sup>183</sup> providing governors with a justification for delaying elections if there is an already scheduled election with which the special election can be combined.<sup>184</sup> Some delays are justified by the high costs of special elections, and it is appropriate for governors charged with the responsibility to weigh the costs and benefits of quickly replacing a representative.<sup>185</sup> Individual actors may make decisions in good faith; even if they do not, it is generally impossible to prove otherwise. Yet, on the whole, there are clear signs of political gamesmanship.

While governors should ensure that their constituents are represented in the federal government, they are increasingly acting contrary to this responsibility, for at least some of their constituents. Many of the longest vacancies are the result of a governor of one party holding open a seat likely to be won by the opposing party.<sup>186</sup> As mentioned above, Republican Governor Ron DeSantis delayed an election in the overwhelmingly Democratic 20th District. Unfortunately, that is far from the only example. In 2017 and 2018, Republican Governor Rick Snyder of Michigan left open the seat in Detroit's 13th District for 359 days.<sup>187</sup> No Republican ran in the special election or in the simultaneous

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182. Rob Mentzer, *Evers Sets New 7th Congressional District Special Election Date*, WIS. PUB. RADIO (Oct. 18, 2019), <https://www.wpr.org/evers-sets-new-7th-congressional-district-special-election-date> [<https://perma.cc/N6F6-XT2P>]. The state House passed the law the next year. WIS. STAT. ANN. § 5.05(11) (West 2021).

183. See, e.g., Eric Moskowitz, *Small Turnout, a Large Price Tag: Special Elections Mean Hefty Costs*, BOS. GLOBE (Nov. 22, 2007), [http://archive.boston.com/news/local/articles/2007/11/22/small\\_turnout\\_a\\_large\\_price\\_tag/](http://archive.boston.com/news/local/articles/2007/11/22/small_turnout_a_large_price_tag/) [<https://perma.cc/HWR7-7G7Q>]; Ashley Fielding, *Special Elections Costly to Counties*, GAINESVILLE TIMES (Mar. 28, 2010), <https://www.gainesvilletimes.com/news/elections-archived/special-election-costly-to-counties/> [<https://perma.cc/3LAE-FWH3>].

184. See, e.g., Hoppy Kercheval, *Yes, Special Elections Cost Money: Governors Need the Consent of the Governed*, CHARLESTON DAILY MAIL, Nov. 9, 2010, PROQUEST, Doc. no. 763147585; Alan Greenblatt, *Citing Costs, Some GOP Governors Refuse to Hold Special Elections*, GOVERNING (Feb. 8, 2018), <https://www.governing.com/archive/gov-republican-governors-special-elections-florida-wisconsin.html> [<https://perma.cc/Z3VM-B6X6>].

185. Grace Panetta, *Special Elections Are Confusing, Chaotic Messes That Bleed Taxpayers — and Could Often Be Avoided if Politicians Quit Before Leveling Up, Flaming Out, or Dropping Dead*, BUS. INSIDER (Sep. 18, 2022), <https://www.businessinsider.com/special-elections-congress-vote-alaska-gerontocracy-2022-9> [<https://perma.cc/JKW6-HPKQ>] (noting that special elections come with high costs and low voter turnout).

186. Rakich, *supra* note 12.

187. Paul Egan, *Snyder Sets Aug. 7, Nov. 6 Election Dates to Replace John Conyers in Congress*, DETROIT FREE PRESS (Dec. 8, 2017), <https://www.freep.com/story/news/local/michigan/detroit/2017/12/08/john-conyers-special-election-congress/934206001/> [<https://perma.cc/7CNG-A9EZ>].

regular election.<sup>188</sup> In 2020 and 2021, Democratic Governor Gavin Newsom of California declined to hold a special election in the 50th District, comprising suburban San Diego County, and kept the seat vacant for 356 days.<sup>189</sup> The Republican candidate retained that seat in the 2020 election, winning by almost eight points.<sup>190</sup> There are numerous instances of the same tendency;<sup>191</sup> these are just the most egregious examples.

An even more disturbing trend is the prevalence of majority-Black districts at the top of the list of the longest vacancies. The vacancy in Florida's 20th District was one example, as was the Ohio 11th District, open for much of the same time.<sup>192</sup> The longest vacancy in the twenty-five-year period was Michigan's 13th District in 2017–18, then a majority-Black district.<sup>193</sup> Another instance occurred in 2014, when the seat for the majority-Black 12th District of North Carolina was left vacant for 310 days.<sup>194</sup> In each of these districts, White Republican governors presided over long vacancies in districts won before and after the vacancy by Black Democrats. This trend is especially troubling, moreover,

188. Sarah Cwiek, *A Funny Thing Happened in That 13th District Special Election*, MICH. RADIO (Aug. 8, 2018), <https://www.michiganradio.org/politics-government/2018-08-08/a-funny-thing-happened-in-that-13th-district-special-election> [https://perma.cc/2AQM-CW2Y].

189. Charles T. Clark, *Rep. Duncan Hunter's Seat in Congress Will Sit Vacant, as Governor Says No to Special Election*, L.A. TIMES (Jan. 8, 2020), <https://www.latimes.com/politics/story/2020-01-08/duncan-hunter-seat-in-congress-vacant> [https://perma.cc/PTH8-TRSD].

190. Charles T. Clark, *The Race That Is Sending Darrell Issa Back to Congress Carries Lessons for California*, L.A. TIMES (Nov. 10, 2020), <https://www.latimes.com/california/story/2020-11-10/california-race-issa-campa-najjar-carries-lessons> [https://perma.cc/M5ZG-TK8W].

191. These include, among others, New York's 27th District (vacant for 295 days in 2019–20) and North Carolina's 11th District (vacant for 279 days in 2020–21). Rakich, *supra* note 12; *see also infra* Appendix.

192. *See infra* Appendix; *Florida - Congressional District 20 (117th Congress of the United States)*, U.S. CENSUS BUREAU, [https://www2.census.gov/geo/maps/cong\\_dist/cd117/cd\\_based/ST12/CD117\\_FL20.pdf](https://www2.census.gov/geo/maps/cong_dist/cd117/cd_based/ST12/CD117_FL20.pdf) [https://perma.cc/22NP-DFPB]; *Ohio - Congressional District 11 (117th Congress of the United States)*, U.S. CENSUS BUREAU, [https://www2.census.gov/geo/maps/cong\\_dist/cd117/cd\\_based/ST39/CD117\\_OH11.pdf](https://www2.census.gov/geo/maps/cong_dist/cd117/cd_based/ST39/CD117_OH11.pdf) [https://perma.cc/Y5AP-KBMH].

193. *See infra* Appendix; *Michigan - Congressional District 13 (115th Congress of the United States)*, U.S. CENSUS BUREAU, [https://www2.census.gov/geo/maps/cong\\_dist/cd115/cd\\_based/ST26/CD115\\_MI13.pdf](https://www2.census.gov/geo/maps/cong_dist/cd115/cd_based/ST26/CD115_MI13.pdf) [https://perma.cc/46ES-BG3W].

194. *See infra* Appendix; Jim Morrill, *Special House Election for Watt Seat to Overlap Regular Schedule*, CHARLOTTE OBSERVER (Jan. 6, 2014), <https://web.archive.org/web/20140107143603/http://www.charlotteobserver.com/2014/01/06/4592170/special-house-election-to-overlap.html#.UswQ4-jP25c> [https://perma.cc/SHE2-DSYX].

given the nation's long history of racial disenfranchisement.<sup>195</sup> It is not surprising given that the provisions of the Voting Rights Act have combined with partisan gerrymanders to promote the establishment of heavily packed districts filled with Democratic-leaning people of color in otherwise red states.<sup>196</sup> The equal protection violations inherent in this practice are particularly clear in these districts, such as one that recently went nine months without a representative.

### C. THE FLORIDA 20TH DISTRICT IN 2020–2021

As a recent partisan dispute involving a high-profile governor that produced both substantial media coverage and litigation, the recent vacancy in Florida's 20th District is an appropriate case study to demonstrate how a lengthy vacancy may be concocted for political gain. The 20th District is a majority-minority district, with a population that was 54.5% Black and 24.4% Hispanic or Latino as of 2021.<sup>197</sup> In 2019, longtime Democratic Representative Alcee Hastings announced that he would run for reelection even though he had been diagnosed with Stage 4 pancreatic cancer.<sup>198</sup> He was elected to his fifteenth term with 78% of the vote but served only three months before passing away on April 6, 2021.<sup>199</sup> Florida law required Republican Governor Ron DeSantis to set a special election but placed no limits on the date of the election.<sup>200</sup> Three weeks after Hastings' death, candidate Barbara Sharief criticized

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195. See Brandon Tensley, *America's Long History of Black Voter Suppression*, CNN, <https://www.cnn.com/interactive/2021/05/politics/black-voting-rights-suppression-timeline/> [<https://perma.cc/2ZMV-3A9C>].

196. David Wasserman, *Is It Time to Rethink Hyper-Minority Districts?*, ATLANTIC (Sep. 20, 2021), <https://www.theatlantic.com/politics/archive/2021/09/it-time-rethink-hyper-minority-districts/620118/> [<https://perma.cc/DT3L-SAWK>] (“Gerrymandered maps have packed Black voters into a lone Voting Rights Act district, while Republicans dominate every surrounding white-majority seat.”).

197. *My Congressional District*, U.S. CENSUS BUREAU, *supra* note 1.

198. Anthony Man, *Congressman Alcee Hastings, Battling Pancreatic Cancer, Says He'll Run for Re-Election and See Donald Trump's Defeat in 2020*, S. FLA. SUN-SENTINEL (July 7, 2019), <https://www.sun-sentinel.com/news/politics/fl-ne-alcee-hastings-pancreatic-cancer-plans-reelection-20190702-5xckk7nlwvf2pginecuzxibdma-story.html> [<https://perma.cc/J9X6-GAH2>].

199. Anthony Man, *Congressman Had Career of Triumph and Calamity*, S. FLA. SUN-SENTINEL, Apr. 7, 2021, PROQUEST, Doc. 2509171448; *Florida Election Results: 20th Congressional District*, N.Y. TIMES (Jan. 26, 2021), <https://www.nytimes.com/interactive/2020/11/03/us/elections/results-florida-house-district-20.html> [<https://perma.cc/J3CW-QVLE>].

200. See FLA. STAT. ANN. § 100.101 (West 2011); *id.* § 100.111 (West 2021).

DeSantis' delay, saying "It's unfair to leave the residents of the 20th District without a congressperson and without representation."<sup>201</sup> Sharief went on to suggest that the wait might be politically motivated, opining that "maybe this is a political opportunity for the Republicans to continue to stall on legislation."<sup>202</sup> Representative Lois Frankel of the neighboring 21st District made a similar point, saying "Our concern is that there is such a close majority of Democrats in the House that any stalling, any less Democrats that are there — and stalling makes it more difficult to [sic] for us to get [our] agenda through."<sup>203</sup>

During the wait, Democrats in the Florida Senate introduced an amendment to Senate Bill 90.<sup>204</sup> The underlying bill placed new restrictions on voting, but the amendment would have required the governor to announce the date of a special election within 14 days of the vacancy.<sup>205</sup> That amendment was defeated twenty-three to sixteen in the Senate on April 22.<sup>206</sup> And on April 29, more than three weeks after Hastings' death, Elvin Dowling filed a lawsuit against DeSantis in the U.S. District Court for Florida's Southern District, seeking an injunction to require DeSantis to issue a writ of election.<sup>207</sup> Dowling, a candidate for Hastings' seat, alleged violations of the First, Fourteenth, and Fifteenth Amendments in his complaint.<sup>208</sup> Dowling considered the racial make-up of the district to be especially relevant to DeSantis' delay, noting that "The ethnicity of the District is 53% Black and 40% white," significantly less White than the state as a whole.<sup>209</sup> He went on to say, "Considering the ethnic make-up and voting history of the 20th District and the current political and legal environment, Gov. DeSantis's unwarranted delay or de facto refusal to call a

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201. Max Greenwood, *Democrats Fume Over Silence from DeSantis on Florida Election*, HILL (Apr. 28, 2021), <https://thehill.com/homenews/campaign/550613-dems-fume-over-silence-from-desantis-on-florida-election> [<https://perma.cc/F45J-6YNC>].

202. *Id.*

203. *Id.*

204. Am. 441962 to S.B. 90, 2021 Fla. Sess. Law Serv. Ch. 2021-11 (C.S.C.S.C.S.S.B. 90), <https://www.flsenate.gov/Session/Bill/2021/90/Amendment/441962/PDF> [<https://perma.cc/DZG4-JF87>].

205. *Id.*

206. Fla. Senate, *Vote History of Am. 441962 to S.B. 90 (Apr. 22, 2021)*, [https://www.flsenate.gov/Session/Bill/2021/90/Vote/SenateVote\\_s00090c3023.PDF](https://www.flsenate.gov/Session/Bill/2021/90/Vote/SenateVote_s00090c3023.PDF) [<https://perma.cc/WY8Q-PMT8>].

207. Complaint at 10, Dowling v. DeSantis, No. 9:21-CV-80796 (S.D. Fla. Apr. 29, 2021), ECF No. 1.

208. *Id.* at 1, 3.

209. *Id.* at 4.

special election constitutes voter suppression.”<sup>210</sup> Dowling also noted the potential consequences of the delay: “The persistent vacancy being allowed by Governor DeSantis leaves the people of the 20th District without representation in this current legal and political environment in which the United States Congress is taking action on measures critical to Black Americans,” citing the George Floyd Justice in Policing Act and the For the People Act as examples.<sup>211</sup> Likewise, the other representatives in the House were denied the opportunity to hear the perspective of a representative for Florida’s 20th District.

On May 4, 2020, 30 days after the seat became vacant, Governor DeSantis set the dates for the election: the primary would be held on November 2 and the general election on January 11.<sup>212</sup> Dowling subsequently amended his complaint to seek declaratory judgment that the governor’s discretion in scheduling the special election was limited and that the proposed plan violated the rights of the residents of the 20th District.<sup>213</sup> Dowling also sought an injunction to require the election to take place no more than 153 days after the vacancy,<sup>214</sup> corresponding with what he claimed was the length of the longest vacancy for a U.S. House seat from Florida.<sup>215</sup> By contrast, Dowling pointed out that in this instance, “280 days — nearly 40% of the term — will elapse between Rep. Hastings’ death and the special election, during which time the people of the 20th District will have no representation in the United States House of Representatives.”<sup>216</sup> Dowling’s prediction was right; the seat was vacant for 287 days. Voters in the 20th District elected Sheila

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210. *Id.* at 8.

211. *Id.* at 6–7.

212. Gary Fineout, *DeSantis Sets Date for Special Election to Replace Hastings*, POLITICO (May 4, 2021), <https://www.politico.com/states/florida/story/2021/05/04/desantis-sets-date-for-special-election-to-replace-hastings-1380145> [<https://perma.cc/K77G-QC4W>].

213. Amended Complaint at 17, *Dowling v. DeSantis*, No. 9:21-CV-80796 (S.D. Fla. May 7, 2021), ECF No. 7.

214. *Id.*

215. *Id.* at 11. Dowling’s claim is incorrect. It appears that he counted the days from when Representative Joe Scarborough announced his resignation on May 25, 2001, until his successor took office on October 23, a time period of 151 days. However, Representative Scarborough did not actually resign his seat for the 1st District until September 5, leaving it vacant for only 48 days. *Congressman Quits to Be with Sons*, ORLANDO SENTINEL, May 26, 2001, PROQUEST, Doc. no. 279653820. Nonetheless, Dowling’s overall claim about the lengths of the longest vacancies is still basically accurate. The longest prior vacancy in a Florida seat in the U.S. House from 1997 to 2021 was 149 days for the 19th District in 2014. See *infra* Appendix.

216. *Id.* at 11.

Cherfilus-McCormick with 79% of the vote on January 11, 2022, and she took office a week later.<sup>217</sup>

But the consequences to representative government in Southeast Florida did not end with the U.S. House of Representatives. Rather, the open House seat set off a chain of events that affected a number of elected positions, which Governor DeSantis exacerbated with more delays. After twenty-eight years with Representative Hastings representing a reliably Democratic district, there was a backlog of potential candidates. Ultimately, eleven Democrats made the ballot, along with two Republicans and one Libertarian.<sup>218</sup> Florida is one of a few states that have “resign-to-run” laws, which prohibit current officeholders from keeping their position while they run for another. Florida’s law requires any state or municipal officer who “qualifies for federal public office” to submit an irrevocable resignation at least 10 days before candidates can qualify for ballots, although the resignation need not take effect until just before the officer would take their new federal position.<sup>219</sup> Therefore, the five candidates in the 20th District who were current officeholders were required to resign from their previous positions; all five did in July 2021, with their resignations going into effect in January 2022.<sup>220</sup>

DeSantis’ choice of January 11, 2022, as the date for the congressional special election was likely intentional, as that was the second Tuesday after the first Monday in January of an odd-numbered year. As such, it was also the day that the Florida state

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217. Brendan Farrington, *Democrat Cherfilus-McCormick to Fill Florida US House Seat*, AP NEWS (Jan. 11, 2022), <https://apnews.com/article/voting-rights-florida-special-elections-election-2020-general-elections-588c116f9ba12be99c25302d6dadcd17a> [https://perma.cc/MGX7-YJ5Y]; Natalie Prieb, *Florida Rep. Cherfilus-McCormick Sworn In as Newest House Member*, HILL (Jan. 18, 2021), <https://thehill.com/homenews/house/590323-florida-rep-cherfilus-mccormick-sworn-in-as-newest-house-member/> [https://perma.cc/59JE-5WNS]. Cherfilus-McCormick’s Republican opponent refused to concede the election, despite winning less than 20% of the vote. Igor Derysh, *Florida Republican Who Lost Special Election by 59 Points Refuses to Concede, Files Suit*, SALON (Jan. 14, 2022), <https://www.salon.com/2022/01/14/florida-lost-special-by-59-points-files-and-refuses-to-concede/> [https://perma.cc/5TCC-GLXM].

218. See Gary Fineout, *Race for Hastings’ Florida Seat Turns into 11-Candidate Pileup*, POLITICO (Oct. 18, 2021), <https://www.politico.com/states/florida/story/2021/10/18/race-for-hastings-florida-seat-turns-into-11-candidate-pileup-1391882> [https://perma.cc/9L5V-2QSZ]; Anthony Man, *Crowded Field for Empty South Florida Seat*, S. FLA. SUN-SENTINEL, Aug. 11, 2021, PROQUEST, Doc. no. 2559980382.

219. FLA. STAT. ANN. § 99.012(4) (West 2021).

220. Anthony Man, *Five Elected Officials Resign in Order to Run for Congress*, S. FLA. SUN-SENTINEL, July 29, 2021, PROQUEST, Doc. no. 2556745310.

legislature was required to convene.<sup>221</sup> Under the resign-to-run law, the five state officials running in the 20th District were required to make their resignations effective on election day: January 11, 2022.<sup>222</sup> Governor DeSantis chose an election date that required state legislators to finalize their resignations just as the legislature went into session.

The next step in the chain reaction was to replace those five officials: two county commissioners, one state senator, and two state representatives. Of course, the replacement of three state legislators required another set of special elections, whose dates also needed to be set by the Governor. Again, Governor DeSantis did not set the dates for those elections for nearly three months. Responding to these delays, voters filed a new suit, this time seeking a writ of mandamus in state court to force him to schedule the election.<sup>223</sup> Governor DeSantis announced the calendar 12 days later, on October 27, 2021, setting the primary elections for January 11, 2022, and the general election for March 8.<sup>224</sup> DeSantis, like Governor Ogilvie in 1970, like Governor Paterson in 2010, and like himself earlier in the year, delayed until legal action forced his hand.<sup>225</sup> The late date of the election meant that only one of the three elected representatives was seated in time to participate in much of the 2022 regular legislative session, and that concession occurred only after pressure was put on the Governor's office to expedite the process.<sup>226</sup> The combination of the

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221. FLA. CONST. art. III, § 3(b).

222. Man, *supra* note 220.

223. Complaint at 1, Staples v. DeSantis, No. 2021 CA 001781 (Fla. Cir. Ct. Oct. 15, 2021).

224. Anthony Man, *Elections for State Legislative Seats Set*, S. FLA. SUN-SENTINEL, Oct. 29, 2021, PROQUEST, Doc. no. 2587575471.

225. *See supra* Part II.C.

226. *Id.* Democrat Daryl Campbell became the new representative for the 94th State House District, where no Republican entered the race. Thus, Campbell was elected to the seat by virtue of winning a modified “universal primary” on January 11 with four Democratic candidates and all voters eligible to participate. After Campbell’s win was certified, Florida’s Secretary of State Laurel Lee, a DeSantis appointee, refused to issue a letter to the Florida House declaring Campbell the winner. Lee initially indicated that she would wait nearly two months until March 8, the date of the previously set general election, even though no voting would take place on that day. Campbell said at the time, “Am I surprised? I am not. It’s just unfortunate that our constituents . . . now are being faced with a situation where their voice does not get heard.” Anthony Man, *Republicans May Prevent Broward’s New Democratic Lawmaker from Participating in Annual Legislative Session After All*, S. FLA. SUN-SENTINEL, Jan. 28, 2022, PROQUEST, Doc. no. 2623244893. The Secretary of State’s Office reversed its position the next day, “Because there was confusion and because there were questions.” Campbell was sworn in to the Florida House of Representatives on February 1. Anthony Man, *Path Cleared for New Democratic*

January 11 resignation deadline and the March 8 election date meant that any state legislators who chose to run for Congress would leave their districts unrepresented for practically the entire 2022 state legislative session.<sup>227</sup>

Governor DeSantis' only public comment on the delayed election in the 20th District skirted the issue: "I know there will be a lot of folks that want to run for it. So hopefully that gives them enough time to be able to get on the ballot and do whatever they need to do to be competitive."<sup>228</sup> A spokesperson for the Governor later responded to an inquiry about the state legislative seats by saying, "All I know is that it is completely in line with Florida law."<sup>229</sup> While true, this is a low bar to clear—Florida law requires the governor to set a date for a special election but imposes no other conditions. A governor could comply with the law by scheduling a special election at any time.

The schedule that Governor DeSantis chose was flawed from both a logistical and financial perspective. The County Supervisors in the two counties that comprise the 20th District advocated for earlier dates for the congressional election, ending with a general election—not a primary—on November 2.<sup>230</sup> The Palm Beach County Supervisor of Elections responded to Governor DeSantis' announcement by saying "These are not helpful dates, not helpful at all" and noted that a January 11 election required early voting sites to be open on New Year's Day.<sup>231</sup> And while governors often justify their delays as cost-saving measures, the belated elections for the statehouse seats in Florida actually increased the costs. Instead of scheduling the state elections to correspond to the previously established federal special election

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*Lawmaker to Be Sworn In*, S. FLA. SUN-SENTINEL, Jan. 30, 2022, PROQUEST, Doc. no. 2623646819. The new senator for the 33rd Senate District and the new representative for the 88th House District were not able to serve until after their elections on March 8, 2022. The Florida legislative session ended shortly thereafter, on March 14. Anthony Man, *Osgood, Edmonds Win State Seats: Democratic Candidates Win Overwhelmingly in Broward, Palm*, S. FLA. SUN-SENTINEL, Mar. 9, 2022, PROQUEST, Doc. no. 2637256295.

227. *2022 Session Dates*, Fla. Senate, <https://www.flsenate.gov/Session/Calendar/2022/Session%20Dates%202021-05-26%20115359.PDF> [<https://perma.cc/9SBW-4KDN>].

228. Opinion, *Ron DeSantis Wants to Deny 800,000 Floridians Representation for Nine Months*, WASH. POST, May 6, 2021, PROQUEST, Doc. no. 2522513357.

229. Anne Geggis, *South Florida's SD 33 and HD 88 Will Be Unrepresented This Session*, FLA. POL. (Nov. 22, 2021), <https://floridapolitics.com/archives/475442-south-floridas-sd-33-and-hd-88-will-be-unrepresented-this-session/> [<https://perma.cc/A7KG-MMVN>].

230. Steve Bousquet, Opinion, *Gov. DeSantis Is Again Attacking Democracy*, S. FLA. SUN-SENTINEL, May 8, 2021, PROQUEST, Doc. no. 2523046632.

231. *Id.*



dates in November and January, as local election officials had urged, Governor DeSantis chose to push them back to January and March.<sup>232</sup> This choice meant additional costs for three elections in Southeast Florida instead of two.

The cumbersome process of filling the vacancy in Florida's 20th District is illustrative not only because the delays were so significant, but also because the domino effect in the state legislature laid bare a model of denied representation. Southeast Florida saw four special elections for three different legislative bodies within six months, evincing a pattern wherein Governor DeSantis consistently delayed elections as long as he could. Because any given governor is confronted with few House vacancies in their tenure, it can be hard to make inferences about the motives behind the scheduling of a special election. What looks like politically motivated bias could be excused once as a necessary concession to a unique scheduling demand, but it is much harder to justify an escalating sequence of obstruction. Governor DeSantis repeatedly chose to impose long delays in the electoral process and offered no good explanation for why he did so. As a result of his actions, many Floridians were disenfranchised twice in the same year.

#### IV. THE NEED FOR CONGRESSIONAL ACTION

The current system for resolving congressional vacancies is untenable. The data demonstrates that vacancies in the House have gotten longer over the last twenty-five years.<sup>233</sup> Likewise, the data shows that that trend is partly driven by some egregious outliers.<sup>234</sup> Other processes once regarded as purely procedural have been weaponized for partisan advantage in recent years, with federal judicial nominations<sup>235</sup> and authorizations of the debt

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232. Man, *supra* note 224 (“During the summer, South Florida election officials, Black community leaders and Democratic activists implored DeSantis to use the same dates, Nov. 2 and Jan. 11, for the special legislative primaries and elections.”).

233. *See supra* Figure 1.

234. *Id.*

235. *See* Philip Bump, *The New Norm in Supreme Court Nominations: Major Partisan Battles*, WASH. POST (Jan. 26, 2022), <https://www.washingtonpost.com/politics/2022/01/26/new-norm-supreme-court-nominations-major-partisan-battles/> [<https://perma.cc/WWX6-PWUB>].

ceiling<sup>236</sup> as just two of many prominent examples. The denial of representation for political gain is an especially worrisome development because it undermines the basic rights of Americans to a voice in government.<sup>237</sup> The people depend on their representatives in Congress to achieve their legislative goals and these concerning developments demand action by those very representatives.

#### A. UNSUITABILITY OF STATE LEGISLATURES AND FEDERAL COURTS AS SOLUTIONS

Each vacancy is different, and all current state laws, to greater or lesser degrees, provide for discretion on the part of the executive to respond to the unique circumstances. State laws run the gamut from those that set a reasonable and explicit limit on the governor's powers to those that allow virtually unlimited discretion.

The variety and flexibility of state laws are desirable, up to a point. The United States is a federal system, and the states should be free to choose outcomes that work best for them. A state may opt to balance efficiency and representation differently than its neighbors. But there must be limits—the United States is a confederation, but it is also a nation, and representatives are federal officials. Governors should not be free to deny representation to some of their constituents for an entire term of office. The state laws that currently exist include both adequate and intolerable solutions. It must fall to the federal government, then, to set the floor.

States may be inspired to act on their own to solve the problem, instead of waiting for a federal law. That solution is likely to run into obstacles because state laws generally require the assent of the governor, an official with a direct interest in maintaining a system of nearly unlimited discretion. Governors may be prone to veto these bills rather than accept a new restriction on their power. For instance, in 2017, state legislators in Idaho attempted to add some checks on the governor's discretion to a law that currently

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236. See Clay Risen, *How the Debt Ceiling Came to Be a Political Cudgel*, N.Y. TIMES (Sept. 30, 2021), <https://www.nytimes.com/2021/09/28/us/politics/debt-ceiling-democrats-republicans-history.html> [<https://perma.cc/ZB5Q-PUZV>].

237. See *Reynolds v. Sims*, 377 U.S. 533, 562 (1964) (“As long as ours is a representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system.”).

has none.<sup>238</sup> Then-Governor C.L. “Butch” Otter vetoed that law, calling it “overly proscriptive.”<sup>239</sup> In that instance, Governor Otter expressed concern that the law would cause more delays (because it required a special primary election), but it would not be surprising if state executives were more generally reticent to give up their power to control the entire process. In response to delays over the last year, Democratic legislators in Florida have introduced bills that would cap the length of a vacancy at 180 days, but both the Florida House and Senate bills died in committee.<sup>240</sup>

Likewise, litigation in federal courts is an inadequate solution. First, the judiciary moves too slowly to deal with the consequences of a temporary disenfranchisement. Second, the courts are limited to applying the current law and so can only go so far to force the governor’s hand. The federal courts have shown that they cannot be a forum to provide relief when a governor merely delays a special election, even though the difference between a delay and an outright denial is sometimes merely semantic.<sup>241</sup>

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238. H.B. 197, 2017 Leg., 1st Reg. Sess. (Idaho 2017); *see also* IDAHO CODE ANN. § 59-911 (West 1995).

239. Betsy Z. Russell, *Otter Vetoes Bill on Special Elections for U.S. House Vacancies*, SPOKESMAN-REVIEW (Spokane) (Mar. 28, 2017), <https://www.spokesman.com/blogs/boise/2017/mar/28/otter-vetoes-bill-special-elections-us-house-vacancies/> [<https://perma.cc/6CPR-5SGK>].

240. Jeffrey Schweers, *Florida Democratic Lawmakers Want Quick Turnaround on Filling Legislative Vacancies*, TALLAHASSEE DEMOCRAT (Jan. 7, 2022), <https://www.tallahassee.com/story/news/local/state/2022/01/07/florida-lawmakers-want-governor-call-special-elections-legislative-vacancies-sooner-than-later/9117469002/> [<https://perma.cc/C9NT-BT33>]; *HB 1217 (2022) - Elections*, Fla. House of Representatives, <https://www.myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=76068> [<https://perma.cc/5F4T-M432>]; *SB 1586: Elections*, Fla. Senate, <https://www.flsenate.gov/Session/Bill/2022/1586> [<https://perma.cc/FCY6-F3ZM>].

241. *See Jackson v. Ogilvie*, 426 F.2d 1333, 1337 (7th Cir. 1970) (holding that the Governor must schedule an election for a vacant House seat, “notwithstanding the fact that delay may eventually render the calling of a special election of so little use that the duty will no longer be enforceable”); *ACLU of Ohio v. Taft*, 385 F.3d 641 (6th Cir. 2004) (finding that the Governor had violated the Constitution by refusing to schedule a special election, but only so finding more than two years after the seat became vacant, when it had already been filled in a regularly-scheduled election); *Fox v. Paterson*, 715 F. Supp. 2d 431 (W.D.N.Y. 2010) (“Although there may be other cases in which such an extraordinary amount of time passes from the existence of the vacancy to the issuance of the proclamation that it amounts to a *de facto* refusal to call a special election at all, that is not the situation before me.” (citations omitted)).

## B. ADVANTAGES AND DISADVANTAGES OF FEDERAL LEGISLATION

Congressional legislation could resolve the issue by simply establishing a maximum length of time in which an election must occur after a vacancy.<sup>242</sup> This is a standard that many, but not all, states have already adopted, and it would be a reasonable, practical reform to apply it on the national level.<sup>243</sup> The standard should be generous to the authority of state executives and continue to give them substantial discretion. To alleviate the delays caused by the MOVE Act, the federal law should also allow states to opt out of the forty-five day minimum requirements in some circumstances. States could petition the DOJ to waive MOVE Act requirements when a seat becomes vacant unexpectedly but would still be expected to abide by the law when it would not create a delay, like when a representative announces a resignation well in advance. It would be appropriate to include such provisions among the many reforms that have been proposed in recent voting rights reform bills such as the Freedom to Vote: John R. Lewis Act.<sup>244</sup>

Of course, there are drawbacks to a system where special elections would be somewhat quicker and more frequent. The removal of some flexibility will flatten out the variance, which is good news for some jurisdictions and bad news for others. Constituents who are accustomed to quick and efficient special elections might, paradoxically, see them become less efficient if a laxer federal standard became the norm. Stricter legislation would place financial and administrative burdens on states to conduct more elections, imposing an unfunded mandate that the states might resent. More frequent elections could also induce voter fatigue and depress turnout, undermining their intended effect.<sup>245</sup>

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242. For one proposed federal law to address vacancies in the House of Representatives, among other things, see Bryan H. Wildenthal, *Proposed Vacancy-Filling and Vote-Counting Act (2022)*, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4212705](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4212705) [<https://perma.cc/J34Z-UWHW>].

243. See, e.g., ALASKA STAT. ANN. § 15.40.140 (West 2021); ARIZ. REV. STAT. ANN. § 16-222(B) (West 2018); CAL. ELEC. CODE § 10700 (West 2003); *id.* § 10703 (West 2020); COLO. REV. STAT. ANN. § 1-4-401(1) (West 2011); MASS. GEN. LAWS ANN. ch. 54, § 140 (West 2009); MISS. CODE ANN. § 23-15-853 (West 2017); MONT. CODE ANN. § 13-25-203 (West 2019); NEB. REV. STAT. ANN. § 32-564 (West 2022); N.M. STAT. ANN. § 1-15-18.1 (West 2019); S.D. CODIFIED LAWS § 12-11-1 (West 1979); W. VA. CODE ANN. § 3-10-4(a)(1) (West 2018).

244. H.R. 5746, 117th Cong. (2022).

245. Panetta, *supra* note 185.

Removing the 45-day requirements of the MOVE Act would make it harder for military and overseas voters, a step backward after significant gains in expanding voting access. Other unintended consequences are possible. Given these constraints, it is incumbent upon state leaders to schedule elections intelligently to limit the costs on administrators and voters.

Even so, these kinds of negative outcomes are not exclusive to states with strict time limits on special election scheduling. In the special election in the Florida 20th District, turnout was notably low, in part due to its odd timing.<sup>246</sup> Furthermore, the scheduling of three distinct special elections in the same congressional district unnecessarily increased the cost.<sup>247</sup> Such an outcome shows that the current system is susceptible to the worst-case scenario—long delays, high costs, and low turnout. New federal legislation would not solve all the problems inherent in modern elections; rather, it would merely constrain the worst abuses of power. Given the grave consequences to democracy, Congress should act before governors have the chance to push the limits of their discretion even further.

## CONCLUSION

It would be easy to minimize the impact of a missing representative for some fraction of a year. Most Americans disapprove of Congress,<sup>248</sup> and few can name their representative.<sup>249</sup> Given these attitudes, one might assume that little is lost if a handful of the 435 seats in the House remain open for longer than is strictly necessary. Nonetheless, representation is a critical element of a republican system, and it is unacceptable to leave so many people without it. 2021 saw important debates

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246. Aaron Navarro, *Democrat Sheila Cherfilus-McCormick Wins Special Election for Florida House Seat*, CBS NEWS (Jan. 12, 2022), <https://www.cbsnews.com/news/florida-20th-congressional-district-special-election/> [<https://perma.cc/VDQ5-U8VS>].

247. Anthony Man, *Area Voters Ask Judge to Compel DeSantis to Call Election to Fill Dem Seats*, S. FLA. SUN-SENTINEL (Oct. 16, 2021), PROQUEST, Doc. no. 2582339309 (“Multiple South Florida leaders . . . said that [the rejected] timing would save the government election costs. . .”).

248. A poll conducted January 2–22, 2023 found 21% of respondents approved of Congress. *Congress and the Public*, GALLUP, <https://news.gallup.com/poll/1600/congress-public.aspx> [<https://perma.cc/GN4B-ACRY>].

249. A poll conducted May 2–7, 2013 found 35% of respondents could provide the name of their representative. Elizabeth Mendes, *Americans Down on Congress, OK With Own Representative*, GALLUP (May 9, 2013), <https://news.gallup.com/poll/162362/americans-down-congress-own-representative.aspx> [<https://perma.cc/MX8A-MP8E>].

about COVID-19 relief, infrastructure, and, most relevant here, voting rights, at a time when the residents of southeast Florida had no one to represent their interests in Congress. During the 287 days in which the seat for the 20th District sat vacant, key pieces of legislation—including the Build Back Better Act,<sup>250</sup> Women’s Health Protection Act,<sup>251</sup> and the John R. Lewis Voting Rights Advancement Act<sup>252</sup>—passed the House by only a handful of votes. Voting rights advocates are rightly focused on combating gerrymandering and strict ID laws,<sup>253</sup> but there is no more fundamental denial of democracy than for the citizens of an entire district to be denied legislative representation.

Demand for legislative representation was a key factor in the creation of the United States. More so than any other office, members of the House are expected to speak on behalf of the interests of a small community in the halls of power in Washington. While vacancies are inevitable, there is no principled reason why seats should remain unfilled for lengthy stretches, as they have in recent years. Instead, a simple reform placing a limit on the timing of elections can restrain the most extreme instances of politicians improperly seeking a partisan advantage. A reasonable standard for special elections can respect the role of governors in a federal system while still prioritizing the sacred right to government of the people, by the people, for the people.

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250. *Roll Call 385 | Bill Number: H. R. 5376*, CLERK, U.S. HOUSE OF REPRESENTATIVES (Nov. 19, 2021), <https://clerk.house.gov/Votes/2021385> [<https://perma.cc/UM52-RRPM>].

251. *Roll Call 295 | Bill Number: H. R. 3755*, CLERK, U.S. HOUSE OF REPRESENTATIVES (Sept. 24, 2021), <https://clerk.house.gov/Votes/2021295> [<https://perma.cc/G9VK-5MX3>].

252. *Roll Call 260 | Bill Number: H. R. 4*, CLERK, U.S. HOUSE OF REPRESENTATIVES (Aug. 24, 2021), <https://clerk.house.gov/Votes/2021260> [<https://perma.cc/G6ZX-C4GL>].

253. See, e.g., *Our Issues*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/issues> [<https://perma.cc/6ZSF-PJ4H>]; *Voting Rights*, ACLU, <https://www.aclu.org/issues/voting-rights> (last visited Feb. 28, 2022) [<https://perma.cc/6SZ6-4DX6>]; *Voting Rights*, LEAGUE OF WOMEN VOTERS, <https://www.lwv.org/voting-rights> [<https://perma.cc/EB66-LR56>].

## APPENDIX

TABLE 1: VACANCIES IN THE U.S. HOUSE OF REPRESENTATIVES, BEGINNING 1997–2021<sup>254</sup>

Start of Vacancy	Special Election	End of Vacancy	Days Vacant	State	Dist.	Outgoing Rep.	Special Election Winner	Cause
1/30/1997	4/12/1997	4/17/1997	77	TX	28	Tejeda	Rodriguez	Death
2/13/1997	5/13/1997	5/20/1997	96	NM	3	Richardson	Redmond	Resignation
8/2/1997	11/4/1997	11/5/1997	95	NY	13	Molinari	Fossella	Resignation
10/28/1997	3/10/1998	3/17/1998	140	CA	22	Capps	Capps	Death
11/11/1997	3/19/1998	3/21/1998	130	PA	1	Foglietta	Brady	Resignation
11/17/1997	2/3/1998	2/5/1998	80	NY	6	Flake	Meeks	Resignation
1/5/1998	4/7/1998	4/21/1998	106	CA	44	Bono	Bono	Death
2/6/1998	4/7/1998	4/21/1998	74	CA	9	Dellums	Lee	Resignation
3/25/1998	6/23/1998	6/25/1998	92	NM	1	Schiff	Wilson	Death
1/3/1999	2/23/1999	2/25/1999	53	GA	6	Gingrich	Isakson	Resignation
3/1/1999	5/29/1999	6/8/1999	99	LA	1	Livingston	Vitter	Resignation
7/15/1999	11/16/1999	11/18/1999	126	CA	42	Brown	Baca	Death
9/11/2000	N/A	1/3/2001	114	VA	1	Bateman	N/A	Death

254. *Vacancies & Successors*, *supra* note 136.

<b>Start of Vacancy</b>	<b>Special Election</b>	<b>End of Vacancy</b>	<b>Days Vacant</b>	<b>State</b>	<b>Dist.</b>	<b>Outgoing Rep.</b>	<b>Special Election Winner</b>	<b>Cause</b>
10/10/2000	N/A	1/3/2001	85	MN	4	Vento	N/A	Death
12/8/2000	6/5/2001	6/7/2001	181	CA	32	Dixon	Watson	Death
2/5/2001	5/15/2001	5/17/2001	101	PA	9	Shuster	Shuster	Resignation
3/29/2001	6/19/2001	6/26/2001	89	VA	4	Sisisky	Forbes	Death
5/28/2001	10/16/2001	10/23/2001	148	MA	9	Moakley	Lynch	Death
8/6/2001	11/20/2001	11/29/2001	115	AR	3	Hutchinson	Boozman	Resignation
8/16/2001	12/18/2001	12/19/2001	125	SC	2	Spence	Wilson	Death
9/5/2001	10/16/2001	10/23/2001	48	FL	1	Scarborough	Miller	Resignation
2/15/2002	1/8/2002	2/27/2002	12	OK	1	Largent	Sullivan	Resignation
7/24/2002	N/A	1/3/2003	163	OH	17	Traficant	N/A	Expulsion
9/9/2002	N/A	1/3/2003	116	OH	3	Hall	N/A	Resignation
9/28/2002	11/30/2002	1/7/2003	101	HI	2	Mink	Case	Death
5/31/2003	6/3/2003	6/5/2003	5	TX	19	Combest	Neugebauer	Resignation
12/8/2003	2/17/2004	2/24/2004	78	KY	6	Fletcher	Chandler	Resignation
1/20/2004	6/1/2004	6/3/2004	135	SD	AL	Janklow	Herseth	Resignation
6/11/2004	7/20/2004	7/21/2004	40	NC	1	Ballance	Butterfield	Resignation
8/31/2004	N/A	1/3/2005	125	NE	1	Bereuter	N/A	Resignation
9/23/2004	N/A	1/3/2005	102	FL	14	Goss	N/A	Resignation
1/1/2005	3/8/2005	3/10/2005	68	CA	5	Matsui	Matsui	Death



<b>Start of Vacancy</b>	<b>Special Election</b>	<b>End of Vacancy</b>	<b>Days Vacant</b>	<b>State</b>	<b>Dist.</b>	<b>Outgoing Rep.</b>	<b>Special Election Winner</b>	<b>Cause</b>
4/29/2005	8/2/2005	9/6/2005	130	OH	2	Portman	Schmidt	Resignation
8/2/2005	12/6/2005	12/7/2005	127	CA	48	Cox	Campbell	Resignation
12/1/2005	6/6/2006	6/13/2006	194	CA	50	Cunningham	Bilbray	Resignation
1/16/2006	11/7/2006	11/13/2006	301	NJ	13	Menendez	Sires	Resignation
6/9/2006	11/7/2006	11/13/2006	157	TX	22	DeLay	Sekula-Gibbs	Resignation
9/29/2006	N/A	1/3/2007	96	FL	16	Foley	N/A	Resignation
11/3/2006	N/A	1/3/2007	61	OH	18	Ney	N/A	Resignation
2/13/2007	7/17/2007	7/25/2007	162	GA	10	Norwood	Broun	Death
4/21/2007	8/21/2007	9/4/2007	136	CA	37	Millender-McDonald	Richardson	Death
7/1/2007	10/16/2007	10/18/2007	109	MA	5	Meehan	Tsongas	Resignation
9/5/2007	12/11/2007	12/13/2007	99	OH	5	Gillmor	Latta	Death
10/6/2007	12/11/2007	12/13/2007	68	VA	1	Davis	Wittman	Death
11/26/2007	3/8/2008	3/11/2008	106	IL	14	Hastert	Foster	Resignation
12/15/2007	3/11/2008	3/13/2008	89	IN	7	Carson	Carson	Death
12/31/2007	5/13/2008	5/20/2008	141	MS	1	Wicker	Childers	Resignation
1/14/2008	5/3/2008	5/7/2008	114	LA	1	Jindal	Scalise	Resignation
2/2/2008	5/3/2008	5/6/2008	94	LA	6	Baker	Cazayoux	Resignation
2/11/2008	4/8/2008	4/10/2008	59	CA	12	Lantos	Speier	Death

<b>Start of Vacancy</b>	<b>Special Election</b>	<b>End of Vacancy</b>	<b>Days Vacant</b>	<b>State</b>	<b>Dist.</b>	<b>Outgoing Rep.</b>	<b>Special Election Winner</b>	<b>Cause</b>
6/1/2008	6/17/2008	6/19/2008	18	MD	4	Wynn	Edwards	Resignation
8/20/2008	11/18/2008	11/19/2008	91	OH	11	Tubbs Jones	Fudge	Death
11/24/2008	N/A	1/3/2009	40	VA	11	Davis	N/A	Resignation
1/3/2009	4/7/2009	4/21/2009	108	IL	5	Emanuel	Quigley	Resignation
1/26/2009	3/31/2009	4/29/2009	93	NY	20	Gillibrand	Murphy	Resignation
2/24/2009	7/14/2009	7/16/2009	142	CA	32	Solis	Chu	Resignation
6/27/2009	11/3/2009	11/5/2009	131	CA	10	Tauscher	Garamendi	Resignation
9/21/2009	11/3/2009	11/6/2009	46	NY	23	McHugh	Owens	Resignation
1/4/2010	4/13/2010	4/15/2010	101	FL	19	Wexler	Deutch	Resignation
2/8/2010	5/18/2010	5/20/2010	101	PA	12	Murtha	Critz	Death
3/1/2010	5/22/2010	5/25/2010	85	HI	1	Abercrombie	Djou	Resignation
3/9/2010	11/2/2010	11/18/2010	254	NY	29	Massa	Reed	Resignation
3/21/2010	6/8/2010	6/14/2010	85	GA	9	Deal	Graves	Resignation
5/21/2010	11/2/2010	11/16/2010	179	IN	3	Souder	Stutzman	Resignation
11/29/2010	N/A	1/3/2011	35	IL	10	Kirk	N/A	Resignation
2/9/2011	5/24/2011	6/1/2011	112	NY	26	Lee	Hochul	Resignation
2/28/2011	7/12/2011	7/19/2011	141	CA	36	Harman	Hahn	Resignation
5/9/2011	9/13/2011	9/15/2011	129	NV	2	Heller	Amodei	Resignation
6/21/2011	9/13/2011	9/15/2011	86	NY	9	Weiner	Turner	Resignation

Start of Vacancy	Special Election	End of Vacancy	Days Vacant	State	Dist.	Outgoing Rep.	Special Election Winner	Cause
8/3/2011	1/31/2012	2/7/2012	188	OR	1	Wu	Bonamici	Resignation
1/25/2012	6/12/2012	6/19/2012	146	AZ	8	Giffords	Barber	Resignation
3/6/2012	11/6/2012	11/15/2012	254	NJ	10	Payne	Payne	Death
3/20/2012	11/6/2012	11/13/2012	238	WA	1	Inslee	DelBene	Resignation
7/6/2012	11/6/2012	11/13/2012	130	MI	11	McCotter	Curson	Resignation
7/31/2012	11/6/2012	11/13/2012	105	KY	4	Davis	Massie	Resignation
8/15/2012	N/A	1/3/2013	141	CA	18	Cardoza	N/A	Resignation
11/21/2012	4/9/2013	4/11/2013	141	IL	2	Jackson	Kelly	Resignation
12/3/2012	N/A	1/3/2013	31	CA	51	Filner	N/A	Resignation
1/2/2013	5/7/2013	5/15/2013	133	SC	1	Scott	Sanford	Resignation
1/22/2013	6/4/2013	6/5/2013	134	MO	8	Emerson	Smith	Resignation
7/15/2013	12/10/2013	12/12/2013	150	MA	5	Markey	Clark	Resignation
8/2/2013	12/17/2013	1/8/2014	159	AL	1	Bonner	Byrne	Resignation
9/27/2013	11/16/2013	11/21/2013	55	LA	5	Alexander	McAllister	Resignation
10/18/2013	3/11/2014	3/13/2014	146	FL	13	Young	Jolly	Death
1/6/2014	11/4/2014	11/12/2014	310	NC	12	Watt	Adams	Resignation
1/27/2014	6/24/2014	6/25/2014	149	FL	19	Radel	Clawson	Resignation
2/18/2014	11/4/2014	11/12/2014	267	NJ	1	Andrews	Norcross	Resignation
8/18/2014	11/4/2014	11/12/2014	86	VA	7	Cantor	Brat	Resignation

<b>Start of Vacancy</b>	<b>Special Election</b>	<b>End of Vacancy</b>	<b>Days Vacant</b>	<b>State</b>	<b>Dist.</b>	<b>Outgoing Rep.</b>	<b>Special Election Winner</b>	<b>Cause</b>
1/5/2015	5/5/2015	5/12/2015	127	NY	11	Grimm	Donovan	Resignation
2/6/2015	6/2/2015	6/9/2015	123	MS	1	Nunnelee	Kelly	Death
3/31/2015	9/10/2015	9/17/2015	170	IL	18	Schock	LaHood	Resignation
10/31/2015	6/7/2016	6/9/2016	222	OH	8	Boehner	Davidson	Resignation
6/23/2016	11/8/2016	11/14/2016	144	PA	2	Fattah	Evans	Resignation
7/20/2016	11/8/2016	11/14/2016	117	HI	1	Takai	Hanabusa	Death
9/6/2016	11/8/2016	11/14/2016	69	KY	1	Whitfield	Comer	Resignation
12/4/2016	N/A	1/3/2017	30	CA	44	Hahn	N/A	Resignation
12/31/2016	N/A	1/3/2017	3	MI	10	Miller	N/A	Resignation
1/23/2017	4/11/2017	4/25/2017	92	KS	4	Pompeo	Estes	Resignation
1/24/2017	6/6/2017	7/11/2017	168	CA	34	Becerra	Gomez	Resignation
2/10/2017	6/20/2017	6/26/2017	136	GA	6	Price	Handel	Resignation
2/16/2017	6/20/2017	6/26/2017	130	SC	5	Mulvaney	Norman	Resignation
3/1/2017	5/25/2017	6/21/2017	112	MT	AL	Zinke	Gianforte	Resignation
6/30/2017	11/7/2017	11/13/2017	136	UT	3	Chaffetz	Curtis	Resignation
10/21/2017	3/13/2018	4/12/2018	173	PA	18	Murphy	Lamb	Resignation
12/5/2017	11/6/2018	11/29/2018	359	MI	13	Conyers	Jones	Resignation
12/8/2017	4/24/2018	5/7/2018	150	AZ	8	Franks	Lesko	Resignation
1/15/2018	8/7/2018	9/4/2018	232	OH	12	Tiberi	Balderson	Resignation

<b>Start of Vacancy</b>	<b>Special Election</b>	<b>End of Vacancy</b>	<b>Days Vacant</b>	<b>State</b>	<b>Dist.</b>	<b>Outgoing Rep.</b>	<b>Special Election Winner</b>	<b>Cause</b>
3/16/2018	11/6/2018	11/13/2018	242	NY	25	Slaughter	Morelle	Death
4/6/2018	6/30/2018	7/10/2018	95	TX	27	Farenthold	Cloud	Resignation
4/23/2018	11/6/2018	11/13/2018	204	OK	1	Bridenstine	Hern	Resignation
4/27/2018	11/6/2018	11/13/2018	200	PA	7	Meehan	Scanlon	Resignation
5/12/2018	11/6/2018	11/27/2018	199	PA	15	Dent	Wild	Resignation
9/10/2018	N/A	1/3/2019	115	FL	6	DeSantis	N/A	Resignation
9/30/2018	N/A	1/3/2019	95	WV	3	Jenkins	N/A	Resignation
12/31/2018	N/A	1/3/2019	3	NM	1	Lujan Grisham	N/A	Resignation
1/3/2019	9/10/2019	9/17/2019	257	NC	9	N/A	Bishop	Lack of Certificate
1/23/2019	5/21/2019	6/23/2019	151	PA	12	Marino	Keller	Resignation
2/10/2019	9/10/2019	9/17/2019	219	NC	3	Jones	Murphy	Death
9/23/2019	5/12/2020	5/19/2020	239	WI	7	Duffy	Tiffany	Resignation
9/30/2019	6/23/2020	7/21/2020	295	NY	27	Collins	Jacobs	Resignation
10/17/2019	4/28/2020	5/5/2020	201	MD	7	Cummings	Mfume	Death
11/3/2019	5/12/2020	5/19/2020	198	CA	25	Hill	Garcia	Resignation
1/13/2020	N/A	1/3/2021	356	CA	50	Hunter	N/A	Resignation
3/30/2020	N/A	1/3/2021	279	NC	11	Meadows	N/A	Resignation
5/22/2020	N/A	1/3/2021	226	TX	4	Ratcliffe	N/A	Resignation

<b>Start of Vacancy</b>	<b>Special Election</b>	<b>End of Vacancy</b>	<b>Days Vacant</b>	<b>State</b>	<b>Dist.</b>	<b>Outgoing Rep.</b>	<b>Special Election Winner</b>	<b>Cause</b>
7/17/2020	12/1/2020	12/3/2020	139	GA	5	Lewis	Hall	Death
10/4/2020	N/A	1/3/2021	91	GA	14	Graves	N/A	Resignation
12/7/2020	N/A	1/3/2021	27	CA	8	Cook	N/A	Resignation
1/3/2021	N/A	2/11/2021	39	NY	22	N/A	N/A	Lack of Certificate
1/3/2021	3/20/2021	4/14/2021	101	LA	5	Letlow (Rep.-Elect)	Letlow	Death
1/15/2021	4/24/2021	5/11/2021	116	LA	2	Richmond	Carter	Resignation
2/7/2021	7/27/2021	7/30/2021	173	TX	6	Wright	Ellzey	Death
3/10/2021	11/2/2021	11/4/2021	239	OH	11	Fudge	Brown	Resignation
3/16/2021	6/1/2021	6/14/2021	90	NM	1	Haaland	Stansbury	Resignation
4/6/2021	1/11/2022	1/18/2022	287	FL	20	Hastings	Cherfilus-McCormick	Death
5/16/2021	11/2/2021	11/4/2021	172	OH	15	Stivers	Carey	Resignation