

ESSAY

Is the Presidential Succession Law Constitutional?

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In this essay, Akhil and Vikram Amar attack the constitutionality of the current presidential succession statute, which places the Speaker of the House and the Senate President pro tempore first and second in line, respectively, if there is neither a President nor a Vice President. Relying on the words of the Framers, the text and logic of the Constitution, and various practical and ethical concerns, the Amars conclude that federal legislators are not "Officers" under the Succession Clause and thus ineligible for the line of succession. Finally, the Amars suggest that an updated succession statute should provide for a prompt national election after succession, and should iron out various other wrinkles in the current succession statute.

PRESIDENT GINGRICH?¹

Since the November 1994 election, Speaker Newt Gingrich has sparked controversy with remarks on a broad range of political and social issues. But one thing that he has said over and over—that he, as Speaker of the House of Representatives, is second in the succession line for the Presidency—has been accepted matter-of-factly by admirer and detractor alike. On the surface, Gingrich's claim that he is two heartbeats away from the Oval Office is completely consistent with current law. The federal succession statute clearly assigns the powers and duties of the Presidency to the Speaker of the House "[i]f, by reason of death, resignation, removal from office, inability, or failure to qualify,

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We dedicate this essay to Professor Charles L. Black, Jr., whose pioneering work on structure and relationship in constitutional law has inspired the way we think about the Constitution, here and elsewhere.

1. Cf. Akhil Reed Amar & Vik Amar, *President Quayle?*, 78 VA. L. REV. 913 (1992) (discussing the possibility of former Vice President Dan Quayle succeeding to the Presidency and advocating consideration of executive ticket splitting to allow Vice Presidents to be independently elected).

there is neither a President nor Vice President.”² But serious questions lurk at a deeper level—questions about the constitutionality of the succession statute itself. In this essay, we conclude that the best reading of the Constitution’s text, history, and structure excludes federal legislators from the line of presidential succession. Our most important reasoning is structural: If legislators are in line to fill a vacant Oval Office, a pervasive conflict of interest will warp their judicial roles in presidential and vice-presidential impeachment proceedings; and similar pressures will tempt lawmakers to betray our Constitution’s careful rejection of a Parliamentary/Prime Minister Model of presidential selection.

I. THE CONSTITUTION

The core issue is whether the current federal succession statute, 3 U.S.C. section 19, is a valid exercise of congressional power under the Constitution’s Succession Clause, which states:

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, *and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.*³

More specifically, the question is whether the Speaker (or the Senate President pro tempore, since he is next on the section 19 list) is an “Officer” within the meaning of the Succession Clause, such that Congress “may by Law . . . declar[e]” that he shall “act as President.”

A. Text and Original Understanding

To answer this question, we begin of course with the constitutional text itself. The Constitution employs the concepts of offices and officers in many different provisions. At various points the document refers to “Officers of the United States,”⁴ to “civil Officers of the United States,”⁵ to “civil Office under the Authority of the United States,”⁶ to “Office under the United States,”⁷ and to “Office of Trust or Profit under the United States.”⁸ As a textual matter, each of these five formulations seemingly describes the same stations (apart

2. 3 U.S.C. § 19(a)(1) (1994). Section 19 goes on to provide that if the Speaker is unable to serve, the President pro tempore of the Senate shall act as President. *Id.* § 19(b). (The current President pro tempore—three heartbeats away from the Oval Office—is the nonagenarian South Carolina Senator Strom Thurmond.) The statute also ranks various Cabinet members (beginning with the Secretary of State) who would succeed if neither the Speaker nor the President pro tempore were able to serve. *Id.* § 19(d)(1).

3. U.S. CONST. art. II, § 1, cl. 6 (emphasis added).

4. *E.g.*, *id.* art. II, § 2, cl. 2 (Appointments Clause); *id.* art. II, § 3 (Commission Clause).

5. *E.g.*, *id.* art. II, § 4 (Impeachment Clause).

6. *E.g.*, *id.* art. I, § 6, cl. 2 (Emoluments Clause).

7. *E.g.*, *id.* (Incompatibility Clause).

8. *E.g.*, *id.* art. II, § 1, cl. 2 (Electoral College Clause); *see also id.* art. I, § 3, cl. 7 (“Office of honor, Trust or Profit under the United States”) (Impeachment Sanctions Clause); *id.* art. VI, cl. 3 (“Office or public Trust under the United States”) (No Religious Test Clause).

from the civil/military distinction)—the modifying terms “of,” “under,” and “under the Authority of” are essentially synonymous. And if the term “Officer” in the Succession Clause is merely shorthand for any of these five longer formulations, then federal legislators are constitutionally ineligible for succession: The Incompatibility Clause of Article I, Section 6 makes clear that sitting members of Congress cannot hold “any Office under the United States.”⁹ “Officers” of or under the United States thus means certain members of the executive and judicial branches, but not legislators—the legacy of an earlier view sharply distinguishing the “people’s” representatives in Parliament from “crown” officers in executive and judicial positions. The Article II Commission Clause confirms this reading: “[A]ll the [executive and judicial] Officers of the United States” receive a commission from the President,¹⁰ but federal legislators have never needed nor received such commissions to serve in the House or Senate.¹¹

Further support for this officer/legislator distinction comes from the Impeachment Clause, which makes “all civil Officers of the United States” subject to removal.¹² In the William Blount impeachment case in 1798, the Senate correctly rejected the idea that its members were “civil Officers” within the meaning of the Constitution, and thus subject to impeachment.¹³ As future Supreme Court Justice James Iredell had put the point in constitutional ratification debates a decade earlier: “[W]ho ever heard of impeaching a member of the legislature?”¹⁴ Thus, federal legislators are neither “Officers under the

9. *Id.* art. I, § 6, cl. 2 (emphasis added). The full text reads: “[N]o Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.” For extensive analysis of this clause and its importance as a repudiation of a parliamentary system of government, see generally Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 CORNELL L. REV. 1045 (1994).

10. U.S. CONST. art. II, § 3 (emphasis added).

11. See *id.* art. I, § 5, cl. 1 (vesting power in “Each House,” and not in the President, to determine legislative qualifications and to judge elections). Although the Speaker and the President pro tempore may be considered “officers” of the legislature, see notes 21-22 *infra* and accompanying text, they too have never received presidential commissions as “Officers of the United States.”

12. U.S. CONST. art. II, § 4.

13. See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 523 n.7 (1969); Ruth C. Silva, *The Presidential Succession Act of 1947*, 47 MICH. L. REV. 451, 461 (1949).

14. 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 127 (Jonathan Elliot ed.) (2d ed. Washington 1836). To remove unfit legislators from government, the Constitution provides a specially tailored alternative to impeachment: expulsion by a two-thirds vote of one’s own House. U.S. CONST. art. I, § 5, cl. 2. Expulsion gives each House exclusive control over its own membership; impeachment of legislators, by contrast, would embroil each House in the other’s controversies.

This reading of Article II’s Impeachment Clause also has implications for the Impeachment Sanctions Clause of Article I, Section 3, which declares that conviction in an impeachment case can disqualify a person from “any Office of honor, Trust or Profit under the United States.” *Id.* art. I, § 3, cl. 7. By parity of logic with the Impeachment Clause as expounded in the Blount affair, a convicted executive or judicial “Officer” could be barred from executive or judicial “Office,” but remain eligible for a congressional seat since, by definition, it is a nonOfficer position. Cf. *Powell v. McCormack*, 395 U.S. 486, 520 n.41 (1969) (noting but not reaching this issue).

United States," nor (to the extent that there is any difference) "Officers of the United States."¹⁵

There is considerable historical evidence that the Constitution's drafters used the term "Officer" in the Succession Clause as shorthand for "Officer of the United States." In fact, early versions of the clause approved by the Philadelphia Convention explicitly employed the longer formulation.¹⁶ According to James Madison's notes, the Convention understood that only "'officers' of the U.S." (the italics are Madison's) would be eligible.¹⁷ A later style committee deleted the words "of the United States," but no evidence suggests that this style change was meant to change meaning.¹⁸ In discussing Congress' first attempt to implement the Succession Clause, the Presidential Succession Act of 1792,¹⁹ Madison suggested that legislators were not "officers, in the constitutional sense" (again the italics are his) and that Congress "certainly err[ed]" in allowing legislators to succeed to the Presidency.²⁰

This textual argument against legislative succession, while forceful, is not quite a slam dunk. In two places, the Constitution uses the term "Officers," without more, and in a way that clearly includes federal legislators. In particular, Article I, Section 2 provides that "[t]he House of Representatives shall chuse their Speaker and *other Officers*";²¹ and Section 3 similarly provides that "[t]he Senate shall chuse their *other Officers*, and also a President pro tempore."²² Thus, the Speaker is an "Officer" in at least one constitutional sense—an "Officer" of the legislature. If the Succession Clause's open-ended reference to "Officer[s]" includes every person whom the Constitution at some point labels an "Officer" (and not just those who are Officers *under* or *of the United States*), then the Speaker might be constitutionally eligible for succession.

15. For a discussion of the distinction between executive officers and legislators in a criminal context, see *Burton v. United States*, 202 U.S. 344, 369-70 (1906) (holding that a U.S. Senator was not removed "*ipso facto*" by criminal conviction, because he was not an officer "under the government of the United States" within the meaning of the criminal statute). By contrast, criminal conviction often automatically effects removal from executive or judicial offices. For an excellent general discussion, see Maria Simon, Note, *Bribery and Other Not So "Good Behavior": Criminal Prosecution as a Supplement to Impeachment of Federal Judges*, 94 COLUM. L. REV. 1617 (1994).

16. *E.g.*, 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 532, 535, 573 (Max Farrand ed. 1966) [hereinafter RECORDS].

17. *Id.* at 535.

18. *Id.* at 573, 599; see Silva, *supra* note 13, at 457 (noting that the Committee of Style had authority to consolidate and clarify, but not to change, substantive provisions).

19. Act of Mar. 1, 1792, ch. 8, § 9, 1 Stat. 239, 240 (repealed 1886).

20. Letter from James Madison to Edmund Pendleton (Feb. 21, 1792), in 14 THE PAPERS OF JAMES MADISON 235, 235 (Robert A. Rutland, Thomas A. Mason, Robert J. Brugger, Jeanne K. Sisson, & Fredrika J. Teute eds., 1983); see also 93 CONG. REC. 7769, 7772, 8629 (1947) (statements of Sen. Hatch and Rep. Gwynne, who relied on Madison's views to oppose legislative succession); William F. Brown & Americo R. Cinquegrana, *The Realities of Presidential Succession: "The Emperor Has No Clones"*, 75 GEO. L. J. 1389, 1425 (1987) (similar). Several members of the First and Second Congresses voiced similar views. See JOHN D. FEERICK, FROM FAILING HANDS: THE STORY OF PRESIDENTIAL SUCCESSION 57-59 (1965); Silva, *supra* note 13, at 457-58.

21. U.S. CONST. art. I, § 2, cl. 5 (emphasis added).

22. *Id.* art. I, § 3, cl. 5 (emphasis added).

At first glance, this reading of the Succession Clause seems textually plausible. But anyone who embraces it must address Article VI's oath requirement, which also speaks in terms of generic "Officers."²³ And Article VI's reference to "Officers" ranges beyond federal officials, and explicitly includes "Officers . . . of the several States."²⁴ Thus, if the Succession Clause really does use the term "Officer" in its broadest constitutional sense, then, as a textual matter, Congress could theoretically designate a *state* government official to fill an empty White House. While the Constitution nowhere explicitly forecloses this result, it seems odd given: (1) the Framers' clear intent to create a stronger and more national central government than had previously existed; (2) the obvious state favoritism and disuniformity such a succession rule would invite (allowing Congress to designate, say, the Governor of Virginia as the *ex officio* successor);²⁵ and (3) the existence of another equally (if not more) plausible reading identified above.²⁶

And the Article VI "Officer" clause cuts against legislative succession in yet another way. Although its oath requirement applies to all state governmental figures, Article VI explicitly distinguishes between "*Members of the several State Legislatures*," on the one hand, and "*executive and judicial Officers . . . of the several States*" on the other. So too, it distinguishes "*Senators and Representatives*" from "*Officers . . . of the United States*."²⁷ This carefully chosen language strongly reinforces the Constitution's global officer/legislator distinction.²⁸

23. See *id.* art. VI, cl. 3.

24. *Id.*

25. Conflicts between large and small, urban and rural, eastern and western, and northern and southern states made compromise at the Constitutional Convention difficult. Undoubtedly, a provision endowing Congress with power to pick any one state's leader as successor to the Presidency would have engendered fierce debate in Philadelphia, along with some record of that heated discussion. The absence of such a debate suggests that few read the Succession Clause to include state officers.

Later, in the First Congress, Elbridge Gerry implausibly claimed that state officers were indeed eligible to succeed, 2 ANNALS OF CONG. 1913 (Jan. 13, 1791), and in the Second Congress, Gerry voted for legislative succession, 3 ANNALS OF CONG. 302-03 (Jan. 2, 1792). Madison and several other Philadelphia Framers took a quite different position. See FEERICK, *supra* note 20, at 57-62; Silva, *supra* note 13, at 457-59.

26. It might be argued that an intermediate reading of the Succession Clause is possible—one that insists that a successor be a federal, rather than state, Officer, without requiring the successor to be an "Officer of the United States." Though analytically possible, this superfine distinction lacks strong textual support, and runs up against important historical and structural objections. Historically, we must remember that some of the most prominent proponents of legislative eligibility also believed in state officer eligibility. See note 25 *supra* (discussing Elbridge Gerry's thoughts on presidential succession). Structurally, we should remember that, prior to the Seventeenth Amendment, a Senator was seen as an agent of his state government in some ways. *E.g.*, 2 ANNALS OF CONG. 1904 (Jan. 10, 1791) (remarks of James Madison) ("[T]he President *pro tem.* of the Senate . . . will be a Senator of some particular State, liable to be instructed by the State."); *id.* at 1913 (Jan. 13, 1791) (remarks of Rep. Smith) ("[T]he President [*pro tempore*] of the Senate . . . was the Representative of a particular State, and bound to obey the instructions of it.").

27. U.S. CONST. art. VI, cl. 3 (emphasis added) ("The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States . . .").

28. The distinction asserts itself yet again in a later amendment providing sanctions for violations of the Article VI Oath Clause. *Id.* amend. XIV, § 3 ("No person shall be a Senator or Representative in Congress . . . or hold any office, civil or military, under the United States . . . who, having previously

B. *Structural Considerations*

Happily, we need not be limited to the isolated constitutional provisions identified above when we decide which reading of the Succession Clause ought to prevail. Instead, we must remember that it is "a [C]onstitution we are expounding."²⁹ Within the Constitution inheres a structure, a set of themes and overarching principles that furnish backdrops against which any single provision must be interpreted. At least five structural arguments militate against reading the Succession Clause to include the Speaker of the House. We present these five in two clusters, beginning with three basic principles of separation of powers before considering a pair of practical and logistical issues.

1. *Separation of powers.*

The ban on congressional office-holding and the resignation problem. Consider first the logical implications of the Constitution's rule that sitting Members of Congress may not hold executive office. This clear and emphatic rule, laid down in the Incompatibility Clause,³⁰ sharply distinguishes the American constitutional system of separated powers from British-style, parliamentary government. The Framers self-consciously rejected the governmental model embodied by eighteenth century Prime Minister Robert Walpole, who served simultaneously as the leading Member of Parliament and the Chief Executive Minister—simultaneously as Speaker and President in American constitutional parlance.³¹ In addition to the Incompatibility Clause itself, yet another emphatic rejection of the Walpole model appears in Article I, Section 3, preventing simultaneous service as Chief Executive and Chief Legislator. The Vice President may no longer preside over the Senate, "when he shall exercise the Office of President of the United States."³²

To see the implications of all this for presidential succession, recall that a President's disability may be only temporary. Indeed, the Succession Clause provides that the "Officer" identified by congressional law to assume the powers of the Presidency when both President and Vice President are unable "shall then act as President . . . until the Disability be removed."³³ Imagine a case in which a President becomes incapacitated and the Vice President who replaces him then dies. Pursuant to the Succession Clause, Congress will have specified by law which "Officer" shall assume the Presidency. If Congress designates the Speaker as such an officer (as section 19 purports to do), then the Speaker must resign his House seat before taking over the Oval Office. Failure to resign would constitute a patent violation of the Incompatibility Clause rule that

taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State . . .") (emphasis added).

29. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

30. U.S. CONST. art. I, § 6, cl. 2.

31. For an outstanding general discussion, see Calabresi & Larsen, *supra* note 9.

32. See U.S. CONST. art. I, § 3, cl. 5.

33. U.S. CONST. art. II, § 1, cl. 6 (emphasis added).

no sitting Senator or Representative may hold executive or judicial office.³⁴ (Imagine the constitutional spectacle of a Speaker presiding over the House as it considers articles of impeachment against him as Acting President.)³⁵

But what happens if the President recovers? Having already resigned, the Speaker cannot simply go back to his old House seat; indeed, a successor Representative may already have been elected.³⁶ Nor would the President necessarily want to nominate him as the new Vice President under the Twenty-Fifth Amendment.³⁷ This quandary will not arise if the term "Officer" in the Succession Clause refers only to officials (like the Secretary of State or Attorney General) who can retain their posts throughout service as Acting President—and even after a recovered President reclaims the reins.³⁸

Madison clearly thought that a Cabinet official could keep his Cabinet post while serving as Acting President.³⁹ And so said Senator Hoar, author of the Succession Act of 1886,⁴⁰ and various other members of Congress, in debates over the Act.⁴¹ As adopted, the Act provided for Cabinet succession but did not require resignation from the Cabinet before assumption of the Presidency. Although as a practical matter it might seem hard to serve as both Acting President and, say, Secretary of State, one's duties in the latter capacity could largely be delegated to undersecretaries.⁴² As one Congressman put the point in 1792, "it is of the nature of Executive power to be transferrable [sic] to

34. See note 9 *supra* and accompanying text. Section 19 explicitly requires resignation from the legislature before assumption of the Presidency. 3 U.S.C. § 19(a)(1), (b) (1994).

A quibbler might try to argue that the President does not, strictly speaking, "hold[] . . . Office under the United States," and is instead a *sui generis* figure. But Article II provides that the President shall "hold his Office" for a four-year term, U.S. CONST. art. II, § 1, cl. 1 (emphasis added), prescribes an oath for "the Office of President of the United States," *id.* art. II, § 1, cl. 8 (emphasis added), and further provides that the President "shall be removed from Office on Impeachment . . . and Conviction," *id.* art. II, § 4 (emphasis added). More importantly, the anti-Walpolian spirit underlying the Incompatibility Clause would have barred, for example, President George Washington from simultaneously serving as a Virginia Senator.

35. This is, of course, precisely the kind of spectacle the Framers explicitly rejected. See text accompanying note 32 *supra*; text accompanying notes 50-68 *infra*.

36. See U.S. CONST. art. I, § 2, cl. 4 ("When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writ of Election to fill such Vacancies."); see also Brown & Cinquegrana, *supra* note 20, at 1395, 1436-37 (discussing the dangers of § 19 successors resigning posts only to have the President recover and resume his duties). For a discussion of the Speaker's ability to resign his legislative seat but remain (a nonmember) Speaker, see note 48 *infra*.

37. U.S. CONST. amend. XXV, § 2. For more discussion of this Amendment, see text accompanying notes 89-101 *infra*.

38. It is an interesting question whether, under incompatibility principles, judges would have to resign judicial appointments before succeeding to the post of Acting President. The Incompatibility Clause prevents simultaneous service as legislator and judge, or legislator and executive official, but it does not explicitly prohibit simultaneous executive and judicial officeholding. Calabresi & Larsen, *supra* note 9, at 1047. In the First Congress, Madison objected to the Chief Justice succeeding to a vacant Presidency on the ground that it would be "blending the Judiciary and Executive." 2 ANNALS OF CONG. 1904 (Jan. 10, 1791); see also *id.* at 1912-13 (Jan. 13, 1791) (recording the similar views of Reps. Baldwin and Smith).

39. Letter from James Madison to Edmund Pendleton, *supra* note 20, at 236; Silva, *supra* note 13, at 464-65.

40. Act of Jan. 19, 1886, ch. 4, § 1, 24 Stat. 1 (repealed 1947).

41. FEERICK, *supra* note 20, at 145; Silva, *supra* note 13, at 465-66 & n.57.

42. 2 ANNALS OF CONG. 1904 (Jan. 10, 1791) (recording that Madison "showed the compatibility of the two offices" of President and Secretary of State).

subordinate officers; but Legislative authority is incommunicable, and cannot be transferred."⁴³

Indeed, Madison, Hoar, and many others went a step further and insisted that an ascending officer not only could, but *must* retain his predicate office in order to become and remain Acting President.⁴⁴ In their view, the predicate office was the *basis* for ascension; when it lapsed, so did one's entitlement to be the "Officer [who] shall . . . act as President" under the Succession Clause.⁴⁵ Put another way, Congress can designate only officers, not private citizens, to act as President; the moment an officer resigns, he becomes a mere citizen and is thus ineligible to succeed to or remain in the Oval Office.

In effect, Madison and others argued that Congress could annex presidential powers only *ex officio*—that is, to some fixed *office*, not a *person*.⁴⁶ Subtle but strong textual support for Madison's reading comes from the fact that the Succession Clause empowers Congress to declare "*what* Officer"—not "the Officer *who*"—shall act as President.⁴⁷

These points, once again, undermine the Speaker's eligibility under section 19. To refuse to resign the Speakership would be constitutionally outrageous: to act simultaneously as President/Chief Executive Officer and Speaker of the House is to be precisely the kind of Walpolian Prime Minister our Constitution's text, history, and structure self-consciously reject.⁴⁸ But to resign one's

43. 3 ANNALS OF CONG. 712 (Nov. 21, 1792) (statement of Rep. Findley); see also *Mistretta v. United States*, 488 U.S. 361, 425 (1989) (Scalia, J., dissenting) ("[U]nlike executive power, judicial and legislative powers have never been thought delegable."); Charles S. Hamlin, *The Presidential Succession Act of 1886*, 18 HARV. L. REV. 182, 188 (1905) (noting Senator Hoar's 1882 argument that legislative and presidential duties were incompatible, whereas the Secretary of State could delegate to assistants); Silva, *supra* note 13, at 465 (noting congressional sentiment in the 1880s that executive but not legislative duties were delegable). For further analysis, see Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 569 (1994) (alluding to the nondelegable nature of legislative power); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1243 n.72 (1994) (discussing the delegability of executive powers and nondelegability of legislative duties). See generally Richard D. Friedman, *Some Modest Proposals on the Vice-Presidency*, 86 MICH. L. REV. 1703, 1714-24 (1988) (supporting the idea of simultaneous executive/executive officeholding); see also FEERICK, *supra* note 20, at 192-93, 201-02, 212-13, 231-32, 277 (noting various executive positions held by Vice Presidents at Presidents' request or *ex officio*).

44. See Silva, *supra* note 13, at 465-66.

45. U.S. CONST. art. II, § 1, cl. 6 (emphasis added).

46. See notes 39-41 *supra* and accompanying text.

47. U.S. CONST. art. II, § 1, cl. 6 (emphasis added); see also Letter from James Madison to Edmund Pendleton, *supra* note 20, at 236 (reproducing Madison's emphasis of the words "*what officers*" in making his *ex officio* argument).

48. For further discussion of the Constitution's break with the Walpole Model, see generally Calabresi & Larsen, *supra* note 9. Section 19 explicitly requires an ascending Speaker to resign the Speakership. See note 34 *supra* and accompanying text (explaining the requirement in constitutional terms).

It might be argued that we should distinguish between House Representatives and the Speaker, and that the Speaker need not even be a member of the House. Thus, even though the Incompatibility Clause requires that one resign as *Representative* to become President, one need not resign as the *Speaker*. Though clever, this argument fails. For starters, one could counterargue that when the House chooses "*their* Speaker" under Article I, Section 2, they must choose one of *themselves*. Historically, the Speaker and President pro tempore have always been sitting legislators.

In any event, the clear logic of Article I prevents a person from acting simultaneously as President and presiding officer of the legislature, even if he is not a Senator or Representative: The Vice President—who is not a Senator—may not preside over the Senate "when he shall exercise the Office of President of the United States." U.S. CONST. art. I, § 3, cl. 5. Most important, a Speaker holds his

Speakership is, under Madison's reading, to pull the constitutional rug out from under one's own feet, destroying one's status as an "Officer" eligible to "act as President" under the Succession Clause (assuming a Speaker even qualifies as a Succession Clause "Officer"). And so, on this logic, the Speaker is ineligible to act as President whether or not he resigns as Speaker.

In the end, the text and structure of the Constitution permit multiple officeholding within the executive branch, but clearly ban parliamentary-style executive/legislative blending. The clear implications of all this argue strongly that members of Congress cannot be "officers" within the meaning of the Succession Clause.⁴⁹

Impeachment process integrity and the conflict of interest problem. A second and critically important structural theme is the Constitution's pervasive fear of conflict of interest. Concern that individuals not judge their own causes infused both the writings of the Founders⁵⁰ and the constitutional framework itself. An important textual embodiment of the self-dealing concern appears in the Emoluments Clause: "No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time."⁵¹ The clear purpose of this provision was to remove the direct, immediate, and personal conflict of interest federal legislators might otherwise have when enacting laws creating (or making more lucrative) any federal executive or judicial offices.⁵²

When we move from voting in the legislative arena to voting in judicial proceedings,⁵³ the conflict-of-interest concern only heightens. Consider the Chief Justice Clause of Article I: "[w]hen the President of the United States is tried [in a Senate impeachment proceeding], the Chief Justice shall preside."⁵⁴ To understand the reasons for and import of this provision, we must ask who

"office" at the pleasure of the House. If he must remain in this office in order to act as President, as the Madisonian reading insists, then his service as President wholly depends on the will of a simple House majority, in obvious violation of the Constitution's rejection of the Walpole Prime Minister Model. See text accompanying notes 69-76 *infra*. Similar logic applies to the President pro tempore.

49. Even if one rejects Madison's *ex officio* reading that a Cabinet officer *must* keep his old post, the clear constitutional fact that he *may* do so—while the Speaker may not—argues strongly against legislative succession in situations where a President suffers a temporary disability. By textual implication, if legislators fail to qualify as officers for temporary disability purposes, neither should they qualify in cases of death or removal.

50. See, e.g., THE FEDERALIST No. 10, at 59 (James Madison) (Jacob E. Cooke ed., 1961) ("No man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity.").

51. U.S. CONST. art. I, § 6, cl. 2. For a fun general discussion, see Michael Stokes Paulsen, *Is Lloyd Bentsen Unconstitutional?*, 46 STAN. L. REV. 907 (1994) (contending that the appointment of Sen. Bentsen as Treasury Secretary violated the Emoluments Clause).

52. The Emoluments Clause speaks of "Office[s]" and thus does not address the conflict-of-interest issues raised by Congressmen voting themselves pay increases as *legislators*. To address this self-dealing problem, a *different* constitutional solution was proposed—the First Congress' original Second Amendment, now ratified (it seems) as our Twenty-Seventh Amendment. Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1145-46 (1991).

53. See generally Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203 (1995) (likening voting in the judicial/jury context to other kinds of voting).

54. U.S. CONST. art. I, § 3, cl. 6.

would otherwise be entitled to preside over impeachment proceedings in the Senate. The answer, of course, is the permanent President (or presider) of the Senate—the *Vice President* of the United States.⁵⁵

It should be obvious why the Constitution does not permit the Vice President to participate in an impeachment proceeding whose result could vault him into the Oval Office: He would be presiding over a judicial proceeding in which he had a huge, direct, immediate, and personal stake. In effect, the Vice President would be judging his own cause. (For similar reasons, the Constitution expressly prohibits the Vice President, when serving as Acting President, from presiding over the Senate; otherwise, if the Senate sat to impeach the Acting President, the Vice President would be presiding in his own trial.)⁵⁶ This simple and obvious conflict-of-interest problem has far-reaching implications for the question of presidential succession in general and the current federal succession statute in particular. Simply put, section 19 may warp the judgment of the Speaker and the President pro tempore when they are called upon to participate judicially in impeachment proceedings against the President and/or Vice President. (Recall that the Constitution vests the sole power to “impeach”—to indict—the President and/or Vice President in the House,⁵⁷ acting as a kind of grand jury; and vests the sole power to “try” the case in the Senate,⁵⁸ acting as judge and petit jury.) Successful impeachment and conviction of either the President or Vice President would materially enhance the likelihood that section 19 would come into play. The structure of the Constitution simply does not permit participants in the impeachment process to have such a direct, immediate, personal stake in the outcome.⁵⁹

55. *Id.* art. I, § 3, cl. 4 (“The Vice President of the United States shall be President of the Senate.”). During debates over the Constitution, considerable controversy arose over the “amphibious” nature of the Vice President, an impeachable executive branch officer, *id.* art. II, § 4, with legislative duties, *id.* art. I, § 3, cl. 4. Given that this relatively minor blending of executive and legislative powers caused so much concern, it is hard to believe that the far more troubling blend embodied in legislative succession to the Presidency—the Chief Executive Office—would not have inspired debate. Seemingly, the Founders never truly expected that legislators might claim to be eligible “Officers” under the Succession Clause. (We are indebted to Gary Lawson for this point.)

56. See text accompanying note 32 *supra*; note 59 *infra*.

57. U.S. CONST. art. I, § 2, cl. 5.

58. *Id.* art. I, § 3, cl. 6.

59. This general principle suggests that, because of the role he is constitutionally assigned in impeachment, the Chief Justice himself is not eligible for presidential succession, even though he is an “Officer of the United States.” (Put another way, the clear logic of the Chief Justice Clause supplements the words of the Succession Clause and renders the Chief Justice ineligible.) See 2 ANNALS OF CONG. 1911 (Jan. 13, 1791) (citing Rep. Livermore’s reservations about including the Chief Justice as a succession candidate because of his impeachment role); Hamlin, *supra* note 43, at 187 (noting 1856 Judiciary Committee recommendations that the Chief Justice follow the President pro tempore and Speaker in the succession line, provided he did not preside at the President’s impeachment). General conflict-of-interest principles similarly preclude the Vice President from presiding over his own impeachment proceedings. (This too is a rather clear entailment of the Chief Justice Clause and the Acting President Clause of Article I, Section 3, Clause 5, which here might be re-labelled the “Mandatory Vice-Presidential Recusal Clauses.” See text accompanying notes 32 & 56 *supra*.)

It could be argued that the best way to deal with the pervasive conflict-of-interest problem is not to read the Succession Clause straightforwardly as excluding all legislators, but to read the Constitution generally to require any legislators mentioned in § 19 to recuse themselves from presidential and vice-presidential impeachment proceedings. But this limited recusal scheme does not address the fact that legislative succession corrupts the whole legislative body, not just individual leaders. Worse still, it

It is true, of course, that the impeachment process has a political component. But impeachment is also clearly a *judicial* proceeding,⁶⁰ and the rules of judicial ethics apply. For instance, Senators must be "on Oath or Affirmation" when sitting as a court of impeachment.⁶¹ And the most basic rule of judicial ethics is that a person may not judge her own case.

Concern about self-dealing in the impeachment and succession contexts is more than just paranoia. Consider, for example, the 1868 impeachment proceedings of President Andrew Johnson, who succeeded to the Presidency after President Lincoln's assassination in 1865. At that time (and until the passage of the Twenty-Fifth Amendment in 1967) no constitutional means existed for filling a vice-presidential vacancy;⁶² thus Senate conviction of President Johnson would have triggered the federal succession statute then in effect—the Act of 1792—which placed the President pro tempore first in line.⁶³ Senator Benjamin Wade, the President pro tempore at the time, vigorously participated in the trial and voted to convict Johnson.⁶⁴ Indeed, Wade had apparently already selected his new Cabinet when he cast his impeachment vote.⁶⁵ Needless to say, Wade's participation in the trial was soundly criticized at the time,⁶⁶ and was one of the factors that led Congress in 1886 to remove the President pro tempore and the Speaker from the statutory succession line, providing instead for Cabinet succession.⁶⁷ In 1947, a misguided Congress repealed the 1886

warps the entire presidential selection process created by the Constitution. See text accompanying notes 69-76 *infra*. Moreover, legislators may not recuse themselves when they should. See text accompanying notes 62-65 *infra* (discussing the Johnson impeachment). A recalcitrant President pro tempore might also claim that mandatory recusal would deprive his state of its constitutionally guaranteed "equal Suffrage in the Senate." See U.S. CONST. art. V; 2 ANNALS OF CONG. 1903 (Jan. 10, 1791) (detailing remarks of Rep. Smith on how a State would be deprived of a Senate vote should the President pro tempore be allowed to succeed to the Presidency); *id.* at 1913 (Jan. 13, 1791) (same); FEERICK, *supra* note 20, at 114 (noting objections to President pro tempore Wade's participation in the Johnson impeachment and counterarguments that his exclusion would deprive Ohio of its vote).

Further, if the suggestion is made that *courts* can require recusal, we must acknowledge that especially tricky problems arise from judicial interference into the impeachment process, because in impeachment the Senate acts as a court. Other courts must thus observe the rules of comity and *res judicata* when asked to enjoin legislative leaders from trying an impeachment. Judicial enforcement of our reading of the Succession Clause would at least avoid these *special* justiciability problems.

60. See text accompanying note 58 *supra*. Note also that Article I speaks in terms of "Judgment" in "Cases" of Impeachment, and gives the Senate the exclusive power to "try" and "convict[]" in such "Cases." U.S. CONST. art. I, § 3, cl. 6-7. Articles II and III likewise describe impeachment as a kind of criminal proceeding. See *id.* art. II, § 4; *id.* art. III, § 2, cl. 3. For general discussions of impeachment as a judicial proceeding, see CHARLES L. BLACK, JR., IMPEACHMENT: A HANDBOOK (1974); Vik D. Amar, Note, *The Senate and the Constitution*, 97 YALE L.J. 1111, 1114-15 (1988).

61. U.S. CONST. art. I, § 3, cl. 6.

62. See text accompanying notes 89-101 *infra* (discussing the Twenty-Fifth Amendment).

63. Act of Mar. 1, 1792, ch. 8, § 9, 1 Stat. 239, 240 (repealed 1886).

64. FEERICK, *supra* note 20, at 114; Brown & Cinquegrana, *supra* note 20, at 1420 & n.107; Silva, *supra* note 13, at 451-52.

65. JOHN D. FEERICK, THE TWENTY-FIFTH AMENDMENT: ITS COMPLETE HISTORY AND APPLICATIONS 214 (2d ed. 1992).

66. *Id.* at 214; see also FEERICK, *supra* note 20, at 114 (noting Senator Thomas Hendricks' objection to Wade's sitting in judgment over Johnson and Hendricks' belief that the President pro tempore, like the Vice President, must recuse himself from impeachment proceedings).

67. Act of Jan. 19, 1886, ch. 4, § 1, 24 Stat. 1-2 (repealed 1947); see also Brown & Cinquegrana, *supra* note 20, at 1420-21. For a discussion of the Act of 1886, see notes 126-128 *infra* and accompanying text.

law and enacted the current version of section 19, reestablishing legislative succession, with the Speaker first in line, followed by the President pro tempore.⁶⁸

The Electoral College Model and the problem of creeping prime ministerialization. Closely related to the self-dealing concern is another core separation of powers issue: the Constitution's fundamental rejection of a parliamentary system in which the legislature, or its dominant party, elects its own leader as Prime Minister/Chief Executive Officer. The problem in 1868 was not just that Ben Wade sat as a judge, and, in effect, ruled for himself; it was that the entire Senate and the party Wade led all sat as judges, and many ruled for their own leader—ruled, in effect, to anoint themselves presidential electors. By making Wade, a legislator, eligible to succeed to the Presidency, the 1792 Act corrupted the entire judicial proceeding. The Act tempted the whole Senate to act in a personal, partisan, and political—rather than judicial—manner.

Worse yet, the 1792 Act tempted the legislature to exercise a political power the Constitution took great pains to deny: the power to pick its own leader as President. As we have noted, one of the most basic decisions at Philadelphia was to break with the parliamentary Prime Minister Model represented by Robert Walpole: Congress would not have free rein to pick a President. Instead, the Constitution adopted an Electoral College Model, under which an assortment of electors independent of Congress would pick a President. Article II went so far as to bar individual members of Congress from serving as presidential electors.⁶⁹ It is true that if the electors deadlocked, Congress would resolve the impasse, but only by picking among those candidates with the most electoral college votes.⁷⁰ Congress would not have complete discretion merely to pick its own leader as President.⁷¹ This basic Electoral College Model was preserved by the Twelfth Amendment, refined by the Twentieth, and extended by the Twenty-Fifth, which requires Congressional approval of a President's nominee to fill a vice-presidential vacancy, but does not allow Congress to fill that vacancy itself.⁷²

The basic rationale for the Electoral College Model is clear: A person should not become President merely by currying favor with the legislature.⁷³

68. 3 U.S.C. § 19(a)(1), (b) (1994); see also Silva, *supra* note 13, at 456 (describing the provisions of the Act of 1947). Although the Speaker might seem to have a less dramatic conflict of interest than the President pro tempore, who sits in final judgment, recall that in impeachment the Speaker is analogous to a grand jury foreman.

69. U.S. CONST. art. II, § 1, cl. 2 (“[N]o Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.”). Note, once again, the clear legislator/officer distinction highlighted in this clause.

70. See *id.* art. II, § 1, cl. 3.

71. In the case of Johnson's impeachment, it might be argued that Benjamin Wade's leadership position was largely formal, and that the true political leader of the Senate in 1868 was Senator William Fessenden. This claim, even if true, misses the point. Nothing in the Constitution would have prevented the Senate from electing its “true leader” as President pro tempore moments before casting a final vote to convict Andrew Johnson.

72. See notes 89-92 *infra* and accompanying text (discussing Congress' role in the provisions of the Twenty-Fifth Amendment).

73. See generally MICHAEL J. GLENNON, WHEN NO MAJORITY RULES: THE ELECTORAL COLLEGE AND PRESIDENTIAL SUCCESSION 8 (1992) (reporting that “most in Philadelphia opposed congressional

Yet this is precisely what can happen if we read the term "Officer" in the Succession Clause to include legislators.⁷⁴ The Constitution's general Electoral College Model does give Congress a (now rare) role in selecting Presidents when electors are deadlocked. Congress also participates in filling a vacant Vice-Presidency by confirming the President's nominee for that post.⁷⁵ However, in both instances, Congress is limited to choosing among those "nominated" by continental institutions⁷⁶ *outside of Congress*—the Electoral College or (in the case of vice-presidential vacancy) the Presidency. Consistent with the basic spirit of the Electoral College model, we should read the term "Officer" in the Succession Clause to include presidential "nominees"—executive and judicial officers appointed via presidential nomination and commission—but not congressional party leaders whom the Congress itself selects.

2. Logistics.

The "where" problem. Consider next the Constitution's concern with geography. "Geography preoccupied the founding generation . . . [It] ramified in every direction, influencing virtually every major issue considered by the Philadelphia Convention . . ."⁷⁷ *Where* to locate various government personnel and institutions obsessed those who wrote and ratified the Constitution, largely because location does affect (and did so much more in 1787) the smooth running of government. For example, impeachment trials—suits that may tend to distract government actors from discharging their duties—were explicitly located in the Senate, in the nation's capital, in part because that is where geographic disruption would be minimized.⁷⁸ Similarly, part of Article III's underlying logic is geographic: The requirement that suits involving ambassadors be tried in the original jurisdiction of the Supreme Court, in the nation's capital, reflected a concern over the disruption of ambassadors' official duties.⁷⁹

Given all this, we must ask what kind of event would cause the single largest disruption in the smooth operation of the federal government? Clearly the answer is the kind of catastrophe that triggers the succession statute—that is,

selection [of the President]"); THE FEDERALIST No. 68 (Alexander Hamilton) (discussing the need to keep the President independent of the legislature).

74. See RUTH C. SILVA, *PRESIDENTIAL SUCCESSION* 155-56 (Greenwood 1968) (1951). In effect, legislative succession threatens to transform the American impeachment model—featuring a judicial proceeding focused on presidential misconduct—into a British-style political vote of parliamentary no confidence.

75. U.S. CONST. amend. XXV, § 2; see text accompanying notes 89-92 *infra*.

76. See text accompanying notes 102-103 *infra* (observing that congressional members lack a national electoral mandate, having been voted into office only by the people of a single state or district).

77. Akhil Reed Amar, Marbury, *Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443, 469-71 (1989).

78. THE FEDERALIST No. 65, at 443-44 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (highlighting the disadvantages of geographically disperse impeachment participants); Akhil Reed Amar & Neal Kumar Katyal, *Executive Privileges and Immunities: The Nixon and Clinton Cases*, 108 HARV. L. REV. 701, 724-26 (1995) (arguing that civil suits against the President should be tried in the capital to avoid disruption of duties).

79. Amar, *supra* note 77, at 469-78 (detailing examples of geography infusing the provisions of Article III); Akhil Reed Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499, 1560 n.222 (1990) (providing further elaboration).

an event that deprives the country of its two elected executive officials. In construing the scope of the Succession Clause, shouldn't we consider the geographic location of a would-be successor? At the Founding, high level executive officials, especially Cabinet members, were most likely to be in Washington during a time of national crisis. Diligent federal legislators, including the Speaker, tended to, and were supposed to, split their time between the capital and the people they represented. Indeed, in the early Republic, Americans expected that legislators would typically meet in short sessions and quickly return back home to live (like everyone else) under the laws just made. Article I's Arrest Clause explicitly focused on this geographic reality in its reference to federal legislators "going to and returning from" the capital.⁸⁰

During the First Congress, in debates over presidential vacancy, Representative Carroll argued against legislative succession, and in favor of Cabinet succession, in geographical terms: "[T]he vacancy might happen in the recess of the Legislature, or in the absence of the President of the Senate; the Secretary of State would always be at the seat of Government."⁸¹ Moments later, Representative Smith echoed the point: "[T]he office of Secretary of State and the duties of President were analogous. He was a kind of assistant to the Chief Magistrate, and would, therefore, very properly supply his place; besides, he was always at the seat of Government."⁸²

Though geography looms less large today, it did inform the Founders' drafting and thus casts some light on what was the most sensible reading of the Succession Clause when enacted. Even in today's jet age, there remains an impulse that location counts—an impulse that helps explain Secretary of State Alexander Haig's attempt to reassure the country, in the wake of the assassination attempt on President Reagan in 1981, that someone was "in control *here, in the White House*."⁸³

The "when" problem. A related structural argument concerns time. The President and the executive officers who serve beneath him are on duty—in office—without break or interruption, 365 days a year. Federal legislators, including the Speaker, do the people's business only while Congress is in session. The Constitution requires only that "the Congress shall assemble at least once in every Year."⁸⁴ Beyond that, the length and frequency of congressional ses-

80. U.S. CONST. art. I, § 6, cl. 1. For a modern textual reflection of geographic concern, see *id.* amend. XXV, § 4 (providing a 48-hour period to assemble should Congress not be in session at the time of an emergency in the Oval Office).

81. 2 ANNALS OF CONG. 1912 (Jan. 13, 1791).

82. *Id.* at 1913-14 (Jan. 13, 1791).

83. *Questions Raised: Who Was In Charge?*, 39 CONG. Q. WKLY. REP. 580 (1981) (emphasis added). Haig further remarked "Constitutionally, gentlemen, you have the president, the vice president and the secretary of state in that order . . ." *Id.* He was widely mocked at the time for ignoring the Speaker and President pro tempore, but, "constitutionally" speaking, Haig was dead right. If federal legislators are constitutionally ineligible, as we argue in this article, the Secretary of State is indeed next in line under the succession act. See note 2 *supra*. Could it be that with these words Haig was staking out his constitutional claim?

84. U.S. CONST. art. I, § 4, cl. 2.

sions are for Congress itself to determine by law.⁸⁵ Indeed, during the first hundred years following constitutional ratification, "there were frequent and lengthy vacancies in the offices of President pro tempore and Speaker."⁸⁶ Even today, the House is, strictly speaking, not a continuing body⁸⁷ and must elect new officers every two years. By its very nature, therefore, the Speakership is not a continuous office.⁸⁸ Yet, who would dispute the importance of filling a Presidential vacancy immediately after an event triggering section 19 occurs? When defining eligible "Officers" within the meaning of the Succession Clause, we should bear in mind that Speakers have never been continuously on the job like federal executive and judicial officers.

In sum, whether we consider the deep implications of the Constitution's separation of powers and its rejection of a Parliamentary/Prime Minister model or focus on the more mundane, practical issues of time and place, we reach the same conclusion: The Constitution's structure strongly suggests that legislators are simply not Succession Clause "Officers."

C. *Subsequent Constitutional Developments*

Thus far, we have looked at textual and structural arguments that could have been (and in many cases were) made in the Founding era. But do more recent changes to the Constitution reinforce or undermine these arguments?

1. *The Twenty-Fifth Amendment.*

The enactment of the Twenty-Fifth Amendment in 1967 makes our structural attack on section 19 even more forceful. The Twenty-Fifth Amendment provides, among other things, a means of filling a vice-presidential vacancy. As we have already noted, the original Constitution did not give a President any authority to replace a Vice President who died or left office.⁸⁹ The Twenty-Fifth Amendment now directs Presidents faced with a vice-presidential vacancy

85. The President may, of course, convene Congress in emergencies. *Id.* art. II, § 3. But what happens when the Presidency is vacant? For an argument that presidential and vice-presidential vacancies occurring when neither House is in session creates the possibility of no existing successor and no constitutional means of selecting one, see Silva, *supra* note 13, at 452, 472 n.83. See also Brown & Cinquegrana, *supra* note 20, at 1419 n.106 (discussing how President Arthur, who had no Vice President immediately after he replaced President Garfield, drafted a proclamation calling Congress into special session if, and only if, he died).

86. Brown & Cinquegrana, *supra* note 20, at 1419; see also FEERICK, *supra* note 20, at 90 n.† (describing "lame duck" sessions of Congress between election and commencement of the new term and the long gap between the beginning of the new term and the seating of the new Congress); Hamlin, *supra* note 43, at 183 (noting historical reality that at times both offices of Speaker and President pro tempore have been vacant); Silva, *supra* note 13, at 452 n.4 (describing nine-month lapses in congressional sessions).

87. *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 512 (1975) (citing *Gojack v. United States*, 384 U.S. 702, 706 n.4 (1966); *McGrain v. Daugherty*, 273 U.S. 135, 181 (1927)).

88. See 3 ANNALS OF CONG. 281 (Dec. 22, 1791) (remarks of Rep. White) ("[T]he Speaker was not a permanent officer, if he could be considered as one in any point of view."); *id.* (remarks of Rep. Giles) ("[T]he Constitution refers to some permanent officer to be created pursuant to the provisions therein contained. [The Speaker and President pro tempore] are not permanent . . . the subject was not to be left to any casualty, if it could possibly be prevented.").

89. See text accompanying note 62 *supra*.

to "nominate a Vice President who shall take office *upon confirmation by a majority vote of both Houses of Congress*."⁹⁰ If the Speaker and President pro tempore are "Officers" who can ascend to the Presidency, then the same conflict-of-interest problem we saw with regard to impeachment now arises with the Twenty-Fifth Amendment's requirement that both houses of Congress approve vice-presidential nominees. For example, think about congressional consideration of a vice-presidential nominee put forth by a President who herself has years remaining in her term. Do we really want the Speaker and President pro tempore to wield power in a confirmation process that might hugely decrease their own chances to ascend? Would we be surprised if the confirmation process bogged down, or perhaps even stalled?⁹¹ Doesn't construing the Succession Clause to include the Speaker as an "Officer" undermine the objective to which the Twenty-Fifth Amendment is dedicated—namely, the prompt and orderly replacement of departed Vice Presidents?⁹²

Consider, in this regard, the shrewd remarks of two of the most able men at the Philadelphia Convention: James Wilson and James Madison. In response to early proposals that put the Chief Senator next in line for a vacant Presidency and also gave the Senate a role in presidential selection, Wilson worried that the Senate "might have an interest in throwing dilatory obstacles in the way" of presidential selection.⁹³ Days later, Madison seconded the point: "[T]he Senate might retard the appointment of a [U.S.] President in order to carry points whilst the revisionary [veto] power was in the President of their own body."⁹⁴

Here too, our concern that a conflict of interest may lead to harmful legislative foot-dragging reflects not abstract fanciful fears, but actual historical experience. It took a Democratically controlled Congress no less than 121 days to confirm Republican Nelson Rockefeller as Vice President in 1974.⁹⁵ Had something happened to Republican President Gerald Ford during this four month window, Democrat Speaker Carl Albert would have moved into the Oval Office under section 19.

Granted, Rockefeller's questionable financial dealings raised genuine issues about his fitness to serve as either Vice President or President.⁹⁶ But the 1947 Act created bad incentives for Congress to string things out, rather than deliberate with dispatch and then vote up or down on Rockefeller.⁹⁷ Even if the con-

90. U.S. CONST. amend. XXV, § 2 (emphasis added).

91. See Brown & Cinquegrana, *supra* note 20, at 1403-04 & nn.55-57, 1414-15 (demonstrating the dangers of partisan politics disrupting the confirmation process and suggesting reform through either limiting confirmation participants to members of the President's party or mandating a time limit on the confirmation process).

92. Though § 19 was on the books when the Twenty-Fifth Amendment was adopted, nothing in the Amendment's text or structure bestows any special constitutional blessing on § 19. To the contrary, as we argue, the very structure of the Amendment undermines the § 19 scheme.

93. RECORDS, *supra* note 16, at 402-03.

94. *Id.* at 427.

95. See FEERICK, *supra* note 65, at 163-184 (chronicling the lengthy and controversial confirmation of Rockefeller).

96. See *id.*

97. For responses to the delay, see *id.* at 176 n.* (noting objections of Sen. Scott, a Rockefeller supporter, to Congress' decision to further postpone hearings); *id.* at 178 (quoting President Ford's complaint that almost three months after Rockefeller's nomination, Congress should "fish or cut bait");

flicts of interest created by the Act never actually affected congressional behavior here, and in fact did not slow things down one bit, the Act still contributed to the *appearance* of a self-dealing slowdown. In this respect, the 1947 Act repeated the mistake of the Act of 1792, which created the *appearance* of impropriety when Ben Wade voted to convict Andrew Johnson in 1868, even though Johnson had in fact done things that raised real doubts about his fitness for the Presidency.

Another section of the Twenty-Fifth Amendment creates further opportunity for legislative self-dealing, should legislators be permitted to succeed to the Presidency. Section 4 of the Amendment allows the Vice President, together with a majority of either the Cabinet or such other body as Congress designates, to certify to the Congress that the President is unable to discharge his duties.⁹⁸ This certification can effectively remove the President from office until the disability passes, making the Vice President Acting President.⁹⁹ Of course, a President alleged to be disabled might disagree, and the Twenty-Fifth Amendment allows him to communicate such disagreement to Congress. In such a case, Section 4 makes the two houses of Congress the ultimate judges of the President's fitness for service.¹⁰⁰ To the extent the legislative leaders rank high up in the succession line, their final arbitration of such executive department disputes may be infected by a direct and immediate conflict of interest. Here again, permitting legislative succession creates the possibility that legislators will judge their own cases.¹⁰¹

id. at 227-29 (suggesting that the ABA's 1974 proposal for a single joint House-Senate hearing would have appropriately expedited Rockefeller's confirmation).

98. U.S. CONST. amend. XXV, § 4.

99. *Id.*

100. *See id.*

101. Given Cabinet officers' own place in the line of succession, one might worry that conflicts of interest will infect their judgments about presidential disability. But the Twenty-Fifth Amendment gives the Cabinet only the first, not the last, word on presidential disability. And even here, if Congress is concerned about possible self-dealing it may displace the Cabinet's role altogether by substituting, for example, a panel of disinterested medical experts. *See Brown & Cinquegrana, supra* note 20, at 1415-16. While the House, in impeachment, acts as a kind of grand jury, the Cabinet members here act more like *qui tam* plaintiffs than judicial officers: They make no findings of misconduct, and may be replaced by any body Congress chooses.

Moreover, Cabinet officials face very different strategic incentives than do legislators. Consider a bad-faith Cabinet official cynically considering whether to deem an able President disabled to push himself one notch higher on the succession chain. If the able President can convince a mere one-third-plus-one of either House of her fitness, she will resume the reins and can immediately dismiss the bad-faith official. Under the Amendment, by contrast, cynical legislators face neither this uncertainty about whether the President will prevail (since they rule at the end), nor the prospect of immediate dismissal.

Also, in ruling against a disabled President, the collective Cabinet does not anoint itself an electoral college: As a group, it may not designate its favorite Cabinet member "Secretary of State" and thus next in line in the same way that each House may pick its favorite as the section 19 "Officer." Finally, Cabinet officers, unlike Congress members, are typically handpicked by and work closely with the President whose fitness is now in question; thus they are likely to be both loyal and knowledgeable about any possible disability. *SILVA, supra* note 74, at 108. The Cabinet's special access to and knowledge of the President's true status may be crucial in many disability cases. In the end, this unique knowledge may outweigh any indirect self-dealing concerns raised by Cabinet succession.

2. *The populist Presidency.*

Finally, we should take note of a powerful post-Founding development in American constitutionalism: the rise of a populist, plebiscitarian Presidency. At first, this trend might seem to support legislative succession—Representatives and Senators (after the Seventeenth Amendment) are directly elected by the people, but Cabinet officials are not. The People's President today, the argument runs, should be elected, not appointed; thus, legislators, not Cabinet officials, should head the succession lineup.

But the President is elected by a *national* electorate; Congressmen are not. They represent the parts, not the whole.¹⁰² The narrow, local strategies by which Congressmen secure election in their states and districts, with promises of pork and parks, often do not reflect the *national* vision the People have historically wanted their Presidents to possess. On this score, Cabinet officials are more truly presidential: According to presidential scholar Steven Calabresi, the "President and [his] accountable subordinates" are the "only representatives of a *national electoral constituency*."¹⁰³

In 200 years, at least nine elected Presidents previously served in the Cabinet (not counting the Vice Presidency) and six of the nine served as Secretary of State; but only one served as Speaker of the House.¹⁰⁴ To be sure, most of these Cabinet-officer Presidents are nineteenth century figures. But of the sixteen men elected President after 1900, five (the two Roosevelts, Taft, Hoover, and Bush) had held Cabinet or sub-Cabinet executive office; four others (Coolidge, Truman, Johnson, and Nixon) had served *de facto* in Cabinets as Vice Presidents; and one other (Eisenhower) had served as an executive department General.¹⁰⁵ Only five (Harding, Truman, Kennedy, Johnson, and Nixon) had served as Senators; while seven (both Roosevelts, Wilson, Coolidge, Carter, Reagan, and Clinton) came to the Oval Office as former state chief executives with no service in either the House or Senate.¹⁰⁶ Although four (Kennedy, Johnson, Nixon, and Bush) had served (typically) brief stints in the House early in their careers, *none* came directly from the House of Representatives to the Oval Office. Only one of the sixteen (Johnson) was a true congressional leader.¹⁰⁷

Of course, the Speaker and the President *pro tempore* are chosen as leaders by their respective Houses, which do span the country; but a Cabinet official is

102. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 435-36 (1819); SILVA, *supra* note 74, at 157-58.

103. Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 58-70 (1995) (emphasis added; capitalization altered).

104. See SILVA, *supra* note 74, at 159 (citing similar figures); see also FEERICK, *supra* note 20, at 267 (noting the "executive competency" of former Secretaries of State, including "John Marshall, Daniel Webster, John C. Calhoun, William H. Seward, John Hay, Elihu Root, William Jennings Bryan, Robert Lansing, Charles E. Hughes, Henry L. Stimson, Cordell Hull, James F. Byrnes, George C. Marshall, and John Foster Dulles"). In addition, Henry Clay and James G. Blaine each served as both House Speaker and Secretary of State. *Id.*

105. JOSEPH NATHAN KANE, *FACTS ABOUT THE PRESIDENTS: A COMPILATION OF BIOGRAPHICAL AND HISTORICAL INFORMATION* 333-34 (6th ed. 1993).

106. *Id.*

107. *Id.* at 333, 335.

appointed by the President and then confirmed by the Senate. Thus, in contrast to the Speaker or President pro tempore, a Cabinet official can claim selection by two continental institutions, and a mandate from the most truly *national* institution (the Presidency). Moreover, only he can claim apostolic succession from the very person whose presidential term ended prematurely.

This last idea—handpicked succession—is especially important. A modern Vice President who moves up to the Oval Office derives his mandate largely from the fact that he is the handpicked successor of the fallen President.¹⁰⁸ Because the People on Election Day are not given a chance to cast separate votes for the Vice President, he lacks a *personal* electoral mandate. Instead, the Vice President derives his mandate from the populist President who chose him as both running mate and heir apparent.¹⁰⁹ The Twenty-Fifth Amendment formalizes the notion of handpicked succession, empowering the President to nominate her chosen heir, subject to congressional approval.¹¹⁰ Cabinet succession simply extends this modern model of handpicked succession to the next level of contingency: In the event of double death, the Oval Office will still pass to a person handpicked by the President as her (contingent) successor. (If none of the existing Cabinet offices is deemed appropriate for this *ex officio* role as contingent successor, a new executive office of “First Secretary” could be explicitly created with duties designed to provide the officer with suitable training for the Presidency, and with a nomination and confirmation process focusing directly on the express role of contingent successor.)¹¹¹

In general, this model of “apostolic” legitimacy will tend to preserve party and policy continuity: The party that won the People’s vote of confidence on Election Day will continue to govern the White House. Legislative succession, by contrast, can defy the People’s presidential verdict, awarding the White House to the party that decisively lost the Presidency on Election Day.¹¹² This is an especially grave problem under current law, since statutory succession does not trigger an interim election.¹¹³

As we have seen, congressional elections cannot substitute for presidential ones. Even if they could, section 19 can defy the people’s will on *Congressional* Election Day. A Speaker who loses his district in an off-year November election, and whose party goes down to defeat nationally, will still become President—for more than two years!—if the Oval Office becomes vacant in

108. See SILVA, *supra* note 74, at 156-57.

109. Elsewhere, we have argued that perhaps the People should be allowed to vote separately on the Vice Presidency, precisely to strengthen the mandate of a Vice President who may one day need to lead the nation. See Amar & Amar, *supra* note 1, at 946-47.

110. See note 90 *supra* and accompanying text. For more extended discussion of the notion of legitimacy via handpicked succession, see Akhil Reed Amar, *Presidents, Vice Presidents, and Death: Closing the Constitution’s Succession Gap*, 48 ARK. L. REV. 215 (1995); see also Allan P. Sindler, *Presidential Selection and Succession in Special Situations*, in PRESIDENTIAL SELECTION 331, 351-54 (Alexander Heard & Michael Nelson eds., 1987).

111. For similar suggestions, see FEERICK, *supra* note 20, at 262 (describing New York Governor Rockefeller’s “First Secretary” proposal); SILVA, *supra* note 74, at 175-76 (advocating creation of the office of Assistant President).

112. See SILVA, *supra* note 74, at 154-55, 157.

113. For a discussion of interim elections, see text accompanying notes 121-125, 144 *infra*.

mid-November, December, or early January. Thus, when fully considered, the modern rise of political parties and a populist Presidency does not undercut, but in fact buttresses, the case against legislative succession.

II. THE STATUTORY EVOLUTION

Given the powerful textual, historical, and structural arguments identified above, how could Congress have ever enacted 3 U.S.C. section 19? To answer this question, and to understand the evolution of the federal succession statute, we must go back to the earliest version, enacted in 1792.¹¹⁴ One major faction of the Second Congress wanted the Secretary of State to follow the Vice President in the succession order.¹¹⁵ The Secretary of State at the time was Thomas Jefferson. Another faction, however, consisted of Jefferson's political opponents: the Federalist party, headed by Secretary of the Treasury Alexander Hamilton, who saw *himself* as the chief Cabinet officer.¹¹⁶ The Succession Act of 1792 resolved this rivalry between Jefferson and Hamilton¹¹⁷ by identifying the President pro tempore and then the Speaker as the first two in line after the Vice President.¹¹⁸ In other words, Congress declared a pox on both executive departments and (not surprisingly) favored its own.¹¹⁹ Because political rival-

114. For general background on the political circumstances giving rise to the 1792 Act, see Brown & Cinquegrana, *supra* note 20, at 1418; Silva, *supra* note 13, at 458-60.

115. Silva, *supra* note 13, at 458-59.

116. See *id.* at 459-60 (contending that the first succession act, favoring legislative succession, resulted "from Hamilton's antipathy for Jefferson, not from mature deliberation").

117. See 2 ANNALS OF CONG. 1904 (Jan. 10, 1791) (remarks of Rep. Seney) ("He was not for making any decision that would give umbrage to any officer of the Government. The Secretary of State and the Secretary of the Treasury were equally entitled to the public notice.").

118. Act of Mar. 1, 1792, ch. 8, § 9, 1 Stat. 239, 240 (repealed 1886).

119. Two other (ultimately unsatisfactory) notions may have made it seem natural or appropriate to place the President pro tempore next in line. First, the Senate, in some ways, resembles an executive council, playing a role in advising on, as well as consenting to, executive appointments and treaty-making. See U.S. CONST. art. II, § 2, cl. 2. Cf. WOOD, *supra* note 13, at 138-39 (noting that in most colonial governments, but not in early revolutionary state constitutions, the upper branch of the legislature also served as the governor's council). But this vision of the Senate contradicts the strong separation of executive and legislative personnel embodied in revolutionary state constitutions and in the Incompatibility Clause of the federal Constitution. See *id.* at 138 (noting criticism of early colonial councils which mixed legislative and magisterial duties); see generally Calabresi & Larsen, *supra* note 9 (discussing the Incompatibility Clause's role in maintaining separation of powers).

Second, some in Congress believed that since the Vice President—the *ex officio* Senate President—succeeds a fallen President, the next official in line should be the Vice President's replacement as Senate presider: the President pro tempore. Indeed, Roger Sherman (wrongly) thought that the President pro tempore, following Vice Presidential ascension, would himself *become* Vice President. See 2 ANNALS OF CONG. 1903 (Jan. 10, 1791), 1912 (Jan. 13, 1791). Sherman's textual mistake mirrors his structural myopia: Unlike the Vice President, the President pro tempore formally represents but a single state. His ascension to the Presidency would thus raise distinct issues of state favoritism and disuniformity. See note 25 *supra* and accompanying text. And to remain in office, a Senator (unlike a Vice President) might need to win state reelection in an off-year election. This would have made the Acting President of the United States dependent on a single state legislature.

Once the decision was made to put the President pro tempore at the top of the Succession Act list, notions of bicameralism may have argued for the Speaker's placement next in line. But see 3 ANNALS OF CONG. 281 (Dec. 22, 1791) (remarks of Rep. Gerry) ("[H]e hoped that the House would never consent to making their Speaker an amphibious animal."). Gerry did support the inclusion of the President pro tempore in the Succession Act. See *id.* at 302-03 (Jan. 2, 1792). Thus he appears to have believed that the Senate was already "amphibious"—mixing executive and legislative functions (but not

ries influenced the 1792 Act, and because Founding giants such as Madison doubted the constitutionality of legislative succession, some twentieth century Congressmen have rightly questioned the authoritativeness of the early Congress' constitutional views.¹²⁰

The 1792 Act does have one other noteworthy aspect: a provision for an immediate national presidential election in the event the succession statute is triggered.¹²¹ The "Officer" who assumed the Presidency under the Act would do so only for as long as was necessary to conduct a new election. This special election procedure squares perfectly with the Constitution's Succession Clause, which empowers Congress to specify an Acting President to serve "until . . . a President shall be elected,"¹²² without explicitly insisting that the country wait for a regular quadrennial election. Indeed, at the Philadelphia Convention, James Madison took special pains to ensure that the Succession Clause was worded to accommodate the possibility of an "intermediate election of the President."¹²³ And at the Virginia ratifying convention, he made public assurances that in the event of double death, "the election of another President will immediately take place."¹²⁴ As we urge in greater detail below, this "special election" provision should be resurrected today.¹²⁵

In repealing the 1792 Act with the Act of 1886, Congress implemented a succession scheme that excluded members of Congress, providing instead for Cabinet succession.¹²⁶ The 1886 Act also gave Congress discretion on whether

personnel) in its "Advice and Consent" concerning appointments and treatymaking—in ways the House was not.

120. For example, during the debates over the 1947 Act, Senator Hatch submitted a legal memorandum stating:

the original succession law was the offspring of a rivalry existing at the time between Mr. Hamilton, the Secretary of the Treasury, and Mr. Jefferson, then Secretary of State. It was the "product of the personal and political animosities of that hour rather than one of deliberate judgment of the Congress that passed it."

93 CONG. REC. 7769 (1947). See also *id.* at 8629 (similar remarks of Rep. Gwynne). We should also note that votes in the Second Congress over inclusion of legislators were close. On January 2, 1792, the House defeated a motion to strike the President pro tempore by a vote of 27 to 24. The same day, the House passed a motion to strike the Speaker by a vote of 26 to 25. Five days later, a motion to strike both carried 32 to 22. Only after the Senate (acting behind closed doors) refused to yield the point did the House give in by a vote of 31 to 24. FEERICK, *supra* note 20, at 59-60. For a more general discussion of the perils of overreliance on early Congresses' constructions of the Constitution, see Calabresi & Prakash, *supra* note 43, at 551-59.

121. Act of Mar. 1, 1792, ch. 8, § 10, 1 Stat. 239, 240-41 (repealed 1886).

122. U.S. CONST. art. II, § 1, cl. 6.

123. RECORDS, *supra* note 16, at 535; see also *id.* at 599 & n.23, 626 (detailing variations in Succession Clause language about "chusing" another President).

124. 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, 487-88 (Jonathan Elliot ed.) (2d ed. Washington 1836).

125. Some doubt congressional power to call a special election. Hamlin, *supra* note 43, at 193-94; Silva, *supra* note 13, at 469-75. But the Succession Clause explicitly empowers Congress to "by Law provide for the Case of" double vacancy in the White House. U.S. CONST. art. II, § 1, cl. 6. The power to call a special election by law seems implicit here and clearly intended. Above and beyond the clear words and implication of this clause, the letter and spirit of the so-called "Sweeping Clause" give Congress power to pass "all Laws which shall be necessary and proper for carrying into Execution . . . Powers vested by [the] Constitution . . . in any Department or Officer." U.S. CONST. art. I, § 8, cl. 18 (emphasis added).

126. Act of Jan. 19, 1886, ch. 4, § 1, 24 Stat. 1, 1 (repealed 1947).

to call a special presidential election.¹²⁷ The legislative debates of the 1886 Act, both in the House and the Senate, reflected: (1) widespread doubt as to the constitutionality of the 1792 Act, based in large part on the scope of the term "Officer"; (2) disenchantment with the conflict-of-interest shenanigans during Andrew Johnson's 1868 impeachment; and (3) concern that legislative succession could deliver the Oval Office keys to the party locked out of the White House by the People on Presidential Election Day.¹²⁸

In 1947, Congress again revised the succession order by enacting section 19, which reinstates legislators atop the list, but this time with the President pro tempore following the Speaker.¹²⁹ Several members of Congress argued against the constitutionality of the 1947 law during the legislative debates, but the bill's supporters relied on an opinion by Acting Attorney General Douglas McGregor, who concluded that congressmen were "Officers" within the meaning of the Succession Clause.¹³⁰ McGregor's reasoning is—not to mince words—shoddy.¹³¹ Importantly, the 1947 version, which still governs today,

127. *Id.* See also Hamlin, *supra* note 43, at 191-94 (discussing special election under the Act); cf. Silva, *supra* note 13, at 472-73 (noting objections to reading a special election provision into the 1886 Act but ultimately concluding that such a provision was intended).

128. See 93 CONG. REC. 7769 (1947) (reproducing a report by Sen. Hatch which details objections during debate over the 1886 Act to deeming the Speaker and President pro tempore "Officers" for succession purposes); FEERICK, *supra* note 20, at 144-45; FEERICK, *supra* note 65, at 41. For more discussion, see Brown & Cinquegrana, *supra* note 20, at 1420-21; Silva, *supra* note 13, at 451-52, 461-63; Sindler, *supra* note 110, at 346.

129. 3 U.S.C. § 19(a)(1), (b) (1994). The belief that legislative leaders, unlike Cabinet members (or federal judges), enjoyed an "electoral mandate" spurred President Truman to ask Congress to reinstate the President pro tempore and Speaker atop the succession list. FEERICK, *supra* note 20, at 205-06; Brown & Cinquegrana, *supra* note 20, at 1421-30 & n.111; Sindler, *supra* note 110, at 353; Silva, *supra* note 13, at 454-55. But see text accompanying notes 102-113 *supra* (arguing that Cabinet members possess a greater national electoral mandate than legislators).

130. 93 CONG. REC. 8621-22 (1947) (reprinting Letter from Acting Attorney General Douglas W. McGregor to Hon. Earl C. Michener, Chairman, House Comm. on the Judiciary).

131. McGregor leaned heavily on the early Congress' interpretation of the Succession Clause, as reflected in the Act of 1792. Such strong reliance on early congressional interpretations, infected by political self-dealing, is misplaced. See note 120 *supra* and accompanying text. Moreover, the 1792 and the 1947 Acts differed in key ways. The 1947 Act explicitly required an ascending legislator to resign his legislative leadership, but the 1792 Act maintained a pointed silence on this. Several lawmakers who voted for the 1792 Act apparently thought that resignation was not required. This judgment is obviously unconstitutional, see text accompanying notes 34-35 *supra*, and thus provides little comfort to supporters of the 1947 Act. Other early legislators may have believed that the Constitution did indeed require resignation, but they failed to come to grips with the unique practical and constitutional problems created by resignation. See notes 30-49 *supra* and accompanying text. In short, by failing to *explicitly* address the resignation dilemma that Madison posed, see note 143 *infra*, the Second Congress simply evaded the key analytic issue, and thus the Act is entitled to little weight as a considered constitutional judgment. (And, of course, no statutory succession ever took place under the 1792 Act—or has yet to take place under the 1947 Act—and so the practical slate remains relatively clean.)

McGregor also stressed the breadth of the word "Officer" in the Succession Clause, but he failed to address the textual and structural criticisms of that construction raised in this article. Finally, McGregor waved in the direction of *Lamar v. United States*, in which the Court decided that an imposter Congressman had falsely portrayed himself as an "officer acting under the authority of the United States" within the meaning of a 1909 fraud statute. *Lamar v. United States*, 241 U.S. 103, 112-15 (1916). But the Justices in *Lamar* took great pains to stress that a term can have one meaning in a statute and another in the Constitution. See *id.* at 112; *Lamar v. United States*, 240 U.S. 60, 65 (1916) (same case) ("As to the construction of the Constitution being involved, it obviously is not . . . [O]f course words may be used in a statute in a different sense from that in which they are used in the Constitution."). Correct interpretation requires careful examination of the *Constitution itself*, and this McGregor failed to offer.

omitted—over President Truman's objection—any provision for an immediate election should the succession act be triggered.¹³²

Other provisions of section 19 of the 1947 Act have created additional constitutional and practical problems. First, section 19 provides that a Cabinet officer who assumes the Presidency after the Speaker and President pro tempore have passed up their chance can later be "bumped" out of the Oval Office if either legislator changes his mind or is replaced by a new legislative leader.¹³³ Bumping creates huge problems of logistics and fosters gamesmanship.¹³⁴ It also seems to violate the plain meaning of the Constitution.¹³⁵ Under the Succession Clause, Congress may declare what Officer shall succeed and such officer shall "then act as President . . . until the [presidential or vice presidential] Disability be removed, or a President shall be elected."¹³⁶ By what logic, or authority, can Congress instead declare that an Officer shall act as President *until some other suitor wants the job*? Neither the Act of 1792 nor the Act of 1886 provided for bumping; on the contrary, the author of the 1886 Act, Senator Hoar, proclaimed bumping unconstitutional.¹³⁷ To make matters even fishier, only *congressional* leaders can bump under section 19; a higher ranking Cabinet officer cannot bump a lower ranking officer once the latter has assumed the office of Acting President. This selective bumping smacks of legislative self-dealing.

Second, the 1947 Act requires any Cabinet officer who ascends to resign his Cabinet post in order to act as President.¹³⁸ Consider the case where the Vice Presidency is vacant and the President becomes temporarily disabled—say, an operation will put her out of action for an anticipated two weeks. Neither the Speaker nor the President pro tempore is likely to resign his legislative seat to act as President for a mere two weeks—and, as we have seen, the Incompatibility Clause demands this resignation.¹³⁹ The ball, therefore, now bounces into the Secretary of State's court. Section 19 forces him to give up his State Department post in order to act as President; and once the disabled

132. See FEERICK, *supra* note 20, at 205-08; Brown & Cinquegrana, *supra* note 20, at 1421-22 & n.111; Silva, *supra* note 13, at 456; Sindler, *supra* note 110, at 335.

133. 3 U.S.C. § 19(d)(2) (1994).

134. FEERICK, *supra* note 20, at 268-69 (noting that bumping could result in several Presidencies within a short period and that Cabinet officers serving as Acting President would be "straitjacketed"); Brown & Cinquegrana, *supra* note 20, at 1437-40, 1448-50 (hypothesizing the political jockeying by Speaker Tip O'Neill, President pro tempore Strom Thurmond, and Secretary of State George Schultz that could have occurred in the wake of the assassination attempt on President Reagan and arguing for reform of § 19's bumping provision).

135. See FEERICK, *supra* note 20, at 268-69; SILVA, *supra* note 74, at 175.

136. U.S. CONST. art. II, § 1, cl. 6 (emphasis added).

137. 17 CONG. REC. 220 (1885) ("You never go back up the ladder after you have gone down around."); 14 CONG. REC. 880 (1883) (recording Hoar's belief that Congress may appoint a successor President until disability ceases or a new election occurs, but not until another officer qualifies); see also Silva, *supra* note 13, at 469 & n.68 (citing Hoar's remarks during congressional debates between 1883 and 1886).

138. 3 U.S.C. § 19(d)(3) (1994).

139. See text accompanying notes 30-38 *supra*. Section 19 also explicitly requires that an ascending Speaker must resign both his legislative seat and his Speakership. 3 U.S.C. § 19(a)(1) (1994). Similarly, an ascending President pro tempore must likewise resign from the Senate and from his Senate office. *Id.* at § 19(b).

President recovers and resumes the reins, the Secretary will regain his post only by rerunning the nomination and confirmation gauntlet. This hardly seems a fitting reward for a good and faithful public servant. The Act of 1886 did not require Cabinet resignation; on the contrary, as discussed earlier, many of its backers believed that a Cabinet officer *must* keep his post to act as President.¹⁴⁰

In short, legislative debates over the centuries do little to refute the force of our analysis in this article. Once, in 1886, Congress denied itself; and twice, in 1792 and 1947, Congress favored its own. Constitutionally, Congress' self-denial was a far, far better thing than its self-dealing.

III. THE BURDEN OF PERSUASION

In the end, the question is not just whose reading of the Succession Clause is best. We must bear in mind the factual contexts in which succession becomes an issue. Statutory succession provisions are triggered by events that rock the very foundations of the country's political and social stability. Constitutional faiths, too, are at stake during these periods of crisis. The need for a smooth, orderly, lawful, ethical, and uncontroversial transition of power is at its peak. Precisely because our nation needs to instill confidence in the constitutional rule of law, we establish succession schemes *before* the need to use them should arise.¹⁴¹ We should devise and construe these schemes to minimize the self-dealing opportunities and logistical glitches that will threaten any successor President's legitimacy at home and abroad. In implementing the Succession Clause, we should steer wide of any sizeable constitutional or ethical challenges. Even a little uncertainty about the legitimacy or constitutionality of a presidential successor makes an already sad situation unacceptably worse.¹⁴²

Thus, if our constitutional criticisms of section 19 merely inspire serious doubt about the current succession scheme, those criticisms become winners because of the stakes involved. In fact, as we have seen, these criticisms are more than substantial. The most straightforward reading of the Constitution's text, the clear implication of five related yet distinct structural themes, and the spirit of twentieth century developments all point to the same conclusion: Legislators are not "Officers" under the Succession Clause.¹⁴³ And if this is so,

140. See notes 44-47 *supra* and accompanying text.

141. Amar, *supra* note 110, at 215, 221-22, 227.

142. Consider, for example, the uncertainty of succession revealed by a careful reading of Secretary of State Haig's 1981 comments. See note 83 *supra*.

143. Some of the most important constitutional arguments against legislative succession were flagged by James Madison in his letter to Edmund Pendleton lamenting the "err[or]" Congress made in enacting the Succession Act of 1792 placing the President pro tempore and Speaker on the list:

1. It may be questioned whether these are *officers*, in the constitutional sense. 2. If officers whether both could be introduced. 3. As they are created by the Constitution, they would probably have been there designated if contemplated for such a service, instead of being left to Legislative selection. 4. Either they will retain their *legislative* stations, and their incompatible functions will be blended; or the incompatibility will supersede those stations, [and] then those being the substratum of the adventitious functions, these must fail also. The Constitution says, Cong[ress] may declare *what officers* [etc.,] which seems to make it not an appointment or a translation; but an annexation of one office or trust to another office. The House of

Congress should act now rather than risk a national crisis when tragedy suddenly strikes.

We also believe that a sensible modern day succession statute should provide for a prompt national election should events trigger statutory succession. On this point, we recommend reenactment of some form of the 1792 Act's

Rep[resentatives] proposed to substitute the Secretary of State, but the Senate disagreed, [and] there being much delicacy in the matter it was not pressed by the former.

Letter from James Madison to Edmund Pendleton, *supra* note 20, at 235-36. With remarkable grace and pith, Madison thus set the stage for much of our analysis today.

To the extent that Professor Manning disagrees with us (and with Madison) we are unpersuaded. The Constitution must mean *something*—the best reading of the document either permits or bars legislative succession. Manning tries to raise doubts about our reading, but fails to weave together a coherent set of arguments that a contrary reading is equally or more plausible overall. Some of his objections just don't wash. For example, he criticizes our reading of the term "officer" as the least natural *textually*, but fails to see that the most "natural" textual reading is one that accounts for a provision's place in the larger constitutional structure. (This error, and others, would have been more evident had he in fact tried to make the affirmative case for legislative succession.)

Manning's key suggestion is that an Acting President is not, as such, an "Officer of the United States." See John F. Manning, *Not Proved: Some Lingering Questions About Legislative Succession to the Presidency*, 48 STAN. L. REV. 141, 143, 145 (1995). This is a novel claim—which itself should worry a self-described traditionalist—and an odd one. If an acting President, wielding the full and awesome executive power of the United States, is not an "Officer of the United States," what is he? And if he does not "hold [] an [] Office under the United States," U.S. CONST. art. I, § 6, cl. 2 (Incompatibility Clause), it's hard to see why he must (or even can) take the Presidential *oath of office*, *id.* art. II, § 1, cl. 8 (Presidential Oath Clause), or how he could be "*removed from Office*" via the impeachment process, *id.* art. II, § 4 (Impeachment Clause).

To avoid the terrifying Scylla of an utterly unaccountable President—a nonofficer officer—Manning lurches toward Charybdis. On his account, a Speaker remains Acting President only by retaining his Speakership and thus the support of a House majority. Manning, *supra*, at 146 n.29. But this simply creates a Parliamentary Prime Minister eligible to preside simultaneously at both ends of Pennsylvania Avenue, and removable at will by a mere majority of the House. Indeed, to stay in the Oval Office, the Speaker must win reelection in his district in an off-year election. All this makes sense in a Parliamentary system, but the idea that the Nation's President should be dependent on the will of a single district is anathema to our Constitution. These huge structural anomalies are not *de minimis* when they happen, and Manning's approach makes them more likely to happen *ex ante*. The warped incentives created by legislative succession can cause double vacancies by encouraging groundless impeachments and unreasonable delays in filling vice-presidential vacancies. Manning's exigency is not exogenous. (And special elections cannot cure this, since they are not required by the Constitution, or even by the 1947 Act.)

To support this radical Prime Ministerialization of America, Manning points to the Vice Presidency. Manning, *supra*, at 148-50. But the plain language of the Constitution prevents a Vice President/Acting President from blending executive and legislative leadership by simultaneously presiding at both ends of Pennsylvania Avenue. See note 48 *supra*; text accompanying notes 32 & 56 *supra*. And unlike Manning's Speaker, the Vice President/Acting President cannot be ousted merely because a bare House majority decides at any point that they don't like him; instead, he is removable only if impeached and convicted of "high crimes and misdemeanors." Manning also ignores other key differences between Vice President and Senators. See note 119 *supra*. Thus, he is left in the awkward position of (properly) admitting that a Virginia governor may not act as President, but (oddly) suggesting that a Virginia Senator may so act, even though the Senator may have to win reelection in Virginia to remain in the Oval Office.

Manning also leans heavily on the self-dealing Act of 1792, but early Acts cannot repeal clear constitutional principles. (Otherwise, the infamous Sedition Act of 1798 repealed the First Amendment.) Here, the structural arguments were not, on balance, close in 1792. And we reject Manning's muffled claim that an amendment passed in the 1960s somehow retroactively changed the fact that Congress "clearly erred" (Madison's phrase) in 1792. (Manning also blurs real differences between legislators and Cabinet members under the Twenty-Fifth Amendment. See note 101 *supra*.)

For additional arguments casting doubt on Manning's approach, but approximating his conclusion that Congress should repeal the 1947 Act on constitutional grounds, while courts should stay out, see Steven G. Calabresi, *The Political Question of Presidential Succession*, 48 STAN. L. REV. 155 (1995).

special election device. If, God forbid, a bomb were to go off at the inaugural celebration, the People of the United States should not be stuck for four years with a President they did not elect—a President who, indeed, may represent a party they decisively rejected on Election Day.¹⁴⁴ Provision for a special election should be fixed in advance in a succession statute, rather than left to congressional discretion after statutory succession has occurred. On this single point, the Act of 1792 was far better than the Act of 1886, which effectively gave Congress discretion to determine the term of a successor President. Such discretion is very much in keeping with a British Parliamentary model, but not with the structural separation of powers established by the American Constitution.¹⁴⁵

144. Under our proposal, the interim President elected in a special election would merely serve out the remainder of the regular term; the regular rhythm of quadrennial Leap Year elections would remain undisturbed. Some have argued that because a President must serve a four-year term under the language of Article II, Section 1, Clause 1 ("[the President] shall hold his Office during the Term of four Years"), a specially elected President must be elected for a *new* four year term. *E.g.*, FEERICK, *supra* note 20, at 146 (noting that it was assumed during debates over the 1886 Act that special election would result in a four-year term for the new successor President-elect); Silva, *supra* note 13, at 474-75 (stating that most scholars conclude that a special election must result in a *new* four-year term). Such arguments misread the Term Clause by applying it beyond its intended scope. The clause specifies the standard term of an *ordinarily elected* President, but it does not apply to *specially elected* Presidents. Precisely because, contrary to the Term Clause, a prior President did *not* "hold his Office during the Term of four years," Congress may call a special election to *complete the prior President's term*, rather than to begin a new one. Similarly, a Vice President who, after the death of a President, himself "become[s] President" under the Twenty-Fifth Amendment does not begin his own new four-year term but merely completes his predecessor's term. And a person who becomes Vice President under Section 2 of the Twenty-Fifth Amendment likewise serves out the remainder of her predecessor's term rather than a new four-year term. This reading preserves the permanent synchronization of presidential and congressional elections, an important part of the constitutional system in place over the last two centuries.

The precise timing of the special election poses the following dilemma: we must allow enough time for grieving, campaigning, and choosing, but the more time allowed for all this, the less time left in the original four-year term. *See* FEERICK *supra* note 65, at 222. Assuming that a proper special election could be conducted within six or seven months of statutory succession, such an extra election would make sense only if succession occurred within the first two-and-a-half years of a regular presidential term.

Some have argued that, since a proper presidential election requires a simultaneous vice-presidential election, Section 2 of the Twenty-Fifth Amendment effectively repealed the Founders' special election option: A statutory successor President, the argument runs, can nominate a new Vice President, who, once confirmed, cannot be ousted from office until the next quadrennial election. FEERICK, *supra* note 65, at 226. This argument invites three big criticisms. First, the Twenty-Fifth Amendment sharply distinguishes between the powers of a true "President" and those of an "Acting President." *See* U.S. CONST. amend. XXV, § 3. Only a "President" can nominate under Section 2. And, strictly speaking, a statutory successor is not a true President, but only an "Officer . . . act[ing] as President" under the Succession Clause—an "Acting President" within the meaning of the Twenty-Fifth Amendment. *Contra* Brown & Cinquegrana, *supra* note 20, at 1405 n.60, 1441-44 (arguing that an Acting President has discretion to nominate a new Vice President). Second, even if a statutory Acting President can invoke Section 2, it is hard to see how he could do more than nominate an *Acting* Vice President whose tenure would track his own. Since his own tenure is clearly limited by the special election option, so too with the tenure of his Acting Vice President. (This preserves Article II's requirement that a President and his Vice President serve the "same Term." U.S. CONST., art. II, § 1, cl. 1 (emphasis added).) Third, a special presidential election need not mirror a regular quadrennial election in every respect. Just as a special election may be for a short "residue" term, perhaps it may also depart from tradition and be a "President-only" election if the Vice Presidency were somehow deemed "filled" under Section 2.

145. *See* Hamlin, *supra* note 43, at 192-93.

If, as we strongly urge, Congress ever revisits presidential succession, two additional items cry out for legislative solution. First, Congress should provide for various scenarios of prepresidential death or disability. What if a leading candidate dies or becomes disabled right before Election Day? Or if the Election Day winner, the *de facto* President elect, dies or becomes disabled before the electoral college meets? Or if the electoral college winner dies or becomes disabled before the electoral votes are counted in Congress? A sensible legislative solution would postpone elections in the event of a candidate's death before Election Day, but would treat the Election Day winner as *de facto* President elect, whose death should trigger the same apostolic succession rules applicable in postInauguration scenarios.¹⁴⁶

Second, Congress needs to create a statutory mechanism for determining and responding to disability in the White House under conditions where Section 4 of the Twenty-Fifth Amendment is unavailing. Section 4 currently pivots on the Vice President's power to certify the President's disability. But what if the Vice Presidency is temporarily vacant and an issue of presidential disability arises? Or if the Vice President assumes the reins as Acting President, and then her own disability comes into question? Or if the President is (for now) healthy and in control, but an issue of vice presidential disability arises? A sensible statute would address these problems by giving the next person in the succession line—in our model, a Cabinet official like the Secretary of State—the same kind of triggering role that Section 4 of the Twenty-Fifth Amendment gives the Vice President.

In light of our textual, structural, political, practical, and ethical concerns about section 19, we suggest that Speaker Gingrich might do well to consider adding one more item to his already crowded reform agenda: amendment of the problematic statute that might one day make him President, but might not make him legitimate or even constitutional.¹⁴⁷

146. For elaboration of the details of such a legislative solution, see Amar, *supra* note 110, at 222-38.

147. For the record, we voiced similar concerns well before Newt Gingrich ever became Speaker. See Amar & Amar, *supra* note 1, at 914 & n.4, 943-44, 946-47 (criticizing schemes that might award the Presidency to someone who lacks a national electoral mandate); Amar, *supra* note 110, at 237 n.30 (reflecting ideas presented in a symposium held in April 1994 and in testimony given before the U.S. Senate in February 1994).

