Political Party and Senatorial Succession: A Response to Vikram Amar on How Best to Interpret the Seventeenth Amendment

by SANFORD LEVINSON[1]

Vikram Amar is incapable of writing an uninteresting or unchallenging article. This being happily said, I also must say that I find myself in fundamental disagreement with his argument as to the meaning of the Seventeenth Amendment. I think it is an example of a brilliant explication of various trees that misses the reality of the surrounding forest. I contrast my response to this article to that several years ago when reading a piece that he coauthored with his brother Akhil (a close, personal friend and a fellow coeditor of a constitutional law casebook) that definitively demonstrated the unconstitutionality of the current Succession in Office Act (the Act) inasmuch as it makes the Speaker of the House (and then the president pro tempore of the Senate) next in line to the vice president to fill any vacancies in the Oval Office.[2] Both that article and the one under discussion are alike in making skillful use of the methods (or, as my colleague Philip Bobbitt would label them, "modalities"[3]), including the particular fillip identified with Akhil Amar, "intratextuality."[4] Yet the first one absolutely convinced me, while the new one leaves me decidedly skeptical.

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2. Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113 (1995).

3. *See* PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION (2001).

4. *See* Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999). A more skeptical account can be found in Ernest Young and Adrian Vermeule, *Hercules, Herbert, and Amar: The Trouble with Intratextualism*, 113 HARV. L. REV. 730 (2000).

What accounts for the difference? The answer is relatively simple: The first article is extraordinarily sensitive to the political dimensions of a succession law that would allow a de-facto takeover by the opposition party without its having to prove itself in a national presidential election.[5] It is unconstitutional in part because it is so unwise with regard to the consequences it might generate. A perverse incentive exists—particularly if there is no vice president—for an opposite-party Speaker to be especially interested in initiating impeachment proceedings as part of an effort to gain unmerited political control over the executive branch. One might also be aware of the potential for policy havoc even if the Speaker took over as the result, say, of a president's temporary medical disability,[6] let alone of the "incentive" created by the Act for a deranged partisan to attempt to change fundamental policy by means of assassinating a president in circumstances where the successor would be an opposite-party Speaker. It does not speak well for ostensibly serious students of the Constitution (whether legal academics or pundits) that their article failed to provoke the kinds of serious public discussion (and change) it most certainly deserved. It is, though, precisely that political dimension that is missing in the newer article.

It is not that Amar is anything less than a consummately skillful lawyer in analyzing text, structure, and history. Rather, the problem is, ultimately, that he begins with what I increasingly believe is the wrong question when analyzing structural provisions of the Constitution. Such provisions are, by and large, "hard wired" into the Constitution in a way that is simply not true of the more "open-textured" provisions that provide the basis for what is litigated before courts, whether one thinks of the Bill of Rights and the Fourteenth Amendment or even the assignments of powers to Congress under Article I, Section 8. We can fight with one another endlessly about

5. Putting to one side, of course, the degree to which the Electoral College itself is contrary to the goal of having a genuinely national presidential election. *See* SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) 81-97 (Oxford Univ. Press 2006); *see also* Sanford Levinson, *Should We Dispense with the Electoral College?*, http://www.pennumbra.com/debates/debate.php?did=8.

6. One recalls in this context several episodes from the late and much lamented *West Wing* when a republican Speaker, played by John Goodman, took over the helm when the democratic president, Jed Bartlett, had to take leave from his office because of the personal conflict of interest posed by terrorists' having kidnapped his daughter. (The vice president, as I recall, had been forced to resign prior to the existence of this situation.) The new president, however temporary his term of office might be, had no hesitation to reverse several of President Bartlett's foreign policies.

the "best way" to interpret these provisions, but the barest familiarity with American constitutional history reveals, for good or for ill, that these provisions are altogether malleable. The most important thing to do, with regard to their future interpretation, is to elect presidents and senators who will appoint and confirm judges (or other officials whose duties include constitutional interpretation, such as heads of the Office of Legal Counsel within the Department of Justice) who share one's own views.

Such interpretive flexibility is, generally speaking, not available with regard to the truly structural Constitution. Whatever one thinks of the fact that Wyoming and California have equal representation in the Senate—which I personally find indefensible[7]—we can be confident that the issue is not subject to litigation, at least within contemporary understandings of the "interpretive community" of well-trained lawyers.[8] I wonder, incidentally, if Amar would grant standing to a Wyoming democrat to litigate the fetters placed on that state's governor by the Wyoming legislature concerning the choice of a successor to a senator who has died or resigned; after all, he concludes his article by a very powerful call for the Senate "to step up to its interpretive duties" of first-order constitutional interpretation, which suggests that he might not be sympathetic to a lawsuit brought by some Wyoming democrat who was statutorily excluded from the pool that could be considered by the governor when picking the successor to the late Senator Craig Thomas.

I strongly agree with Amar that it is a dreadful mistake to assign to the judiciary a monopoly over constitutional interpretation;[9] we disagree, however, on what the Senate should have concluded if it had the debate Amar advocates. So, how would I wish conscientious senators to frame the question (and then reach what I believe to be the correct result upholding the Wyoming legislature and the constitutional legitimacy of the senator appointed under the constraints it has placed on the governor) if the Senate embarked on such a debate in the future? I strongly believe that the very first question should be the following: *How would we design the Constitution in 2008 with regard to filling senatorial vacancies?* Only

7. *See* LEVINSON, *supra* note 5, at 49-62.

8. On interpretive communities, *see generally* STANLEY FISH, IS THERE A TEXT IN THIS CLASS? THE AUTHORITY OF INTERPRETIVE COMMUNITIES (1980).

9. *See generally*, SANFORD LEVINSON, CONSTITUTIONAL FAITH (Princeton Univ. Press 1988) (identifying and defending a "protestant" perspective with regard to institutionalizing constitutional interpretation, as against a more "catholic" approach that places such a duty uniquely in the Supreme Court).

after resolving that question should we consider inquiries into text, structure, and history. And, with regard to those interrogations, we should ask whether the text, structure, and history so definitively point in a direction different from our own answer to the first question that we must reluctantly conclude that we must acquiesce to just another "constitutional stupidity" that clutters up our Constitution.[10] It is not my view that lawyerly skill can always save us from distinctly unhappy endings. But I obviously think we should ask whether we can, consistent with adherence to legal craft, legitimately find in the text, structure, and history "permission" (even if not "an order") to do what we believe to be best given the realities of 2008.

I find myself in the unusual position of favorably quoting Justice Scalia with regard to constitutional interpretation: "Words do have a limited range of meaning, and no interpretation that goes beyond that range is permissible."[11] This is true, particularly with regard to "hard-wired" structures. *But*—and this is the all important caveat—Scalia goes on to write that "context is everything, and the context of the Constitution tells us not to expect nit-picking detail, and to give the words and phrases an expansive rather than narrow interpretation—though not an interpretation that the language will not bear."[12] One might also quote James Madison's first rule of interpretation that he conveyed to his colleagues in the first House of Representatives with regard to the controversy over the propriety of chartering the Bank of the United States: "Where the meaning is clear, the consequences, whatever they may be, are to be admitted—where doubtful, it is fairly triable by its consequences."[13]

I interpret both Scalia and Madison to suggest that if the constitutional materials are indeed "clear," so that one would have to make what an advocate herself would believe to be a "frivolous" argument"[14] in order to assert the contrary, then we are stuck, unless,

10. *See* CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES (William Eskridge & Sanford Levinson eds., N.Y. Univ. Press 1998).

11. ANTONIN SCALIA, A MATTER OF INTERPRETATION 24 (1998). I am grateful to Thomas B. Colby and Peter J. Smith whose paper, *Originalism's Living Constitutionalism* (February 6, 2008) (unpublished manuscript, on file with author), reminded me of Scalia's comment.

12. *Id.* at 37.

13. *See The Bank Bill* (Feb. 2, 1791) *in* 13 Papers of James Madison (Charles F. Hobson & Robert A Rutland eds., 1979). I note that Madison adds three other "rules," which may or may not be entirely congruent with his first rule.

14. *But see* Sanford Levinson, *Frivolous Cases: Do Lawyers Really Know Anything at All?*, 24 OSGOOD HALL L.J. 353-78 (1986).

of course, we view the consequences as so drastic as to warrant a self-conscious decision to defy the Constitution.[15] Deciding which particular person should succeed a dead senator would not, except in the oddest of circumstances, strike most people as having drastic consequences.[16] In any event, we should begin with what I believe to be the most appropriate initial question, which is how We the People—the ostensible sovereigns of the American republic—would choose to design our Constitution in 2008 with regard to the issue presented.

My own view is that we (and the perhaps mythic "We") would agree that in a political system where political parties play, for good and sometimes for ill, such an important role in structuring what is politically (im)possible, it would be foolish indeed to ignore the party identity of the senator whose death or resignation has necessitated the invocation of the Seventeenth Amendment's provision for gubernatorial appointment of replacements. Especially in our own era, where the two major parties are as ideologically divided as has been the case in American politics for at least the past century,[17] the presumptive majorities that voted for either the democratic or republican senator to be replaced could well feel a sense of justified outrage if a governor used his or her authority to negate that preference and fill the vacant seat with a senator from the opposite party (who would almost certainly be substantially to the right or the left of the prior senator).[18] To be sure, one can conjure up scenarios

15. *See* Jack M. Balkin & Sanford Levinson, Three Types of Constitutional Crises (Apr. 24, 2008) (unpublished manuscript, on file with editors) ("type-one" crises are those in which decision makers self consciously defy the Constitution in the name of "necessity"); CARL SCHMITT, CONSTITUTIONAL THEOLOGY 13 (pb. ed. 2005) ("For a legal order to make sense, a normal situation must exist.").

16. The situation would be different, however, if we were discussing the aftermath of a terrorist attack that killed or disabled dozens of senators. *See* LEVINSON, *supra* note 5, at 69-75; *infra* note 32 and accompanying text.

17. As measured, for example, in the relative solidarity of voting by party bloc in both the House and the Senate on major legislation. Today it is the case that not only the modal or median member of the Democratic and Republican Parties are quite distant from one another on relevant ideological scales; there is also very little overlap at the "tails" of the two parties, so that "liberal republicans" would be measurably more liberal than "conservative democrats" and, in turn, "conservative democrats" would be significantly more conservative than these "liberal republicans."

18. It would be far trickier to appoint a replacement for "independent senators." In the case of Vermont's Bernie Sanders, it would be obvious that his replacement should be a democrat, unless another prominent left-leaning "independent" (like Sanders, a self-declared Socialist) were a plausible designate. Selecting a replacement for Connecticut's Joseph Lieberman might present more complications, for he is clearly, on foreign policy, far close to the Republican Party than to his former democratic colleagues. He has, after

whereby the now-absent senator was narrowly reelected only because of name recognition or a last-moment scandal that discredited the favored opponent. But, after all, we are talking only about filling a vacancy until the next scheduled election—and, in some cases, even before then if a special election were called. If the majority is ready to shift its preferences, it will have that opportunity in no less than twenty-four months and, most often, even earlier. There is no good reason for an "opposite-party governor" to anticipate that change and, in effect, negate the consequences of the closest previous election with regard to expressed party preference.

And consider also the fact that in recent years the Senate has been extremely closely divided, so that the shift of political party identification by even one senator could lead to a shift of power in the Senate itself, with all of the ramifications that brings concerning chairs of committees and the practical powers to control the agenda. The country at large could pay a significant price for the decision of a state's governor to honor the desire of his or her national political party to control the Senate as against the desire of a state's majority to have their own demonstrated preferences honored. If, of course, one shared the partisan preferences of the appointment governor, one would say that the country substantially benefits from this change of control. The point is that it occurs because of a personal decision by the governor as against any kind of election.

There is, of course, a good reason to place the replacement power in the hands of the governor: A state legislature, as in my now home state of Texas, might well be in recess,[19] and time might be of the essence with regard to making sure that the state has full representation in the Senate. But there is also good reason to place certain constraints on the governor, as the Wyoming legislature has done, so that, as in that instance, the governor must pick from a list of three possibilities submitted by the central committee of the former senator's own political party. This law presumably has real bite only if—as was the case in Wyoming—the governor is of a different party from the senator. One can be fairly confident that most governors who share a party affiliation with the late senator can exercise enough

all, endorsed Republican Senator John McCain for the presidency. On the other hand, on domestic policy, he is more accurately described as a democrat, albeit a rather conservative one. I note that the Wyoming statute in question takes account of the possibility that the late senator was not affiliated with a political party. *See* Amar, *supra* note 4.

19. The Texas Constitution provides that the state legislature meet only once every other year for 150 days.

control over state party leaders to make sure that at least one of the names is fully acceptable—and, of course, it might even be his or her own name! I confess that I might have greater confidence in the situation if the legislature had, in effect, completely deprived the governor of an effective role by mandating the appointment of the *single* person recommended by the party's state leadership. This could easily be interpreted as an illegitimate delegation of the executive's authority to a private organization by depriving the governor of any genuine choice at all in the matter. But so long as the governor is provided some meaningful choice—and so long as one can trust the state party leadership to pick other than a list of out-and-out incompetents who would be recognized as such by the public at large—I see no reason to object to a constitutional design as that instantiated by the Wyoming process.

From my perspective, then, Professor Amar (or any other opponent of the Wyoming process) has a very high burden to overcome. I must be convinced that it is truly "frivolous" to interpret the Constitution so as to allow the Wyoming procedure. So long, however, as we regard the Seventeenth Amendment as "open to interpretation," as it were, and so long as we concomitantly allow a suitable attention to consequences to play some role in our final interpretation, I have no trouble at all in giving Wyoming a constitutional seal of approval.

So let's take a closer look at Professor Amar's arguments. As one would expect, it begins with the text of the Seventeenth Amendment itself, which in its relevant part provides that

> When vacancies happen in the representation of any State in the Senate, the executive authority of each State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.[20]

Are we forced, as speakers of English (or even of that particular dialect called "legal English"), to say that this is the equivalent of the two-senators-per-state or the "start of a new congressional session" rules set out in the Constitution?[21] I think not, even if I happily concede that Professor Amar's interpretation is a "possible reading"

20. U.S. CONST. amend XVII, § 2 (emphasis added).

21. *See* U.S. CONST. art. I, § 3; U.S. CONST. amend. XX.

of the Amendment and even, perhaps, a "better reading" than mine *if* (and only if) one pays no attention to the consequences of each of our readings.

Does "empower the executive" *necessarily* mean to place in the executive an absolute discretion, save, presumably, only for constitutional limitations concerning age, habitation, and duration of citizenship?[22] Would it be unconstitutional, for example, for a state legislature to say that the governor cannot appoint his or her own child, as happened recently in Alaska when Senator Frank Murkowski traded in that job for service as Alaska's governor. According to the *Washington Post,* "to the disgust of many Alaskans, he selected his daughter, an obscure state legislator, to serve out his Senate term"[23] (though Senator Murkowski was subsequently retained in office by gaining the votes of 48.6 percent of the voters in a multi-candidate race in which the democratic candidate received only 45.5 percent of the vote).[24] I see no reason to read the Seventeenth Amendment (or the Qualifications Clause)[25] in such a wooden matter, whatever a five-Justice majority might have said to the contrary in *U.S. Term Limits, Inc. v. Thornton.*[26] I think it more than legitimate to read the "empowerment" clause to include a role for the legislature to limit the appointment power with reasonable conditions designed to prevent what the legislature can reasonably believe would be an abuse of discretionary power.

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22. *See* U.S. CONST. art. I, § 3. I am critical of the age and duration of citizenship requirements. *See* LEVINSON, *supra* note 5, at 142-46. But I readily concede that it would be unconstitutional for a governor to appoint a twenty-eight-year-old person or someone who had been naturalized only five years prior to the appointment.

23. *See* Blaine Harden, *Senator Murkowski's Big Problem: Dad the Governor*, WASH. POST, August 10, 2004, at A01, *available at* http://www.washingtonpost.com/wp-dyn/articles/A52838-2004Aug9.html.

24. *See* Wikipedia.com, United States Presidential Elections, 2004, http://en.wikipedia.org/wiki/United_States_presidential_election,_2004. The raw voting totals for the two candidates were, respectively, 147,942 to 138,551. *See* WashingtonPost.com, http://www.washingtonpost.com/wp-srv/elections/2004/ak/. Though irrelevant to the central subject matter of this exchange, these numbers underscore the ludicrousness of equal voting power; consider that on the same night, 6,955,728 voters returned Barbara Boxer to the Senate. *See* USElectionAtlas.org, 2004 Senatorial General Election Results—California, http://uselectionatlas.org/RESULTS/state.php?year=2004&fips=6&off=3&elect=0&f=0. Both the Peace and Freedom and Libertarian Party candidates in California received far more votes than did Senator Murkowski, 243,846 and 216,522, respectively. *Id.*

25. U.S. CONST. art. I, § 3.

26. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995).

One might also argue, of course, that the final clause—"as the legislature may direct"—applies to the "empowerment" clause as well as the "special elections" clause. Grammarians might well disagree about this. One's ultimate answer might well depend on the degree to which one believes that constitutional drafters are like poets or novelists like Ernest Hemingway in their concern for the placement and grammatical implications of every single word. I confess that I have no belief that drafters should be compared to such individually exact writers. The Constitution is rife with badly or confusingly drafted language, not least because constitutions almost always fit the classic definition of a camel—"a horse drafted by a committee." If I agreed that Professor Amar's solution to the constitutional issue ostensibly presented by Wyoming were in fact one that I would adopt as a 2008 drafter of a new Seventeenth Amendment, then I would happily endorse his interpretation of the language. But I do not and, therefore, will not.

Professor Amar, of course, moves on from linguistic/textual arguments (and consideration of some Supreme Court cases examining the meaning of words like "legislature") to make what for "originalists" may appear to be an even stronger argument rooted in history. Section III.A. of Professor Amar's article is titled "The History of Direct Election and the Seventeenth Amendment Reflects a Distrust of Political Parties, Especially of Party Bosses." I have no reason to dispute his historical account. I have not looked sufficiently into the history myself, and I certainly believe that Professor Amar offers a fair and complete, albeit necessarily truncated, review of the historical record. But what exactly follows from this if one is a constitutional interpreter and not an historian?

Let's assume that the proponents of the Amendment were motivated not only to make the selection of senators more democratic, but also to clip the power of "political bosses." That is not what the text says. There is no mention at all of political parties or of "political bosses" in the text. What proponents might have believed, though, is that shifting the totally discretionary power of appointment to governors rather than leaving it with legislatures would in fact be an effective means to diminish the relevance of political party identity. Whereas legislators, by stipulation, would be party hacks, thinking only of partisan political advantage, the governor would fulfill eighteenth-century conceptions of civic virtue who would ask only "who is the best person to fill this position, independent of political party identity?" With respect, let me suggest this is an idle fantasy, similar to the fantasy that members of the

Electoral College would ask only who was most fit to serve as president of the United States. That particular vision was in utter shambles no later than 1800, when the stupidity of the initial draft of the Electoral College clause led to the brink of national collapse.[27] Similarly, any Progressive Era notions that an age of "non-partisanship" would follow a repudiated system of "party government" had no staying power.

Even if one laments it, the reality of American politics, as noted earlier, is the centrality of political parties. State governors, with rare exceptions,[28] are important members of their state party's hierarchy. If one doubts their designation as "party bosses," it may be only because in the modern era it is hard to designate *anyone* as a "party boss" in the sense that term was used in the Progressive Era or, for that matter, as late as the 1960s with regard to such individuals as Chicago's Mayor Richard J. Daley. Consider in this regard an editorial published by the *New York Times* on March 8, 2008, which notes that New York's Governor Eliot Spitzer "controls" that state's Democratic Party.[29] The fact that modern governors may not be "bosses" does not lessen their identity one whit, by and large, as thoroughly political and partisan creatures.

Recall Robert Bork's famous (or, for some, notorious) defense of the propriety of *Brown v. Board of Education*[30] in the teeth of evidence demonstrating that most of the congressional proponents of the amendment stipulated that it would not cover school segregation. Bork, of course, was a noted "originalist," and one might have thought that *Brown* might present a problem for him. Not so. Testifying before the Senate Judiciary Committee during his ill-fated hearings upon being nominated for the Supreme Court by President Ronald Reagan, Bork stated that

> [The framers] wrote a clause that does not say anything about separation. They wrote a clause that says "equal protection of the laws." I think it may well be true . . . that they had an assumption . . . that equality could be achieved with separation. Over the years it became clear that that assumption would not

27. *See, e.g.*, BRUCE A. ACKERMAN, THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY (2005).

28. California's Governor Arnold Schwarzenegger may be one of them, courtesy of the California Constitution's "recall" provision, added during the Progressive Era.

29. Editorial, *A One-Party New York State*, N.Y. TIMES, Mar. 8, 2008, at A14, *available at* http://www.nytimes.com/2008/03/08/opinion/08sat2.html.

30. Brown v. Board of Educ., 347 U.S. 483 (1954).

> be borne out in reality ever. Separation would never produce equality.

I think when the background assumption proved false, it was entirely proper for the Court to say "we will carry out the rule they wrote" and if they would have been a little surprised that it worked out this way, that is too bad. That is the rule they wrote and they assumed something that is not true.

And in that way I do not think any damage is done, and you can even look at it more severely. You could say suppose they had written a clause that said "we want equality and that can be achieved by separation and we want that too." By 1954 it was perfectly apparent that you could not have both equality and separation. Now the court has to violate one aspect or the other of that clause, as I have framed it hypothetically. It seems to me that the way the actual amendment was written, it was natural to choose the equality segment, and the court did so. I think it was proper constitutional law, and I think we are all better off for it.[31]

Similarly, I think that one might say that some proponents of the Seventeenth Amendment believed that placing unfettered discretion in the hands of presumptively virtuous governors would be an effective way of diminishing the role that partisan politics would play in selecting senators. They were wrong, precisely in the same way that those who believed that segregation was consistent with equality were manifestly wrong. To honor the demonstrably incorrect empirics of Seventeenth Amendment proponents solely because of evidence in the historical record as to their own assumptions would be necessary only if they had written the Amendment in a language that made such a conclusion truly compelling. As has already been demonstrated, there is no such necessity. Not only is it not necessary to read the Seventeenth Amendment in the way suggested by Professor Amar; it would also be improper to do so, precisely for the consequentialist reasons that I have been emphasizing.

There is an even more ominous possibility, suggested earlier, that deserves more extended discussion.[32] Unfortunately, it is not fanciful to imagine an attack on Washington that would kill dozens of senators. It would, of course, be absolutely essential to fill these

31. *Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 100th Cong. 284-86 (1987).

32. *See supra* note 16.

vacancies as soon as possible. I confess that I was surprised to learn from Professor Amar's article that several states have *not* authorized their governors to make appointments, thus consigning those states to diminished representation in the Senate until an election is held. Were I drafting a new Seventeenth Amendment, I would *require* states to have in place a procedure that would allow for functionally immediate replacement, at least when the number of vacancies exceeds a certain number, such as, say, fifteen. And if states refused to pass enabling legislation, I would allow Congress itself to pass corrective legislation. But the language does not seem to require states to pass enabling legislation, and I agree that under the Constitution we have,[33] states *are* free to deny themselves representation in the Senate, even if that decision imposes external costs on the rest of the nation as well.

A joint commission of the American Enterprise Institute and the Brookings Institution has issued a report, *Preserving Our Institutions*,[35] that addresses the necessity of replenishing the Senate after a catastrophic attack. Is it not fairly obvious that terrorists should not be able to transfer control of the Senate from one political party to another by virtue of the fact that partisan governors of a party different from the dead senator would be unable to resist the temptation to reward a fellow partisan (or, perhaps, to name him or herself to the office)? Indeed, if one is sufficiently sensitive to awful possibilities, is it not the case that Professor Amar's reading of the Amendment might offer an incentive to political assassins to attack even one or two given senators in the hope that his or her replacement by a senator of the other party might shift the overall control of the Senate, as would have been the case between 2000-2002 and 2006-2008?

Do I believe that the Seventeenth Amendment is a perfectly drafted amendment for twenty-first century America? Definitely not.

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33. As Bob Woodward commented in a symposium at the University of Texas, "we conduct our politics under the Constitution we have, not the Constitution we'd like to have."

35. Continuity of Education Commission, *Preserving Our Institutions: The First Report of the Continuity of America*, May 2003, http://www.continuityofgovernment.org/report/FirstReport.pdf.

But, to return to the central theme, the fact that the Seventeenth Amendment, as written, does not provide "slam-dunk" evidence for my preferred reading does not mean, logically or otherwise, that it necessarily supports Professor Amar's reading. All one can say is that each of us offers plausible, non-frivolous readings of the text. Which of us has offered the better overall argument is up to readers to decide.

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