How the Minnesota Senate Lost Its Stagger:

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

by

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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.[2] During the 2019 legislative session, DFL Governor Walz 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.[3]

What typically has gone unmentioned is why this happened: Minnesota is one of a few states with a Senate that 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 an entirely different complexion.

A quirky history underlies the Senate's un-staggered terms: the founders intended Senate terms to be staggered and they were for over two decades after statehood. 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 actually provide for staggering after the boundaries of legislative districts were redrawn in 1881. In the 135 years since, Senate terms have not been staggered. The Minnesota Supreme Court confirmed that practice roughly halfway through that period under unusual circumstances.

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[2] *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.

[3] *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).

This post tells how this all 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 composition of the legislature and lawmaking. It's a story of how poor drafting and hasty interpretation of that drafting combined to have important effects on the legislature.

What is staggering?

Many legislative and governing bodies (e.g., corporate boards and city councils) have staggered terms for their members – a structure where members' terms overlap rather than running concurrently. Some members will be elected (or appointed) at each selection cycle, while others continue serving until a later selection cycle. Staggering can be implemented in different ways; its goal is to achieve a balance of continuity of membership along with the potential for regular turnover. The U.S. Senate, for example, with six-year terms has a staggering system; one-third of its members are elected every two years. Most state senates, but not all, either have staggered 4-year terms or 2-year terms (see box). Whether or not to stagger terms is a governance-structure choice with trade-offs.

Staggering and other state senates

38 states have 4-year senate terms:

- 27 states stagger their terms.
- 10 states, including Minnesota, elect all their senators every four years, except when all terms are shortened to two years to redraw boundaries.
- New Jersey also does not stagger terms but starts the cycle after redistricting with two-year terms for all senators.

12 state senates have two-year terms, so staggering is not an issue.

Part One: The Saga of How Staggering of Senate Terms Stopped

Senate terms are staggered after the adoption of the constitution

Under the 1857 Constitution representatives served 1-year terms and senators 2-year, staggered terms. Mechanically the constitution's drafters implemented staggering by providing Senate districts would be numbered "in a regular series" (i.e., 1, 2, 3, etc.) and by specifying two separate rules for the length of Senate terms:

- **Rule 1** applied when all senators were on the ballot (that is, the first election of the legislature and the first election after legislative redistrictings).[4] In those elections, senators representing odd-numbered districts served shortened (1-year) terms and those from even-numbered districts full (2-year) terms.
- **Rule 2** applied to all other elections when all senators would be elected to full or 2-year terms.

Thus, one-half of senators would be elected at most elections, except the first election after legislative redistrictings when all senators would be elected. Unfortunately, the drafters did not explicitly state what term lengths applied at elections immediately after redistrictings when all senators were on the ballot; if staggering was to continue the odd-even or Rule #1 needed to apply. But the constitution

[4] The constitution calls the redrawing of legislative boundaries "apportionments," a term now typically used to describe the decennial reallocation of the 435 congressional seats among the states. I generally use the term "redistricting" reflecting current usage, despite the language of the constitution.

simply said those elections were an exception to the application of Rule 2.[5] The almost certain intent was that Rule 1 then applied; that is, senators from odd-numbered districts would be elected to 1-year terms and those from even-numbered districts to 2-year terms. The relevant local and state officials apparently were not troubled by the imprecision or lack of explicit language; they must have assumed when Rule 2 did not apply Rule 1 did. Those were the only two choices. At least that is the way they administered it following the 1860, 1866, and 1871 redistrictings. For the first two decades of statehood, senators served staggered terms and at least half of senators were on the ballot at every election.

1877 constitutional amendment adopts biennial legislative sessions

In 1873, the legislature concluded it was unnecessary to meet annually and submitted a constitutional amendment to the voters providing for biennial sessions. The voters rejected that amendment but adopted an identical one on the second try in 1877. Holding sessions every other year required, at a minimum, increasing the 1-year terms of House members if only to avoid electing House members who would have no legislative session to serve in. A separately submitted amendment doubled the length of terms for both House and Senate members to two and four years. To implement this change, the amendment required all legislators stand for election in 1878 and that senators representing odd-numbered districts would have 2-year terms and even-numbered districts, 4-year terms. That, of course, restarted staggering of Senate terms but with the new, longer 4-year terms.

The constitutional language requiring election of all senators at the first election after a redistricting remained unchanged – that is, it still lacked explicit language specifying the length of Senate terms at those elections.[6] By inserting more language (how to handle the 1878 election and term lengths following it) between the statement of Rule 1 and Rule 2, the amendment made the language more complex and moved the crucial "except" clause farther from the Rule 1 language. The question submitted to the voters to approve the constitutional changes in legislators' term lengths described the changes simply as "preparatory" for biennial sessions.[7] It did not suggest it would end staggering. The drafters likely assumed that staggering of terms would continue after redistrictings as it had since statehood. If so, that proved to be a bad assumption.

Attorney General Hahn nixes staggered terms

After the 1880 census, the 1881 legislature redrew legislative district boundaries. The entire Senate stood for election in 1882 using the new districts. A natural question was whether the past staggering practice would continue, with one-half of the senators (those representing odd-numbered districts) serving shortened, now 2-year terms? As the end of the 1883 legislative session approached, some senators must have read the relevant amended constitutional language and realized that it failed to explicitly specify that Rule 1 applied after a redistricting. It could be read to apply Rule 2 permanently after the initial staggering of their terms following the 1878 election. To resolve this question, the

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[5] More precisely, it said (as an exception to the statement of Rule 2) that the entire Senate was up for election at the first election after a redistricting, rather than saying anything about term lengths. All this was expressed – as was typical of 19th century legal drafting – as one long sentence. See the Appendix for the actual language.

[6] See the Appendix for the original constitution's language on term lengths, marked for the changes made by the 1877 amendment.

[7] Each of the changes to sections of the constitution (providing for biennial sessions, lengthening legislative terms, and election administration changes) were separately submitted to the voters. In theory, the voters could have adopted biennial sessions without changing legislative term lengths. 1877 MInn. Laws ch. 3, §§ 3 – 5.

Senate passed a resolution requesting an opinion from the then Attorney General, W. J. Hahn.[8] The resolution was sponsored by Senator Harrison J. Peck, a freshman senator who probably not coincidentally represented an odd-numbered district and, thus, would have served a 2-year term under the staggering practice.

Attorney General Hahn issued an opinion six days later that was short and to the point.[9] He was "clearly of the opinion" that all senators elected in 1882 (not just those representing even-numbered districts) had 4-year terms. Thus, he read the language as providing for staggering of terms only until the first redistricting after 1878. His reasoning would sound familiar to readers of recent court opinions, since it relied on the concept of "plain language" or his reading of the literal language. In Hahn's view, the language was "unambiguous" or "too plain to admit doubt" and, thus, "no room is left for construction." The opinion did not go through a lawyerly exercise of attempting to read the language in a way that would validate the administrative practice that had been used after the three previous redistrictings, even if only to reject that interpretation. It did not even note that staggering of terms had been the practice.

Attorney General Hahn

William John Hahn was born in Pennsylvania in 1841 and came to Minnesota in the early 1860s. He "read law" with Lake City and Philadelphia attorneys and was admitted to the Minnesota bar in 1867.

Hahn served as Wabasha county attorney from 1873 to 1878. Governor Pillsbury appointed him Attorney General in March 1881 to serve out the term of Charles Start; Hahn was elected to the office in 1881 and again in 1883, serving until January 1887.

As Attorney General, Hahn successfully litigated the famous "bond case" that enabled Governor Pillsbury and the legislature to refinance the 1858 state railroad development bonds on which the state had defaulted.

While he was attorney general, Hahn formed with Charles H. Woods a Minneapolis law firm that became the Gray Plant Mooty law firm. Hahn left the firm to become a trust officer with Minnesota Loan & Trust Company in 1886, a position he held until his death. Governor Van Sant appointed him to the 1901 tax commission. He died in 1902.

Hahn must have thought there was simply no other way to read the language. In quoting the constitutional language, however, he emphasized (by italicizing it) the phrase "at such election" which was added by the 1877 amendment to modify when Rule 1 (different term lengths based on odd-even district numbers) applied. Used in this way, "such" is a sort of pronoun for which the reader must find the antecedent term or phrase that it references. Hahn must have concluded that "such" referred to *and only to* the 1878 election for which the amendment specifically restarted the staggering mechanism and, therefore, staggering of terms would end with the first redistricting. This overlooked the possibility that "such election" instead referred to any "entire new election of all the senators" (including ones occurring after a redistricting) – another term/phrase that preceded "such election" in the constitutional

[8] 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*).

[9] *Opinions of the Attorneys General of the State of Minnesota,* p. 527 (West Publishing Company, 1884), p. 527. The opinion was less than 600 words long, including reprinting the Senate resolution and a long quotation from a New York Court of Appeals decision.

language and could have been "such's" antecedent. That is almost certainly what the drafters intended, unless they simply forgot to address staggering after redistricting.[10]

The original constitutional language, which the 1877 amendment left unchanged, said Rule 2's 4-year terms applied "thereafter" – a word that Hahn's opinion also emphasized by italicizing. Hahn must have thought the "there" in "thereafter" clearly (plainly?) referred only to the 1878 election. But a reasonable alternative reading is that it refers to any election in which Rule 1 applies, including the first election after a redistricting, not just the 1878 election.

As noted, Hahn's reading was not reflected in the ballot question that was submitted to the voters for approval of the term length portion of the constitutional amendment. Moreover, terms like "such" and "thereafter" with their potentially imprecise references to other terms are prone to ambiguity and potential for varying interpretations. Hahn could have construed the language as it was intended without much difficulty. His opinion was certainly questionable, if not wrong, as a legal matter. But it was likely welcomed by half of the senators whose terms it extended by two years. In any case, imprecise legal drafting created the opportunity for what transpired.

Staggering ends

After Hahn issued his opinion, staggering of Senate terms stopped. The legislature redrew the boundaries of legislative districts twice more in the 19th century (in 1889 and 1897) and once (in 1913) in the first half of the 20th century.[11] Because of the timing of the enactment of these laws, no Senate terms were shortened because of a redistricting until the 1959 legislature enacted the second redistricting of the 20th century. That law shortened the terms of senators elected in 1958 to two years, since the new district lines took effect for the 1960 election.

65 years later the Supreme Court agrees with Hahn

In 1946, the entire Senate was elected; it was a very successful election for the Republicans nationally and in Minnesota.[12] The conservative (effectively GOP) caucus controlled 52 of 67 Senate seats after the election.[13] By 1948 – 65 years after Hahn issued his opinion – the practice of staggering of Senate terms was a distant memory and no Senate seats were on the ballot. But staggering of Senate terms under the original constitution had apparently not been forgotten.[14] In early August, five putative candidates for Senate seats apparently thought Hahn had been wrong and that Senate seats for odd-numbered

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[10] That must be what Hahn thought happened: the drafters just made a mistake. That mistake would have also been made by the drafters of the original constitutional language; the amendment drafters simply failed to correct it – understandably because the pre-existing language had been administered as intended, even if It was not written that way.

[11] *See* Alexis C. Stangl, and Matt Gehring, *History of Minnesota Legislative Redistricting* (November 2018) for details.

[12] All of the GOP candidates for statewide offices were elected and the conservatives controlled both houses of the legislature, which by law was "nonpartisan" or elected without party designation.

[13] The 15 other senators did not even bother to form a liberal caucus; they voted for the conservative caucus's candidate for presiding officer. *Senate Journal*, p. 23 (Jan. 7, 1947) (all senators voting for Senator Lightner as President Pro Tem); Charles R. Adrian, *The Nonpartisan Legislature in Minnesota*, U. of Minnesota PhD Thesis (Dec. 1950), p. 168.

[14] A 1943 newspaper story noted that "every once in awhile this issue [the lack of staggering] bobs up when interested persons insist the state constitution is being violated by election of all 67 senators at one time every four years." M.W. Halloran, "Gardner Resignation Revives Old Debate Over Staggering Elections," *Minneapolis Star*, October 14, 1943, p. 17.

districts should be on the ballot.[15] They filed affidavits of candidacy for Senate seats in Hennepin and LeSueur counties and in the cities of St. Cloud and Duluth. The county officials rebuffed them, but Secretary of State Mike Holm who was responsible for the Duluth and St. Cloud seats requested an opinion from Attorney General JAA Burnquist before acting.

Attorney General Burnquist issued an opinion stating Holm had "no authority to accept" the affidavits of candidacy, because the offices were not up for election. He relied on the Hahn opinion and the 65 years of administrative practice without attempting to construe the constitutional language itself. The opinion noted that even if the constitutional language were ambiguous, "a practical construction for more than six decades" was enough to avoid reopening the issue.[16] As a result, Holm also rejected the filings.

The rejected candidates waited five weeks until late September before filing a petition requesting the Minnesota Supreme Court to order officials to accept their filings. The court heard the case on October 6th. Petitioners' 78-page brief argued, quite remarkably, that the language unambiguously provided for staggering – based on largely on elaborate parsing of the constitutional language. They further contended that any ambiguity should be resolved in favor of staggering based on the account of the constitutional debates and the administrative practice immediately after statehood.[17]

Petitioners' arguments were of no avail; the court rejected them a little more than a week later or less than three weeks before election day.[18] The opinion doubled down on Hahn's interpretation and further concluded that the original constitutional language also did not provide for staggering, despite the practice following statehood.[19] As a result, the 1877 amendment's insertion of new language including the modifying phrase "at such election" (meaning in Hahn's view only the 1878 election) was not definitive. Rather, it was the failure to include specific term length language in the "except" clause (governing elections after redistrictings) that was the fatal flaw. As Hahn had, the court felt the language was so clear that it could not apply the rules of construction courts use to resolve what unclear provisions mean.[20] The court must have considered the "there" in "thereafter" (describing when senators received full or four-year terms – i.e., when Rule 2 applies) to clearly mean every election after the very first election under the original constitution and later the 1878 election when terms were

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[15] The five candidates likely were DFLers; since legislative elections were nonpartisan that is not reflected in official records. Adrian, note 13, 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.

[16] 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).

[17] Brief of Relators in *Leonard G. Kernan et al v. Mike Holm et al*, file no. 34,877 (Minn. Sup. Ct. filed Oct. 10, 1948) (on file at Minnesota History Center). By contrast, the state's and counties' brief was short, a mere 12 pages, and relied mainly on the doctrine of upholding longstanding practical administrative constructions of statutory or constitutional provisions, rather than the wording of the constitution itself.

[18] *Kernan v. Holm*, 227 Minn. 89, 34 N.W.2d 327 (1948). The opinion was issued on October 15, 1948. Election day was November 2, 1948.

[19] *Ibid.* at 92. The court's conclusions regarding the original constitution were *dicta* – expressions of its opinion that were unnecessary to decide the case, since the original language before the 1877 amendment was no longer at issue.

[20] *Ibid.*

lengthened and staggered once again.[21] In the court's view, if staggering were intended, the drafters forgot to include the necessary language.[22]

The five-week delay in filing probably sealed petitioners' fate, because it presented the court with the unpalatable option of effectively granting Senate seats to the five petitioners by court order and *de facto* mandating special elections for the remaining odd-numbered Senate districts.[23] Whether the court had authority to order special elections – e.g., under its equitable powers – is open to question. Effectively declaring that nearly half of the Senate seats were vacant at the start of the 1949 legislative session would have made it nearly impossible for the legislature itself to act to resolve what to do, so punting it back to the legislature was also not an option.[24] Given this reality, the court's decision to simply reaffirm Hahn's opinion and continue the long-term status quo seems completely predictable. Why petitioners thought they had a chance to prevail is the real mystery.[25] Even without the delay and the difficult position it put the court in, overturning a 65-year administrative practice based on a plausible interpretation of an unclear provision would have been a heavy lift for the court, in my view.

Efforts to reinstate staggering gain no traction

The court's decision ensured that if Senate terms are to be staggered, a constitutional amendment is required. That means a majority of senators must assent to staggering their terms; absent a constitutional convention, the legislature must approve constitutional amendments. The Senate, thus, can veto whether its terms will be staggered. So far, it has shown no inclination to even consider an amendment that re-staggers its terms. Despite the introduction of many bills proposing constitutional amendments to do so (especially during the 1970s), including most recently in the 2011 and 2019 sessions, none of these bills has passed either house. The most recent bills do not appear even to have been heard in committee.

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[21] The court must have been focusing on the meaning of "thereafter" since the modifier "such election" was added in 1877 and its opinion is clear there was no staggering under the original language. *Ibid.*

[22] The opinion doesn't actually say that (i.e., it was inadvertent), but it is the logical implication of the court's conclusion that the necessary language was omitted from the except clause and its assertion that the drafters clearly knew how to say it, since they had done so in stating Rule 1. The court did not feel the need to acknowledge the obvious minor premise - that the founders intended staggering to be a permanent practice – that would have completed the syllogism's conclusion that the omission was a drafting mistake. Given the illogic of temporary staggering and the evidence from the debates at the constitutional convention, it seems clear staggering was intended to be a permanent feature.

[23] The petitioners' brief, as a practical matter, makes it clear that if the court ruled in their favor, petitioners would become senators because it was too late for anyone else to file. Brief of Relators, note 17, pp. 75-78 (describing requested relief). The special election reality was noted by newspaper coverage of the case, reflecting that that remedy was likely discussed at oral argument or in interviews with the attorneys. Richard P. Kleeman, "Supreme Court to Decide State Senate Filing Case," *Minneapolis Morning Tribune* (October 7, 1948), p. 4.

[24] For example, declaring 34 Senate seats vacant (the odd-numbered districts) would have deprived the Senate of the 34 votes necessary to enact legislation. If the five petitioners were deemed elected (because they were the only candidates for those seats), the Senate in theory could have acted.

[25] A newspaper story suggests a second motive for the petitioners' lawsuit. They hoped to draw public attention to the legislature's failure to redistrict itself and to put pressure on the Constitutional Commission to recommend an amendment that would have transferred that authority to a bipartisan commission if the legislature failed each decade to enact a redistricting law. Richard P. Kleeman, "1883 Ruling Balks Plans to File for State Senate," *Minneapolis Morning Tribune*, (Aug. 8, 1948) p. 12. Perhaps, they really didn't expect to win?

Since the 1960s, the U.S. Supreme Court "one-person-one-vote" decisions effectively require legislative districts to be redrawn after each census. As a result, senators must serve shortened, 2-year terms once each decade. The only issue is whether that occurs for half of the Senate at the beginning of the decade and for half at the end (under staggering) or at the end of the decade for the entire Senate (current practice without staggering). A long period without a redistricting (e.g., the 46 years that elapsed between the 1913 and 1959) is no longer possible. Thus, senators now have one set of shortened (2-year) terms each decade and for two out of five general elections, senators are not on the ballot. [26]

Bottom Line – inartful legal drafting and an AG opinion thwart the framers' intent
In retrospect, it seems clear that Attorney General Hahn's aggressive "plain language" reading of the poorly drafted language led to the unexpected death of staggered Senate terms, contrary to the founders' intent. Had Hahn taken the time to test his reading against the context, logic, and other available evidence of the meaning of the language, he should have concluded that the only meaning he perceived possible was not really so "plain"; a more nuanced and careful interpretation could have honored the framers' intent without doing violence to the words of the constitution. The 1948 Supreme Court decision – given the procedural context, timing, and that 65 years of water had flowed over Hahn's dam – is more understandable and excusable.

The fact that the constitution gives the Senate a *de facto* veto over constitutional changes and that body's apparent antipathy to staggered terms guarantee that the current arrangement is a permanent, if an accidental, feature of the Minnesota legislative process.

Part Two: How much does it matter?

This post is not intended to discuss the policy merits (or demerits) of staggering. Reasonable cases can be made for either approach, which is why a modest number of states do not have staggered senate terms. But an interesting question is how much Hahn's wiping out the staggering of Senate terms really matters? Is this just an interesting historical quirk with occasional random but consequential effects (e.g., the GOP's taking Senate control after 2010 election)? Or does it have more substantial and systematic impacts on the legislature – who is elected to and controls the Senate and how senators (and the legislature more generally) act?

These questions can be divided into how much the lack of staggered terms affects:

- Who is elected and controls the Senate (e.g., favoring one party/caucus over another)?
- Legislative behavior (political responsiveness)?

Obviously, answers to these questions are unknowable, but some informed speculation about possible effects and looking at Minnesota's election experience could be informative (or not). In any case, here are some of my thoughts.

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[26] Before the federal court decisions compelling redistricting each decade, the legislature appears to have consciously scheduled redistricting for years in which senate terms would not be shortened. 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."

Control of the Senate:

The effects are ambiguous; when one party is dominant, lack of staggering helps the minority party, but when the partisan balance is closely competitive, lack of staggering helps the majority party.

The question that likely interests most politicos and legislative junkies is how the lack of staggering affects who wins Senate elections and how that affects partisan control of the Senate.[27] In the current polarized political environment, many will boil that down to an issue of whether it benefits one or the other of the two political parties. The potential implications go well beyond that, of course, since partisan affiliation is only one important attribute of legislators.

Over its history, the Minnesota Senate has been subject to long periods of one-party dominance. Between statehood and 1972, the Republicans (or conservatives during the nonpartisan era) controlled the Senate for all except four years in the 1890s, most of this during a period when there was no staggering. Similarly, the DFL controlled the Senate for a 38-year stretch after that. By contrast, control of the House has flipped between the parties more often. A popular perception is that changes in the House majority typically happened when the Senate was not on the ballot: examples include elections in 1932, 1936, and 1958 (Farmer Labor or DFL House control during the period the Senate was controlled by the GOP); 1978 (even split); 1984 and 1998 (GOP gains control of the House during extended period of DFL Senate control); and 2018.[28]

Was the elimination of staggering at least partially responsible for these long periods of one-party dominance of the Senate? Does it have other effects on which political party's members win elections to the Senate? In thinking about and analyzing these possibilities it is useful first to review theoretically how staggering might affect the results of Senate elections and, then, apply that theory to Minnesota's experience over the last 60 or so years.[29]

A matter of theory. In thinking about how staggering could affect Senate elections, three general points seem important to me:

- **Missing some elections.** Staggering does not change how often senators are on the ballot, just when they are.[30] Rather than some senators being on the ballot at every general election as intended by the staggering system, without staggering all senators are on the ballot for three elections each decade, skipping the other two. Thus, one issue is whether the elections they miss are systematically different? Or does skipping 40 percent of elections consistently yield differing results?

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[27] Lack of staggering could also affect House elections. For example, years when the Senate is not on the ballot allows the parties to focus their efforts – recruiting candidates, running campaigns, and so forth – on House races. It also prevents House incumbents from leaving to run for the Senate, a potentially important factor in some races since incumbents are typically more difficult to beat. The post discusses exclusively the impact on the control of the Senate.

[28] This probably is a misperception. In five other elections where the House majority changed (1954, 1972, 2006, 2010, and 2016), the Senate was on the ballot. Thus, the count is seven versus five, likely no different than chance.

[29] Because the Legislative Reference Library provides a convenient database of partisan control of the House and Senate for this period, I limited my analysis of legislative elections to the 1952 – 2018 period.

[30] Provision of longer, 4-year Senate terms effectively guarantees that there will be less turnover in the Senate and this should translate to reductions in the number of changes in control of the Senate, compared with the House.

- **Presidential versus midterm elections**. There are two types of general elections – presidential and midterm elections. Voter turnout is higher for presidential elections, compared with midterms. If Senate elections were consistently held at one or the other type of election, it could tilt the rules in favor of one party. For example, conventional wisdom holds that low-turnout elections favor Republicans;[31] if that is accurate, always holding Senate elections on a midterm schedule would favor the GOP. That, in fact, was the situation for the entire period between the issuance of Hahn's opinion and 1959, because the legislature was not required to regularly redistrict itself and the few times it did so, it preserved that schedule for Senate elections.[32] As a result, the lack of staggering may have been a small contributor to the long period of GOP control of the Senate over the first 70 years of the 20th century if the conventional wisdom that the GOP benefits from low turnout is correct.[33]

  The "one-person-one-vote" Supreme Court decisions now foreclose that possibility. Those decisions require redistricting each decade. As a result, the schedule for Senate elections switches each decade – one decade they are held at presidential elections and the next at midterms. This eliminates any potential advantage for a high or low turnout benefiting one party *over the long run*. But in any decade, the schedule could help one or the other of the two parties and, of course, most of us care about the here-and-now, rather than the "long run" that economists and other social scientists often focus on.[34]

- **"Wave" elections.** High school civics and popular perceptions posit that elections are determined by the candidates' and parties' positions on issues, the quality of candidates, and the effectiveness of campaigns. However, political scientists find, and activists know that many other factors often determine the results. Economic recessions or unpopular wars typically help the minority party, sometimes in big ways. Even random events or occurrences outside the control of any elected official or political party may be important.[35] 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. These wave elections often are the elections where the minority party caucus is swept to control of one or both bodies of the legislature.

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[31] That conventional wisdom did not appear to hold in the 2016 and 2018 legislative elections, where the DFL did better in the 2018 mid-term and the GOP in the 2016 presidential election. A sample of one or two elections is too small to reach any conclusions about trends, though.

[32] See note 26.

[33] Larger contributing factors are likely the Republican Party's dominant position in the first century after statehood and effects of nonpartisan legislative elections from 1914 through 1972. See Adrian, note 13, for a discussion of these factors, especially pp. 181ff (describing the dominance of the Republican Party in the first 90 years of statehood, in particular, the "if in doubt, vote Republican rule"); p. 213 ("Nonpartisanship appears to have been a real boon to conservatives [the GOP oriented legislative caucus] and a frustration to Farmer-Laborities in the heyday of that party [referring to the early 1930s].").

[34] As John Maynard Keynes famously observed: "In the long run, we're all dead." *A Tract on Monetary Reform* (1923) p. 80.

[35] The classic case for this is made by Christopher H. Achen and Larry M. Bartels, *Democracy for Realists* (Princeton University Press 2016). For example, the authors document how droughts, floods, and shark attacks (!) materially affected voting behavior, even though a rational voter would not hold politicians accountable for or vote based on matters outside of the government's control (one assumes). *Ibid.* ch. 5.

One possibility is that staggering, or its absence, somehow interacts with the occurrence of wave elections to affect which party controls the Senate. On the one hand, failing to stagger terms means that senators (and the party in control) have a 50-percent chance of missing a wave election. Senators won't be on the ballot for half of the relevant elections.[36] On the other hand, failing to stagger means if a wave hits when the Senate is up for election, the effect will be twice as large because all senators (not just half) will be on the ballot. Applying probability theory, the two effects should offset one another – senators have a 50-percent chance of missing a wave election, but if the wave hits, its effects will be twice as powerful because all senators will be on the ballot. Thus, if wave elections occur randomly, staggering should not matter much, *in the long run*. Missing waves because of no staggering will be offset by the bigger effects of the waves that do wash over the Senate.

But that ignores a crucial factor – how close are the control margins between the two parties – because it may be in the interest of the minority party to increase its chances of benefiting from a wave in return for smaller payoffs when a wave hits.[37] Thus, if the minority party only needs to pick up one to three seats to gain control, it may prefer a system that makes it less likely to miss a wave (that is, staggering), even if the payoff is half what it would otherwise be.[38]

Testing using Minnesota election data. To see if my hypotheses are consistent with actual experience, I looked at Minnesota legislative election data since 1952 to determine (1) whether the occurrence of wave elections was random and (2) to make some educated guesses about how staggering might have changed control of the Senate over that period.[39]

Wave elections appear to be randomly distributed. I first determined how many wave elections the House of Representatives experienced since 1952. I arbitrarily defined a wave election as one in which one party gained a minimum of 12.5 percent of the total House seats (17 seats for a 134-member House).[40] Eight of the 34 elections met this criterion. Exactly half of these elections were ones in which

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[36] The first election after a redistricting will always have all senators on the ballot. Thus, if a wave elections hits, staggering doesn't matter. As a result, I calculated the probability ignoring those elections.

[37] This is like a horse player making an "across-the-board" bet to increase the odds of winning at least something if the horse comes in second or third.

[38] My discussion and analysis assume that full "control" of the Senate is the most important goal and falling short (even by one or two votes) is equivalent to failure. Of course, experienced legislative hands will tell you that reducing the opposition party's majority may help advance your agenda even if you fail to win control. That, in my judgment, was much truer in earlier times when the parties more often worked "across the aisle" to deal with a fair number of issues. In today's polarized, hyper-partisan legislature, that seems to be less true and outright control is more essential. See Dave Durenberger and Lori Sturdevant, *When Republicans Were Progressive*, pp. 161 – 206 (Minnesota Historical Society Press 2018) (discussing partisan polarization in Minnesota); Thomas E. Mann and Norman J. Orenstein, *It's Even Worse Than It Looks: How the American Constitutional System Collided with the New Politics of Extremism* (Basic Books 2012) (national).

[39] See note 29 for the explanation of why I did not attempt to go back beyond 1952. During the nonpartisan era it is very difficult to make reliable determinations on the "partisan" results of formally nonpartisan legislative elections.

[40] The average or mean partisan change in these elections was just less than 10 seats (the median was 8) and the standard deviation was 8.76, so this is a relatively weak definition of a wave election, at about one standard deviation. Applying the criterion to the U.S. House of Representatives suggests that 54-seat or more shift from one party to the other is a wave – I think most observers would agree that would be a wave election.

the Senate was on the ballot, suggesting that wave elections are randomly distributed.[41] Thus, the lack of staggering causes the Senate to miss about one-half of wave elections. The "but," of course, is that when waves do hit, they will have twice the effect that would occur without staggering. For the four House wave elections when the Senate was on the ballot, the results of Senate elections also met my wave criterion for two of those elections. Looking at the details of the other elections suggests that the House and Senate (when senators are on the ballot) are similarly affected by waves.[42] That leads to the next point: estimating how control of the Senate would have differed from the actual experience for House wave elections if the original staggering rule had continued by extrapolating from the House results when necessary.

How would staggering have changed control of the Senate? Obviously, there is no way to definitively answer this question – especially for years when the Senate was not on the ballot. But extrapolating the results of House elections to the Senate under staggering system might give some useful impressions. I estimated how control of the Senate might have been affected under the original staggering system for four House wave elections (1962, 1978, 2010, and 2018) two different ways. The results tended to support my hypotheses – when margins are close, staggering benefits the minority party caucus by giving it more good chances to win control, but when the majority party caucus has a large majority, staggering would benefit the incumbent or majority party because it dilutes the effect of wave elections. The 2010, 2018, and 1978 elections illustrate these points.[43]

> **2010 election.** In 2010 the entire Senate was on the ballot under the no staggering system. 2010 was the national Tea Party wave election in which the GOP regained control of Congress and many state legislatures, including Minnesota's. Going into the election, the DFL had large majorities in both houses, specifically 46-21 in the Senate. The GOP reversed that by winning 16 the DFL-held Senate seats to gain a 37-30 majority. Because the entire Senate was on the ballot, it is easy to recalculate what would have happened under staggering, since only even-numbered district seats would have been on the ballot. Of the 16 seats the GOP won, only 9 would have been on the ballot. Thus, staggering would have prevented the GOP from gaining control (the DFL would have retained a 37-30 majority).[44] This illustrates the point that the staggering system would help a dominant majority party caucus retain control, compared with Hahn's no staggering system. Staggering would have extended DFL control of the Senate through 2014, at a minimum, since the DFL regained control in 2012.

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[41] Raising the threshold to 15 percent of the seats did not change matters much – five elections satisfy that criterion of a "wave" and the Senate was on the ballot for two of those.

[42] In two of these instances, the control of the Senate was already in the hands of the same party that benefited from the House wave and, thus, it would have been more difficult to gain the required number of seats. In one instance, the change in Senate seats was one seat less than the 12.5-percent benchmark.

[43] For more detail on how I prepared the estimates and the results, as well as estimates for the other three elections, see the longer version of this post, which is available from the author upon request.

[44] One might object that in 2008 those odd-numbered Senate seats would have been on the ballot, giving the GOP the chance to win some of them and narrow the DFL majority and, thus, providing a better chance in 2010. But the 2008 election was very favorable to the DFL. Based on the results of House elections, it seems unlikely that the DFL would have lost many of its seats and may have increased its majority.

2018 election. The situation in 2018 was the converse of 2010. In 2018, the GOP controlled the Senate by the narrowest of margins (34-33) and the Senate was not on the ballot.[45] The 2018 House election meets my wave criterion: the DFL won 19 previously held GOP seats gaining a 75-59 majority. To estimate the potential impact of staggering, I determined the number of GOP-held Senate seats that would have been on the ballot under the original staggering system (i.e., the GOP represented 16 odd-numbered districts). If the Senate DFL won roughly the same percentage of those seats as the House DFLers did of all GOP House seats (25 percent), it would have yielded a four-seat gain and the majority. If one extrapolates only from the results in odd-numbered House seats, the results are less clear. The DFL's success rate in those races was lower (19%), suggesting a 3-seat pickup.[46] Because the House GOP held a higher proportion of seats than the Senate GOP, it probably would have been very difficult for the Senate DFL to win the same proportion of GOP-held Senate seats (and not lose any of its own seats) – the available Senate GOP seats were likely less "competitive" in their partisan leanings than the House seats held by the GOP. But all the DFL needed to capture was one seat, which seems likely. This illustrates the principle that staggering helps the minority caucus when control margins are narrow.

1978 election. 1978 presents a third situation that differs from both 2010 and 2018: as was the case going into the 2010 election, the DFL held a large majority in both houses (48-19 in the Senate), but unlike 2010 senators were not on the ballot. The 1978 election was the iconic "Minnesota Massacre" in which the GOP won 33 previously held DFL House seats (along with the governorship and two U.S. Senate seats) or one-third of the DFL seats, yielding a 67-67 split. Under staggering, odd-numbered Senate seats would have been on the ballot. Of those 34 seats, the DFL held 24. Thus, the GOP would have had to retain all its seats and win 15 of the DFL seats. That would have required an unlikely success rate of 62.5% or double what House GOP candidates achieved. It seems safe to say that under staggering, the DFL would have remained in control of the Senate. This again confirms the insight that staggering would help a party caucus with a large majority retain control in a wave election scenario.

Legislative behavior:

The failure to stagger terms creates inconsistency in the way the Senate performs its buffering role in the legislative process.

A bicameral legislature is designed to make it more difficult to enact laws, since proposals must run the gauntlet of two legislative bodies to become law. Providing longer terms, as Minnesota does for members of its Senate, is intended to add an additional check: longer terms give senators more distance from the voters, allowing them to take a longer view or enabling them to be less beholden to immediate

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[45] Senator Fischbach's resignation resulted in one, previously GOP-held Senate seat being on the ballot.

[46] It is important to note that this is at best a probability; the GOP certainly could have retained its Senate majority in the 2018 election under the original odd-even staggering rule. The fact that odd-numbered districts would have been the ones on the ballot favored the GOP. DFL House candidates won both House seats in two Senate districts, but both had even numbers (districts 44 and 56). In only one odd-numbered Senate district held by the GOP did the DFL House candidates win more votes than GOP candidates and then by a very small margin. Of course, real races with actual candidates and campaigns would change the dynamics. All this does is to illustrate the importance of the "map" under staggering (i.e., which seats and candidates are on the ballot, those for odd or even numbered districts).

political currents. Four-year Senate terms are intended (one assumes) 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.

One can debate how much 4-year terms versus 2-year terms affects legislative decision making. However, most involved in the process likely would say it has some effect. Senators who have three years before their next election tend to be more willing to support a policy that they favor or think is the "right" thing to do, but that they perceive may not be politically popular.

Two examples or anecdotes can be used to support the notion that 4-year terms do affect legislative decision making:

- Many speculated that it helped to pass funding for the new Senate office building (a long sought, but elusive goal of the Senate) in 2013, a session when the Senate was three years away from its next election.
- The timing of the enactment of increases in legislative pay provides a more striking example: from 1900 to 2016[47] the legislature enacted 12 laws increasing legislative salaries. To say increasing legislative pay is politically sensitive is an understatement; doing so can appear self-serving, it makes it easier for the opposing party to recruit good candidates to run against incumbents, and it gives those candidates a politically potent argument to use against incumbents no matter what party or ideology they represent or espouse. It is likely not coincidental that 9 of these 12 increases were enacted in sessions where the Senate was not up at the next election.[48]

These examples suggest that longer terms do affect legislative decision making; if they did not, the justification or rationale for them would be inherently suspect.

Lack of staggering creates an inconsistency in the buffering effect that longer Senate terms are intended to provide, since the entire Senate stands for election in three out every five elections and is entirely off the ballot in the other two. As a result, in three out of five biennial legislative sessions, the Senate is no different than the House (regarding term lengths anyway). In those sessions, all legislators know that they will need to face the voters at the next election. If 4-year terms for senators were intended to provide a longer or more detached view for senators, the lack of staggering takes that effect away in those sessions. But in the other two sessions when no senators will be on the ballot, it is present on steroids. Staggered terms would more consistently provide that buffering effect, except in the biennial session when the legislative districts are redrawn.[49]

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[47] Before 1900, legislators were paid a per diem amount for each session day, rather than a salary. In 2016, the voters approved a constitutional amendment that transferred authority to set legislative salaries to an independent body, the Legislative Salary Council.

[48] For one of the three instances in which the Senate was up (1971), the salary increase could be easily justified by the voters' adoption of annual legislative sessions, greatly increasing the required time commitment by legislators. In yet another instance (1965), it may have been a surprise to senators that they were up for election in 1966, a result that occurred because the legislature, responding to a court order, enacted a redistricting law in a 1966 special session.

[49] With or without staggering, the entire Senate must stand for election in one election each decade, because of the constitutional requirement to redistrict.

Concluding Observations

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 an obscure 19th century attorney general. This interpretation was confirmed by the Minnesota Supreme Court 65 years later in litigation 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 and for which the court may not have had clear legal authority.

The Senate has shown no apparent interest in reinstating staggered terms 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 appears to 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 important 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.[50] 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.

[50] It's also possible that there a tendency to delay acting on very challenging political issues until sessions when the Senate is not on the ballot.

Appendix
1877 Constitutional Amendment

Note: unlined language was added by the amendment; stricken language deleted; italicized words and phrases are from Hahn's opinion.

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. 1877 Minn. Laws ch. 1 § 2, amending Minn. Const. art. IV § 24 (1857).