How the Senate Lost its Stagger

The Story of an Attorney General's Opinion that Changed the Legislature

by
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Introduction

Following the 2018 midterm election the media made much of the fact that Minnesota was the only state with split partisan control of its legislature, a Democratic House and Republican Senate.[1] During the 2019 legislative session, DFL Governor Walz frequently expressed frustration with what he considered the Republican-controlled Senate's obstruction of his election mandate, pointing out that the Senate had not been on the ballot in 2018.[2]

What typically has gone unmentioned is why this likely happened: Minnesota is one of a few states whose Senate has neither staggered nor two-year terms. As a result, only one Senate seat – because of a fluke vacancy – was on the 2018 ballot, representing a Republican-leaning district. Had half of the Senate seats been up for election (that is, if Senate terms were staggered), one could reasonably speculate that the Republicans would have lost their one-vote majority and the 2019 legislative session would have had a different complexion.

A quirky history underlies the Senate's un-staggered terms: the founders clearly intended Senate terms to be staggered and they were for two decades after statehood. But that changed when a constitutional amendment increased the length of legislative terms and Attorney General W.J. Hahn issued an opinion in 1883 that the constitutional language did not provide permanently for staggering. In the 135 years since, Senate terms have not been staggered. The Minnesota Supreme Court confirmed that practice halfway through that period (in 1948) under unusual circumstances.

This post describes how this came to pass, why Hahn's opinion was probably wrong as a legal matter, and why the Supreme Court had little practical choice but to reaffirm it. Finally, it speculates about how the lack of staggering affects the legislative process, the composition of the legislature, and lawmaking in general. It's a story of how poor legal drafting and a hasty interpretation of that drafting combined to have long-term, important effects on the legislature.

History: How the Senate's Staggered Terms Disappeared

The practice under the 1857 Constitution was to stagger Senate terms

The initial constitution provided 1-year terms for representatives and 2-year terms for senators. It explicitly provided that the senators' terms were staggered with one-half of the senators serving 1-year terms and one-half, 2-year terms after the first election. It did so by numbering Senate districts and providing that senators representing odd-numbered districts served 1-year terms and those representing even-numbered districts, 2-year terms after the first election.[3] Following those initial

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[1] *See, e.g.,* Tim Gruber, "A First in Over a Century: Only One State Has a Split Legislature," *New York Times,* Jan. 27, 2019, p. A10.

[2] *See, e.g.,* J. Patrick Coolican, "Impasse at Minnesota Capitol on taxes, guns brings 2020 into focus," *Star Tribune*, March 16, 2019, which quotes Governor Walz on Senate Republicans' rejection of his proposals: "The day I announced my transportation package, that was dead. The day I announced my education package, that was dead. *Here's the thing, the dead-on-arrival stuff is coming from a group people who were not on the ballot in 2018*[.]" (emphasis added).

[3] The full text of the constitutional provision read as follows:

> The senators shall also be chosen by single districts of convenient contiguous territory, at the same time that the members of the house of representatives are required to be chosen, and in the same manner, and no representative district shall be divided in the formation of a senate

terms, all senators served 2-year terms. The last sentence of the section provided that after each apportionment (i.e., when new legislative boundaries were drawn after a census), all senators would, again as they had in the first election, stand for election.

What is obvious in retrospect is that the constitutional language did not explicitly provide that senators' terms would be staggered after (in its terms) "each new apportionment" of legislative districts when the entire Senate, per the except clause at the end of the provision, again stood for election.[4] Given the illogic of staggering terms only once, the drafters likely just assumed that it followed or that it was

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> district. The senate districts shall be numbered in regular series, and the senators chosen by the districts designated by odd numbers shall go out of office at the expiration of the first year, and the senators chosen by the districts designated by even numbers shall go out of office at the expiration of the second year; and thereafter the senators shall be chosen for the term of two years, except there shall be an entire new election of all the senators at the election next succeeding each new apportionment provided for in this article. Minn. Const. art. IV § 24 (1857).

This language was identical to the similar provision in the Wisconsin Constitution of the time but with the crucial difference that the "except" clause that ends the section was not in the Wisconsin Constitution. Wis. Const. art. IV, § 5 [original form]. It seems very likely that the Minnesota provision was copied from the Wisconsin document and the Minnesota drafters thought that they should clarify what was to happen after a redistricting by explicitly saying that the entire Senate would stand for election when boundaries were redrawn. (The constitution envisioned the size of the Senate would rise with growth in the state's population, so that the need to elect the full Senate after a redistricting was probably obvious to the drafters.) By contrast, Wisconsin (and every other state provision I looked at) left that practice to be prescribed by law or handled by administrators. As will be seen, the Minnesota except clause ultimately proved to be the undoing of staggering of Senate terms, even though that was almost certainly not the intent.

[4]The immediately preceding section (section 23) of the constitution required the state to conduct a census in 1865 and every ten years thereafter and gave the legislature power to reapportion legislative districts across the state after each state and federal census but did not require it:

> The legislature shall provide by law for an enumeration of the inhabitants of this state in the year one thousand eight hundred and sixty-five, and every tenth year thereafter. At their first session after each enumeration so made, and also at their first session after each enumeration made by the authority of the United States, the legislature shall have the power to prescribe the bounds of congressional, senatorial and representative districts, and to apportion anew the senators and representatives among the several districts according to the provisions of section second of this article. Minn. Const., art. IV § 8 (1857).

It's likely that the legislature's discretion to reapportion itself was contingent on the census showing that it was necessary to satisfy the requirement of section 2 of article IV. That section put a maximum population limit on House districts (2,000) and Senate districts (5,000) and required representation to be "apportioned equally throughout the different sections of the state in proportion to the population thereof[.]" Minn. Const. art. IV §2 (1857). As a practical matter that probably dictated a new apportionment after each census – assuming the maximum population limits (per legislative district) would not continue to be satisfied, as was likely to be the case.

If that was the case, the legislature ignored that requirement in its relatively sporadic redistrictings, as described below. In 1912, a constitutional amendment repealed the maximum population limits on legislative districts, leaving only the more indeterminant and subjective equality requirement. 1911 Minn. Laws ch. 395. The Minnesota Supreme Court in two decisions made it clear that that requirement allowed the legislature wide discretion in deciding when that was necessary and how to do so. *State v. Weatherill*, 147 N.W. 105 (Minn. 1914); *Smith v. Holm*, 19 N.W.2d 914 (Minn. 1945); see discussion in Aleix C. Stangel and Matt Gehring, *History of Minnesota Redistricting* (November 2018).

implied that matters reverted to the odd-even term rule after a reapportionment. At least that seems like a reasonable inference.

The two accounts of the debates at the constitutional conventions shed some light on whether staggering was intended to be permanent.[5] As far as I can tell, the account of the Democratic debates does not directly or indirectly mention or implicate the staggering of Senate terms at all.[6] However, the account of the Republican debates includes an indirect reference, which implies that the framers intended the system of staggering (as one would naturally expect) to be a permanent, not a one-time (until the first redistricting occurred), feature.[7]

The 1858 legislature enacted an implementing law with a slightly different formulation (reflecting the fact that the 1857 election referred to in the constitutional provision had already occurred) that added a gloss on the constitutional language and which could be interpreted to require staggering of the terms after later apportionments.[8] That law added modifying language "at each succeeding election" language

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[5] In an early case of partisan polarization (over slavery), Minnesota's constitutional convention divided into separate Democratic and Republican meetings. There are separate printed accounts of each of these debates. See Office of Secretary of State website, Minnesota Constitution 1858, for a brief description of how the original constitution was adopted following separate Republican and Democratic conventions.

[6] *The Debates and Proceedings of the Minnesota Constitutional Convention,* Francis H. Smith, reporter (Earle S. Goodrich, Printer 1857). I did a variety of word searches of this long document (over 700 pages) and came up with nothing.

[7] The comment that may be relevant was made in opposition to an amendment to delete the requirement that the entire Senate stand for election after each reapportionment. The proponent of the amendment (a Mr. Cleghorn) expressed concern that the provision (without his amendment) would result in shortened Senate terms in a "great many" cases. The constitution could have resulted in redrawing legislative boundaries every five years – after both state and federal census, each of which were done every ten years on schedules five years apart. The amendment was opposed by a Mr. North who pointed out that the result would be impractical with some senators holding over and serving after district boundaries were redrawn (their old districts would not really exist) and others not. (The amendment was voted down by the convention.) Obviously, if you did not have a system of permanent staggering of terms, Cleghorn's concern would not have been valid, simply because there would be no staggering of terms after the first reapportionment. *The Debates and Proceedings of the Constitutional Convention for the Territory of Minnesota*, T.F. Andrews, reporter (George W. Moore, printer 1857), p. 200. This provides some evidence that the founders understood that they were proposing a system of permanently staggering Senate terms. Given the way Attorney General Hahn and the Supreme Court later read the amended language, the effect of the Cleghorn amendment instead would have been to provide for permanent, rather than temporary, staggering. Since that would have been a more material change, one would have expected the convention to have discussed that, rather than whether it was practical to continue some Senate terms after redrawing of boundaries.

As discussed in note 3, that would have made Minnesota's provision identical to the Wisconsin provision on which it appears to have been based. Given how Wisconsin's provision is applied, that would have shortened Senate terms whenever a legislative districts were redrawn, the result Cleghorn appeared to be concerned about. Of course, there is no guarantee the Minnesota and Wisconsin provisions would have been interpreted and applied in an identical fashion.

[8] Minn. Laws 1858, ch. 50 § 3 provided:

> The Term of office for Senators shall be two years, and at the first election hereafter for Senators and members of the House of Representatives, Senators shall be elected for the odd districts only, *and at each succeeding election*, Senators shall be chosen alternately from the districts designated by even and odd numbers, except that there shall be an entire new election of all the Senators at the election next succeeding each new apportionment, provided for by the State Constitution. Members of the House of Representatives shall be elected annually, and they shall hold said office for one year. (emphasis added).

in two places, which arguably could be read to imply the alternating or staggering requirement also applied after a new apportionment and not simply for the first cycle after adoption of the constitution. It certainly wasn't clear, though.

Staggering continued after the initial redistrictings of the legislature

1860 Reapportionment. The Senate districts set by the territorial legislature, and used in the 1857 to 1859 elections, did not provide for single member Senate districts or a consistent number of senators per district for that matter. There were 16 single-member districts, 9 two-member districts, and one 3-member district for a total of 26 Senate districts and 37 senators.[9] However, 19 senators represented odd-numbered districts and 18 senators represented even-numbered districts, so the staggering system provided by the constitution and chapter 50 of the 1858 Laws worked mechanically. It was used in the 1858 and 1859 elections. The 1860 legislature drew new legislative districts that provided for a 21-district Senate in which all the districts were single member districts.[10] It's unclear why the legislature redrew its boundaries in 1860. It was obviously not driven by the 1860 census, since its results were unavailable when the legislature met in the spring of 1860.[11]

Following this redrawing of the boundaries, the system of staggering of Senate terms was used again.[12] This provides evidence that the founders intended the staggering of Senate terms to apply after a new apportionment, even though the constitution did not include clear or explicit language requiring it. One can safely assume that the state officials (legislators and election administrators) in 1860 knew what the constitutional convention had intended, since it had occurred less than three years prior. Some of them undoubtedly were at the convention. Apart from having actual knowledge of the intent, they may also have considered it to be implicit in the structure and language of the section, notwithstanding the lack of an explicit provision. To me, that seems like a logical and reasonable inference – what sense would it make for the founders to opt to only have staggered Senate terms for one cycle (until the first reapportionment occurred) and, then, only elect senators every other year. If a policy of staggered Senate terms made sense for the first cycle, it seems reasonable to assume that the framers intended that policy to apply permanently.

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[9] *Senate Journal*, pp. 5-6 (Dec. 7, 1858). A table showing the changing size of the Minnesota Legislature from its inception to the present is available on the Legislative Reference Library's website.

[10] Minn. Laws 1860, ch. 73.

[11] It may be that the districts which were used to elect the first legislature in 1857 did not reflect the 1857 territorial census. I have not attempted to determine what the 1857 legislative district boundaries were based on.

[12] It is difficult to verify based on government records that the staggering system was followed immediately after the 1860 apportionment, since I could not find official records of Senate term lengths. An exhibit used in the 1948 lawsuit, see note 52, documents the staggering of Senate terms in the 1861 – 1865 period. The *Senate Journal* starting in 1865 confirms that the staggering system was being used. In 1865, only senators representing even-numbered districts were sworn in and in 1866 only senators representing odd-numbered districts were sworn in. *Senate Journal*, pp. 3 – 4 (Jan. 3, 1865) (even); p. 3 (Jan. 2, 1866) (odd). Prior to that the practice was to swear in all senators at the beginning of each annual session. *See, e.g., Senate* Journal, pp. 3 - 4 (Jan. 7, 1862). Apparently, in 1865 the Senate concluded it was only necessary to swear in newly elected senators – i.e., that taking the oath of office once was enough.

1865 Reapportionment. A state census was conducted in 1865 and the 1866 legislature reapportioned legislative districts and added one Senate district so there were 22 senators.[13] As was the case with the 1860 apportionment, it did not address whether the resulting Senate terms would be staggered. I assume that the legislature considered that to be governed by the constitutional language and did not need to be specified by the law.

In the 1866 election, senators from odd-numbered districts were elected to 1-year terms and those from even-numbered districts to 2-year terms. In later elections (e.g., 1867, 1868 and so forth), one-half of senators were elected under the odd-even numbered staggering scheme specified by the constitution.[14] Thus, for the second cycle after a reapportionment, the relevant state officials (secretary of state, local election administrators, or the senators themselves) must have considered the constitutional provision – despite its silence as to the length of Senate terms after a reapportionment – to require staggering.

1871 Reapportionment. Following the 1870 federal census, the legislature enacted a reapportionment law, which expanded the Senate to 41 members.[15] The pattern of staggering terms of senators continued for a third time.[16]

The 1873 legislature submitted proposed constitutional amendments to the voters that, if adopted, would have provided for biennial sessions of the legislature and doubled the length of legislative terms in office – to two years for House members and four years for senators. The language of the amendment relating to legislative terms preserved (but did not modify or clarify) the language providing for staggering of Senate terms.[17] The voters failed to approve both amendments.[18]

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[13] Minn. Laws 1866, ch. 4. The constitution envisioned that as population increased legislative seats would be added. Although the change added one senator, it added five representatives.

[14] I have been unable to obtain official election records for the legislative elections in the early years after statehood. An 1861 law required these records to be transmitted to the legislature. 1861 Minn. Laws, ch. 15 § 20. This likely was a result of Acting Governor Chase refusing to send election records to Senate unless the Senate paid for copying costs, when it sought them to help resolve an election contest in 1858. *Senate Journal*, p. 110 (Jan. 14, 1858). As indicated in note 12, the fact that the staggering scheme was implemented is confirmed by the Senate Journal. *Senate Journal*, p. 4 (Jan. 1, 1867) (all members sworn in, since it was the first election after reapportionment); *Senate Journal*, p. 4 (Jan. 7, 1868) (senators from odd-numbered districts only, i.e., those serving 1-year terms, were sworn in); *Senate Journal*, p. 3 (Jan. 5, 1869) (senators representing even-numbered districts); *Senate Journal*, p. 3 (January 4, 1870) (senators representing odd-numbered districts); *Senate Journal*, p. 3 (Jan. 3, 1871) (senators representing even-numbered districts).

[15] 1871 Minn. Laws ch. 20. The House of Representatives was increased to 106 members.

[16] *Senate Journal*, pp. 3 – 4 (Jan. 2, 1872) (all 41 senators sworn in); *Senate Journal*, p.3 (Jan. 7, 1873) (only 20 senators sworn in; journal does not list district numbers, but I assume they were from odd-numbered districts – should have been 21, though); *Senate Journal,* p. 3 (Jan., 6, 1874) (only Senators from even-numbered districts sworn in); pp. 3 – 4 (Jan. 5, 1875) (odd), pp. 3 – 4 (Jan. 4, 1876) (even), pp. 3 – 4 (Jan. 2, 1877) (odd), pp. 3 – 4 (Jan. 8, 1878) (even).

[17] 1873 MInn. Laws ch. 3.

[18] Minn. Secretary of State, *Legislative Manual*, p.78 (compiled for the legislature of 2016-17) (vote of 11,675 in favor and 24,331 against on the amendment proposing 2 and 4-year legislative terms).

1877 constitutional amendments adopt biennial sessions and double term lengths

The state conducted a census in 1875, as mandated by the constitution.[19] However, the 1876 and 1877 legislature failed to enact a law redrawing the boundaries of legislative districts under the census. Instead, the 1877 legislature again submitted to the voters proposed constitutional amendments to shift to biennial sessions and to double the length of legislative terms.[20] The voters approved both amendments at the 1877 election.[21]

The language of the amendment extending legislative terms did not address the issue of staggered Senate terms, but simply modified the length of terms and specified when the longer terms would begin to take effect. In the 19th and early 20th centuries, Minnesota legislation that modified existing statutory, session law, or constitutional language did not explicitly show the changes being made in the existing language but just showed how the language would read if the bill passed or the constitutional amendment were adopted (i.e., the additions and deletions were not noted in the bill language). The following language shows the 1877 amendment to the legislative term section of the constitution following the protocol that the legislature now uses for drafting bills, which shows the additions (underlined language) and deletions (stricken language) to the preexisting language:

> The senators shall ~~also~~ be chosen by single districts of convenient contiguous territory, at the same time that ~~the~~ members of the House of Representatives are required to be chosen, and in the same manner, and no representative district shall be divided in the formation of a Senate district. The Senate districts shall be numbered in a regular series. The terms of office of senators and representatives shall be the same as now prescribed by law, until the general election in the year one thousand eight hundred and seventy-eight (1878), at which time there shall be an entire new election of all the senators and representatives. Representatives chosen at such election, or at any election thereafter, shall hold their office for the term of two years, except it be to fill a vacancy, and the senators chosen at such election by the districts designated by odd numbers shall go out of office at the expiration of the ~~first~~ second year, and the senators chosen by the districts designated by even numbers shall go out of office at the expiration of the ~~second~~ fourth year; and thereafter the senators shall be chosen for the term of ~~two~~ four years, except there shall be an entire new election of all the senators at the election next succeeding each new apportionment provided for in this article.

As with the 1857 constitutional language there was no explicit provision specifying whether staggering continues after a reapportionment. Rather, the amendment retained the original constitutional language staggering Senate terms (using odd-even numbering) but added a modifying phrase "at such

[19] Minn. History Center, Census Records: Minnesota Territorial & State Census.
[20] 1877 Minn. Laws ch. 1.
[21] Minn. Secretary of State, *Legislative Manual*, p.78 (compiled for the legislature of 2016-17) (vote of 37,995 in favor and 20,833 against on the biennial session amendment and 33,072 in favor and 25,099 opposed on the amendment proposing 2 and 4-year legislative terms; neither amendment would have passed if the current requirement that a majority all of the voters voting in the election approve, since the total vote in the election was 98,614).

election" to proceed the staggering language.[22] Thus, senators elected in 1878 to represent odd-numbered districts would serve 2-year terms and those elected to represent even-numbered districts would serve 4-year terms. This pattern was applied to the 1878, 1880, and 1882 elections.[23] The 1878 legislature implemented the biennial session amendment by enacting a law that provided that the biennial regular sessions would meet beginning in January of odd-numbered years.[24]

Attorney General Hahn ends staggered terms in 1883

Following 1880 federal census, the 1881 legislature redrew legislative district boundaries and increased the size of the Senate to 47 members.[25] As in the past, the law was silent as to the length of Senate terms in the first election after the apportionment (i.e., the 1882 election).

That sets the stage for the 1883 legislative session. If the pattern following previous legislative apportionments (1860, 1865, and 1871) had been used, senators representing odd-numbered districts would serve 2-year terms and their seats would be up for election in 1884. That reality was obviously looming, when the 1883 Senate passed a resolution requesting that the Attorney General provide an opinion as to whether that was the case.[26] The resolution was sponsored by Senator Harrison J. Peck, a freshman senator from Scott County, who probably not coincidentally represented an odd-numbered district (number 31) and would have served a 2-year term under the past practice of staggering terms. The resolution passed near the end of the legislative session.[27] The Attorney General, W. J. Hahn, responded promptly, issuing an opinion on February 26, 1883.[28]

Attorney General Hahn's opinion was short and to the point.[29] He was "clearly of the opinion" that all senators elected in 1882 (not just those representing even-numbered districts) had 4-year terms. His reasoning would be familiar to readers of recent Minnesota Supreme Court opinions, since it relied exclusively on the concept of "plain language" or his reading of the grammatical effect of the literal language of the constitution.

The opinion begins by reciting excerpts of the constitutional language with the added gloss of italicizing two separate words and one phrase (see Appendix A): "until", "at such election" (which was added by

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[22] Attorney General Hahn latched onto this addition – although he does not characterize or discuss it as a change from the 1857 provision – to opine that the staggering of terms just applied until the first reapportionment.

[23] This can be confirmed by the *Senate Journal* in which only half of the senators would sworn in (after they were newly elected) at the beginning of each biennial legislative session after 1878.

[24] 1878 Minn. Laws ch. 23 §1.

[25] 1881 Minn. Laws ch. 128. The House of Representatives was set at 103 members, a decrease from 106.

[26] *Senate Journal*, p. 269 (February 20, 1883). The resolution was terse:

> Resolved that the attorney general of this State be and is hereby requested to furnish his opinion for the use of this Senate upon the question of the length of the terms of the senators elected at the last election in 1882.

[27] The resolution was passed on February 20th and the legislature adjourned on March 2nd. *Senate Journal*, p. 269 (Feb. 20, 1883) (adoption of resolution), p. 467 (Mar. 2, 1883) (adjournment *sine die*).

[28] See Appendix C for biographical information on Attorney General Hahn.

[29] *Opinions of the Attorneys General of the State of Minnesota,* p. 527 (West Publishing Company, 1884), p. 527. The opinion, which is reprinted in Appendix A, is less than 600 words long, including reproducing the Senate resolution and a long quotation from a New York Court of Appeals case. The opinion was also printed in the *Senate Journal* with slightly different punctuation and a different date. *Senate Journal*, p. 340 (February 26, 1883) (the version printed by West Publishing has a date of February 27, 1883).

the amendment), and "thereafter" and dropping what he must have considered unnecessary language. In Hahn's view his highlighted terms must have made it abundantly clear that the 2-year terms for senators representing odd-numbered districts only applied to the 1878 election (i.e., it was the one and only "such election") and that "thereafter" really meant "forever after" all senators would be elected to 4-year terms unless redrawing boundaries shortened those terms to two years. Thus, terms would never be staggered or overlapping after the first reapportionment after 1878. The language was "unambiguous" or "too plain to admit doubt" and, thus, "no room is left for construction."

Relying on the "plain language" doctrine allowed Hahn to avoid thinking about or discussing intent, logic, or extrinsic evidence of the purpose behind either the original constitutional language or the amendment. The language was so clear and unambiguous in his view that he did not attempt to read it to validate the practice that had been used after the three previous reapportionments. The opinion did not even note that the practice had been to stagger terms under the 1857 language. Given how previous state officials had applied the language administratively and the illogic of using staggered terms for only one cycle, the opinion's self-assurance as to the meaning and unambiguity of the language is breathtaking – in particular, given its reliance on inherently ambiguous terms like "such" and "thereafter" (what is the antecedent of "such"?) as to be so "plain" to admit no alternative readings of them. A close reading of the constitutional language suggests that a more nuanced interpretation could have preserved the likely intent consistent with the ordinary meaning of the words.[30]

As a result of his opinion, staggering of Senate terms ended with the 1881 redistricting and the system of electing senators to represent all districts at the same elections continued unchallenged for 65 years.

The legislature redrew legislative boundaries three times after Hahn's opinion

The legislature redrew the boundaries of legislative districts three times in the period between issuance of Hahn's opinion and the Minnesota Supreme Court's validation of the opinion's interpretation in 1948. District boundaries were redrawn in 1889,[31] 1897,[32] and 1913.[33] These laws increased the size of the Senate to 54, 63, and ultimately 67 senators, its current size.

After each of these laws took effect, all senators were elected to 4-year terms with the result that at every other biennial election there was no election of senators except to fill vacancies resulting from a death or resignation. As luck would have it, the entire Senate thus was elected at midterm – rather than presidential – elections for an extended period, because the boundaries were drawn in 1913 and the first election after that was 1914, again a midterm. The failure of the legislature to redraw boundaries after the next four censuses meant that this state of affairs continued for a 78-year period, from the 1881 redistricting through 1960.[34] Conventional wisdom is that that arrangement favored the Republican party, since its core supporters are more reliable voters (typically more affluent and highly

[30] See Appendix B for my alternative reading of the language that would have preserved staggering.
[31] 1889 Minn. Laws ch. 2 (providing for 54 senators and 114 representatives).
[32] 1897 Minn. Laws ch. 120 (providing for 63 senators and 119 House members).
[33] 1913 Minn. Laws ch. 91 (providing for 67 senators and 130 representatives).
[34] The redistricting enacted in 1959 was based on the 1950 census (8 years late) and caused this alignment to switch with the entire Senate standing for election in 1960.

educated than Democratic voters were[35]) who turnout to vote in higher percentages in the typically lower turnout midterm elections. Whether that was the case or not, the absence of Senate elections in 1932 (and a resulting more heavily Republican Senate) created challenges for Farmer-Laborite Governor Floyd B. Olson in the depth of the Depression.[36] The Farmer Labor Party gained control of the House in two elections during the Great Depression: 1932 and 1936.[37] Under the no-staggering system, no senators were up for election in those two elections.

By contrast, the entire Senate was up in 1946, the first election after the end of the World War II, which was a national wave election for Republicans at which they regained for the first time after the onset of the Great Depression control of both houses of Congress.[38] The 1946 results in Minnesota were similarly favorable to the Republicans. One source reported that that Republicans (called "conservatives" in the nonpartisan legislature) controlled 105 seats (out of 131) in the House and 55 (out of 67) in the Senate.[39] Although the results of the 1946 legislative elections were very favorable to Republicans, they apparently were in line with the GOP's success at the ballot during the 1940s.[40]

1948 Supreme Court affirms Hahn's opinion

The lack of staggering of Senate terms resurfaced in the lead up to the 1948 election. Since the entire Senate had been elected in 1946, 1948 was an election in which no Senate seats (absent a vacancy) would be on the ballot. Nevertheless, on August 5, 1948, five individuals attempted to file affidavits of

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[35] This may no longer be the case with the Trumpification of the Republican Party. During his campaign, President Trump claimed "I love the poorly educated" after his victory in the 2016 Nevada primary. Josh Hafner, "Donald Trump loves the 'poorly educated' — and they love him," *USA Today* (Feb. 24, 2016). There is some demographic evidence from the 2016 and 2018 elections confirming the reversal of traditional Republican advantage among more highly educated voters. *See, e.g.,* Alec Tyson and Shiva Maniam, "Behind Trump's victory: Divisions by race, gender, education" (Nov. 9, 2016), Pew Research: "In the 2016 election, a wide gap in presidential preferences emerged between those with and without a college degree. College graduates backed Clinton by a 9-point margin (52%-43%), while those without a college degree backed Trump 52%-44%. This is by far the widest gap in support among college graduates and non-college graduates in exit polls dating back to 1980." Pew Research Center, *Wide Gender Gap, Growing Educational Divide in Voters' Party Identification*
College graduates increasingly align with Democratic Party (March 20, 2018).

[36] *See, e.g.,* George B. Mayer, *The Political Career of Floyd B. Olson* 117 – 142 (MN Historical Society Press 1987) for an account of the clashes between the governor and Senate in the pivotal 1933 legislative session at which a mortgage moratorium and the state's income and corporate taxes were enacted. Mayer observes "Nothing could be done about the senate because the entire membership had been elected for a four-year term in 1930." (p. 117).

[37] The legislature was elected on a nonpartisan basis in those years but organized itself into conservative (Republican) and liberal (Farm Labor and/or Democratic) caucus. It is nearly impossible to track partisan affiliation of legislators through official records, requiring resort to secondary sources. *See, e.g.,* Minnesota Assoc. of Cooperatives, *The Minnesota Legislature … How It Works of 1951,* p. 8 (1951) (on file in the Minnesota Legislative Reference Library). The report drolly notes: "In the 1949 session there were so few liberals in the Senate that scarcely any caucuses were held by the liberals."

[38] The *Smithsonian* lists the 1946 election is one of its top ten historic midterm elections. Republicans gained 58 seats in the U.S. House of Representatives and 13 senate seats.

[39] Minnesota Assoc. of Cooperatives, *The Minnesota Legislature … How It Works of 1951,* p. 8 (1951) (on file in the Minnesota Legislative Reference Library). Also, all the Republican statewide candidates were elected. Secretary of State, *Legislative Manual* 359 - 60 (1946).

[40] Charles R. Adrian, *The Nonpartisan Legislature in Minnesota*, U. of Minnesota PhD Thesis (Dec. 1950), p. 170 (reporting that the liberal caucus in the House since the 1938 election had hovered around 25 members, providing overwhelming majorities to the conservative or Republican caucus).

candidacy for Senate seats representing odd-numbered districts. The theory, of course, was that the constitution required staggering. Since it was the scheduled election for odd-numbered districts, the filers treated those districts as being up for election, even though the law had not been administered that way for 65 years.

All the putative candidates appear to have been DFLers.[41] Two of the districts were in Hennepin County, one in Duluth, one in St. Cloud, and one in LeSueur County. The local election officials in Hennepin and LeSueur counties refused to accept the affidavits because the offices were not up for election. The filings for seats in Duluth and St. Cloud were the responsibility of Secretary of State Mike Holm who did not immediately refuse to accept the affidavits, but instead requested an opinion from Attorney General JAA Burnquist (pictured at right).[42]

Burnquist provided Holm an opinion four days later (August 9, 1948) that the Secretary of State had "no authority to accept and file" the affidavits of candidacy because the offices were not up for election in 1948.[43] In reaching this conclusion, the opinion relied on Hahn's opinion and the 65 years of administrative practice following it without attempting to construe the constitutional language itself:

> It might have been argued in 1883 that the provision of the state constitution adopted in 1877 was originally intended to result permanently in elections after 1878 of one-half of the senators at one biennial election and the other half at the next biennial election. However, if such was the intention, it was held by the attorney general in 1883 to have been defeated by [the clause that provided for election of all senators after each apportionment].
>
> *** The practice so established has been followed ever since, and, even if the constitution could be construed to be ambiguous with respect to the matter in question, a practical construction for more than six decades should, I believe, be given sufficient weight to prevent, without amending the constitution, a change in the time of elections or the terms of senators.[44]

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[41] Legislative elections were nonpartisan, so the filings and subsequent court papers do not reveal an official party affiliation by indicating a party primary to which the filing relate. I reached my conclusion by doing some basic research on the backgrounds of several of the candidates and their lawyer who was an active DFL party member. Adrian, note 40, p. 249, reports that the DFL Party in 1948 made its first concerted and relatively successful statewide effort to win legislative elections by tying the races to the party's state positions. The lawsuit might have been connected to that, although I did not find any direct evidence of it.

[42] Burnquist is the only Minnesota Attorney General who previously had served as governor (from 1915 – 1921). He was initially elected Lieutenant Governor and became governor when Governor Eberhardt resigned. He was elected governor twice (in 1916 and 1918). He served as Attorney General from 1939 to 1955. Wikipedia reports he was the longest serving Minnesota Attorney General. He was a Republican.

[43] JAA Burnquist, "State senators – Filing for nomination in 1948 not authorized where there is no vacancy." *Opinion of Attorney General* 280-G (August 9, 1948) (copy provided to the author by the Office of Attorney General).

[44] *Id.* pp. 104-05.

The opinion was not exactly a ringing endorsement of Hahn's interpretation, since it recognized the possibility that permanent staggering was intended and relied on the administrative practice under Hahn's opinion as the reason not to consider construing the constitutional language to effectuate that intent. Or Burnquist's summary dismissal of the issue may simply have reflected his view of its lack of merit. In any case, it resulted in Holm following the local officials in rejecting the affidavits of candidacy.

Court procedures. After the rejection of their affidavits in early August, the five candidates waited until the last week of September to file a petition under the Supreme Court's original jurisdiction for an order directing the election officials to accept their affidavits of candidacy. The court heard the petition on October 6, 1948.[45] This timing put the court in a difficult position if it was inclined to seriously entertain the petition. For the five petitioners, granting the petition would have *de* facto seated them in the Senate by court order for 4-year terms; they were the only candidates that had filed and, thus, would have been the only candidates on the ballot. Reopening filing, printing ballots, potentially holding primaries, and so forth simply would not have been practical in mid-October (one can confidently assume).[46] Granting the order would effectively have declared the 29 other Senate seats for odd-numbered districts vacant before the convening of the 1949 legislature in January, probably necessitating special elections in December.[47] That likely caused the Supreme Court to look at the petition with some skepticism or trepidation.

Petitioners' brief. The parties' briefs are revealing. Petitioners' brief devoted considerable ink to arguing that the constitutional language was "clear and unambiguous" in requiring staggered terms.[48] Given the constitutional language that was no small task. The brief advanced that view by carefully parsing the constitution's words and appealing to construing the provision "as a whole" to overcome the absence of explicit language in the except clause that specified term lengths when the entire Senate was on the ballot after a redistricting. It is hard to state their arguments clearly and simply, but in essence it was that the language provides a general rule of staggering based on district numbering – that is, at every general election one-half of the Senate is up for election, depending upon whether the district number is odd or even. The only exceptions to this are governed by the "except clause" at the end of the language for an election after an apportionment, when the entire Senate is up. In the petitioner's

[45] The order to show cause was signed by Justice Thomas Gallagher on September 24, 1948 (the same day it was filed with the court), so the hearing occurred 12 days later. The petitioners allowed passage of over 40 days between the rejection of their attempted filing and the filing of the petition with the supreme court. The length of their delay is curious, since it put the court in a more difficult position to decide the case for petitioners.

[46] Based on the assertions in their briefs, that appears to be what petitioners intended. Brief of Relators in *Leonard G. Kernan et al v. Mike Holm et al*, file no. 34,877, pp. 75-78 (Minn. Sup. Ct. filed Oct. 10, 1948) (on file at Minnesota History Center) [later references are to "Brief of Relators"].

[47] The Minneapolis *Tribune*'s coverage noted that this would have required calling a special election for those seats. Richard P. Kleeman, "Supreme Court to Decide State Senate Filing Case," *Minneapolis Morning Tribune* p. 4, col. 1 (October 7, 1948). There may have been some question whether the statutes governing vacancies and the authority to call special elections covered such a situation. None of these practical effects of a ruling for the petitioners was addressed by either of the briefs.

[48] This is remarkable given the Hahn opinion and the 65 years of practice, as well as the fact that how to read the language to reach that result is not immediately obvious. What does seem obvious is that they were anticipating the attorney general's reliance on the "practical construction" doctrine that only applies to "ambiguous" provisions and must have thought (1) that the court's potential reliance on "practical construction" was the biggest obstacle to their winning and (2) that arguing the language was clear and unambiguous would avoid that challenge altogether.

view, the only reasonable way to construe this except clause was to conclude that the same system of half of the terms being shortened (as for the 1878 election) must apply. It focused particularly on the word "each" in that language – its use implied that those elections (immediately after an apportionment) were the only ones where the entire Senate was up for election. Although the brief didn't explicitly say so, that implies the system of electing one-half of the Senate must apply to all other general elections. In essence, they were arguing that Hahn's reading of the except clause made it the general rule, rather than an exception – i.e., that it was always the case that entire Senate was always up (or not), rather than that just occurring after apportionments. Specifically, they argued that reading is inconsistent with the use of "each" in the except clause, which somehow implies those are the only elections when the entire Senate is up.[49] It's hard to see how any of this is clear or unambiguous.

Petitioner's brief goes on to argue that if the provision is ambiguous, then extrinsic evidence of intent from the constitutional convention,[50] logic, and the original staggering practice must lead to construing any ambiguity to yield a permanent staggering system. In the words of the brief, a view that staggering was only to apply until the first reapportionment was "preposterous."[51] To illustrate that Senate terms had been staggered consistently from statehood through adoption of the amendment petitioners provided the court with a large format chart (16" X 24") showing the term lengths for each senator from 1858 through 1881.[52] The following quote captures the essence of this portion of the argument:

> The pattern and design of "staggered" senatorial elections was clear to those who adopted the Constitution. It was clear to those who followed it for more than twenty years next succeeding the adoption of the Constitution. It was clear to those who, with full knowledge of all that had taken place previously, reenacted the same section without substantial change. The amendment recommended by the Legislature to continue carrying on with the "staggering" Senate and was so adopted by the people November 6, 1877.[53]

The petitioners' brief closes by anticipating their opponents' argument that the practical construction doctrine supported upholding the non-staggering practice by arguing that that doctrine, in fact, supported their construction – i.e., the administrative practice and its underlying interpretation from 1858 to 1881 trumped the conflicting interpretation from 1883 to 1946, because of the reenactment of the language in 1877. Overall, the brief does not make a very convincing case, given its challenge of overturning over 60+ years of administrative practice, compelling a December special election to be held for half of the Senate, and granting the five petitioners four-year Senate seats by court order!

Respondents' brief. By contrast, Burnquist and the two county attorneys opposing the motion filed a perfunctory brief (12 pages versus 78 pages for petitioners) that did not bother to directly address the

[49] Hahn's likely response to this would have been that the four-year term is the general rule and the except clause deviates from that because it can shorten terms to two years in some cases (true enough although it had not occurred since Hahn issued his opinion). Neither reading seems obvious based on just words and grammar.
[50] For this they cite to the same exchange that is discussed in footnote 7. Relator's Brief, note 46, pp. 40 – 44.
[51] Ibid. p. 49.
[52] Document on file with the Minnesota History Center.
[53] Relator's Brief, note 46, pp. 45 – 46.

language of the constitution, [54] but referred to the state's and counties' brief statement in response to petitioner's motion for an order to show cause, which in turn relied on Hahn's opinion. Their brief spent virtually all its space simply reciting quotes from cases on the "practical construction" doctrine in which courts looked to longstanding administrative constructions and applications of statutes and constitutional provisions in resolving the meaning of ambiguous language. The brief characterized as particularly "trenchant" a quote that observed after "many years" of general acquiescence in an administrative interpretation, "it is too late to think of undoing the past."[55] Given the practical situation facing the court and the mess that would have resulted from granting the petition, one can easily understand that sentiment and why they likely thought it would be persuasive for the court.

The two briefs are unusual in that they both heavily relied on actual practice as the best way to construe language which is clearly ambiguous. Each of them points to opposing administrative practices – the petitioners to that immediately after statehood and the state's and county's attorneys to the 60+ years under the Hahn opinion.

The Supreme Court decision. The court resolved the case quickly, issuing an opinion on October 15th, nine days after the argument. The court's opinion ignored the parties' dueling arguments based on administrative practice and turned to the constitutional language.[56] It dispatched petitioners' arguments in a short opinion, much of which consists of reprinting of the constitutional language and a large part of Hahn's opinion. The court simply accepted Hahn's view of the language. It was telling to the court that the language explicitly provided for staggering after the 1878 election when terms were lengthened. As a result, the drafters knew how to write staggering language and, then, did not repeat that language in the except clause that applied to elections after reapportionments. To reach the result petitioners wanted, the court concluded it would have been required to write that language into the constitution, which it could not do.[57] The language was so clear that the court concluded in applying the language that "there is no room for the application of the rules of construction."[58] In the court's view, the language had been read erroneously during the 20-year period after statehood, when a practice of staggering was followed.[59]

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[54] The brief could not address petitioners' brief because both parties' briefs were filed on the same day, making it impossible for the parties to know the arguments that they needed to respond to. However, one would have thought that they would still address the basic constitutional construction issue.

[55] The language came from *County of Travese v. St. Paul M. & M. Ry. Co.,* 73 Minn. 417, 426, 76 NW 217, 219 (1898).

[56] *Kernan v. Holm*, 227 MInn. 89, 34 N.W.2d 327 (1948).

[57] *Id.*, 227 MInn. 89, 91 - 92.

[58] *Id.*, 227 MInn. 89, 92.

[59] One would think that officials who were closest in time to the constitutional conventions would be the ones most familiar with its intent and would have best knowledge of the meaning of the language – i.e., the officials who adopted staggering after the 1860 apportionment. Of course, the language in the court's view was so clear that resort to this sort of support should have been unnecessary. But incongruously, the court reached exactly for this argument in supporting Hahn's interpretation – i.e., citing that the 1883 Senate, who were "contemporary to the adoption of the amendment [in 1877] and were familiar with the previous practice immediately saw the significance of the omission of a provision for staggering after reapportionment." *Kernan v. Holm*, 227 MInn. 89, 93. If it was so obvious from the language, how does their being contemporary to the amendment's adoption matter? Since the operative language dates back to the 1857 constitution, would not the officials in the 1860s be a more reliable barometer of the provision's meaning or the framers' intent?

Given the practical situation that the court faced and the longstanding practice of no staggering, it is hard to see how it could have reached a different result. By simply parroting Hahn's opinion, it did not have deal with the uncomfortable reality that the framers of the constitution intended Senate terms to be staggered and that if one considers the language to be ambiguous, it can easily be read to reach that result. At least, that is my best guess as to the court's thinking. What is perplexing is that the petitioners thought that they could prevail by using delay and brinksmanship tactics.

Proposals to reinstate staggering of Senate terms are nonstarters

Since 1948, bills have periodically been introduced to amend the constitution and provide for staggering of Senate terms. In some cases the proposals have addressed Senate terms only.[60] In other cases, they have been combined with proposals to move the House to 4-year staggered terms.[61] Proposals to convert Minnesota to a unicameral legislature with 4-year terms have typically provided that the terms would be staggered.[62] However, in no case do any of these proposals appear to have been seriously considered, if seriousness is measured by successful passage by at least one house. The conventional wisdom is that the Senate is not receptive to the idea because it would impose more immediate pain on its members: one-half of senators would have 2-year terms at the beginning of a cycle after legislative redistricting, while the current system defers that pain for all senators until the end of the 10-year cycle, a lifetime for many legislators (three elections later).

Assessing the Effects: Does It Actually Matter?

Whether or not Senate terms are staggered seems clearly to have some effect – on institutional legislative dynamics, the political composition of the legislature, and indirectly on the programs and laws enacted by the legislature. It's unclear how big these effects are or even exactly what they are, but it is easy to ignore them (unless you're closely involved in the process, in which case they seem obvious). In any case, it is useful to engage in some informed speculation as to the existence and nature of the potential effects.

There is no clear "right" or "wrong" way to structure a lawmaking body (i.e., with or without staggered terms). State senates are divided between three different models with significant use of each model, although Minnesota's model (4-year terms without staggering) is the least common:[63]

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[60] The most recent of these proposals have come from Senator Carla Nelson. S.F. No. 1007 (2019); S.F. No. 807 (2011).

[61] A fair number of bills were introduced in the House in the 1970s to restructure the legislature, including reducing its size and/or lengthening the terms of House members. In 1975-76, H.F. No. 1965, which was coauthored by Speaker Martin O. Sabo and Majority Leader Irv Anderson, provided for 4-year House terms and staggering of both House and Senate terms. The bill was reported out of the Government Operations Committee, which amended it to drop the staggering of Senate terms but did not progress beyond that. *House Journal*, p. 4046 (1976). In the 1977-78 session, four bills were introduced in the House providing for staggering of Senate terms (in some cases while making other changes), two of which had Senate companion bills. H.F. No. 195, H.F. No. 1615 (also reduced size of legislature), H.F. No. 1637; and H.F. 2009.

[62] *See, e.g.*, H.F. No. 4147 § 1 (May 4, 2000) (1st engrossment) (proposing unicameral legislature with 4-year staggered terms).

[63] The breakdowns are from Kansas Legislative Research Dep't., *Staggered State Legislative Terms* (Nov. 8, 2017). The document includes citations to the relevant state constitutional provisions.

- **Twelve states have 2-year terms.** This approach requires no staggering because the entire Senate stands for election at each biennial election.[64]
- **Twenty-seven states have staggered 4-year terms.**[65] The methods of staggering vary. Some, like Minnesota's original method, staggered terms based on district numbers; others assign terms based on chance (e.g., by drawing lots).
- **Eleven states, like Minnesota, have 4-year Senate terms that are not staggered**.[66] One of these states, New Jersey, provides senators who are elected immediately after a redistricting serve 2-year terms.[67] Minnesota and the other states reverse that with the 2-year term ending the 10-year cycle.

This piece is not an attempt to debate or promote the merits (or demerits) of staggered terms. But It is useful to briefly discuss some possible impacts of electing senators to 4-year terms without staggering.

Responsiveness of senators to voters

The most obvious effect of the failure to stagger terms is that for two out of every five general elections, no senators stand for election: that is, in the second and fourth general elections after a redistricting.[68] As a result, during biennial legislative sessions after senators are elected in those years, they will have three or four years before they stand for election.

Longer Senate terms are clearly intended to add an additional check on the political responsiveness of the legislature: longer terms give senators more distance from the voters than House members with their 2-year terms, potentially helping senators to take a longer view or enabling them to be less beholden to immediate political currents. Four-year Senate terms are supposed to help senators to function as buffers or speed bumps limiting the more politically responsive impulses of House members who are on the ballot at every general election. What is unclear is how big that effect is.

Anyone more than causally involved in the legislative process will probably tell you that the length of time to a legislator's next election does affect his or her perspective on the political feasibility of policy options. Senators who know three years will pass before their next election tend to be more willing to support policies that they favor but that they perceive may not be popular with voters. The thinking might be (unfavorable view) that with the passage of time (and voters' ability to take out their wrath on House members and sometimes the governor in the meantime) the public will forget or (favorable view) that the long-term benefits of the policy will become apparent or be accepted. This is often perceived to affect legislative negotiations with House members (and sometimes a governor) in legislative sessions

[64] These states are Arizona, Connecticut, Georgia, Idaho, Maine, Massachusetts, New Hampshire, New York, North Carolina, Rhode Island, South Dakota, and Vermont.
[65] These states are Alaska, Arkansas, California, Colorado, Delaware, Florida, Hawaii, Illinois, Indiana, Iowa, Kentucky, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Tennessee, Texas, Utah, Washington, West Virginia, Wisconsin, and Wyoming.
[66] These states are Alabama, Kansas, Louisiana, Maryland, Michigan, Minnesota, Mississippi, New Jersey, New Mexico, South Carolina, and Virginia.
[67] N.J.Const. art. IV § II (2).
[68] In other words, general elections held in years ending in a four or an eight – for example, 2024 and 2028 after the next redistricting in 2021-22. Some Senate seats may be on those general election ballots if a vacancy occurs because of the death or resignation of a senator whose term is filled by a special election held at the same time as the general election.

when the Senate is not up at the next election. For example, it was a common perception that this dynamic was in play in approving funding for the new Senate office building. Providing better offices for the Senate was a goal of Senate leaders over several decades (dating back to the 1970s), but authorizing it proved elusive (politically difficult to say the least). Funding was finally enacted in the 2013 session when the entire Senate was three years away from standing for election and some believe that a few DFL House members lost their elections in 2014 as a result.[69] This is obviously only one ambiguous anecdote.

A more elaborate example that supports the proposition that the length of time to the next election matters is provided by the timing of when the legislature enacted increases in its members' salaries. Enacting legislative salary increases provides an unusual or special case of political sensitivity. On the one hand, many legislators will privately confide that members are underpaid, given the time demands and importance of their jobs. This view is held without regard to partisan or ideological views, in my experience.[70] But, on the other hand, enacting legislative pay increases ranks among the most difficult to do politically.[71] That is so because it is likely to threaten incumbents politically in two important ways (sort of like military pincer maneuver): (1) The higher pay will encourage potential candidates to challenge incumbents. (2) The pay increase itself will appear self-serving and provide challengers with an easy cudgel to wield against the incumbent that transcends political ideology ("He/she voted to raise his/her own pay!"). The Minnesota Constitution (until the 2016 amendment that took the setting of their salaries out of the hands of legislators altogether) requires a legislative election to occur before a legislative pay increase could take effect.[72] That is, at least House members needed to stand for election before an enacted pay increase could be implemented. But Hahn's repeal of staggering meant that senators could avoid that by timing the enactment of pay increases in sessions after which they would not stand for election.

Did the lack of staggering affect the timing of enactment of legislative pay increases? Looking at the data, the answer appears to be a clear yes. Over the last century plus, the legislature has increased its salary twelve times. Nine or three-quarters of these increases were enacted in sessions in which the Senate was not on the ballot at the next election.[73] At least one of the three exceptions (1971) can be explained or justified by the return of the legislature to annual sessions, substantially increasing the time commitments and easily justifying a salary increase.[74]

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[69] Funding the building was still raised as a campaign issue in 2016 and may have affected races of Senate DFL members, so time may not always be a salving balm for taking politically unpopular actions.

[70] This is obviously based on a very limited number of House members who made off-hand statements to me or in my hearing in private settings. But it is common perception among many legislative staffers, lobbyists and others involved in the process.

[71] The political difficulty and the constitutional requirement that the House stand for election before a salary increase can take effect has led to the legislative bodies increasing the much less visible per diem expense allowances. This can also be done by votes of the rules committees, rather than the entire Senate or House. *Citizens for the Rule of Law v. Senate Committee on Rules & Administration*, 770 N.W.2d 169 (Minn. App. 2009).

[72] Minn. Const. art. IV § 9 (2014).

[73] The details are provided in Appendix G.

[74] A second exception (1965) also has a possible explanation: it is not clear that senators expected to be on the 1966 ballot when they approve the pay increase in 1965, since the entire Senate had been on the ballot in 1964. The fact

Whether this is good or bad probably depends upon your philosophical views about how responsive to voters it is desirable for legislators to be. Some certainly may prefer that legislators have a more "Burkian" resistance to the political winds or the whims of the day. But one may wonder why that additional distance should be only provided every other biennial session and not in the one in which a census is conducted. Put another way, the lack of staggering results in an uneven effect, if the purpose of longer Senate terms is intended to give that body a bit more distance from the voters so its members can act in a more detached way or take a longer view of issues than House members do. In two out five sessions, no senators will be up for election and they will (may) be less concerned about short-run political concerns. However, in the other three sessions when all senators' terms will end, the Senate will (one assumes) be as politically responsive as the House with its 2-year terms and time horizon.[75] Staggering would consistently provide that each session half of senators' terms will end, except in the session immediately before redistricting is required.

Composition of the Senate

Partisan control of the Minnesota Senate has been dominated for long uninterrupted periods by one or the other of the parties for nearly all of its history.[76] The Republican or conservative caucus (during the nonpartisan era) controlled the Senate from 1895 through 1972 (a 78-year period of one-party control!), while the Democratic caucus controlled from 1973 through 2010 (a 38-year period).[77] By contrast, control of the House flipped between parties much more frequently during those two eras. During the 78-year stretch of Republican or conservative control of the Senate, the liberals or DFL controlled the House for 10 of those years.[78] During the DFL control of the Senate from 1973 to 2010, the Republicans controlled the House for 10 years with one year (1979) of an even split. Longer terms inherently provide more stability of membership, since members stand for fewer elections. Thus, with or without staggering, control of the House should flip between the two parties more frequently. But the differences in party control of the two houses are still striking.

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that they were was the result of a federal court ordering the legislature to enact a redistricting law, which ultimately was done in a 1966 special session.

[75] An obvious alternative, occasionally proposed, that achieves the same end would be to provide four-year terms for House members and stagger both House and Senate terms. That would consistently provide that half of the members of the legislature would not be up at the next election, except after a redistricting. A similar effect would be to provide for a unicameral legislature whose members serve four-year, staggered terms. That obviously would have even more profound effects on the legislature and its processes, since it would (one assumes) be easier for a legislature with a single body to act.

[76] It needs to be noted that in the first half of the 20th century, there were more than two parties with significant representation in the Minnesota legislature until the Democratic Farmer Labor Party was formed in the late 1940s. I am lumping its constituent parties in the period prior to that into one caucus (the then Liberal caucus). Members from the Famer Labor Party and Democratic Party typically jointly voted for liberal caucus leaders in the biennial sessions in which they constituted a majority of House members.

[77] During the 1973 – 2020 period, the DFL caucus controlled the Senate for 42 years of that 48-year period.

[78] The Farmer-Laborites controlled the House for the sessions after the 1932 and 1936 elections; the DFL (liberal caucus) controlled the sessions after the 1954, 1956, 1958, and 1960 elections. The Senate was on the ballot in three of those elections.

Was the lack of staggered Senate terms responsible (in part) for this pattern?[79] Two possibilities occur to me:

1. **Holding Senate elections at presidential versus mid-term elections.** Turnout traditionally is lower at midterm than presidential elections. Conventional wisdom is that low-turnout elections favor the Republican Party and its candidates, since their voters traditionally have been higher-income, better educated, and more politically aware and vote more reliably. That historical pattern may no longer hold because of changes in demographics of the two parties' supporters, but it did throughout most of the post-Civil War era.[80] Because of timing oddities and the Minnesota legislature's failure to redraw legislative districts between 1913 and 1959, Minnesota state senators stood for election only in midterm elections between the issuance of Hahn's 1883 AG opinion and the 1960 election, an 88-year period.[81] For almost all of that period, the GOP or conservatives (during the portion of that era when the Minnesota legislature was elected on a nonpartisan basis) controlled the Senate.[82] Obviously, this is simply correlation (not causation) but a reasonable inference is that the failure to stagger terms probably helped the GOP, if only modestly. The absence of party labels for most of that period (a situation that disadvantaged "low information" voters, more typically Democrats in that era) likely also contributed to Republican dominance.[83]

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[79] An alternative hypothesis, which I will later suggest is likely true, is that staggering would have extended the period of one-party control of the Senate by the DFL caucus.

[80] See discussion in footnote 35.

[81] See Appendix E for the details. Based on a 1943 newspaper article, it appears this was intentional. See M.W. Halloran, "Gardner Resignation Revives Old Debate Over Staggering Elections," *Minneapolis Star*, October 14, 1943, p. 17: "The senate has always been careful to redistrict just before their terms are up to ensure full four-year elections of the membership." Obviously, this is somewhat thin evidence to base conclusions about the how intentional these decisions were, but reporters who frequent the capitol typically are aware of the conventional wisdom, which is likely what Halloran was expressing in the story.

[82] After the 1890 election, a coalition of senators representing the Democratic and Farmers Alliance Parties gained control of the Senate and the House. Charles R. Adrian, *The Nonpartisan Legislature in Minnesota*, U. of Minnesota PhD Thesis (Dec. 1950), p. 50. This was the only time from statehood until 1972 when the Senate was not under Republican or "conservative" control.

In the two elections during the 1896 - 1972 period (1932 and 1936) when the liberals succeed in winning majorities in the House, senators were not on the ballot because both were presidential election years. See Appendix E.

[83] Although nonpartisan legislative elections likely favored GOP legislative control, that was not a factor in passage of the 1913 law that provided for them. See Charles R. Adrian, "The Origin of the Minnesota's Nonpartisan Legislature," *Minnesota History*, 155 – 63, (Winter 1952), which recounts the interesting and almost accidental way in which the law providing for nonpartisan legislative elections passed as a by-product of prohibition politics, attempting to quash the growing support for the socialist candidates, the 1912 split of Republicans into regular and Bull Moose factions, the backfiring of a plan to kill the bill by expanding its reach from local offices to include the legislature, counting on assurances by the Speaker that House would kill it, and similar. The Republican Party dominated all levels of state government at that point and GOP legislative leadership opposed the bill, concerned that it "would destroy the vitality of political parties * * *." *Id.* at 158. Interesting reading for a legislative junky – particularly the account of the conference committee deliberations about the permissibility under the rules of adding new matters outside of the differences between the House and Senate versions of the bill and decision making based on the perceived strategic and tactical political advantages rather than the actual policies. These things never change.

Because Supreme Court decisions in 1960s required redistricting to occur after each census, an extended period where the Senate is elected only at midterm elections can no longer occur. Rather, the calendar ensures that each decade the schedule for Senate elections will flip between presidential and midterm elections. Thus, in the long run, equal numbers of Senate elections will be held for each type of election. But it seems likely to have been a small factor in GOP control of the Senate for the first half 20th century. In the short run, it will continue to be a factor that interacts with the lack of staggering to help or hurt one or the other party. There should not be, however, any consistent bias toward a party that benefits from or may be hurt by higher turnout elections, as may have been the case during the late 19th and first half of the 20th century.

2. **Catching or missing "wave elections."** Standard high school civics and popular perceptions suggest elections are determined by voters' policy preferences and/or the qualities of the candidates and the campaigns they run. Under this naïve view, positions on issues, candidates' character, charisma and similar, and how well parties and candidates articulate their views determine the results of elections. Political activists who run campaigns and political scientists who study voting behavior, however, will tell you that party affiliation of the relevant electorate, how enthused activists are, and many other background factors (e.g., the state of the economy and events – some random and/or potentially outside the control of any elected official or party) are equally and probably more important.[84] Candidates often find themselves – depending upon their political affiliation and the swirl of a variety of events – swimming with or against powerful electoral waves favoring one or the other of the parties that may be more important than any of the classic factors that civics class principles say govern outcomes.

   So how, if at all, do these factors interacted differently under systems with or without staggering of terms to affect control of the Senate? House DFLers occasionally have harrumphed privately about how Senate DFLers lived a charmed life during the 38 years they were in power. Senators were not on the ballot for some of the particularly bad elections for the DFL: e.g., the 1978 "Minnesota Massacre,"[85] Reagan's reelection in 1984 (when the GOP retook the Minnesota House), and the first election after the "Phonegate" legislative scandal (the GOP gained

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In the first legislative session after DFLers gained control of the governorship and both houses of the legislature, they repealed nonpartisan legislative elections, providing indirect evidence for the advantage that they perceived it provided to the GOP. See 1973 Minn. Laws ch.3. The fact that it was the third bill enacted into law that session may indicated how high a priority it was for the DFL Party.

[84] Christopher H. Achen & Larry M. Bartels, *Democracy for Realists* (Princeton University Press 2016) makes the classic case. For example, chapter five documents how droughts, floods, and shark attacks (!) have materially affected voting behavior, even though a rational voter should not (one assumes) hold politicians accountable for or vote based on matters outside of the government's control.

[85] In the 1978 election, Independent Republicans (as they were then called) captured the governorship, both U.S. Senate seats, and the state auditor, all offices previously held by DFLers. The effects on House races were equally dramatic. Before the election, the DFL controlled 99 House seats and the GOP 35. After the election, the two caucuses were at equal strength or 67-67. Thus, the GOP picked up 32 seats previously held by the DFL. The Senate was not on the ballot. See Dave Durenberger and Lori Sturdevant, *When Republicans Were Progressives*, 121 – 132 (Minn. Historical Society Press 2018) for an account of the election (mainly Durenberger's U.S. Senate race). A confluence of potential factors likely contributed to the GOP's success – divisions in the DFL over environmental issues and abortion, enactments in 1977 of increases in legislative pay and pensions, tax increases, and so forth.

substantial House seats but not enough to control).[86] Similarly, the GOP Senate of the early 20th century missed the 1932 and 1936 elections, two elections in which the Farmer Laborites (in coalition with a few Democrats) managed to eke out control of the House. However, the entire 2010 Senate (controlled by the DFL) was on the ballot because of the lack of staggering and that allowed the GOP to take control, a result that would not have occurred under staggering.

As a simple matter of theory over the long-run, lack of staggered terms should not enhance or diminish the effects of wave elections. That is so because staggering reduces by one-half the number of senators who are on the ballot in any one year. If wave elections are randomly distributed (which they likely are over long periods of time), staggering terms would cut in half the effect of a wave election (only half the senators will be on the ballot) but makes it impossible for all senators to "miss a wave." Given the mathematics of probabilities, the effects exactly offset: the chances of missing a wave are reduced by 50 percent, but the effects of a wave when one hits the Senate are also increased by 50 percent.[87]

To test these theories, I looked at 34 House elections (1952 – 2018)[88] to see how many wave elections were "missed" by the Senate because of the lack of staggering. I arbitrarily defined a "wave" as one in which at least 12.5 percent of House seats (17 seats) switched caucus or party control.[89] Eight elections satisfied my "wave criterion" and exactly half (as one would predict if they were randomly distributed) were ones where the Senate was not on the ballot. If one sets the bar for a wave higher (at 15 percent of seats), there were five such elections and the Senate was on the ballot for two of them. This suggests that (at least in the long run), the lack of staggering may not affect party control of the Senate. Of course, long-run effects are cold comfort for those living in the here and now: as John Maynard Keynes famously said, "In the long run, we're all dead."[90]

There is a second factor in how probability theory affects wave elections and staggering of terms, though: how dominant one or the other party is. In simple terms, if the "out" party only needs to pick up a few seats to win control, it is much better to have twice as many chances to win half as many seats. However, if a big gain in seats is necessary, it probably is better to have one-half the chances at winning twice as many seats.[91] Thus, if small wins are enough, control will shift more frequently with staggering, benefiting the "out" party. But if a large wave is necessary because one party is very dominant, then staggering will help the "in" party retain control by halving the effect of a wave. Lack of staggering has

[86] "Phonegate" was the popular name used to describe the fallout from revelation that many legislators (and family members and staff) used the state's account to make personal long-distance phone calls, diverting state money to their personal use.

[87] This ignores the effect of redistricting, which reduces the effect of staggering by shortening Senate terms each decade because of the redrawing of boundaries. But that effect is neutral, since it applies to both the staggering and no staggering systems (all senators will be on the ballot in either case).

[88] This is the period for which the Legislative Reference Library conveniently provides data on party caucus control of the House and Senate.

[89] Appendix F describes my estimating methods and provides some details about the elections as well as estimating/guessing at what the effect would have been under a staggering system.

[90] John Maynard Keynes, *A Tract on Monetary Reform* (1923), chap. 3, p. 80.

[91] This assumes waves are mainly one-time events. In at least one instance (1974 and 1976 elections), it appears the effects generally a wave (mainly Watergate) lasted for two elections. In that case, staggering simply delays the effects.

the opposite effect by providing when a wave does hit (i.e., the whole Senate is on the ballot), the effect is more powerful.

For most of its history, the Minnesota legislature has been dominated by one or the other party and that is particularly true in the Senate. In the 19th and the first half of the 20th century, Minnesota was heavily a Republican state.[92] By contrast, in the 1970s and 1980s, Minnesota politics were dominated by the DFL Party. During the 1950s and 1960s and during the 21st century (so far), it is probably fairer to characterize Minnesota as a competitive state where legislative control swings back and forth between the two parties and it is less likely that one caucus will have very large legislative majorities.

This unique history of party dominance in the Minnesota legislature – switching between one or the other party being dominant and having periods when the partisan balance is very competitive as now – provides an opportunity to use the experience with Minnesota wave election to test the effect of staggering on partisan control. I'll illustrate this using three wave elections – 1978, 2010, and 2018.

In two cases (1978 and 2018) the Senate was not on the ballot and in the other (2010) it was. These two circumstances require differing techniques to predict what would have happened under the staggering system. It's relatively straightforward for elections when the Senate is on the ballot; we know under staggering one-half of senators would not be on the ballot and, to state the obvious, senators who are not up for election cannot be defeated. For elections where the Senate is not on the ballot, it is more difficult to predict what would have happened and any predictions are of more problematic validity.[93] I'll take the easy case first and the elections when the Senate was not on the ballot after that:

- **2010 Election**. The 2010 election was a national Republican wave election fueled by Tea Party fervor when the nation was emerging from throws of the Great Recession. Before the election, the DFL caucus had a comfortable 46-21 margin of control. To the surprise of most politicos, the GOP caucus captured 16 of those seats in the 2010 election, giving it a 37-30 majority. Calculating the impact of staggering is straight forward, since one need not hypothesize about who would have won elections that did not occur; incumbents representing odd-numbered districts would not have been on the ballot and so would have remained in office. Of the 16 DFL seats that the Republicans captured in 2010, 9 were from even-numbered districts and 7 from odd-numbered districts. As a result, instead of a 7-seat majority, the GOP would have remained in the minority (37-30 DFL control). This illustrates the principle that the lack of staggering magnifies the effects on the Senate of a wave election (compared with staggering) when the Senate is on the ballot. If the "in" party has a large majority, the lack of staggering may help the "out" party gain control when a wave election comes ashore.[94]

[92] *See* Adrian, note 82, for background on how strongly the Republican Party dominated Minnesota politics, especially the legislature, in the first 90 years after statehood, pp. 181ff (describing the background behind the common saying "if in doubt, vote Republican rule").

[93] More details on how I made my estimates are in Appendix F.

[94] Under staggering, it is plausible, if not likely, that the DFL would not have lost control of the Senate in the 21st century. As described in the text, they would have maintained control after the 2010 election. The DFL retook control in the 2012 election with an 11-seat margin. The GOP retook control in 2016 narrowly (a 1-seat margin). It seems likely that the GOP would pick up seats in both 2014 and 2016 under a staggering system – possibly enough to duplicate the 2016 results and give them control in 2016. It is also possible that the 2013 legislature would not

- **1978 Election.** The 1978 election (often called the Minnesota Massacre) also was a GOP wave. Before the election, the DFL controlled 99 House seats. After the election, the two caucuses were at equal strength or 67-67 so the GOP picked up 32 previously DFL-held seats or a 32 percent success rate. Obviously, one cannot know what would have occurred if the Senate had been on the ballot, but it seems reasonable to assume that the GOP would have about the same success in the Senate as it had in the House. Under staggering of terms, one-half of the Senate seats (representing odd-numbered districts) would have been on the 1978 ballot or 34 seats.[95] The 1978 Senate was controlled by the DFL caucus (48-19) and exactly one-half of DFL senators (24) represented odd-numbered districts. To gain control, the GOP would have need to win 15 DFL seats – winning 62 percent of the DFL seats on the ballot (15 of 24 seats). That would have required twice the rate of success achieved by the GOP in the House (winning 32 percent of the DFL seats).[96] One can guess that would have been unlikely to occur. However, if 1978 had been a year in which the entire Senate was on ballot under the non-staggering system, GOP success was plausible. If GOP realized the same success in the Senate as it realized in the House (i.e., winning 32 percent of the DFL seats) that would have translated into a 15-seat pickup, the exact amount needed to win control. This illustrates why the lack of staggering may help the "out" party gain control when the "in" party is dominant. The lack of staggering magnifies the effect of wave elections if the wave comes ashore when the full Senate is on the ballot.
- **2018 Election.** The 2018 election was a smaller DFL wave with the DFL picking up 18 (out of 75) GOP seats or 24 percent. But the GOP controlled the Senate by just a one-seat margin (34-33). If 34 Senate seats had been on the ballot under the odd-even staggering system, it seems likely that the DFL would have picked up at least one seat and taken control. Because differences in control were so narrow, having only half the seats on the ballot would not have mattered.

General observations on implications. Based on these historical experiences and the underlying theory, a few observations or conclusions about the effect of staggering on partisan control of the Senate can be made:

Midterm versus Presidential Election Schedule

- For about 75 years after the Hahn opinion, the Senate was consistently on the ballot at midterm, rather than presidential, elections. This was likely a calculated decision and probably helped the Republican Party, if only slightly, maintain its near stranglehold control over the Senate during that period. Most observers conclude that electing legislators on a nonpartisan ballot for much of this period was a bigger structural factor in helping the Republicans maintain control. Of course, their general dominance of the state politics was the biggest factor.
- After the Supreme Court required legislative redistricting each decade, the schedule of Senate elections now alternates between midterms and presidential elections each decade. As a result,

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have financed the new Senate office building if staggering had remained in place (as discussed in the text above) and that would have affected the 2014 and 2016 election results, given how close some of the races were.

[95] Under the odd-even system, 1978 would have been an "odd" election, so there would have been 34 seats on the ballot. In even elections, 33 seats would be on the ballot.

[96] GOP House candidates had a materially higher success rate in odd-numbered districts. See Appendix F for details. Extrapolating from that rate would imply that hypothetical Senate GOP candidates would have had to do 50% better (rather than 100%), a still implausible result.

there can be no long run advantage for one or the other of the two parties – assuming one consistently would benefit from running in low or high turnout elections. However, in the short run, the lack of staggering may tip the scales in favor of one or the other party if high versus low turnout has that effect. Staggering would, however, mostly eliminate that oddity.

Wave Elections and Staggering

- During periods when one party caucus has larger majorities in the Senate, the lack of staggering helps the "out" party gain control. Although it is more likely to miss the benefits of a wave election, when a wave hits the effects are potentially twice as large and may be enough to propel the "outs" to "in" status. From their perspective, that is likely preferable to making modest gains more often, but never attaining majority status. That is the lesson of the 1978 and 2010 wave elections.
- When partisan margins of control are narrow in the Senate, the lack of staggering benefits the "in" party. In this case, the "outs" prefer the tradeoff of only reaping half the benefits of a wave, but never missing those benefits, because that may be enough to win control. That is the principle illustrated by the 2018 election, where the Senate GOP probably would have lost its majority had the senators representing odd-numbered district been on the ballot, as the founders intended. The lack of staggering makes it more difficult in closely contested periods for the voters' preferences to turn into legislative control and enacting policy changes.

Potential effects on enacted policies

A related question is whether the lack of staggering has any predictable or persistent effect on the policies actually enacted by the legislature.[97] On the surface, it seems unlikely because the effects (as discussed immediately above) are largely random – e.g., making the Senate more responsive to voters in some legislative sessions and less responsive in others; helping minority parties to gain control in some eras and hurting them in others. Given that, one could speculate that if there are persistent policy effects, they are likely modest (i.e., mainly random, helping liberals or those favoring an activist government in some cases and conservatives or opponents of change in others).

A bicameral legislature imparts a "conservative" bias[98] to the process – passing legislation requires running the gauntlet of two bodies, making it harder to enact legislation, all else equal. Providing longer terms for one of the bodies adds an additional degree of difficulty or conservative bias, since the "out" party now may have a shot at only half the seats (staggered terms) and thus must sustain its appeal through two elections to gain control. Or it may have to wait until the next election (non-staggering) to gain control. In an environment where margins are close (i.e., where both parties regularly have a shot at winning control), a non-staggering system would lean somewhat "conservative" or inertial – making it more difficult for the "out" party (whether favoring liberal or conservative flavored policies) to win

[97] Again, it is necessary to distinguish obvious short run effects. For example, if it is correct that with a staggering system the DFL would have taken control of the Senate after the 2018 election, one can safely say that would have a significant effect on the legislation enacted in the 2019-2020 legislative session. But that is simply a one-off or short run effect. The question the text attempts to address is whether there is some sort of persistent effect that favors a certain type of policy.

[98] I use "conservative" here in the sense not of political right (conservative policies) versus left (liberal policies), but relative to how difficult or easy it is to change the path the law and policy is actually on – whether that means *changing* policies or laws so that they are more consistent with conservative or liberal values and principles.

control of both houses. The effects along these lines – if there are any – must be relatively small. But that does not discount the importance of no staggering in some cases – e.g., following the 2018 election, when it likely thwarted (or delayed) enactment of policy initiatives of the DFL. It may also encourage the Senate to delay acting on difficult political issues until sessions when the Senate will not be on the ballot; the history of enacting salary increases certainly could be read to suggest that.

Conclusion

The practice of electing members of the Minnesota Senate to unstaggered terms is an accident of history – contrary to the founders' plans and the result of inartful legal drafting and an aggressive or poorly considered interpretation by Attorney General Hahn. His interpretation was confirmed by the Minnesota Supreme Court 65 years later under circumstances that presented it with little other practical choice; upholding the founders' intent would have required it to order December special elections (both primaries and generals) for half of the Senate, a remedy which would have imposed substantial costs on the public.

The Senate has shown no interest in reinstating staggering by submitting a constitutional amendment to the voters. Staggered terms would require some senators to serve shortened 2-year terms at the beginning of each decade (after redistricting), rather than at the end. Compared with the present arrangement that must be too distasteful an option for most senators. Thus, the lack of staggered Senate terms will likely endure as a feature of the Minnesota legislative process.

Eliminating staggering has had consequences both for the composition of the Senate and on legislative behavior. In the long run, it is unlikely to systematically benefit one or the other party. In general terms, lack of staggering will tend to hurt a very dominant majority party caucus, making it more susceptible to losing its majority in a wave election *when* it is on the ballot. By contrast, staggered terms would help a minority caucus win control more often when margins are close, because it will give it more realistic opportunities to win control. Assessing the recent, short run effects on partisan control is easier and the results clearer. It allowed the GOP to win control of the Senate in 2010, a result which very likely would not have occurred if only half of the Senate seats had been on the ballot under staggering. Similarly, it likely helped the GOP maintain control in 2018 when only one senator was on the ballot to fill a vacancy and the House DFL caucus made significant gains in their races.

Four-year Senate terms are intended to provide a buffering effect on legislative decisions by providing more distance from the voters for senators, compared with House members who face the voters at each election. The extent to which the longer terms affect legislative behavior is unclear, but anecdotes suggest there is an effect. For example, the Senate office building and 9 out of the 12 legislative salary increases were enacted in legislative sessions when the Senate was not on the ballot. The lack of staggered Senate terms means the intended buffering effect applies unevenly or inconsistently. In sessions when the entire Senate is on the ballot, all senators face the same political dynamic as House members, while in the other sessions none do.

About the author

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Appendices

APPENDIX A: Text of Attorney General Hahn's Opinion

To the Honorable the Senate of the State of Minnesota:

I have the honor to acknowledge the receipt of the following resolution, passed by your honorable body, viz.: "Resolved, that the Attorney General of this State be and is hereby requested to furnish his opinion for the use of this Senate upon the question as to the length of the terms of the Senators elected at the last general election in 1882." The terms of the Senators elected in 1882 is fixed by the amendment to the constitution adopted in 1877. By this amendment the terms of the Senators were to be the same as theretofore prescribed, *until* the general election in 1878, at which time an entire new election of such officers was to be had. It then goes on to provide that "the Senators chosen *at such election*, by districts designated by odd numbers," should hold for two years, and those designated by even numbers, for four years; "and *thereafter* Senators shall be chosen for four years," except that there shall be an entire new election after each apportionment. It will be seen from this amendment that it is only such senators as are chosen by odd-numbered districts at the election of 1878 who are to hold for two years. Thereafter there is to be no difference in the term: all hold for four years. The language of this amendment is too plain to admit of doubt. The Legislature in proposing, and the people in adopting, this amendment, must be deemed to have meant just what the language used clearly imports. "Where a law is plain and unambiguous, whether it be expressed in general or limited terms, the Legislature should be intended to mean what they have plainly expressed, and consequently, no room is left for construction. Possible and even probable meanings, when one is plainly declared in the instrument itself, the courts are not at liberty to search for elsewhere." Cooley, Const. Lim. 68, 69. "We are not at liberty to presume that the framers of the Constitution, or the people who adopted it, did not understand the force of language," says Mr. Justice Bronson in People vs. Purdy, 2 Hill, 35. Mr. Justice Johnson, in Newell vs. People, 7 N. Y. 9. expresses the same idea in this language: "Whether we are considering an agreement between parties, a statute, or a constitution, with a view to its interpretation, the thing which we are to seek is *the thought which it expresses*. To ascertain this, the first resort in all cases is to the natural signification of the Words employed in the order of grammatical arrangement in which the framers of the instrument have placed them. It, thus regarded, the words embody a definite meaning, which involves no absurdity, and no contradiction between different parts of the same writing, then that meaning apparent on the face of the instrument is the one which alone we are at liberty to say was intended to be conveyed. In such a case there is no room for construction. That which the words declare, is the meaning of the instrument, and neither courts nor Legislatures have a right to add to or take away from that meaning. " I am, therefore, clearly of the opinion that the Senators elected in 1882, whether from odd or even numbered districts, hold for four years.

February 27th, 1883. W.J. Hahn, Atty. Gen.

Copied from *Opinions of the Attorneys General of the State of Minnesota* (From the Organization of the State to Jan. 1, 1884; Published Pursuant to Chapter 129, General Laws 1883; West Publishing Company, 1884), p. 527.

APPENDIX B: An Alternative to Hahn's and the Court's Interpretation

A reading of Attorney General Hahn's 1883 Opinion leads one to assume that the language of the constitutional amendment is clear with regard to staggering of Senate terms: i.e., its "plain language" leads inevitably to the conclusion that terms are not staggered. The 1948 Supreme Court opinion in *Kernan v. Holm* goes further and concludes that was also true of the language of the original 1857 constitution before it was modified by the 1877 amendment.[99] Both opinions effectively say that applying basic rules of the English language (dictionary meanings of words and rules of grammar) leads inescapably to a conclusion that there is no staggering of Senate terms after legislative district boundaries are redrawn. Putting it baldly, the Hahn and court must have believed that there is simply no other reasonable interpretation of the constitutional language.[100]

Under the circumstances, it seems implausible to conclude that that is what the framers of either the original constitution or the amendment actually intended:

- It is difficult to come up with a reasonable rationale for providing for staggered terms for only the first period after adoption of the constitution (or the amendment lengthening legislative terms) and, then, switching to unstaggered terms. If staggering is the preferred policy or structure, why should it apply for only one cycle?
- Similarly, the administrative practice of staggering terms from 1861 through 1877 indicates that those closest to the adoption of the original language thought it provided a permanent system of staggering.[101]
- Why would the 1877 amendment, again, explicitly provide for staggered terms after the 1878 election, if it was not intended to be permanent feature?

[99] 227 MInn. 89, 92, 34 N.W.2d 327 (1948), where the court stated that the practice under the original constitutional language "was erroneously interpreted" to provide for staggering.

[100] The Hahn opinion (see Appendix A) cites to the proposition that even "probable meanings" are precluded by how "plain and unambiguous" the language is (citing to the Cooley constitutional law treatise that was a mainstay in 19th century). It is unclear to me what that means – e.g., that an interpretation that a reasonable person would conclude more likely than not ("probable") was what was intended must be rejected because it is inconsistent with the standard usage of the words and grammar ("plain language")?

[101] The court in *Kernan* resorted to a variation on this argument – contending essentially that the 1883 senate recognized the situation for what it was. In the words of the court: "Though these men [i.e., the 1883 senators] were contemporary to the adoption of the amendment and were familiar with the previous practice, they immediately saw the significance of the omission of a provision for staggering after reapportionment." *Id.* at 93. This seems odd to me on two counts. First, all the 1883 senate did was to request an opinion (one that could yield an interpretation favorable to half of its members by extending their terms). That seems, at best, ambiguous as to their view of the meaning of the language. Second, it seems odd to give more credence to the 1883 Senate knowing what was intended than the Senate and state officials in 1860, 1866, and so on, all of whom were closer in time to the adoption of the original language which the 1877 amendment left largely unchanged. Of course, the court's view might be consistent with the idea that the 1877 amendment was intended to change the previous practice. I address that possibility below and don't see much, if any, evidence for it.

- Finally, the little available evidence from the constitutional deliberations suggests that participants in (at least) the Republican discussions thought staggering was not to be a one-time, first-cycle thing only.[102]

Given these factors, I can only conclude that Hahn and the court concluded that the drafters of both the original language and amendment inadvertently forgot to include the necessary language providing for permanent staggering. It was a drafting error. And apparently the Senate and election officials (in the period after the original constitution went into effect) failed to read the language closely or decided to ignore the drafting mistake because they knew that wasn't the real intent. Of course, neither Hahn nor the court say that explicitly, but that must have been what they concluded.

So is their interpretation really the only reasonable way to read the language? Is the language so "plain" (obvious?) that it cannot reasonably be read otherwise? Did the drafters simply make an egregious mistake, forgetting to include language for staggering after legislative district boundaries were redrawn, as the court and Hahn imply? That certainly is possible; drafting mistakes and oversights occur regularly, as I can attest after spending over 40 years drafting bills, some of which were enacted into law and contained mistakes. However, it is useful to revisit the language – both that in the original constitution and the changes made by the 1877 amendment – to determine if it can reasonably be read to reach what was very likely the actual intent. I think a careful reading of the language (avoiding the tyranny of quickly succumbing to one's preconception of or first impression of a "plain language" meaning) can preserve that actual ("subjective") intent to provide for permanent staggering. My thinking follows.

The original constitutional language provided:

> The senators shall also be chosen by single districts of convenient contiguous territory, at the same time that the members of the House of Representatives are required to be chosen, and in the same manner, and no representative district shall be divided in the formation of a Senate district. The Senate districts shall be numbered in regular series, and the senators chosen by the districts designated by odd numbers shall go out of office at the expiration of the first year, and the senators chosen by the districts designated by even numbers shall go out of office at the expiration of the second year; and thereafter the senators shall be chosen for the term of two years, except there shall be an entire new election of all the senators at the election next succeeding each new apportionment provided for in this article. Minn. Const. art. IV § 24 (1857).

This language explicitly addresses three situations:

1. At the first election of the Senate, senators representing odd-numbered districts would be elected to 1-year terms and senators representing even-numbered districts would be elected to 2-year terms.
2. At following elections and up until the first election after reapportionment, all senators would be elected to 2-year terms.
3. At the first election after a reapportionment, the entire Senate would again stand for election (same as the very first election). This will shorten half of the terms that incumbents were serving at the time of the reapportionment.

[102] See the discussion of the account of the Republican constitutional deliberations in footnote 7 and the accompanying text.

What the language does not explicitly say is what the length of the terms in situation #3 is. Obviously, the crucial interpretative issue is how to read the interrelation between "thereafter" and the except clause at the end of the section which simply says that "except there shall be an entire new election of all the senators at the [next] election [after a reapportionment.]"

The Supreme Court concluded that because the except clause itself did not explicitly state a different term length for this "entire new election," then the rule covering situation #2 applied: i.e., electing senators to 2-year terms "thereafter" must include the "entire new election" after a reapportionment. So rather than the narrower way I stated #2 above, the court read "thereafter" to mean "every succeeding election" of the Senate *including those after a reapportionment*. This reads the except clause narrowly to say that all it does is to shorten the terms running before an apportionment. And reads "thereafter" broadly to mean essentially "forever after" or "there" in "thereafter" to refer only to the first election of the Senate.

An alternative reading is that "except" also modifies and limits "thereafter" to say that the 2-year term rule for all senators (#2 above) does not apply to an "entire new election of all senators[.]" Rather, in that case, the rule reverts to #1, where the length of terms is dictated by the odd-even numbering of districts. This very likely is what the drafters thought they were doing and is the way the provision was administered: There are two rules, #1 for election of the entire Senate, where senators for odd-numbered districts are elected to 1-year terms and even-numbered districts, to 2-year terms and #2 for elections "thereafter" (i.e., any election after an election of the entire Senate).

To me this alternative reading is a reasonable interpretation, because it preserves the more logical and implemented approach and it does not seem inconsistent with the plain or obvious meaning of the words. The constitutional language that states rule #1 above is not sufficiently clear to limit its application only to the very first election after adoption of the constitution, as the court must have concluded. It is stated simply as a general rule: "senators chosen by the districts designated by odd numbers shall go out of office at the expiration of the first year, and the senators chosen by the districts designated by even numbers shall go out of office at the expiration of the second year[.]"[103] The contrary interpretation (i.e., the court's reading) depends upon how one reads the inherently ambiguous words "thereafter" and "except" as far as I can tell. Reading "except" broadly to negate or limit the universality of 2-year terms "thereafter" appears to be the better interpretation, given the context. In short, the except clause means that both (1) 2-year terms that are being served can be shortened and (2) the 2-year term rule does not apply to the entire new elections of all senators that occur after a reapportionment.

The second level question, which Attorney General Hahn and the Supreme Court actually addressed,[104] is whether the 1877 amendment somehow modified or made it clear that there will be no staggering after a reapportionment. Unfortunately, the 1877 changes rather than helping to clarify further muddied the waters.

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[103] Put another way, nowhere in the language specifying the odd-even mechanism is it explicitly tied only to (much less limited to) the first election of the Senate. That opens the possibility (and reasonable interpretation) that is to apply with some regularity – that is, whenever the entire Senate is up for election.

[104] The court discussion in *Kernan* of the original constitutional language is *dicta* and not necessary, since it was the 1877 language that the court was applying.

The 1877 amendment made the following changes in the original language (marked by the underlined and stricken language):

> The senators shall ~~also~~ be chosen by single districts of convenient contiguous territory, at the same time that ~~the~~ members of the House of Representatives are required to be chosen, and in the same manner, and no representative district shall be divided in the formation of a Senate district. The Senate districts shall be numbered in a regular series. The terms of office of senators and representatives shall be the same as now prescribed by law, until **the general election in the year one thousand eight hundred and seventy-eight (1878)**, at which time there shall be **an entire new election** of all the senators and representatives. Representatives chosen at such election, or at any election thereafter, shall hold their office for the term of two years, except it be to fill a vacancy, and the senators chosen at **such election** by the districts designated by odd numbers shall go out of office at the expiration of the ~~first~~ second year, and the senators chosen by the districts designated by even numbers shall go out of office at the expiration of the ~~second~~ fourth year; and **thereafter** the senators shall be chosen for the term of ~~two~~ four years, except there shall be an entire new election of all the senators at the election next succeeding each new apportionment provided for in this article.[105] [Bold emphasis added.]

The drafters of the 1877 amendment were faced with at least two tasks: (1) lengthening the terms and (2) resolving what happens to the existing terms of legislators if the amendment passed. Based on the question posed to the voters, the purpose of the changes was simply to accommodate going from annual to biennial legislative sessions.[106] It seems safe to conclude that there was no "subjective" intention to change any preexisting staggering practice (or the lack of staggering). To resolve the first task (what happens to existing terms), the first underlined sentence provides that all those terms ended with the 1878 election.[107] The new prefatory language for the succeeding sentence provides 2-year terms for representatives starting with the 1878 election and (because it modifies the situation #1 language above) restarts the staggering scheme for the Senate with the 1878 election by specifying 2- and 4-year terms based on the odd-even numbering. It does this by adding one phrase to the pre-existing language "at such election[.]"

Thus, if one thinks the 1877 amendment modified the Senate terms that applied after reapportionment, the key interpretative issue is what was intended by the addition of "at such election[.]" Attorney General Hahn must have thought this term was pivotal. His opinion reprinted portions of the 1877 amendment (reorganized to make the language on the issue of term length clearer from his perspective). He highlighted (using italicization) two words and a phrase: "until," "at such election," and

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[105] 1877 Minn. Laws ch. 1 § 2. I marked up the original constitutional language using the legislature's current conventions for the amendment in the quoted language in the text. In the 19th century, the convention was simply to show the language as it would read if the bill were enacted into law or (as in this case) the voters approved the constitutional amendment.

[106] The form of the ballot questions (separate ones for answering yes or no) was "Amendment to section twenty-four, article four, of the constitution, *preparatory for biennial sessions of the Legislature* * * * [Yes or No]?" 1877 Minn. Laws 21, ch.1, §5 (emphasis added).

[107] Under the staggering scheme, that meant that senators from even-numbered districts (elected in 1877 to 2-year terms since the last election of the entire senate had occurred in 1872) would have their terms end after only one year. Obviously, representatives who were elected to 1-year terms would be unaffected.

"thereafter." The key question is what election or elections does "at such election" refer to, because that is when the odd-even staggering of terms applies.[108]

"Such" used in this way is a pronoun for which one must find the antecedent to determine what it refers to or means. There seem to be two possibilities that I highlighted with bolding in the quoted language above: (1) the 1878 general election or (2) "an entire new election of all the senators" (the second of the highlighted potential antecedents).

Attorney General Hahn (and later the Supreme Court) thought it was so obvious or "plain" that "such" referred to "the 1878 election" that they could not conceive any other reasonable interpretation. However, another possible interpretation is that "such election" refers to any election of the entire Senate (i.e., including one after a reapportionment). This view is consistent with my alternative reading of the original constitutional language. It would preserve the logic of and preexisting practice, which likely was the intent (i.e., all the 1877 amendment drafters were trying to do was to adopt biennial sessions). The original constitutional language is easier to read this way, because the 1877 changes now provide that the odd-even numbering mechanism apply "at such election" whereas the original language just stated it as an unmodified, general rule. However, the ballot question (saying the changes made by the section were "preparatory" to adopting biennial sessions – i.e., not making policy changes, such as negating staggering) augers against reading any substantive effect into the insertion.[109]

I can think of two considerations to support the Hahn and court interpretation: First the drafters used the singular (not a plural formulation: "such elections") which might imply only the 1878 election is the antecedent.[110] Second, the other earlier use of "such election" with regard to elections of the House of Representatives appears to refer only to the 1878 election[111] and, one would assume, that both terms should be read to mean the same thing. However, I think one can still easily conclude that the language is ambiguous, allowing resort to the interpretative rules, which neither Hahn nor the court thought was the case. To me it seems difficult to conclude "such" "thereafter" and "except" as used here are so clear that, in the court's words, "there is no room for application of the rules of construction."[112] Once you conclude the provision is ambiguous, resolving the ambiguity to provide for permanent staggering

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[108] Hahn's opinion also highlighted by italicizing the term "thereafter" – obviously he thought that this meant permanently. It is worth noting that "thereafter" was in the original constitutional language – it was not added by the 1877 amendment. Thus, one would assume, that its meaning did not change. To me the crucial word is "except" and whether it exempts elections of senators after a reapportionment from "thereafter" receiving four-terms at those elections, as well as potentially shortening the terms sitting senators were serving.

[109] The statutory requirement that the Attorney General provide a statement of the purpose and effect of proposed constitutional amendments had not been adopted in 1877. Minn. Stat. § 3.21 (adopted by 1887 MIinn. Laws ch. 157). As a result, the ballot question is one of the few pieces of official evidence of the intent behind the 1877 amendment.

[110] Of course, a standard canon of construction is that the singular includes the plural. *See., e.g.,* Minn. Stat. § 645.08 (2) ("the singular includes the plural; and the plural, the singular"). As a result, one could argue not much should be put into the use of the singular rather than the plural.

[111] I assume that is so because it refers to "such election, or any election thereafter" implying the reference is only to one election, the one in 1878. However, it is also plausible that the drafter felt compelled to add "and any election" because they considered "such election" to refer to only elections where the entire legislature was on the ballot (i.e., my reading of "such" not Hahn's).

[112] *Kernan v Holm*, 227 Minn. 89, 92. As described, in the body of the post, I think that practical circumstances effectively compelled the court to move down this path; absent the longstanding practice under the Hahn opinion and the impracticality of ordering a statewide special election of the Senate, the result might have been different.

seems easy (the alternative is illogical and the officials with the most direct knowledge of the intent interpreted and applied it that way for two decades).

As an aside, this episode points out the risks for legislative drafters of relying on inherently ambiguous words like “such” and “thereafter” as shortcuts to avoid cumbersomely restating longer rules or phrases – it might seem obvious to you what the reference is to or means, but someone with a different frame of reference or perspective might be fooled and think some other meaning is so obvious that it is “plain” as appears to have been the case here.

To me it also illustrates the risk of the elevation of “plain language” to be the preeminent legal rule that allows courts (or here a quasi-administrator, the Attorney General) to ignore context, logic, common sense and extrinsic evidence in the reading of statutes and constitutions when they think a statute’s or constitution’s language is “plain” in their minds. It simply can be too easy to think that words and sentences are clear or obvious, allowing the interpreter to blithely ignore other relevant evidence. I fail to understand the wisdom of not looking at relevant evidence of intent or meaning, if only as a check or limit on bone-headed conclusions that something is obvious (plain) when it really isn’t and it is just the interpreter’s quick rush to judgment, as appears to have been the case here.

Postscript

Full disclosure: I am more of an intentionalist than a textualist, if the world of statutory construction is divided into those two camps. My bias stems from my background as a legislative drafter who perpetually lived in fear of making mistakes or simply doing a mediocre job drafting (a la the staggering debacle) that thwarted the intent of my former employer, the legislature, because a court or other responsible entity concludes the plain meaning of the words is what was never intended. Contrary to the late Justice Scalia, in my view, slavish reliance on dictionaries and grammar rules (and ignoring other relevant evidence) does not show respect for the legislature or the legislative process, but rather increases the potential for results contrary to what was intended. Punishing the public for the low quality (or even average) work of some hapless drafter should not be considered wise or good – certainly not respectful of the legislature and its processes. Mindless textual interpretations that are fairly clearly contrary to the actual intent seem to me a bigger risk than judges ranging too far afield in interpreting statutes or constitutions because they considered factors beyond the text (whether general context, extrinsic evidence, consistency with the policy goals, and so forth). These are obviously major jurisprudential questions involving tradeoffs, matters of degree, and unclear answers. The interpretations of the staggering provisions (or lack thereof) provide a nice example, though, of the risks of misuse of the rubric of plain meaning as an exclusionary rule that allows court to ignore reasonable evidence of a contrary meaning and intent. I consider that risk greater than the risk of runaway courts synthesizing their own formulation of legislative intent that is contrary to or inconsistent with what the legislature would do if it had been compelled to resolve the matter explicitly.

APPENDIX C: Attorney General W.J. Hahn

Biographical Sketch

William John Hahn was born in Mifflin County, Pennsylvania on November 5, 1841. His family immigrated to America before the Revolutionary War and his grandfather was a soldier in the Continental Army.[113]

Hahn's first contacts with Minnesota were in 1862 when he visited his sister in Lake City. Hahn is reported to have participated for two months in "the expedition against" the Dakota Uprising, which was occurring at that time.[114] Hahn apparently returned to Pennsylvania, but permanently moved to Lake City in 1863. His father, Joseph Hahn, moved to Minnesota in 1864. While in Lake City he had charge of the Lake City's schools (does that mean he was a teacher?) and worked as a bookkeeper. He read law with a Lake City law firm, Ottman & Scott, and went to Philadelphia to read law with R. Pemberton Morris for one year.[115]

Hahn permanently returned to Lake City in 1867. He was admitted to the bar in 1867 and formed a law partnership with W.W. Scott. (It is unclear if this is the same Scott that he had read law with earlier.) He practiced with Scott until Scott moved to Kansas at some point. Hahn was elected Wabasha County attorney in 1872, 1874, and 1876. He was re-nominated in 1878 but declined to run. Hahn was a Republican – he ran for elective office on the Republican ticket.

On March 11, 1881, Governor Pillsbury appointed Hahn Attorney General to replace Charles M. Start who had resigned to become a judge. Hahn was elected in his own right in November 1881 (receiving 66,812 votes or 62.5% of the 105,696 cast) and reelected in 1883 (receiving 79,324 votes or 58.6% of the 135,353 cast).[116] His second term was extended by one year (through 1886) when the law was changed to provide that elections of constitutional officers would be held in even-numbered years (starting in 1886). He went out of office in January 1887.

Hahn moved to Minneapolis in 1882, so he must have served as Attorney General while still maintaining his Lake City residence during 1881. He may not have wanted to change his residence until he was elected. Upon moving to Minneapolis, he formed a partnership with Charles Woods – Woods & Hahn – in which he engaged in the private practice of law while he was Attorney General. Apparently being

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[113] Most of this account is based on the biographical sketch in *History of Wabasha County* (H.H. Hill, Publisher, Chicago IL 1884), pp. 1311 – 1313. Since the volume was published while Hahn was both alive and the incumbent Minnesota Attorney General it seems likely that he wrote it or was a major contributor to it.

Showing how fleeting his notoriety was, a second history of Wabasha County was published in 1920 and its only reference to Hahn was that he was twice elected county attorney and even in that reference it described him as J.H. Hahn (rather than the correct W.J. Hahn). Franklyn Curtiss-Wedge, *History of Wabasha County Minnesota*, p. 43 (H.C. Cooper, Jr. & Co. 1920).

[114] *Id.* at 1311.

[115] I found no record of Hahn's formal education beyond reading law with the law firms – e.g., in the biography in the *History of Wabasha County* or in any other source. I assume he must have attended grammar and possibly high school in Pennsylvania. It is unlikely that he attended college; that was sufficiently distinctive in the 19th century to merit noting it in his biographies.

[116] RESULTS OF ELECTIONS OF ATTORNEYS GENERAL 1857 – 2014, compiled by Douglas A. Hedin (2016), available on the Minnesota Legal History Project website.

Attorney General was still a part time position in the 1880s. The Woods & Hahn firm evolved into what is now the Gray Plant Mooty firm, which claims to be the oldest continuing law practice in Minneapolis.[117]

One of Hahn's most important first tasks as Attorney General was handling the celebrated bond case in 1881. That case challenged state legislation enacted in 1881 intended to resolve the long festering dispute over the state's default on bonds it issued in 1858 to finance private railroads. Professor Folwell, in the still standard Minnesota history text, described the case as "the most celebrated of all cases that have up to this time [1926] come before the [Minnesota Supreme C]ourt and probably will long remain so." [118] Resolution of this case paved the way for Governor Pillsbury and legislature's resolution of the defaulted debt overhang in a fall 1881 special session that authorized issuance of new bonds that replaced principal and interest on the old ones at roughly 50 cents on the dollar. Folwell devotes 23 pages to describe the long and winding path that governors and the legislature took to resolve this issue between 1860 and 1882.[119] Resolution of the case involved holding that the 1860 constitutional amendment (requiring voter approval of payment of the bonds) violated the contract clause of the federal constitution and that the 1881 legislation, passed in the regular session, was invalid because it unconstitutionally delegated the legislature's power to a tribunal. That cleared the deck for the 1881 special session to resolve the issue without obtaining voter approval.

Hahn's role in the bond case required him to walk a legal and political tight rope, which he obviously did successfully. The biographical sketch for Hahn in the *Wabasha County History* contains a laudatory quote from the *St. Paul Dispatch* on Hahn's performance in arguing the case – probably selected for inclusion by Hahn himself?[120]

In 1886 (according to Wikipedia) Hahn was elected a trust officer for the Minnesota Loan & Trust Co., a position he held until he died in 1901. At that point, he likely stopped practicing law as part of what was then the Woods, Hahn, & Kingman firm.

Governor Samuel Van Sant appointed Hahn to a state tax commission in 1900, which made its report in 1901, the year Hahn died.[121] He was married twice (first wife died in 1891) and had five children.

Hahn's Motivation

The cavalier way in which Attorney General Hahn dispatched with the preexisting practice of staggering naturally raises questions whether his opinion was motivated by something other than simply "following

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[117] Gray Plant Mooty history. The firm history erroneously says that when Hahn joined the firm he was a "former" Attorney General. I believe that his service with the firm occurred only while he served as Attorney General. The Gray Plant history was likely written by someone who did not realize that the duties of the Attorney General could be carried out on a part time basis in the late 19th century.

[118] William W. Folwell*, A History of Minnesota*, vol. III, p. 435 (Minnesota Historical Society edition 1969).

[119] *Ibid*, pp. 418 – 441.

[120] The quote, attributed to an unnamed Ramsey County lawyer: "The attorney general had made a brilliant argument and one which would give him a high reputation among lawyers throughout the state as abounding in legal acumen and displaying deep research and very high order of logical reasoning." *History of Wabasha County*, note 113, p. 1313. If only his opinion on staggering of Senate terms had reflected such deep research and acumen, Senate terms would likely continue to be staggered.

[121] *Report of the Tax commission created by chapter 13, General laws, 1901*. The report is subtitled "Framing a Tax Code" and includes proposed bill language for revising Minnesota tax law.

the law." That occurred to me when I first discovered Hahn's opinion years ago. Sidney Blacker, the lawyer for the petitioners in *Kernan v. Holm,* apparently had similar feelings. He described Hahn's opinion as "political opinion intended to protect friends."[122] He specifically thought that Hahn was trying to head off a growing sentiment for the "Populist Party" (his term), by eliminating the need for any senators to stand for election in 1884.[123] Hahn was a Republican and the Senate was controlled by a Republican majority. The apparent implication in Blacker's mind (he was a DFLer) was that this would ensure the Republicans retained their majority without facing an electorate, heavily comprised of unhappy farmers.

I searched for direct historical evidence of this – e.g., by looking through the archives of the Office of the Attorney General from the 1880s – and was unable to find anything supporting it. The circumstantial evidence is weak, as well. The emergence of a populist farm-oriented party in Minnesota – referred to as the Farmers Alliance – did not occur until the late 1880s.[124] In the 1884 House election, the Republicans retained a comfortable margin of control of the House. In the 1883 session, the Republican speaker was elected without opposition.[125] In the 1885 session the Democrats put up a candidate for Speaker, but the Republican candidate, John L. Gibbs, was still easily elected (79-22).[126] Given the results in the House elections, it seems likely that the Senate Republicans would have also easily retained control, if staggered terms had required half of them to stand for election. If Hahn and the Senate Republicans were acting out of fear of a populist agrarian uprising against Republicans in 1884, it was a falsely placed fear. (It would hit them in the 1890 election. Blacker's perception of history was probably off by a few years.) Of course, that does not mean that Hahn and Republican senators were not conspiring in an abundance of caution; it just doesn't look much like it.

The greater chance is that Hahn was acting hastily and may have thought that ending staggering would ingratiate him with the Senate, which might have been in his interest for other than partisan political reasons. As the head of a department in the executive branch, it is certainly possible that Hahn had an interest in either pending legislation or budget decisions under consideration by the legislature at the end of the session. I simply found no evidence of any of this.

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[122] Richard P. KIeeman, "1883 Ruling Balks Plan to File for State Senate," *Minneapolis Morning Tribune*, p. 12 (Aug. 8, 1848) (quoting Sidney Blacker).

[123] *Ibid.*

[124] The first year that the Farmers Alliance fielded candidates as a political party was in 1888 or 1890. In the 1890 election, a coalition of candidates representing the Farmers Alliance, Democratic Party, and the Peoples Party managed to win control of both houses of the legislature. That was the only time between statehood and 1972 when the Republicans (or the conservatives during the nonpartisan era) did not control one of the houses. The margin in the Senate was the slimmest possible. There were 54 senators – 26 Republicans; 14 (or 15) Democrats; and 14 (or 13) Farmers Alliance. See *Senate Journal*, pp. 16 – 17 (January 9, 1891) (committee list that includes party identification of senators; Senator E. D. Hammer was not Included in the list but is listed as a Republican in the Legislative Manual for the 1891 session).

[125] *House Journal*, pp. 5 – 6 (January 2, 1883) (Speaker Loren Fletcher elected 95-0).

[126] *House Journal,* p. 5 (January 6, 1885). There were two abstentions; one of these (Rep. Brown) also was a Republican based on his voting for other House officers who were listed as Republican candidates. As an interesting aside, the total turnover in the House in the 1884 election is remarkable to someone familiar with legislative elections in the late 20th and early 21st centuries. There were 103 House members at that time; in the 1885 session only 17 members returned who had served in the 1883 session. The Speaker himself had not, but he had served in the House in 1876-1877.

APPENDIX D: Censuses and Redrawing of State Legislative Boundaries[127]

Census	Redistricting or reapportionment authority	Senators	House members
1857 (territorial)	Laws 1858, Appendix, Schedule § 12 (p. 404)	37 senators (26 districts)	80
	Laws 1860, ch. 73	21	42
1860 federal	Not used		
1865 state	Laws 1866, ch. 4	22	47
1870 federal	Laws 1871, ch. 20	41	106
1875 state	Not used		
1880 federal	Laws 1881, ch. 128	47	103
1885 state	Laws 1889, ch. 2	54	114
1890 federal	Not used		
1895 state	Laws 1897, ch. 120	63	119
1900 federal	Not used		
1905 state (last)	Not used		
1910	Laws 1913, ch. 91	67	131
1920	Not used		
1930	Not used		
1940	Not used		
1950	Laws 1959, 1st spec. sess.ch. 45	67	135
1960	Laws 1966, 1st spec. sess. ch. 1	67	135
1970	Court order	67	134
1980	Court order	67	134
1990	Laws 1991, ch. 246	67	134
2000	Court order	67	134
2010	Court order	67	134
Note: Some censuses that were not used to redraw legislative districts were used to redraw Congressional districts because a change in the number of congressional seats Minnesota was entitled to. For example, this was true of 1930 census which required a U.S. Supreme Court decision to resolve. Court order redistrictings were typically codified into law often with minor changes and adjustments.			

[127] For a history of Minnesota legislative redistricting between 1913 and the present with much more detail, *see* Alexis C. Stangl, and Matt Gehring, *History of Minnesota Legislative Redistricting* (November 2018). Information from this publication was used in preparing the table.

APPENDIX E: General Elections when the Senate was Elected

Election	Senate	Presidential	Comment
1858	Staggered	No	
1859	Staggered	No	
1860	Staggered	Yes (Lincoln)	
1861	Entire	No	
1862	Staggered	No	
1863	Staggered	No	
1864	Staggered	Yes (Lincoln)	
1865	Staggered	No	
1866	Staggered	No	
1867	Entire	No	
1868	Staggered	Yes (Grant)	
1869	Staggered	No	
1870	Staggered	No	
1871	Staggered	No	
1872	Entire	Yes (Grant)	
1873	Staggered	No	
1874	Staggered	No	
1875	Staggered	No	
1876	Staggered	Yes (Haynes)	
1877	Staggered	No	
1878	Entire	No	
1880	Staggered	Yes (Garfield)	
1882	Staggered	No	
1884	None	Yes (Cleveland)	
1886	Entire	No	
1888	None	Yes (Harrison)	
1890	Entire	No	
1892	None	Yes (Cleveland)	
1894	Entire	No	
1896	None	Yes (McKinley)	
1898	Entire	No	
1900	None	Yes (McKinley)	
1902	Entire	No	
1904	None	Yes (Roosevelt)	
1906	Entire	No	
1908	None	Yes (Taft)	
1910	Entire	No	
1912	None	Yes (Wilson)	
1914	Entire	No	
1916	None	Yes (Wilson)	
1918	Entire	No	
1920	None	Yes (Harding)	
1922	Entire	No	
1924	None	Yes (Coolidge)	
1926	Entire	No	
1928	None	Yes (Hoover)	

Election	Senate	Presidential	Comment
1930	Entire	No	
1932	None	Yes (Roosevelt)	Many consider 1932 to be a "realigning national election" wherein Democrats replaced Republicans as the majority national party; 1932 was one of only two elections between 1900 and 1950 when liberals obtained a majority of Minnesota House members.
1934	Entire	No	
1936	None	Yes (Roosevelt)	Along with 1932, the other election where liberals obtained a majority of Minnesota House members.
1938	Entire	No	
1940	None	Yes (Roosevelt)	
1942	Entire	No	
1944	None	Yes (Roosevelt)	
1946	Entire	No	National GOP wave; little change in MN legislative seat distribution
1948	None	Yes (Truman)	
1950	Entire	No	
1952	None	Yes (Eisenhower)	
1954	Entire	No	DFL gains 20 House seats; 4 Senate seats
1956	None	Yes (Eisenhower)	
1958	Entire	No	
1960	Entire	Yes (Kennedy)	
1962	None	No	GOP gains 22 House seats; number of House seats increases from 131 to 135
1964	Entire	Yes (Johnson)	
1966	Entire	No	GOP gains 15 House seats and 1 Senate seat
1968	None	Yes (Nixon)	
1970	Entire	No	DFL gains 15 House seats and 11 Senate seats
1972	Entire	Yes (Nixon)	
1974	None	No	Democratic wave following Watergate scandal; DFL House members rise from 77 to 104.
1976	Entire	Yes (Carter)	House unchanged; DFL gains 11 Senate seats

Election	Senate	Presidential	Comment
1978	None	No	"Minnesota massacre" – DFL loses governorship and two US Senate seats; DFL House seats drop from 99 to 67.
1980	Entire	Yes (Reagan)	
1982	Entire	No	
1984	None	Yes (Reagan)	
1986	Entire	No	DFL gains 18 House seats and 4 Senate seats
1988	None	Yes (Bush)	
1990	Entire	No	
1992	Entire	Yes (Clinton)	
1994	None	No	First election after Phonegate; GOP gains 13 House seats
1996	Entire	Yes (Clinton)	
1998	None	No	
2000	Entire	Yes (Bush)	
2002	Entire	No	
2004	None	Yes (Bush)	DFL gains 13 House seats
2006	Entire	No	DFL gains 15 House seats and 6 Senate seats
2008	None	Yes (Obama)	
2010	Entire	No	GOP gains 25 House seats and 16 Senate seats
2012	Entire	Yes (Obama)	
2014	None	No	
2016	Entire	Yes (Trump)	
2018	None	No	DFL gains 18 House seats

APPENDIX F: Staggering and Wave Elections

As described in the text of the body of the post, staggering of Senate terms interacts with wave elections in two opposite ways that may affect partisan control of the Senate. Because staggering would guarantee that at least one-half of senators are on the ballot at each election, it is impossible for the Senate to completely "miss" a wave. But for four out of five elections only one-half of senators are on ballot.[128] Thus, putting aside the elections immediately after redistrictings, the effects of any wave election under staggering will be roughly one-half the effect of a non-staggering system if the Senate is up for election when a wave hits. The effect is approximate or rough, because the actual effect will depend upon the "map" – how many incumbent senators of the "in" party's caucus are on the ballot under the odd-even staggering system.[129]

To provide an impressions of the extent to which the lack of staggered terms has caused the Minnesota Senate to miss wave elections and what the potential effect could have been if the original staggering system had remained in place, I used data from legislative elections from 1952 to 2018 to:[130]

- **Determine how many "wave elections" the House was subject to**. I used an arbitrary benchmark of a minimum of 12.5 percent of House seats switching from one party to the other to characterize an election as a wave; that required a party caucus to pick up a minimum of 17 House seats from the other party.[131] There were 8 elections that met this criterion, four of which were elections when only the House was on the ballot: 1962, 1974, 1978, and 2018; and four when both houses were on the ballot: 1954, 1986, 2006, and 2010. This suggests that wave elections are randomly distributed.

- **Determine the number of Senate "wave elections" during the same period**. Using this criterion, there were four Senate wave elections: 1970, 1976, 2010, and 2012. Two of these (1970 and 2010) match up with the wave affecting the partisan balance in the House. In one case (1976), the lack of staggering simply delayed the effect (of Watergate and the mid-1970s recession) on the Senate. In 1974 (when the Senate was not the ballot), DFLers picked up 26 seats in the House (expanding their majority to 104-30). In the 1976 election, the partisan tide continued to run in the same direction (House maintained it 104-30 majority) and Senate DFLers

[128] The first election immediately after redistricting (one each decade), all senators are on the ballot under either system.

[129] This is similar to the way analysts evaluate the favorability of the "map" in assessing the prospects for changing control of the US Senate, when one third of senators on the ballot under its staggering scheme.

[130] I picked that period because the Legislative Reference Library has conveniently compiled and published on its website legislative control data that I could use. During the nonpartisan era (which ended in 1974), it is extraordinarily difficult to generate this type of information, since there are no official (or even consistent unofficial) records of the membership of the conservative and liberal caucuses of the legislative bodies.

[131] The 12.5 percent benchmark is calculated relative to the total House or Senate seats, not those in the majority caucus. This makes the wave definition constant, rather than varying it based on the size of the "in" party's majority. For this period, the median change in partisan or caucus representation was 8 seats (or 6 percent), so my benchmark is twice the median or about one standard deviation (standard deviation is 8.76 and the mean is 9). The partisan turnover in the Senate was similar – median was 3 seats and standard deviation 4.43. My benchmark or criterion requires a turnover of 8 Senate seats to qualify as a wave.

picked up 10 seats (expanding its majority of 38-29 to 48-19). That leaves the 2012 election in which the Senate DFLers picked up 9 seats and the House DFLers, 11 seats, 6 less than my 12.5-percent benchmark. On balance, the data suggest that both houses are roughly equally affected by waves.

- **Speculate/guess about how the effects of waves would be altered by staggering**. I did this in two ways – one way for the 1978, 2010, and 2018 elections and in a cruder or more simplistic way for the other House 1962 wave election when the Senate was not on the ballot. [132] The method I used in making the calculations and the results are described below.

Calculations for the 1978, 2010, and 2018 elections. These three elections are iconic Minnesota elections – 1978 was the Minnesota Massacre,[133] 2010 was the national Tea Party wave and the Minnesota results yielded the first Republican-controlled Minnesota legislature since 1971 (surprising many observers), and 2018 is fresh in everyone's mind as a big win for the DFL. Two of these elections were instances when the Senate was not on the ballot (1978 and 2018) and the other when the entire Senate was on the ballot. Had Attorney General Hahn not ended staggering, one-half of the Senate would have been on the ballot for each of these elections – those representing odd-numbered districts in 1978 and 2018 and those representing even-numbered districts in 2010 – since none of the three was an election after a redistricting when the entire Senate is on the ballot.

2010 election. At the end of the 2010 session, the DFL caucus controlled the Senate with a 46-21 majority, a comfortable margin of control (69 percent of the seats). The GOP caucus in 2010 election captured 16 previously DFL-held seats, giving it a 37-30 majority. Calculating the impact of staggering is straight forward, since one need not hypothesize about who would have won elections that did not occur; incumbents representing odd-numbered districts would not have been on the ballot if the staggering system had remained in place and so would have remained in office. Of the 16 DFL seats that the Republicans captured in 2010, 9 were from even-numbered districts and 7 from odd-numbered districts. As a result, instead of a 7-seat majority, the GOP would have remained in the minority (37-30 DFL control).[134] This illustrates the principle that the lack of staggering magnifies the effects on the Senate of a wave election (compared with staggering, of course) IF the Senate is on the ballot. When

[132] I did not do the calculations for the 1974 election, since actual events make it pretty clear that the lack of staggering simply delayed the DFL expanding its majority until the 1976 election as discussed above.
[133] See description of this election above in note 85.
[134] Given that the DFL won the governorship, the fact that the lack of staggering allowed the GOP to win control of the Senate probably was not that consequential – if one's metric is policies enacted into law. To enact policies requires control or consent of three entities – both legislative houses and the governorship. Two is better than one, but not a lot. One can easily speculate that the lack of staggering could have been very consequential, though, if the GOP candidate for governor had been elected. It's easy to imagine that occurring, if the GOP had nominated a slightly more centrist candidate (e.g., Marty Seifert, the other major candidate) or if their candidate had run a slightly different campaign, etc. The governor's race was very close; Mark Dayton won by a little more than 9,000 votes out of more than 2 million cast. Under those circumstances (the GOP winning the governorship) the 2011 legislative session, rather than the partisan deadlock that occurred, could have been more like what transpired in Madison, Wisconsin – essentially an opportunity to enact Republican-favored policies on the budget, public employee labor relations, declining to participate in the ACA's Medicaid expansion, and adopting a Republican gerrymander of legislative districts. Redrawing legislative boundaries probably would have prevented the DFL from retaking control of the legislature in 2012 election and ensured Republican some legislative control throughout the rest of the decade.

the "in" party has a large majority, the lack of staggering may help the "out" party gain control when a wave election hits.

1978 and 2018 elections. Judging what would have happened under a staggering system for elections when the Senate was not on the ballot is more difficult and the results are of problematic validity. However, to provide an impression of the possible effects, I made the following calculations for the 1978 and 2018 elections, essentially extrapolating from the results of the House elections to the Senate.[135] I determined how many senators represented districts that would have been on the ballot (odd-numbered districts in both cases) were represented by the "in" party (DFL for 1978 and GOP for 2018) and, then, assumed that the "out" party would have won the same percentage of those seats that their party did in the House elections.

> **2018.** At the end of the 2018 session (ignoring the effects of resignations for seats that were not filled), the House GOP had a 77-57 majority. The 2018 election resulted in the DFL caucus winning 18 of those seats, yielding a 75-59 majority. Put another way, the DFL won 23 percent of the seats represented by GOP members that were on the ballot (18 of 77). Assume that odd-numbered Senate districts were on the ballot (as under staggering) and assume that the DFL would win the same percentage of those seats as the House DFL did yields one estimate of the potential for a change in control. During the 2018 session, GOP members represented 16 odd-numbered districts. Thus, if one assumes DFL would have won 23 percent of those races (as they did for races involving House GOP represented districts), they would have picked up between three and four seats and gained control.
>
> That, of course, is simplistic for two reasons: (1) it mindless projects the results in House races to hypothetical Senate races based purely on the party outcome and (2) it fails to adjust for "map" effects – i.e., whether the composition of odd-numbered or even-numbered districts are more favorable to one or the other of the parties.[136] Absent using sophisticated math and additional data (e.g., controlling for past voting patterns, districts with only one candidate, open seats without incumbents, and so forth), we are stuck with the former effect. But the latter can be adjusted for easily in two ways, either by looking only at how many GOP-held House seats in odd-numbered districts were won by the DFL and using that percentage to extrapolate or by comparing the total number of House candidates and assuming voters would have voted the same way for Senate candidates.[137] Both methods reveal that the odd-numbered district map was less favorable to the DFL than an even-number district map. The DFL captured 27.5% of GOP held even-numbered House districts and only 19% of odd-numbered districts.[138] Extrapolating using 19% suggests that a DFL pickup of 3 seats. Simply totaling the votes for House candidates in odd-numbered districts by party suggests a more conservative pickup of

[135] This is obviously fraught the possibility for of being misleading and full disclosure I have no training as political scientist and, thus, do not really know what I'm doing. But it still is interesting and may provide some impressions and useful insights.

[136] This is similar to the analysis that national pundits use in assessing chances of flipping the U.S. Senate based on which states (red or blue) have Senate seats on the ballot.

[137] Thanks to Mark Shepard, a former House Research Department colleague, for suggesting this approach.

[138] This reality shows up in the fact that the two Senate GOP-held seats where both House districts are represented by DFLers are even-numbered districts (44 and 56).

only one seat. Given the narrow, one-vote margin of Senate GOP control (before Senator Lourey's resignation), it seems a reasonable speculation that the DFL would have gained control under a staggering system by winning at least the one seat it needed to gain a majority. However, given the vagaries of electoral politics, that is no sure thing.[139] In any case, it illustrates the general point that staggering helps the "out" party when partisan control margins are very close.

1978. Applying the same methodology to the 1978 election, it seems obvious that under a staggering system the GOP (the "out" party at that time) would not have gained control of the Senate. In 1978, the DFL had a substantial Senate majority, 48-19. Thus, to take control the GOP would need to capture 15 DFL Senate seats. Under a staggering system with odd-numbered districts on the ballot, 24 of those 34 seats were represented by DFLers.[140] To gain control, the GOP would have needed to win over 60 percent of those seats (15 out of 24), a tall task indeed. House Republicans won one-third of the seats represented by DFLers before the election. If the Senate GOPers were equally successful, they would have gained 8 seats (one-third of 24), far short of the necessary 15 to win control.[141] Based on their success in House districts with odd-numbers, the map (putting odd-numbered Senate districts on the ballot) appeared to favor the GOP. Of the 32 House seats they picked up, 21 of them were in odd-numbered districts (the DFL held 53 odd-numbered districts yielding about a 40% success rate for GOP candidates).[142] Extrapolating from the success of House candidates only in odd-numbered district races implies that the GOP would have picked up 10 Senate seats, still short of the 15 they needed.[143] Thus, it seems very likely that the GOP would not have won control of the Senate in 1978 if staggering had remained in place.[144] This simply reinforces the illustration of the 2010 election, where having the entire Senate on the ballot was necessary for the GOP to take control.

Calculations for the 1962 election. To simplify calculations for the 1962 election, I did not attempt to determine how many of the majority and minority party caucus seats would have been on the ballot under the staggering system. Doing that is not be easy for the nonpartisan era, since the official records do not indicate the caucus of legislators or candidates.

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[139] The favorability of the odd-numbered map to the GOP is a clear factor.

[140] This includes district 13, which had been represented by a DFLer, but was vacant because Win Borden had resigned. The special election in 1978 was won by the GOP.

[141] For example, it is also possible that the fact that the Senate was not ballot helped the House Republicans win more seats by focusing better candidates and more resources on the House races. Some good candidates that ran for the House might have run for Senate seats instead, dissipating Republican efforts.

[142] The GOP caucus picked up 12 DFL-held House seats in even-numbered districts, but also lost one GOP seat they held for a net gain of 11 seats.

[143] Summing the vote totals for House candidates by political party and assuming that each party's hypothetical Senate candidates would have received the same number of votes suggests that the GOP would have picked up 9 seats.

[144] Unlike the 1974-76 DFL wave (likely related to the Watergate scandal and poor economic conditions), the 1978 GOP wave did not persist in the 1980 election; the Senate DFL's majority dropped from 47 members to 45 members as a result of special elections to fill vacancies and that DFL majority (45-22) did not change in the 1980 election.

In the 1962 election, the House conservative caucus (essentially the GOP in the nonpartisan legislature) picked up substantial seats and moved from minority status to majority control. Following the 1960 election, the liberal caucus had a 73-58 majority. After the 1962 election, the conservatives controlled (80-54 with one independent). The 1961 redistricting expanded the number of House members from 131 to 135, making it unclear how many seats the liberals actually lost – at a minimum it was 19 seats or about one-quarter. The conservatives already controlled the Senate with a 43-24 majority, a margin that remained roughly the same throughout the 1960s. The greater number of Senate conservative seats before the election makes it problematic to extrapolate the House results to what the Senate would have experienced if half of its members had been on the ballot. Applying the House percentage pickup to one-half of the Senate liberal-controlled seats suggests a possible pickup of 3 seats. But, of course, those districts may have already been leaning liberal/DFL and, thus, would be more difficult to pick up. In fact, the conservative caucus did pick up one additional seat in each of the succeeding elections, raising its majority ultimately to 45 members following the 1966 election. The lack of staggering may simply have delayed that pickup. Because of the large pre-existing conservative majority in the Senate, the effect of no staggering was small.

APPENDIX G: Timing of the Enactment of Legislative Salary Increases

Year Enacted	Law	Annual increase	% increase	Years to next Senate election
1907	1907 Minn. Laws ch. 229	$500	NA*	3
1943	1943 Minn. Laws ch. 629 § 1	$500	100%	3
1951	1951 Minn. Laws ch. 701 § 1	$500	50%	3
1955	1955 Minn. Laws ch. 793 §1	$900	60%	3
1965	1965 Minn. Laws ch. 881 § 1	$2,400	100%	1**
1971^	1971 Minn. Laws 1st sp. Sess. ch. 32 § 22	$4,800	100%	1
1977	1977 Minn. Laws ch. 35 § 10	$8,100	96%	3
1984	1984 Minn. Laws ch. 654 art. 2 § 30	$2,640	14%	2
1985	1985 Minn. Laws 1st sp. Sess. ch. 13 § 52	$894	4%	1
1987	1987 Minn. Laws ch. 404 § 43 subd. 2	$1,197	5%	3
1993	1993 Minn. Laws ch. 192 § 2 subd. 6	$1,678	6%	3
1997	1997 Minn. Laws 2nd sp. Sess. ch. 3 § 16	$1,488	5%	3
All additional increases adopted by legislative salary council under 2016 constitutional amendment.				

*Legislators were previously paid a per diem (daily amount) for session days.
**When enacted, next election was scheduled for 1968, three years later. Redistricting enacted in 1966 special session in response to a court order reduced this to one year.
^Increase follows constitutional amendment adopting annual sessions, requiring substantial increases in time commitments by legislators.
Source: Minnesota Legislative Reference Library website

APPENDIX H: *Kernan v. Holm*

227 Minn. 89

LEONARD G. KERNAN AND OTHERS v. MIKE HOLM AND OTHERS[1]

October 15, 1948.
No. 34877.

Election – state senators from odd-numbered districts

Minn.Const. art. 4, § 24, M.S.A., does not require the election of senators from odd-numbered senatorial districts at the general election to be held November 2, 1948.

Petition to this court upon the relation of Leonard G. Kernan and others for orders directing Mike Holm as secretary of state, Robert F. Fitzsimmons, auditor of Hennepin county, and C. L. Huebl, auditor of Le Sueur County to accept the filing fees and affidavits of candidacy of relators for the offices of state senators in their respective legislative districts, to be voted on at the November 2, 1948 general election, or to show cause why the petition should not be granted. Petition denied.

Sidney G. Blacker, Henry S. Blacker and *S. Harry Gainsley* for relators.

J. A. A. Burnquist, Attorney General, and *Ralph A. Stone*, Assistant Attorney General, for respondent Mike Holm, Secretary of State.

Michael J. Dillon, County Attorney, and *Frank J. Williams*, Assistant County Attorney, for respondent Robert F. Fitzsimmons.

George T. Havel, County Attorney for respondent C. L. Huebl.

LORING, Chief Justice.
This is a petition for orders invoking original jurisdiction of this court under M.S.A. 205.78 directing Mike Holm, as secretary of state, to accept fees and file affidavits for Leonard G. Kernan and Charles E. Bannister, as candidates for the office of state senator in the 45th and 57th legislative districts respectively; directing Robert F. Fitzsimmons, county auditor of Hennepin county, to accept the filing fees and affidavits of candidacy of S. Harry Gainsley and Henry S. Blacker for the office of state senator in the 33d and 35th legislative districts respectively; and directing C. L. Huebl, county auditor of Le Sueur county, to accept the filing fee and affidavit of candidacy of Ben L. Spors for the office of state senator in the 17th legislative district.

The ground asserted by each official in refusing the fees and affidavits was that there would not be a state senatorial election in the general election of November 2, 1948.

Minn.Const. art. 4, §24, as amended in 1877 (L.1877, c. 1) reads as follows:
"The senators shall also be chosen by single districts of convenient contiguous territory, at the same time that members of the house of representatives are required to be chosen, and in the same manner; and no representative district shall be divided in the formation of a senate district. The senate districts shall be numbered in a regular series. The terms of office of senators and representatives shall be the same as now prescribed by law until the general election of the year one thousand eight hundred and

[1] Reported in 34 N.W. (2d) 327.

seventy-eight (1878), at which time there shall be an entire new election of all senators and representatives. Representatives chosen at such election, or at any election thereafter, shall hold their office for the term of two years, except it be to fill a vacancy; and the senators chosen at such election by districts designated as odd numbers shall go out of office at the expiration of the second year, and senators chosen by districts designated by even numbers shall go out of office at the expiration of the fourth year; and thereafter senators shall be chosen for four years, except there shall be an entire new election of all the senators at the election of representatives next succeeding each new apportionment provided for in this article.'

The question presented by petitioners is whether § 24, properly construed, requires the election of senators from odd-numbered districts at the coming election on November 2, 1948.

Whatever may or may not have been the purpose of the legislature which proposed the amendment of Minn. Const. art. 4, § 24, in 1877, we must, as the people who voted upon it had to do, take the language of the amendment as voicing its purpose. It provided that the terms of senators should be the same as then provided by law (two years) until the election of 1878, when there should be an entire new election of senators, the terms of those from odd-numbered districts to expire at the end of two years and of those from even-numbered districts to expire in four years, and thereafter terms of senators should be for four years. It provided further that after each reapportionment there should be an "entire new election." Had it been the intent to provide for staggered terms for senators after the "entire new election" to take place after each reapportionment, as was provided for after the election of 1878, the addition to the amendment of a simple clause, to the effect that the terms of senators chosen in such election from odd-numbered districts should expire at the end of two years and of those from even-numbered districts at the end of four years, would have accomplished that purpose. The inclusion of a provision substantially to that effect for the election of 1878 and the omission of any such provision after the provision for the "entire new election" taking place after each reapportionment are a manifestation of clear intent that there was to be no further discrimination against senators from odd-numbered senatorial districts in the elections immediately following reapportionment. The clause providing for four-year terms was left without modification. Consequently, staggered senatorial elections were eliminated after reapportionment. Where, as here, the language of the section of the constitution is clear and can only be construed as petitioners contend if there is read into it a clause such as was omitted, are we compelled to read into it such provisions for the sole reason that, at a previous period long past, such a provision was in practice read into the original section before it was amended' We answer that question in the negative.

Because for 20 years the original § 24[2] was erroneously interpreted in practice, as if it contained a provision to the effect that at the "entire new election," following a legislative apportionment, the

[2] "The senators shall also be chosen by single districts of convenient contiguous territory, at the same time that the members of the house of representatives are required to be chosen, and in the same manner, and no representative district shall be divided in the formation of a senate district. The senate districts shall be numbered in regular series, and the senators chosen by the districts designated by odd numbers shall go out of office at the expiration of the first year, and the senators chosen by the district designated by even numbers, shall go out of office at the expiration of the second year; and thereafter the senators shall be chosen for the term of two years, except there shall be an entire new election of all the senators at the election next succeeding each new apportionment provided for in this article." Minn. Stat. at Large (Bissell) (1873) p. 50.

senators from odd-numbered districts should be elected for a short term and those from even-numbered districts for a full term, the petitioners earnestly contend that, notwithstanding that that clearly unauthorized practice, on the advice of the attorney general, has been discontinued for 65 years in the interpretation of like language in § 24, as amended in 1877, this court should now read into the constitution a like provision which is not there and never was there. The plain language of the constitution cannot be amended in such manner.

Where the language of a constitutional provision is clear, there is no room for the application of rules of construction. See, Fairbank v. United States, 181 U.S. 283, 308-311, 21 S. Ct. 648, 658, 659, 45 L. Ed. 862, 872-874; State ex rel. Chase v. Babcock, 175 Minn. 103, 107, 220 N.W. 408, 410; State ex rel. University of Minnesota v. Chase, 175 Minn. 259, 272, 220 N.W. 951, 956. Here, the chronology is also significant. The amendment was adopted by the people in 1877. The staggered election provided for in it occurred in 1878. The shortest terms of senators elected thereat expired in 1880. A reapportionment was enacted in 1881. L.1881, c. 128. The next general election occurred in 1882. The senate elected thereat, by resolution, requested an opinion from the attorney general as to the length of the terms of its members. Though these men were contemporary to the adoption of the amendment and were familiar with the previous practice, they immediately saw the significance of the omission of a provision for staggered terms after reapportionment. The then attorney general rendered an opinion to the effect that all senators elected in 1882 were elected for four years, regardless of the number by which their districts were designated. Opinions of Attorneys General, 1858-1884, p. 527.[3] That opinion was, in our judgment, correct.

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[3] "To the Honorable the Senate of the State of Minnesota:
"I have the honor to acknowledge the receipt of the following resolution, passed by your honorable body, viz.: 'Resolved, that the Attorney General of this State be and is hereby requested to furnish his opinion for the use of this Senate upon the question as to the length of the terms of the Senators elected at the last general election in 1882.' The terms of the Senators elected in 1882 is [sic] fixed by the amendment to the constitution adopted in 1877. By this amendment the terms of the Senators were to be the same as theretofore prescribed, *until* the general election in 1878, at which time an entire new election of such officers was to be had. It then goes on to provide that 'the senators chosen At *such election*, by districts designated by odd numbers,' should hold for two years, and those designated by even numbers, for four years; 'and *thereafter* Senators shall be chosen for four years,' except that there shall be an entire new election after each apportionment. It will be seen from this amendment that it is only such senators as are chosen by odd-numbered districts at the election of 1878 who are to hold for two years. Thereafter there is to be no difference in the term: all hold for four years. The language of this amendment is too plain to admit of doubt. The Legislature in proposing, and the people in adopting, this amendment, must be deemed to have meant just what the language used clearly imports. 'Where a law is plain and unambiguous, whether it be expressed in general or limited terms, the Legislature should be intended to mean what they have plainly expressed, and consequently, no room is left for construction. Possible and even probable meanings, when one is plainly declared in the instrument itself, the courts are not at liberty to search for elsewhere.' Cooley, Const. Lim. 68, 69. 'We are not at liberty to presume that the framers of the Constitution, or the people who adopted it, did not understand the force of language,' says Mr. Justice Bronson in People v. Purdy, 2 Hill (N.Y.) 35. Mr. Justice Johnson, in Newell v. People, 7 N.Y. 9, expresses the same idea in this language: 'Whether we are considering an agreement between parties, a statute, or a constitution, with a view to its interpretation, the thing which we are to seek is The thought which it expresses. To ascertain this, the first resort in all cases is to the natural signification of the words employed in the order of grammatical arrangement in which the framers of the instrument have placed them. If, thus regarded, the words embody a definite meaning, which involves no absurdity, and no contradiction between different parts of the same writing, then that meaning apparent on the face of the instrument is the one which alone we are at liberty to say was intended to be conveyed. In such a case there is no

Petition denied.

Posted MLHP: November 7, 2019

room for construction. That which the words declare, is the meaning of the instrument, and neither courts nor Legislatures have a right to add to or take away from that meaning.' I am, therefore, clearly of the opinion that the Senators elected in 1882, whether from odd or even numbered districts, hold for four years. [Italics in text.]
"February 27th, 1883. W. J. Hahn, Atty. Gen.'