

# THE CONSTITUTIONAL POLITICS OF PRESIDENTIAL SUCCESSION

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## I. INTRODUCTION

Imagine terror strikes the nation. As the President approaches the dais to deliver the annual State of the Union Address to a joint session of Congress, terrorists unleash the horror of a weapon of mass destruction in the heart of Washington. When first responders arrive onto the scene, they comb through the rubble of bricks, mortar, and bodies, hoping to identify the President and the Vice President. But neither has survived the attack. Who will lead the nation?

The untimely death of President Franklin Delano Roosevelt during the Second World War triggered a similar scramble for certainty amid a comparably disastrous crisis of insecurity. Congress ultimately passed a new law establishing a line of succession to the presidency. Under the Presidential Succession Act of 1947, the Speaker of the House and the Senate President pro tempore follow respectively when the President and Vice President are unable to serve.<sup>1</sup> Next in line is each of the Cabinet secretaries according to departmental seniority, meaning that State, Treasury, and Defense sit atop the list, while Labor, Health and Human Services, Transportation, and Education fall in the middle with others, and Homeland Security is last.<sup>2</sup>

This line of succession is dead wrong. The Speaker of the House and the Senate President pro tempore may be schooled in the science of legislation but both are inexpert in the art of popular leadership. Neither possesses the presidential timbre necessary to pilot the country in the aftermath of an attack nor enjoys the democratic legitimacy that only a national election can confer. And consigning the Homeland Security Secretary to the bottom of the list only confirms the folly of the current presidential succession law, which imprudently privileges politics and tradition over competence and leadership.

No one knows how the Speaker, Senate elder, or a Cabinet secretary would fare were time and chance to catapult one of them into the presidency. Until a crisis descends upon the United States and thrusts someone unexpectedly into the Oval Office, no one can know whether that person will exhibit the necessary presidential ability to steer the nation through tumultuous times and, ultimately, back to normalcy. After all, the Speaker earns her stripes not on the strength of public moral suasion, but rather in the privacy of backroom machinations. For her part, the Senate President pro tempore rises to her role based alone on time served in the chamber. And Cabinet secretaries are chosen not

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1. 3 U.S.C. § 19(a)(1), (b) (2006).

2. *Id.* § 19(d)(1).

for their presidential promise, but rather for their professional and political profile.

That is precisely why the current line of succession is no safer than playing presidential roulette. The line of succession should therefore be amended in the interest of proven leadership and competence. We can conceive any number of creative institutional arrangements to serve these interests. But the task I have given myself in these pages is to propose and defend one alternative in particular. I have chosen this approach for two reasons. First, I believe the succession model I will propose below is the best alternative to the current succession regime. Second, even if readers disagree with my suggestion, the larger purpose of this project nevertheless remains achievable: to probe the values that currently shape presidential succession and to invite reflection about whether they are the right ones for our time.

What should replace the current presidential succession sequence? Here is what I suggest: the solution is to revise the order of succession to insert former living Presidents—in reverse chronological order of service, beginning with former Presidents of the same party as the unavailable president—into the line of succession and to concurrently remove the Speaker of the House and the Senate President pro tempore. Under this new presidential succession sequence, a former President will serve only temporarily until a special election is held to elect a new head of state. Former Presidents are the only ones equipped with the proven competence, domestic reputation, and foreign stature needed to pull the United States out of the depths of disaster. Moreover, they are known quantities seen as motivated by the public interest and not driven by political posturing. Unlike the Speaker of the House, Senate President pro tempore, and Cabinet secretaries, former Presidents have deliberated on weighty matters of state in the White House, presided over national security meetings in the ultra-secure situation room, and observed our dangerous world from the unique perspective of the presidency. With a former President at the helm during a national crisis, no longer would presidential succession be like a game of presidential roulette. Instead, in the aftermath of a devastating terrorist strike, the nation would be secure in competent hands and resolute on its march toward rebuilding the nation and its institutions.

I will begin to construct this argument, in Part II, by critiquing the current succession regime. I will explore the foresights of the constitutional Founders, discuss the original statutory succession design and its subsequent revisions, and conclude by painting a troubling portrait of the modern sequence of presidential succession. In Part III, I will turn to the high stakes of succession, and point to the constitutional,

political, and prudential shortcomings of the existing rules of presidential succession. Having deconstructed presidential succession in Parts II and III, I will reconstruct the succession regime in Part IV with a proposed solution to correct the deficiencies in the current order of presidential succession. Part V will offer closing reflections.

## II. THE SUCCESSION REGIME

The presidential succession regime has raised perilous problems, both lived and imagined, over the course of American history. Even today, centuries into the American project of democracy, ambiguities continue to linger about the rules governing presidential succession. For example, what happens if an emergency foils the President-elect from taking the presidential oath just moments before reciting it?<sup>3</sup> What is the difference between presidential inability and presidential disability?<sup>4</sup> May a two-term President accept the vice presidential nomination and then succeed to the presidency?<sup>5</sup> And what should we make of the requirement mandating presidential eligibility only for a “natural born Citizen, or a Citizen of the United States”:<sup>6</sup> does it disqualify statutory successors born in the District of Columbia?<sup>7</sup>

Even the Twenty-Fifth Amendment<sup>8</sup>—which was adopted in the aftermath of the assassination of John F. Kennedy to constitutionalize rules to navigate a presidential disability and to fill a vice presidential vacancy<sup>9</sup>—fails to answer important questions about presidential succession. What assurances must the Vice President make, and to whom must she make them, to avoid the appearance of commandeering the presidency when she claims the President is unable to discharge the

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3. See Bruce Peabody, *Imperfect Oaths, the Primed President, and an Abundance of Constitutional Caution*, 104 NW. U. L. REV. COLLOQUY 12, 21 (2009), <http://www.law.northwestern.edu/lawreview/colloquy/2009/26/LRColl2009n26Peabody.pdf>.

4. See Calvin Bellamy, *Presidential Disability: The Twenty-Fifth Amendment Still an Untried Tool*, 9 B.U. PUB. INT. L.J. 373, 380 (2000).

5. Compare Bruce G. Peabody & Scott E. Gant, *The Twice and Future President: Constitutional Interstices and the Twenty-Second Amendment*, 83 MINN. L. REV. 565, 619 (1999) (suggesting that a two-term President is constitutionally eligible to serve as Vice President), with BRUCE A. ACKERMAN, *BEFORE THE NEXT ATTACK: PRESERVING CIVIL LIBERTIES IN AN AGE OF TERRORISM* 204-05 n.34 (2006) (opposing the Peabody & Gant interpretation).

6. U.S. CONST. art. II, § 1.

7. See Sarah Helene Duggin & Mary Beth Collins, *‘Natural Born’ in the USA: The Striking Unfairness and Dangerous Ambiguity of the Constitution’s Presidential Qualifications Clause and Why We Need to Fix It*, 85 B.U. L. REV. 53, 60 n.26 (2005).

8. U.S. CONST. amend. XXV, § 1 (establishing that upon removal, death, or resignation of the President, the Vice President becomes President).

9. See Katy J. Harriger, *Who Should Decide? Constitutional and Political Issues Regarding Section 4 of the Twenty-Fifth Amendment*, 30 WAKE FOREST L. REV. 563, 565-66 (1995).

powers of the presidency?<sup>10</sup> How, and by whom, may a statutory successor be deemed incapacitated and therefore unfit to continue her temporary presidential service?<sup>11</sup> Who conducts the medical evaluation upon which to base the decision to deem the President unfit to serve?<sup>12</sup> What may Congress characterize as conclusive evidence of presidential disability?<sup>13</sup> What procedures does the Constitution provide for resolving competing claims to the presidency?<sup>14</sup> And on what basis must or may Congress decide whether the President is psychologically fit to serve in the high office?<sup>15</sup> The Constitution does not answer these questions.

But the Founders could not possibly have foreseen these and other succession uncertainties in their draft of the new constitution. Their grand revolutionary mission was not to write a statutory constitution that would outline with exquisite specificity all contingencies for the administration, regulation, selection, and continuity of government. Their task was instead the larger and more conceptual undertaking of re-orienting government toward the broad objectives of furthering national expansion, permitting industrial growth, and preserving individual liberties. The constitutional text was therefore cast as an organic document whose details would be left to the first and subsequent congressional sessions.<sup>16</sup>

#### A. *Founding Foresight*

When the constitutional drafters gathered in 1787 to rewrite the charter governing what would soon become the United States, the subject of presidential succession was far from a priority. There were

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10. *See id.* at 578.

11. *See* Paul Taylor, *Proposals to Prevent Discontinuity in Government and Preserve the Right to Elected Representation*, 54 SYRACUSE L. REV. 435, 471-72 (2004).

12. *See* Bert E. Park, *Protecting the National Interest: A Strategy for Assessing Presidential Impairment Within the Context of the Twenty-Fifth Amendment*, 30 WAKE FOREST L. REV. 593, 594 (1995).

13. *See* Scott E. Gant, *Presidential Inability and the Twenty-Fifth Amendment's Unexplored Removal Provisions*, 1999 L. REV. MICH. ST. U. DETROIT C. L. 791, 796 (stating that the Twenty-Fifth Amendment's failure to define the terms "unable" and "inability" has led some to argue that these terms apply to any circumstance keeping the President from discharging her duties).

14. *See* Richard E. Neustadt, Douglas Dillon Professor of Gov't, Emeritus Harvard Univ., *The Twenty-Fifth Amendment and Its Achilles Heel*, Keynote Address to the Working Group on Disability in U.S. Presidents at the Carter Center of Emory University (Jan. 26, 1995), in 30 WAKE FOREST L. REV. 427, 434-35 (1995) (arguing that "discretionary procedures" are necessary to resolve competing claims for the presidency, and offering examples of such procedures).

15. *See* Kirath Raj, Note, *The Presidents' Mental Health*, 31 AM. J.L. & MED. 509, 521 (2005).

16. *See* John D. Feerick, *Writing Like a Lawyer*, 21 FORDHAM URB. L.J. 381, 382 (1993).

more pressing items on the agenda: defending the new republic against foreign invasion, assuaging tensions between states, regulating the conduct of commerce across the land, and fashioning a new structure of government that would frustrate those individuals and institutions with designs on concentrating power.<sup>17</sup> When the Constitutional Convention finally broached the subject of succession, not only had the Convention reached its final days, but succession arose only against the backdrop of bigger discussions about the role of the Vice President.<sup>18</sup>

That succession did not feature foremost in the minds of the Founders is surprising. As students of political history,<sup>19</sup> the Founders had internalized the received wisdom of the many succession transitions across the Early and Middle Ages. They had studied the work of Numa and Tullus Hostilius, the two elective successors of Romulus who put the final touches on the original Roman government.<sup>20</sup> They had also learned about the succession struggles that gave rise to the Hundred Years' War.<sup>21</sup> But most importantly, they knew well the work of the leading political theorist of the day they referred to as "[t]he oracle who is always consulted and cited,"<sup>22</sup> Charles Montesquieu, whose careful inquiries into government and public institutions served as a blueprint for the Constitution.<sup>23</sup> The Founders had read his cautionary tales about the shortcomings of the Russian succession rules, which permitted the Czar to choose his own successor.<sup>24</sup> For Montesquieu, as it later came to be for the Founders, succession demanded stability and certainty in its design, something that would not necessarily follow from placing the power to appoint a successor solely in the hands of the head of state. That kind of arrangement would risk the government becoming "as

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17. See 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 18-19 (Max Farrand ed., 1966) [hereinafter 1 RECORDS OF THE FEDERAL CONVENTION].

18. See JULES WITCOVER, CRAPSHOOT: ROLLING THE DICE ON THE VICE PRESIDENCY 12-18 (1992) (describing the Constitutional Convention's "almost accidental" creation of the vice presidency).

19. TARA ROSS, ENLIGHTENED DEMOCRACY: THE CASE FOR THE ELECTORAL COLLEGE 33 (2004).

20. See THE FEDERALIST NO. 38, at 232 (James Madison) (Clinton Rossiter ed., 1961).

21. See DAISY DELOGU, THEORIZING THE IDEAL SOVEREIGN: THE RISE OF THE FRENCH VERNACULAR ROYAL BIOGRAPHY 80-82 (2008) (describing the succession issues precipitating the Hundred Years' War).

22. THE FEDERALIST NO. 47, *supra* note 20, at 301 (James Madison).

23. See JACK P. GREENE, THE INTELLECTUAL HISTORY OF THE CONSTITUTIONAL ERA 43-44 (1986). The Federalist Papers makes repeated reference to the work of Montesquieu. See, e.g., THE FEDERALIST NO. 9, *supra* note 20, at 73-76 (Alexander Hamilton); THE FEDERALIST NO. 43, *supra* note 20, at 275 (James Madison); THE FEDERALIST NO. 47, *supra* note 20, at 301-03 (James Madison); THE FEDERALIST NO. 78, *supra* note 20, at 466 n.\* (Alexander Hamilton).

24. See BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS 61 (Oskar Piest ed., Thomas Nugent trans., Hafner Publ'g Co. 1949) (1748).

tottering as the succession is arbitrary.”<sup>25</sup> To prevent the state from devolving into capricious government, prudence therefore required the law to delineate a clear line of succession well in advance of any hint of a crisis, both to push panic and doubt at bay and also to keep citizens well informed about the order of precedence—the latter being what Montesquieu called “one of those things which are of most importance to the people to know.”<sup>26</sup>

Quite apart from these historical points of reference, the Founders also had contemporaneous proof of the importance of crafting a reliable succession regime. After all, they had come of age at the dawn of the brutal yet glorious revolutionary era that swept across the much of the world, with reverberations on both ends of the Atlantic.<sup>27</sup> The untold losses of life and treasure made plain for all to see the volatility of political hierarchies, many of which had been designed hastily with no long-term vision, and were consequently brought to the brink of collapse. Beyond unsettling results of revolution, the eighteenth century proved a playground perhaps unlike any other for assassins and agitators.<sup>28</sup> The world witnessed the dethroning of Sultan Achmet III of the Ottoman Empire,<sup>29</sup> the destructive conspiracy against Peter III of Russia,<sup>30</sup> unsuccessful attempts on the lives of French King Louis XV<sup>31</sup> and Joseph I of Portugal,<sup>32</sup> and the looming downfall of the Swedish King Gustav III.<sup>33</sup> This precarious political context should have drawn the Founders’ attention to the importance of sustaining stable leadership at the head of government—especially for a new nation still recovering from a disruptive war of independence against its imperial overlords.

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25. *Id.*

26. *Id.*

27. *See generally* E.J. HOBBSAWM, *THE AGE OF REVOLUTION: EUROPE 1789-1848* (1962) (chronicling the rise of various revolutions in Europe).

28. This revolutionary period corresponded with the development of a corpus of laws permitting assassination in times of war. *See* Nathan Canestaro, *American Law and Policy on Assassinations of Foreign Leaders: The Practicality of Maintaining the Status Quo*, 26 B.C. INT’L & COMP. L. REV. 1, 4-5 (2003).

29. *See* 1 STANFORD SHAW, *HISTORY OF THE OTTOMAN EMPIRE AND MODERN TURKEY* 239-40 (1976) (describing the overthrow of Sultan Achmet III).

30. *See* CAROL S. LEONARD, *REFORM AND REGICIDE: THE REIGN OF PETER III OF RUSSIA* 138-49 (1993) (describing the overthrow of Peter III).

31. *See* JULIAN SWANN, *POLITICS AND THE PARLEMENT OF PARIS UNDER LOUIS XV, 1754-1774*, at 136 (1995) (describing the attempted assassination of Louis XV).

32. *See* ALAN W. ERTL, *TOWARD AN UNDERSTANDING OF EUROPE: A POLITICAL ECONOMIC PRÉCIS OF CONTINENTAL INTEGRATION* 303 (2008) (describing the attempted assassination of Joseph I and its immediate aftermath).

33. *See* FRANKLIN L. FORD, *POLITICAL MURDER: FROM TYRANNICIDE TO TERRORISM* 205-06 (1985) (describing the downfall of Gustav III).

The drafters ultimately rose to the occasion when they finally turned to the task of preparing the nation for the possibility of a presidential vacancy. They constructed a founding succession regime fulfilling the two essential functions that any contingency plan must satisfy: establishing the general rules of presidential succession and authorizing the legislature to plug any remaining holes. On both counts, the founding drafters hit the mark, providing in the final draft of the constitutional text that, first, the Vice President would ascend to the presidency in the event of a presidential vacancy and, second, Congress may pass a law specifying who shall act as President when both the President and Vice President are unavailable to serve.<sup>34</sup>

The founding succession sequence was accordingly quite simple: where the President is unable to serve, the Vice President takes the reins. No one stood next in line after the Vice President—the Founders chose deliberately not to include detailed succession procedures in the constitutional text.<sup>35</sup> They had given serious thought to mapping out the succession rules with greater specificity in the founding charter but they realized that procedures and politics raised infinite possibilities that they could neither fully anticipate nor adequately catalogue.<sup>36</sup> This is precisely why the Founders assigned to Congress the task of drawing up a detailed line of succession.

### B. *The Original Design*

Congress took little time to accept the Founders' invitation to design a line of succession extending beyond the vice presidency. The Second Congress passed the very first statute on presidential succession in 1792, and also took that occasion to tackle some of the finer points of elections to the presidency, including the appointment process for presidential and vice presidential electors,<sup>37</sup> the gubernatorial function in national elections,<sup>38</sup> the duties of the Secretary of State in presidential and vice presidential elections<sup>39</sup> and vacancies,<sup>40</sup> and the timing of

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34. U.S. CONST. art. II, § 1, cl. 6, *amended by* U.S. CONST. amend. XXV.

35. *See* WITCOVER, *supra* note 18, at 17 (describing how the Founders drafted the Constitution's succession rules).

36. *See* THE FEDERALIST NO. 59, *supra* note 20, at 362 (Alexander Hamilton).

37. *See* Presidential Succession Act of 1792, ch. 8, § 1, 1 Stat. 239, 239, *repealed by* Presidential Succession Act of 1886, ch. 4, § 3, 24 Stat. 1, 2.

38. *See id.* § 3, 1 Stat. at 240.

39. *See id.* § 4, 1 Stat. at 240.

40. *See id.* § 10, 1 Stat. at 240-41.



presidential and vice presidential terms in office.<sup>41</sup> But the heart of the statute was the line of presidential succession.

The first Presidential Succession Act created the original statutory succession framework by elaborating a critical distinction between constitutional and statutory successors.<sup>42</sup> Under the founding succession sequence, presidential successors come in both constitutional and statutory flavors. The former refers to those officeholders who are named in the Constitution as presidential successors. At the founding, there was only one; and today, there remains only that same one: the Vice President.<sup>43</sup> The person occupying the vice presidency is first in the order of precedence to assume the presidency.<sup>44</sup> This rule is not subject to change by regular statutory procedures because it is enshrined in the constitutional text.<sup>45</sup> Only a constitutional amendment may displace the Vice President from her position as first in line to the presidency.<sup>46</sup>

But statutory successors are different. Though they trace their legitimacy to the Constitution, they owe their selection to Congress.<sup>47</sup> Recall that the Founders expressly authorized Congress, in the text of the original Constitution, to pass a law establishing the order in which designated officeholders would ascend to the presidency in the event the Vice President were unavailable to fill that role.<sup>48</sup> It was the responsibility of Congress both to select the successor offices and to determine precedence among them.<sup>49</sup> Unlike the single constitutional successor chosen by the Founders, the statutory successors could be as numerous as Congress wished and would moreover be subject to simple statutory repeal by subsequent congressional action.<sup>50</sup>

Congress ultimately settled on two statutory successors to the presidency, and positioned those officeholders in the following order of precedence: the Senate President pro tempore followed by the Speaker

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41. *See id.* § 12, 1 Stat. at 241.

42. *Compare id.* § 9, 1 Stat. at 240 (naming the Speaker of the House and the President pro tempore of the Senate as the first *statutory* presidential successors), *with* U.S. CONST. art. II, § 1, cl. 6, *amended by* U.S. CONST. amend. XXV (establishing the Vice President as the first *constitutional* presidential successor).

43. *See* U.S. CONST. art. II, § 1, cl. 6, *amended by* U.S. CONST. amend. XXV.

44. *Id.*

45. *See* U.S. CONST. art. V (establishing procedures for amending the Constitution).

46. *See id.*; *see also* U.S. CONST. art. II, § 1, cl. 6, *amended by* U.S. CONST. amend. XXV (naming the Vice President as the first constitutional presidential successor).

47. *See* U.S. CONST. art. II, § 1, cl. 6, *amended by* U.S. CONST. amend. XXV.

48. *Id.*

49. *See id.*

50. *See* Steven G. Calabresi, *The Political Question of Presidential Succession*, 48 STAN. L. REV. 155, 171 (1995) (stating that Congress has “unilateral power to set the presidential succession by statute”).

of the House.<sup>51</sup> The post of Senate President pro tempore has historically been held by the senior-most Senator of the majority party,<sup>52</sup> and it is perhaps no secret why. When the Senate's presiding officer is absent from the chamber, the duties of presiding over the Senate fall to the Senate President pro tempore, who fills those shoes "for the time being"<sup>53</sup> while that officer is away. Insofar as the Constitution names an officeholder of great stature as the official President of the Senate—the Vice President of the United States<sup>54</sup>—it therefore demands someone of significant stature to replace him, and there can be fewer more appropriate candidates than the majority party's elder member. This was especially true when the first Presidential Succession Act came into force. Only one month after Congress had placed the Senate President pro tempore at the head of line of succession, the Senate was called to name a Senator to the position.<sup>55</sup> They chose one of America's most revered sons, Richard Henry Lee,<sup>56</sup> an American revolutionary whose leadership helped defeat the imperial Crown and pull together the colonies to form a new country.<sup>57</sup>

At the time the Second Congress answered the constitutional call to create a statutory line of succession, the emerging practice was to confer by internal senatorial election the title of Senate President pro tempore upon a sitting Senator only when the Vice President announced her absence.<sup>58</sup> The title expired when the Vice President returned and a new stand-in would later be elected at the Vice President's next departure.<sup>59</sup> This practice changed in 1890, when the Senate adopted a standing order providing that a Senator elected as Senate President pro tempore would

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51. Presidential Succession Act of 1792, ch. 8, § 9, 1 Stat. 239, 240, *repealed by* Presidential Succession Act of 1886, ch. 4, § 3, 24 Stat. 1, 2.

52. Akhil Reed Amar, Sterling Professor of Law and Political Science, Yale University, Fourteenth Annual Frankel Lecture: Applications and Implications of the Twenty-Fifth Amendment (Nov. 6, 2009), in 47 Hous. L. Rev. 1, 27 (2010).

53. 2 ROBERT C. BYRD, *The President Pro Tempore*, in THE SENATE 1789-1989: ADDRESSES ON THE HISTORY OF THE UNITED STATES SENATE 167, 167 (Wendy Wolf ed., bicentennial ed. 1991).

54. U.S. CONST. art. I, § 3, cl. 4.

55. See RICHARD C. SACHS, CONG. RESEARCH SERV., RL 30960, THE PRESIDENT PRO TEMPORE OF THE SENATE: HISTORY AND AUTHORITY OF THE OFFICE 5-6, 19 (2004), available at <http://lieberman.senate.gov/assets/pdf/crs/senateprezprotemp.pdf>.

56. J. KENT MCGAUGHY, RICHARD HENRY LEE OF VIRGINIA: A PORTRAIT OF AN AMERICAN REVOLUTIONARY 217 (2004).

57. See 1 RICHARD H. LEE, MEMOIR OF THE LIFE OF RICHARD HENRY LEE, AND HIS CORRESPONDENCE WITH THE MOST DISTINGUISHED MEN IN AMERICA AND EUROPE, ILLUSTRATIVE OF THEIR CHARACTERS, AND OF THE EVENTS OF THE AMERICAN REVOLUTION 167-73 (1825) (situating the importance of Richard Henry Lee in the American Revolution).

58. SACHS, *supra* note 55, at 4.

59. *Id.*

retain that title until the election of a successor.<sup>60</sup> This change, technical though it may have been, was an improvement because it obviated the inefficiencies of holding an election on every occasion the Vice President excused himself from the red chamber.

Another significant feature of the Presidential Succession Act concerns the separation of powers. The original line of statutory succession did not respect the theory of separation of powers that is so deeply constitutive of American constitutionalism. Quite the contrary, the original design ran afoul of the separation of powers in the most conspicuous manner of all: the fusion of personnel.

Begin first with the uncontroversial and foundational proposition that the cornerstone of the American constitutional edifice is the separation of powers.<sup>61</sup> The Constitution was designed to frustrate the concentration of power in one branch<sup>62</sup> as well as to bestow upon each branch the power to resist intrusions from others.<sup>63</sup> Each organ of government was intended to operate independently of the others,<sup>64</sup> with the autonomy that only separated functions can provide.<sup>65</sup> But more than merely separating the functions of government, the theory of separated powers just as strongly calls for separating the personnel of government such that an individual occupying an executive function cannot simultaneously occupy a legislative or judicial role, a legislator cannot stand concurrently in the executive or judicial branches, and a judicial officer cannot serve at the same time in the legislature or the executive.<sup>66</sup> There are a few notable exceptions<sup>67</sup> but the separation of personnel is therefore a central pillar, indeed a requirement, of the conventional theory of separated powers.

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60. *Id.* at 7.

61. See U.S. CONST. art. I, § 1, art. II, § 1, art. III, § 1 (vesting “legislative Powers” to Congress, “executive Power” to the President, and “judicial Power” to the Supreme Court respectively).

62. See THE FEDERALIST NO. 66, *supra* note 20, at 401-02 (Alexander Hamilton).

63. See THE FEDERALIST NO. 48, *supra* note 20, at 308 (James Madison).

64. See JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 197 (Carolina Academic Press 1987).

65. See THE FEDERALIST NO. 47, *supra* note 20, at 301 (James Madison).

66. See Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 CORNELL L. REV. 1045, 1094 (1994) (arguing that the “Incompatibility Clause” of the Constitution keeps members of Congress from holding any other federal office during their term, and that this limitation helped strengthen the “constitutional system of separated powers”).

67. See Richard Albert, *The Fusion of Presidentialism and Parliamentarism*, 57 AM. J. COMP. L. 531, 546-48 (2009) (arguing that the American system “runs afoul” of the general proscription against holding offices in more than one branch of government in three areas: the impeachment process, the line of presidential succession, and the office of the Vice President).

Yet the Presidential Succession Act of 1792 did not require the separation of personnel. The Presidential Succession Act of 1792 actually contemplated the possibility that the Senate President pro tempore or the Speaker of the House would succeed to the presidency while serving concurrently in her congressional role.<sup>68</sup> Indeed, a close reading of the text lays bare that the Presidential Succession Act of 1792 did not require a statutory successor to relinquish her seat in the House or Senate in order to ascend to the presidency.<sup>69</sup> Today, it appears that the Incompatibility Clause<sup>70</sup> would forbid an officeholder from holding offices concurrently across branches.<sup>71</sup> But with respect to the founding era, the evidence from the first Presidential Succession Act indicates the contrary: joint inter-branch service may well have been constitutional.

That is not the only constitutional controversy encasing the Presidential Succession Act of 1792. Some scholars have suggested that the original congressional design is unconstitutional on the theory that legislators cannot constitutionally stand in the line of succession.<sup>72</sup> Even James Madison is said to have contested the constitutionality of the original succession design.<sup>73</sup> This perhaps helps explain why the Presidential Succession Act of 1792 passed by such a small margin to begin with: 31-24 in the House of Representatives and 27-24 in the Senate.<sup>74</sup>

Other scholars have sought to undermine the first Presidential Succession Act by placing it in the political context of the day. They claim that the congressional choice to place legislators at the head of the line of presidential succession—and to altogether exclude executive officeholders like the Secretary of State or the Secretary of the Treasury—can be understood as a founding compromise between Jeffersonians and Hamiltonians, who wished to sidestep a potentially

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68. Gregory F. Jacob, *25 Returns*, 10 GREEN BAG 177, 188-89 (2007).

69. See Presidential Succession Act of 1792, ch. 8, § 9, 1 Stat. 239, 240 (establishing statutory successors, but not explicitly requiring that those successors yield their congressional positions), *repealed* by Presidential Succession Act of 1886, ch. 4, § 3, 24 Stat. 1, 2.

70. U.S. CONST. art. I, § 6, cl. 2.

71. See, e.g., AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 131 (2005); John Harrison, *Addition By Subtraction*, 92 VA. L. REV. 1853, 1863 n.25 (2006). *But see generally* Seth Barrett Tillman, *Why Our Next President May Keep His or Her Senate Seat: A Conjecture on the Constitution's Incompatibility Clause*, 4 DUKE J. CONST. L. & PUB. POL'Y 107 (2009) (arguing that joint senatorial-presidential service is not unconstitutional).

72. See Vasana Kesavan & Michael Stokes Paulsen, *Is West Virginia Unconstitutional?*, 90 CALIF. L. REV. 291, 381 & n.316 (2002).

73. Vasana Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1174 (2003).

74. HUGH E. EVANS, *THE HIDDEN CAMPAIGN: FDR'S HEALTH AND THE 1944 ELECTION* 125 (2002).

divisive dispute over the relative rank of Cabinet secretaries in the succession sequence.<sup>75</sup> True or not as a matter of historical record, this point of contention did not preclude later generations from inserting executive officials into the line of presidential succession because that is just how the rules of succession evolved as America prepared to enter its second century.

### C. *The Revised Sequence*

The original design did not satisfy Grover Cleveland, the twenty-second President of the United States, whose Vice President, Thomas Hendricks, died only nine months after his inauguration.<sup>76</sup> Under the original succession sequence, had a double vacancy occurred in both the presidency and the vice presidency, the presidency would fall to the next person in the line of succession, which existing law identified as the Senate President pro tempore, followed by the Speaker of the House.<sup>77</sup> That possibility inspired the drafting of a new succession act.<sup>78</sup> President Cleveland was uncomfortable with the thought of the presidency succeeding to a legislative officeholder who could conceivably carry the banner of a political party different from the President's own.<sup>79</sup> President Cleveland was not alone in his concern about the imprudence of the first succession law; critics of the Presidential Succession Act of 1792 argued that a midstream change of party leadership could result in a disruptive switch in the nation's policy direction and also that Cabinet experience could provide better finishing for a presidential successor than congressional service.<sup>80</sup>

What further complicated succession matters was the absence of any available statutory successors. Nothing could be done to correct the problem: Congress was out of session when Hendricks expired.<sup>81</sup> Congress had accordingly yet to elect either a Senate President pro tempore or a Speaker of the House so both offices were vacant.<sup>82</sup> The

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75. See Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113, 132 (1995).

76. See JULES WITCOVER, *NO WAY TO PICK A PRESIDENT: HOW MONEY AND HIRED GUNS HAVE DEBASED AMERICAN ELECTIONS* 195 (2001).

77. Presidential Succession Act of 1792, ch. 8, § 9, 1 Stat. 239, 240, *repealed by* Presidential Succession Act of 1886, ch. 4, § 3, 24 Stat. 1, 2.

78. RICHARD E. WELCH, JR., *THE PRESIDENCIES OF GROVER CLEVELAND* 229 n.3 (1988).

79. See AARON WILDAVSKY, *THE BELEAGUERED PRESIDENCY* 261 (1991).

80. DAVID J. BENNETT, *HE ALMOST CHANGED THE WORLD: THE LIFE AND TIMES OF THOMAS RILEY MARSHALL* 32 (2007).

81. William F. Brown & Americo R. Cinquegrana, *The Realities of Presidential Succession: "The Emperor Has No Clones,"* 75 GEO. L.J. 1389, 1396 n.22 (1987).

82. See U.S. CONST. art. I, § 2, cl. 5 & § 3, cl. 5 (giving the Senate and the House of

additional wrinkle was the reality of political positioning: the Senate ultimately elected Republican Senator John Sherman as its President pro tempore, which did not sit well with President Cleveland, a Democrat, who thought it inappropriate that someone from the opposing party would stand next in line to the presidency.<sup>83</sup>

If anything could convince President Cleveland that the presidential line of succession needed to expand, this was the perfect confluence of events. Undeterred by the knowledge that his immediate predecessor, President Chester Arthur, had failed three times to cobble together congressional consent for a new succession act,<sup>84</sup> President Cleveland nonetheless pressed forward, confident that his chosen course was the right one for the nation. With only minimal Republican opposition<sup>85</sup> and bolstered by the influential support of Senator George Hoar,<sup>86</sup> President Cleveland advocated for and Congress ultimately adopted a revised sequence for the line of presidential succession.<sup>87</sup> For President Cleveland, the need for a new succession order had been so pressing that he made it a signature segment of his first State of the Union Address.<sup>88</sup> A few months later, in a retrospective assessment of the prior congressional year, one newspaper called the new act a law “of large national importance.”<sup>89</sup>

It was indeed a law of great significance. Not only because it improved the line of presidential succession by bringing to it greater specificity than the first Presidential Succession Act had provided, but moreover because the new act delineated, appropriately, a much longer list of succeeding officeholders. Whereas the first Presidential Succession Act had identified only two statutory successors—the Senate President pro tempore, then the Speaker of the House—the new Presidential Succession Act of 1886 catalogued seven statutory

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Representatives the power to pick the Senate President pro tempore and the Speaker of the House respectively); *see also* WILDAVSKY, *supra* note 79, at 261 (noting that “Vice-President Thomas Hendricks died ten days before the first session of the next Congress”).

83. *See* BYRD, *supra* note 53, at 174; WILDAVSKY, *supra* note 79, at 261.

84. BIRCH BAYH, ONE HEARTBEAT AWAY: PRESIDENTIAL DISABILITY AND SUCCESSION 17-18 (1968).

85. ALLAN NEVINS, GROVER CLEVELAND: A STUDY IN COURAGE 345 (9th prtg. 1938).

86. STEVEN O'BRIEN ET AL., AMERICAN POLITICAL LEADERS: FROM COLONIAL TIMES TO THE PRESENT 190 (1991).

87. *See* Thomas J. Vilsack, *Reflections of a Participant on American Democracy and the Constitution*, 55 DRAKE L. REV. 887, 888 (2007) (describing the revised sequence).

88. W. U. HENSEL, LIFE AND PUBLIC SERVICES OF GROVER CLEVELAND: TWENTY-SECOND PRESIDENT OF THE UNITED STATES 174-75 (New York, John W. Lovell Co. 1888).

89. 1 PUBLIC OPINION: A COMPREHENSIVE SUMMARY OF THE PRESS THROUGHOUT THE WORLD ON ALL IMPORTANT CURRENT TOPICS 349 (Washington, D.C., The Public Opinion Co. 1886) (quoting the St. Paul Press from Aug. 6, 1886).

successors.<sup>90</sup> But these were successors unlike those listed in the Presidential Succession Act of 1792, which had placed only legislative officeholders in the line of succession.

The revised succession sequence marked a noteworthy departure from the original design. The change was not as stark as it would have been had Congress adopted one congressional proposal that would have added the Chief Justice of the United States to the presidential line of succession.<sup>91</sup> But it was nonetheless a striking change in material respects. In contrast to the two legislative successors under the first Presidential Succession Act, each of the seven successors under the new act was a Cabinet secretary, and therefore an executive officeholder.<sup>92</sup> This was a crucial distinction. The prior law had contemplated the possibility of a change of party between the President and a succeeding Senate President pro tempore or Speaker of the House.<sup>93</sup> But under the revised sequence, there would be no change of party absent unusual circumstances. The legislative successors were removed altogether from the list of presidential successors and replaced by executive successors, each of whom could claim to represent continuity with, and not change from, the presidential administration.<sup>94</sup> An additional improvement is worth noting: Cabinet members, who serve year-round and whose tenure is not subject to normal congressional procedures or midterm elections,<sup>95</sup> brought greater stability to the succession sequence. The new Presidential Succession Act consequently reflected the greater deference extended in presidential transitions to executive officials over legislators.<sup>96</sup>

A peculiar feature of the Presidential Succession Act is the way it ordered the Cabinet secretaries along the line of succession: the Cabinet secretaries were ranked according to the seniority of their respective

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90. See Presidential Succession Act of 1886, ch. 4, § 1, 24 Stat. 1, 1 (listing the seven successors), *repealed by* Presidential Succession Act of 1947, ch. 264, § (g), 61 Stat. 380, 381.

91. See David P. Currie, *The Constitution in Congress: The Second Congress, 1791-1793*, 90 NW. U. L. REV. 606, 622 n.88 (1996) (citing Charles S. Hamlin, *The Presidential Succession Act of 1886*, 18 HARV. L. REV. 182, 187 (1904)).

92. See Hamlin, *supra* note 91, at 182 (comparing the succession regime under the 1792 and 1886 acts).

93. See *id.* at 183 (stating that a key goal of the Presidential Succession Act of 1886 was to allow “the party which had succeeded in the last election” to maintain control of the presidency through “the balance of the regular unexpired term”).

94. See Presidential Succession Act of 1886, § 1, 24 Stat. at 1 (inserting Cabinet secretaries in the line of presidential succession in the place of the President pro tempore of the Senate and the Speaker of the House).

95. See JEFFREY M. ELLIOT & SHEIKH R. ALI, *THE PRESIDENTIAL-CONGRESSIONAL POLITICAL DICTIONARY* 117, 185 (1984).

96. See *id.* at 111.

departments, such that the older departments were placed higher in the order of precedence.<sup>97</sup> The resulting order saw the Secretary of State placed first—of course, after the Vice President—followed by the Secretary of the Treasury, the Secretary of War, the Attorney General, the Postmaster General, followed by the Secretary of the Navy, and finally, the Secretary of the Interior.<sup>98</sup> The language of the statute is clear in stating that the “powers and duties” of the presidency devolve upon the highest ranking statutory successor available to serve when the Vice President is not herself available to serve.<sup>99</sup> The statute was equally clear in disqualifying statutory successors who had been nominated by the President, but not yet confirmed by the Senate, as well as those who were under impeachment by the House of Representatives at the time the presidential vacancy arose.<sup>100</sup>

Another point of interest is the President Succession Act’s requirement that a Cabinet secretary ascending to the presidency retain her portfolio as head of an executive department precisely because her Cabinet position was a precondition to her eligibility to fill the presidential vacancy.<sup>101</sup> This should not be interpreted as similar to the first Presidential Succession Act’s shortcoming in permitting a legislative successor to retain her congressional position while concurrently serving as President. Quite the contrary, it makes sense to permit a Cabinet secretary to hold her post while filling the temporary void in the presidency because there is an obvious alignment of interests between a Cabinet secretaryship and the presidency. Both are executive officeholders who likely belong to the same party and likewise have endorsed the same policy direction and share similar policy preferences.

The same comparison does not necessarily apply between the President and a legislative successor like the Senate President pro tempore or the Speaker of the House. They may come from different parties, in which case they will have taken different views of the path the nation should chart and come to different conclusions about how best to accomplish their policy objectives for the state. It therefore makes sense, both as a matter of politics and prudence, to authorize a Cabinet secretary succeeding to the presidency to keep her post until the presidential vacancy is remedied by an intervening presidential election, the return of the President, or the restored availability of the Vice

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97. GREGORY J. DEHLER, CHESTER ALAN ARTHUR: THE LIFE OF A GILDED AGE POLITICIAN AND PRESIDENT 150 (2007).

98. Presidential Succession Act of 1886, § 1, 24 Stat. at 1.

99. *Id.*

100. *Id.* § 2, 24 Stat. at 2.

101. EDWARD S. CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 67 (5th ed. 1937).



President. What does not seem sensible, however, is to place members of a different party in the line of presidential succession.

Imagine, for instance, the disruption that would have ensued had then-Speaker of the House Tip O'Neill, a fierce liberal, filled a vacancy created by the unavailability of President Ronald Reagan, a champion of conservatism; or if President Bill Clinton, a moderate Democrat, had been succeeded by his ardent conservative opponent, then-Speaker Newt Gingrich.<sup>102</sup> Awkward is one word to describe these succession transitions, but another more appropriate one may be unsettling. Yet that is the state of affairs that risks befalling the United States under the current regime of presidential succession, which came into force in 1947 when it repealed the Presidential Succession Act of 1886.

#### D. *The Modern Order*

It was President Harry Truman who last successfully urged Congress to change the line of presidential succession. Having ascended to the presidency from the vice presidency as a result of a presidential vacancy, Truman was one of the few persons ever to succeed to the office rather than earning election to the post.<sup>103</sup> In his view, this positioned him in the uniquely privileged role of witnessing with almost peerless clarity the promise and pitfalls of the existing rules of succession, which, at the time, provided that a Cabinet secretary would fill a presidential vacancy in the event of the Vice President's unavailability.<sup>104</sup>

As a succeeding President with no Vice President in tow, Truman was catapulted into what he regarded as a conflict of interest: a President should not, Truman believed, be able to name his own successor without first being subject to an intervening election.<sup>105</sup> And insofar as Truman had become Vice President by presidential designation, not competitive election, and further given that he had become President by succession, not election, he did not consider himself imbued with the popular legitimacy needed to make as weighty a decision as who should stand ready to take over the presidential controls.<sup>106</sup>

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102. MAX J. SKIDMORE, *PRESIDENTIAL PERFORMANCE: A COMPREHENSIVE REVIEW* 248 (2004).

103. See ALLAN P. SINDLER, *UNCHOSEN PRESIDENTS: THE VICE PRESIDENT AND OTHER FRUSTRATIONS OF PRESIDENTIAL SUCCESSION* 20, 27 (1976).

104. See *id.* at 20.

105. See *id.*

106. See *id.*; see also Special Message to the Congress on the Succession to the Presidency, 1945 PUB. PAPERS 128, 129 (June 19, 1945) [hereinafter Special Message to the Congress] ("I do not believe that in a democracy this power should rest with the Chief Executive.").

But that is what he was required to do when he became President. The reason why is simple yet perhaps shocking: until the passage of the Twenty-Fifth Amendment years later in 1967, there were no constitutional or statutory procedures for filling a vice presidential vacancy, the consequence being that the vice presidency had often gone unfilled for significant stretches of time, in fact for roughly twenty percent of American history.<sup>107</sup> And so, in naming a Secretary of State, Truman would designate not only the nation's chief diplomat but also the first statutory presidential successor—without having himself first faced the electorate. All of which was exacerbated both by the possibility that the named successor could perhaps have also never been previously elected in any capacity and that the actual then-sitting Secretary of State was thought to possess a less than stellar record of service and an even more problematic profile of presidential competence.<sup>108</sup>

Quite apart from concerns of competence and popular legitimacy, President Truman harbored an additional concern about the Presidential Succession Act of 1886. Were he to name a new Secretary of State, under the terms of the existing law, President Truman would be choosing his own immediate successor—the person who would fill a presidential vacancy should something prevent Truman from serving as President. And that, to President Truman, was unacceptable: “In so far as possible,” wrote Truman in a message to Congress, “the office of the President should be filled by an elective officer,” adding that in the absence of the President and the Vice President, the Speaker of the House should be next in line to the presidency because:

The Speaker of the House of Representatives, who is elected in his own district, is also elected to be the presiding officer of the House by a vote of all the Representatives of all the people of the country [and is the officeholder] whose selection next to that of the President and Vice President, can be most accurately said to stem from the people themselves.<sup>109</sup>

For President Truman, the presidency should therefore be occupied by an elected officer instead of an appointed one,<sup>110</sup> which is why he

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107. Allen P. Sindler, *Presidential Selection and Succession in Special Situations*, in *PRESIDENTIAL SELECTION* 331, 344 (Alexander Heard & Michael Nelson eds., 1987).

108. See Robert H. Ferrell, *Harry Truman: A Biographer's Perspective I*, in *HARRY'S FAREWELL: INTERPRETING AND TEACHING THE TRUMAN PRESIDENCY* 336, 340 (Richard S. Kirkendall ed., 2004).

109. Special Message to the Congress, *supra* note 106, at 129.

110. See Richard D. Friedman, *Some Modest Proposals on the Vice-Presidency*, 86 *MICH. L. REV.* 1703, 1715 n.47 (1988) (“The [succession] law was changed in 1947, in response to the belief

pushed so vigorously to reinsert legislative leaders—the Speaker of the House and the Senate President pro tempore—ahead of Cabinet secretaries.<sup>111</sup> Even though these legislative officeholders owed their respective leadership roles largely to seniority or legislative stickhandling and not necessarily competence, Truman regarded each of them as much better situated than Cabinet secretaries to reflect the founding vision of republican government.<sup>112</sup>

Acting at the urging of the President, Congress revived the spirit of the original design of legislative succession embodied in the Presidential Succession Act of 1792. The Speaker of the House became the first statutory successor,<sup>113</sup> followed by the Senate President pro tempore,<sup>114</sup> who was then proceeded by the following list of Cabinet secretaries: Secretary of State, Secretary of the Treasury, Secretary of War, Attorney-General, Postmaster General, Secretary of the Navy, Secretary of the Interior, Secretary of Agriculture, Secretary of Commerce, and the Secretary of Labor.<sup>115</sup> The order of precedence among the first seven Cabinet secretaries remained unchanged from the succession law of 1886, but the new 1947 law added three secretaries to the bottom of the list, reflecting the creation of three new departments—Agriculture, Commerce, and Labor—after the 1886 law came into being.<sup>116</sup> The principle underlying the order of Cabinet succession to the presidency remained unchanged: seniority, which is the very same basis upon which the Senate President pro tempore earns her post.<sup>117</sup>

Certain features of the Presidential Succession Act of 1947 merit special mention. First, although the new law marks a return to the original theory of preferring legislative succession to the presidency, the law does not adopt the original order of legislative succession. Whereas

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of Harry Truman that the president should always be an elective officer, not someone chosen by his predecessor.”)

111. See, e.g., Special Message to the Congress, *supra* note 106, at 128-31 (urging Congress to insert the Speaker of the House and the President pro tempore of the Senate into the line of presidential succession ahead of the various Cabinet secretaries).

112. See ROBERT E. GILBERT, *THE MORTAL PRESIDENCY: ILLNESS AND ANGUISH IN THE WHITE HOUSE* 233-34 (Basic Books 1992) (describing President Truman’s support for inserting the Speaker of the House and the Senate President pro tempore into the line of succession, but arguing that these positions are democratic only “in a limited sense”).

113. Presidential Succession Act of 1947, ch. 264, § (a)(1), 61 Stat. 380.

114. *Id.* § (b).

115. *Id.* § (d).

116. Compare *id.*, with Presidential Succession Act of 1886, ch. 4, § 1, 24 Stat. 1, *repealed by* Presidential Succession Act of 1947 ch. 264, § (g), 61 Stat. at 381.

117. See ELLIOT & ALI, *supra* note 95, at 110 (explaining how, under the 1947 act, Cabinet officers are placed in the line of presidential succession “in order of the establishment of their departments”); see also SACHS, *supra* note 55, at 8-9 (describing the customary practice of appointing the most senior Senator of the majority party as the President pro tempore of the Senate).

the Presidential Succession Act of 1792 placed the Senate President pro tempore ahead of the Speaker of the House, the reverse is true under the succession law of 1947.<sup>118</sup> Second, the new succession law requires a legislative successor to resign her congressional office: the Speaker of the House must resign her position both as Speaker and as a Representative before ascending to the presidency;<sup>119</sup> and the Senate President pro tempore must likewise vacate both her leadership post and her Senate seat before succeeding to the presidency.<sup>120</sup> Third, the new law makes explicit what had previously been largely implicit: in order for a statutory successor to fill a presidential vacancy, the successor must satisfy the requirements for presidential eligibility.<sup>121</sup> In modern history, two notable Secretaries of State have been ineligible for presidential service, and therefore disqualified from filling a presidential vacancy: Henry Kissinger and Madeleine Albright, foreign-born members of the Cabinets of Richard Nixon and Bill Clinton, respectively.<sup>122</sup> And fourth, the law confirms that a presidential successor will earn the same compensation given to the President, as stipulated by law.<sup>123</sup>

The Presidential Succession Act of 1947 remains today the governing law of succession. But a series of congressional amendments have altered it over the last half-century. Those few amendments have not changed the law in material respects. They have generally only revised the list of Cabinet secretaries generally to reflect the subsequent creation of new federal departments. In 1965, two positions were added behind the Secretary of Labor in the following order: the Secretary of Health, Education, and Welfare, and the Secretary of Housing and Urban Development, thereby bringing the total number of statutory Cabinet successors to twelve.<sup>124</sup> In 1966, the Secretary of Transportation joined the ranks of presidential successors.<sup>125</sup> In 1970 and 1977, respectively, the Postmaster General was removed from the list of presidential successors<sup>126</sup> and the Secretary of Energy was added to the end of the

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118. Compare Presidential Succession Act of 1947 § (a)–(b), 61 Stat. at 380, with Presidential Succession Act of 1792, ch. 8, § 9, 1 Stat. 239, 240, repealed by Presidential Succession Act of 1886 § 3, 24 Stat. at 2.

119. Presidential Succession Act of 1947 § (a)(1), 61 Stat. at 380.

120. *Id.* § (b).

121. *Id.* §§ (a)–(b), (d)–(e).

122. STEPHEN HESS, WHAT DO WE DO NOW?: A WORKBOOK FOR THE PRESIDENT-ELECT 16 (2008).

123. Presidential Succession Act of 1947, § (f), 61 Stat. at 381.

124. Department of Housing and Urban Development Act, Pub. L. No. 89-174, § 6(a), 79 Stat. 667, 669 (1965).

125. Department of Transportation Act, Pub. L. No. 89-670, § 10(a), 80 Stat. 931, 948 (1966).

126. Postal Reorganization Act, Pub. L. No. 91-375, § 6(b), 84 Stat. 719, 775 (1970).

list.<sup>127</sup> In 1979, to bring the order of succession into conformity with recent changes to the structure of the Cabinet—which had seen the Department of Health, Education, and Welfare divided into two separate entities<sup>128</sup>—the Secretary of Health, Education and Welfare was replaced in the order of precedence by the Secretary of Health and Human Services, and the Secretary of Education was added to the back of the line of presidential succession.<sup>129</sup> In 1988 and 2006, respectively, the Secretary of Veterans Affairs<sup>130</sup> and the Secretary of Homeland Security were inserted as the last two presidential successors.<sup>131</sup>

Today, the Secretary of Homeland Security stands as the very last successor to the presidency. She is behind many officeholders who are less qualified to fill a presidential vacancy. The Secretary of Homeland Security—historically an individual of great competence and experience,<sup>132</sup> and generally among the more prepared to fill a presidential vacancy in the current context of international conflict and the instability engendered by terrorism—must stand idle behind other department heads who, by virtue only of the earlier date upon which their respective departments were created, take priority in the order of precedence to the presidency. Those statutory successors include individuals whose Cabinet experience gives them less desirable preparation to assume the presidency than the Secretary of Homeland Security, for instance the Secretaries of Labor, Transportation, Agriculture, and Commerce, just to name a few.

Although the public servants who run departments that are listed ahead of the Homeland Security chief are usually great American citizens concerned only with protecting American institutions and advancing American interests, can they be said to possess the presidential timbre required of a presidential successor? No one can say for certain whether they are prepared to serve as President in the event of a vacancy. Who could possibly know until the moment arrives and an officeholder is thrust into the seat of authority? It is a difficult argument

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127. Department of Energy Organization Act, Pub. L. No. 95-91, § 709(g), 91 Stat. 565, 609 (1977).

128. Department of Education Organization Act, Pub. L. No. 96-88, § 508(a), 93 Stat. 668, 692 (1979).

129. *Id.*

130. Department of Veterans Affairs Act, Pub. L. No. 100-527, § 13(a), 102 Stat. 2635, 2643 (1988).

131. USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, § 503, 120 Stat. 192, 247 (2006).

132. See *infra* notes 133-35 and accompanying text (describing the backgrounds of the three Secretaries of Homeland Security).

to make in the case of Cabinet secretaries whose executive responsibilities concern neither war nor foreign affairs.

But the argument is easier to make in the case of the Secretary of Homeland Security, a position which has been held since its inception by three distinguished Americans, whose prior experience would make them credible presidential candidates. Indeed, all three are, in their own right, giants in modern American public life: Tom Ridge, former Governor of Pennsylvania and member of the U.S. House of Representatives;<sup>133</sup> Michael Chertoff, previously Assistant Attorney General of the United States, judge on the U.S. Circuit Court of Appeals for the Third Circuit, and federal prosecutor;<sup>134</sup> and Janet Napolitano, formerly Governor of Arizona and Attorney General of Arizona.<sup>135</sup> Their experience as Secretary of Homeland Security only made them better prospective presidential successors. Yet the rules of presidential succession fail to appreciate their value to the nation in the event of a calamity. And that is a shame of large proportions that could have even larger consequences for the stability of the state. But that is not the only shortcoming of the current succession law.

### III. THE SUCCESSION STAKES

The current law of presidential succession raises three quite substantial concerns. The first is constitutional, the second is political, and the third is prudential. First, presidential succession law has been mired in a textual uncertainty since the very beginning of the republic: does the Constitution contemplate statutory succession by executive officers alone, or are legislative officers also eligible? After years of scholarly debate and legal wrangling, the question remains unresolved. And it is unlikely ever to be comfortably resolved in the years ahead. Second, even if we could reach agreement on the correct way to interpret this constitutional provision, the political calculus that informs presidential succession would nonetheless imprudently elevate politics over competence, and institutional traditions over leadership experience. That too, is a problem.

Third, even setting aside the unavoidable problem of politics seeping into the succession regime, it would be difficult to relieve the prudential pressures that lay beneath the existing edifice of presidential

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133. *Tom Ridge, Homeland Security Secretary 2003-2005*, U.S. DEP'T OF HOMELAND SECURITY, [http://www.dhs.gov/xabout/history/editorial\\_0586.shtm](http://www.dhs.gov/xabout/history/editorial_0586.shtm) (last modified Sept. 22, 2008).

134. *Michael Chertoff, Homeland Security Secretary 2005-2009*, U.S. DEP'T OF HOMELAND SECURITY, [http://www.dhs.gov/xabout/history/biography\\_0116.shtm](http://www.dhs.gov/xabout/history/biography_0116.shtm) (last modified Jan. 20, 2009).

135. *Secretary Janet Napolitano*, U.S. DEP'T OF HOMELAND SECURITY, [http://www.dhs.gov/xabout/structure/gc\\_1232568253959.shtm](http://www.dhs.gov/xabout/structure/gc_1232568253959.shtm) (last modified Mar. 24, 2011).

succession: the modern roster of statutory successors can give only a weak assurance of democratic stability, and can make only an even weaker claim to democratic legitimacy. Each of these criticisms, on its own, raises doubts about whether the current succession law is right for America. But when viewed together, all three leave little room to argue that Americans would not be better served with a new presidential succession regime that fosters constitutional peace and coherence, achieves the primary purpose of placing the presidency in competent hands at a time of crisis, and is both attentive to and consistent with the democratic underpinnings of the American Constitution.

### A. *Constitutional Clarity*

One of America's leading constitutional scholars has described the current succession law as an unconstitutional arrangement and "a disastrous statute, an accident waiting to happen."<sup>136</sup> Others have echoed those sentiments, insisting that the Presidential Succession Act is not only unconstitutional, but also unsound.<sup>137</sup> It remains the case, though, that the current law has been in force for decades and must therefore be presumed constitutional until successfully challenged. Yet whether or not the succession law is constitutional, constitutional scholars concede that it is constitutionally problematic.<sup>138</sup> And that is the critical point: deep division abounds as to whether the current law is in fact constitutional.<sup>139</sup>

Here is the problem: Who is an officer? The Succession Clause authorizes Congress to pass a law, to apply in the event of a presidential vacancy, "declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a new President shall be elected."<sup>140</sup> This constitutional provision seems simple enough: when the Vice President is unavailable to fill a presidential vacancy, the officer designated by Congress as the first statutory

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136. *Ensuring the Continuity of the United States Government: The Presidency: J. Hearing Before the Comm. on the Judiciary and the Comm. on Rules and Admin.*, 108th Cong. 7 (2003) [hereinafter *Ensuring the Continuity of the United States Government*] (statement of Akhil Reed Amar, Southmayd Professor of Law and Political Science, Yale University).

137. See, e.g., John C. Fortier & Norman J. Ornstein, *Presidential Succession and Congressional Leaders*, 53 CATH. U. L. REV. 993, 996, 999-1000 (2004); James C. Ho, *Unnatural Born Citizens and Acting Presidents*, 17 CONST. COMMENT. 575, 580 n.24 (2000).

138. Vikram David Amar, *Adventures in Direct Democracy: The Top Ten Constitutional Lessons from the California Recall Experience*, 92 CALIF. L. REV. 927, 944 n. 76 (2004).

139. Even courts have recognized the difficulty of this question. See, e.g., *Motions Sys. Corp. v. Bush*, 437 F.3d 1356, 1371 n.6 (Fed. Cir. 2006) (acknowledging the "lively academic debate" surrounding the issue of legislative succession).

140. U.S. CONST. art. II, § 1, cl. 6, amended by U.S. CONST. amend. XXV.

successor—and in her absence, the second statutory successor, and so on—fills the vacancy. But the complexity of the matter quickly becomes evident when the Constitution is read as much for what it does not say as what it does. Because although the Constitution leaves no reasonable ground upon which to contest that Congress is authorized to decide the order of statutory successors to the presidency, the Constitution does not specify whether those statutory successors must be executive or legislative officers, or whether they may be both.<sup>141</sup> So the question remains: who, exactly, is an officer?

For Akhil and Vikram Amar, the answer is unmistakably that a legislator cannot be an officer for purposes of statutory succession. The consequence of this reading is clear, and clearly problematic: the succession law is unconstitutional because neither the Senate President pro tempore nor the Speaker of the House is an officer, and therefore, neither can constitutionally succeed to the presidency in the event of a presidential vacancy.<sup>142</sup> That these legislators are not *officers*, as that term is understood in the Succession Clause, is a difficult argument to make, yet the Amars make a strong case.

Using the interpretative technique of intratextualism<sup>143</sup> and with resort to the drafting history of the Constitution,<sup>144</sup> the Amars begin where we must: with the constitutional text. They locate other occurrences of the term *officer* in the Constitution, and endeavor to identify patterns of usage and to interpolate themes that may illuminate what the Founders meant when they authorized Congress to pass a law designating an “officer” to fill a presidential vacancy in the absence of the Vice President. Referring to the Incompatibility,<sup>145</sup> Commission,<sup>146</sup> and Impeachment Clauses,<sup>147</sup> as well as other provisions in Articles II<sup>148</sup> and VI<sup>149</sup> of the Constitution, they conclude that the Founders wrote the

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141. *See id.*; Amar & Amar, *supra* note 75, at 116 (observing that the Constitution’s use of the word “Officer” could possibly lead to the conclusion congressional leaders should be considered “Officers” for the sake of succession).

142. *See* Amar & Amar, *supra* note 75, at 114-17.

143. *See generally* Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999) (defining, illustrating, critiquing, and applying intratextualism).

144. *See* Amar & Amar, *supra* note 75, at 116.

145. U.S. CONST. art. I, § 6, cl. 2.

146. *Id.* art. II, § 3.

147. *Id.* art. II, § 4.

148. *Id.* art. II, § 2 (making the President the “Commander in Chief of the Army and Navy”; giving her the ability to request opinions from “the principal Officer in each of the executive Departments”; and setting forth the process by which she can nominate various “Officers of the United States”).

149. *Id.* art. VI, cl. 3 (requiring legislative members, as well as “executive and judicial Officers” to take an oath of office, but forbidding the requirement of a religious test).



Constitution to distinguish between an *officer* and a *legislator*, the latter not correctly considered a species of the former.<sup>150</sup> In addition to their textual line of reasoning, the Amars also marshal important structural, policy, and logistical arguments as to why legislators should not be eligible to succeed to the presidency.<sup>151</sup>

In contrast, David Currie suggests a different conclusion from his own historical and textual analysis. What matters to Currie, as it does for the Amars, are the varying uses of the term *officer* in the Constitution. Begin with a contrast: the Impeachment Clause, which states that “[t]he President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors,”<sup>152</sup> while the Succession Clause speaks of the congressional authority to pass a law declaring which “officer”—but not which “officer of the United States”—will fill a presidential vacancy.<sup>153</sup> On its own this distinction may not mean much, but when viewed in concert with the Expulsion Clause, its importance becomes more apparent.

Consider that legislators are not subject to impeachment. They are instead subject to expulsion upon a supermajority vote by their congressional colleagues.<sup>154</sup> A Senator, for example, cannot be impeached for wrongdoing; she may only be removed by a two-thirds vote of her senatorial colleagues, pursuant to the Expulsion Clause, which declares that “[e]ach House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.”<sup>155</sup> And since legislators are not impeachable it follows that they are not “Officers of the United States.”<sup>156</sup> It is, therefore, critical to note the distinction, suggests Currie, between the Constitution’s specific reference to “Officers of the United States” in the Impeachment Clause and simply to an “Officer” in the Succession Clause—the former revealing the drafting intent to designate only executive officers as officers and the latter referring to both legislators and executive officeholders.<sup>157</sup> Howard Wasserman makes similar textual claims that the Succession Clause’s reference to an

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150. Amar & Amar, *supra* note 75, at 114-17.

151. *Id.* at 118-32.

152. U.S. CONST. art. II, § 4.

153. *Id.* art. II, § 1, cl. 6, *amended by* U.S. CONST. amend. XXV.

154. *See id.* art. I, § 5, cl. 2.

155. *Id.*

156. *Compare id.* (establishing removal proceedings for members of Congress), *with id.* art. II, § 4 (establishing impeachment as the method of removal for “civil Officers of the United States”).

157. *See* DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789-1801*, at 139-44, 276-81 (1997).

“Officer,” unmodified by the further descriptive detail “of the United States” was intentionally designed in this way so as to include both legislative and executive officers in the line of succession.<sup>158</sup>

But there is a third, equally defensible view that aligns with neither construction of the Constitution. John Manning raises prudential arguments about the risks of relying on the constitutional drafting history to reach broader conclusions about how to interpret the constitutional text that was ultimately ratified. “The relevant fact,” writes Manning, “is that the ratifiers acted on the text submitted to the States, not on the sequence of ‘secret deliberations’ of the Constitutional Convention—deliberations that were not revealed until decades after ratification.”<sup>159</sup> Manning also responds to the Amars’ structural and historical arguments, finding evidence in contemporaneous congressional practices that suggests, at best, that legislators were considered *officers* for purposes of presidential succession and, at the very least, that there is ambiguity in the matter.<sup>160</sup> For Manning, the prevailing ambiguity in the Succession Clause is key; given the Clause’s textual and historical uncertainty, Congress should be given the benefit of the doubt for what he argues is a reasonable constitutional interpretation.<sup>161</sup>

A related view of the Succession Clause comes from Steven Calabresi. But his position does not rest on textualist or historical interpretations of the constitutional text. It stands instead on institutional theory, and may perhaps be the most compelling argument of all, insofar as it is not subject to the kind of point-counterpoint of constitutional interpretation that textualism and intentionalism invite. This inquiry essentially boils down to this: If a constitutional disagreement amounting to a crisis arises as to the proper interpretation of the succession law, will a court agree to hear the matter? Senator John Cornyn, in a congressional hearing on presidential succession, recently wondered the very same thing, asking four important questions: “If lawsuits are filed, will courts accept jurisdiction? How long will they take to rule? How will they rule? And how will their rulings be respected?”<sup>162</sup> The last question is perhaps the most important because it

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158. *Ensuring the Continuity of the United States Government*, *supra* note 136, at 73 (testimony of Howard M. Wasserman, Assistant Professor of Law, Florida International College of Law).

159. John F. Manning, *Not Proved: Some Lingering Questions About Legislative Succession to the Presidency*, 48 STAN. L. REV. 141, 144 (1995) (quoting Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 725 (1988)).

160. *Id.* at 145-52.

161. *Id.* at 141-42, 153.

162. *Ensuring the Continuity of the United States Government*, *supra* note 136, at 4 (statement of Sen. John Cornyn of Texas).

speaks to the ultrapoliticized nature of presidential succession—something for which courts are not particularly well-equipped, both because the question is one better left resolved by political actors and also because even if a court ventured onto that uncertain terrain, it is unclear whether its judgment would be enforced or even enforceable.

This is precisely why Calabresi argues that the constitutionality of the Presidential Succession Act of 1947 is a nonjusticiable political question that courts should not, nor cannot, touch.<sup>163</sup> Calabresi sees not only a lack of judicially discoverable and manageable standards to govern the judicial intervention into this political thicket, but moreover a lack of clarity about what kind of remedy the judiciary could reasonably issue.<sup>164</sup> For those reasons, Calabresi maintains that Congress retains the final word on presidential succession because the succession law is not legitimately subject to judicial review.<sup>165</sup>

Public and political disagreement about the constitutionality of laws is nothing new, nor should open dialogue about the constitutional status of laws pose a threat to the stability or continuity of government. Quite the contrary, the foundations of American constitutional democracy are only strengthened by robust discussions as to what is or is not, and should or should not be, permissible under the laws of the United States. It is one thing to invite vigorous lawyerly debate in a time of relative tranquility, as is the case now, but quite another to confront a potentially destabilizing constitutional quarrel about who is constitutionally authorized to discharge the duties of the presidency during a time of crisis—a troubling controversy that could only undermine the prospect for an expeditious and sustainable return to normalcy. Yet that is what the current succession law is poised to provoke. And that bodes poorly for the nation.

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163. See Calabresi, *supra* note 50, at 156-57 (“Congress’s power to specify what ‘Officer’ shall succeed the presidency in the event of double death, incapacity, resignation, or removal is not subject to judicial review because of the political question doctrine.”).

164. *Id.* at 167-71.

165. *Id.* at 175. One must wonder, though, whether the political question doctrine has eroded so much as to make it inapplicable, even in the context of presidential succession. See generally Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237 (2002) (detailing the erosion of the political question doctrine). It also bears asking whether the political question doctrine would foreclose judicial review of *all* matters of presidential succession. Even impeachment, which is perhaps the most political of all procedures, may properly be the subject of judicial review where the circumstances warrant. See Joel B. Grossman & David A. Yalof, *The Day After: Do We Need a “Twenty-Eighth Amendment?”*, 17 CONST. COMMENT. 7, 14-15 (2000) (arguing for judicial review of presidential impeachments).

### B. Partisanship and Tradition

Any discussion of the political limitations of the current rules of presidential succession must begin with how the Speaker of the House and the Senate President pro tempore are elected to their respective posts. Neither owes her election to their presidential qualifications.<sup>166</sup> The Speaker of the House achieves her leadership position by virtue of a majority vote of Representatives in the House,<sup>167</sup> while the Senate President pro tempore is by custom the Senator holding the longest record of continuous service in the majority party.<sup>168</sup> Neither ascends to her position on the strength of presidential traits that could prove indispensable in a time of crisis. The Speaker is typically a master legislator whose expertise in the horse-trading and logrolling common to Washington politics makes her an effective legislative leader.<sup>169</sup> But proficiency in Robert's Rules of Order does not translate into preparedness to assume the presidency.

For its part, the office of Senate President pro tempore is also a less than optimal source of leadership in the event of a presidential vacancy. That position has historically been filled by party elders whose advanced age inspires much less confidence than one might have in a younger statutory successor. Consider that the current Senate President pro tempore, Daniel Inouye, is in his mid-80s.<sup>170</sup> His immediate predecessors in the post were the late Robert Byrd, who passed away at age ninety-two while serving as Senate President pro tempore;<sup>171</sup> Strom Thurmond, who held the position as a nearly hundred-year-old Senator;<sup>172</sup> and the late Ted Stevens, who was eighty-three as Senate President pro tempore.<sup>173</sup> Experience of course comes with age, but

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166. See Michael J. Glennon, *Nine Ways to Avoid a Train Wreck: How Title 3 Should Be Changed*, 23 CARDOZO L. REV. 1159, 1170 (2002).

167. Howard M. Wasserman, *The Trouble with Shadow Government*, 52 EMORY L.J. 281, 290 (2003).

168. *President Pro Tempore*, U.S. SENATE GLOSSARY, [https://www.senate.gov/reference/glossary\\_term/president\\_pro\\_tempore.htm](https://www.senate.gov/reference/glossary_term/president_pro_tempore.htm) (last visited July 29, 2011).

169. See MelissaC, *Job Description of the Speaker of the House*, EHOW, [http://www.ehow.com/about\\_6701326\\_job-description-speaker-house.html](http://www.ehow.com/about_6701326_job-description-speaker-house.html) (last updated July 5, 2010).

170. Manu Raju, *Inouye Now in Line of Presidential Succession*, POLITICO (June 28, 2010, 11:02 AM EST), <http://www.politico.com/news/stories/0610/39100.html>.

171. Michael Sheridan, *Sen. Robert Byrd, Longest-Serving Member of Congress, Has Died at 92*, NYDAILYNEWS.COM (June 28, 2010, 10:45 AM), [http://www.nydailynews.com/news/politics/2010/06/28/2010-06-28\\_robert\\_byrd\\_congress\\_longestserving\\_senator\\_dead\\_at\\_92.html](http://www.nydailynews.com/news/politics/2010/06/28/2010-06-28_robert_byrd_congress_longestserving_senator_dead_at_92.html).

172. Paul Kane, *Inouye Succeeds Byrd as Senate President Pro-Tempore*, WASHINGTONPOST.COM (June 28, 2010, 1:23 PM ET), <http://voices.washingtonpost.com/44/2010/06/inouye-succeeds-byrd-as-senate.html>.

173. David Stout, *Senate Democrats Choose Leaders for Next Congress*, NYTIMES.COM (Nov. 14, 2006), <http://www.nytimes.com/2006/11/14/washington/14cnd-dems.html?ex=1321160400&en>

there may be a point at which too much of the latter leads to diminishing returns on the former. These are only two concerns with the line of succession.

An equally troubling prudential concern arising out of the current succession sequence is that someone from the opposing political party could fill a presidential vacancy. Any midstream change of presidential party would prove more disruptive than constructive, insofar as the new President would likely replace the existing personnel with her own team, representing her own policy and partisan preferences.<sup>174</sup> But to introduce an additional element of uncertainty and instability during a time of crisis is a recipe for a disaster of a different sort than the kind occasioned by a terrorist strike. The potential for reverting to peace-time political instincts that foster political posturing, legislative gridlock, and personality conflicts only rises, even in times of crisis, when partisanship becomes a dominant factor in decision-making.<sup>175</sup> And that is precisely what is possible under the current line of succession: a Republican Senate President pro tempore or a Republican Speaker of the House may fill a presidential vacancy created by the death or incapacity of a Democratic President and Vice President, just as a Republican President may be replaced in office by a Democratic Speaker of the House or Senate President pro tempore.

To illustrate the problem more concretely, consider a few examples from modern American politics. Imagine the jarring effect of a sudden change in presidential leadership in 2007 from then-President George W. Bush, a Republican, to then-Speaker of the House Nancy Pelosi, a Democrat. Other similar examples of a party split between the President and the Speaker of the House abound in contemporary American political history: from 1995 to 2001, then-President Bill Clinton, a Democrat, would have ceded the reins to then-Speakers Newt Gingrich or Dennis Hastert, both Republicans; from 1989 to 1993, then-President George H.W. Bush, a Republican, would have been replaced by then-Speakers Jim Wright or Tom Foley, both Democrats; or from 1981 to 1989, then-Speakers Wright and Tip O'Neill, also both Democrats, would have filled a vacancy for then-President Ronald Reagan, a Republican. These recent examples are more than anecdotal. They are indicative of the larger trend that has dominated American politics since the Second World War: the growing norm of divided government. Under

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174. See Taylor, *supra* note 11, at 465-66.

175. See NANCY L. ROSENBLUM, ON THE SIDE OF THE ANGELS: AN APPRECIATION OF PARTIES AND PARTISANSHIP 61 (2008) (discussing the traditional view of political parties as divisive forces in government).

divided government, the presidency and one or both Houses of Congress are controlled by different parties. From 1946 to 1992, divided government existed sixty-seven percent of the time; and from 1981 to 2001, it existed for ninety percent of the time.<sup>176</sup> The possibility of a party reversal in the event of a presidential succession is therefore quite high.

Party reversals are discomfoting for two reasons, the first is political and the second is more historical. First, they disturb expectations. When voters enter the voting booth to cast their ballot, they make a collective choice to agree to be bound by the results of the poll. Whether an individual voter wins or loses with respect to her particular preference, she will, by convention and law, adhere to the aggregated voice of the people. A mid-stream substitution of presidential party representation vetoes the freely expressed will of the electorate, because it imposes upon citizens a choice to which they have not consented.<sup>177</sup> And it is not just any kind of choice—it is the most important kind of choice about what political values will govern the land. On a deeper level still, a party reversal may weaken the connection between citizen and state, a connection that must be strong in order both for the state to be stable and for citizenship to have a meaning beyond a passport.

A mid-stream reversal of presidential parties is troubling for a second reason: it undermines the modern American value of partisanship. By using the term *partisanship*, I do not mean to invoke the partisan wrangling that has threatened to paralyze, and indeed at times has frozen, the legislative process. I refer instead to the larger institutional memberships that structure the political process. That type of partisanship, which is embodied in political affiliations like parties and organizations, lays at the core of politics in the United States.<sup>178</sup> These affiliations are what James Sundquist called “the stuff of American politics.”<sup>179</sup> Since the 1950s, political parties have evolved in the United States into objects of social identification, as vehicles for

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176. James P. Pfiffner, *The President and Congress at the Turn of the Century: Structural Sources of Conflict*, in *RIVALRY FOR POWER: PRESIDENTIAL-CONGRESSIONAL RELATIONS* 27, 30-31 (James A. Thurber ed., 2002).

177. See Howard M. Wasserman, *Structural Principles and Presidential Succession*, 90 *KY. L.J.* 345, 385 (2001) (“[W]hile not ideologically pure, political parties reflect a commitment to some set of policies and a connection among candidates and voters sympathetic to those policies.”).

178. See JOHN H. ALDRICH, *WHY PARTIES? THE ORIGIN AND TRANSFORMATION OF POLITICAL PARTIES IN AMERICA* 3 (1995).

179. JAMES L. SUNDQUIST, *DYNAMICS OF THE PARTY SYSTEM: ALIGNMENT AND REALIGNMENT OF POLITICAL PARTIES IN THE UNITED STATES* 449 (rev. ed. 1983).

civic engagement, and as anchors of institutional stability.<sup>180</sup> Partisanship is so deeply entrenched in the constitutional culture of the nation that it has become constitutive of the democratic values that shape politics in the United States.<sup>181</sup> This is not to suggest that party affiliation has always been strong or that it has intensified in contemporary America. Quite the contrary, there is evidence both that party affiliation has been in decline<sup>182</sup> and that Americans have taken an increasingly neutral posture, though not a negative view, toward political parties.<sup>183</sup> The point is instead a different one: it is that partisanship cultivates, through political parties, aspirational virtues that help govern American pluralist politics, namely inclusiveness, compromise, civil disagreement, institutionalized dissent, and collective action,<sup>184</sup> each of which is furthered by political parties as mediating organs of public discourse. That the current succession regime departs from the norm of partisanship is another strike against it.

What further exacerbates the design flaws of the existing succession regime is that it privileges tradition over reason. By adhering to an order of precedence that ranks Cabinet secretaries along the line of succession according to the date upon which their departments were created, the succession regime defers to institutional seniority at the expense of leadership experience. Granted, placing the Secretary of State first among Cabinet successors is a wise selection given that Secretaries of State are commonly seen as, and indeed are, international heavyweights and competent administrators.<sup>185</sup> The same is largely true of Secretaries of Treasury and Defense, the next two statutory successors.<sup>186</sup> But as we proceed further down the list of statutory

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180. See generally DONALD GREEN ET AL., *PARTISAN HEARTS AND MINDS: POLITICAL PARTIES AND THE SOCIAL IDENTITIES OF VOTERS* (2004) (describing the evolution of partisan views and the effects of partisan views on electoral politics).

181. See SAMUEL J. ELDERSVELD & HANES WALTON, JR., *POLITICAL PARTIES IN AMERICAN SOCIETY* 81 (2d ed. 2000).

182. See, e.g., Morris P. Fiorina, *Parties and Partisanship: A 40-Year Retrospective*, 24 *POL. BEHAV.* 93, 94 (2002) (describing the declining power of political parties).

183. See Russell J. Dalton, *The Decline of Party Identifications*, in *PARTIES WITHOUT PARTISANS: POLITICAL CHANGE IN ADVANCED INDUSTRIAL DEMOCRACIES* 19, 28 (Russell J. Dalton & Martin P. Wattenberg eds., 2000); see also Martin P. Wattenberg, *The Decline of Political Partisanship in the United States: Negativity or Neutrality?*, 75 *AM. POL. SCI. REV.* 941, 946 (1981).

184. See ROSENBLUM, *supra* note 175, at 356-62 (weighing the virtues of partisanship).

185. See *Duties of the Secretary of State*, U.S. DEP'T OF STATE (Jan. 20, 2009), <http://www.state.gov/secretary/115194.htm> (discussing the Secretary of State's various foreign policy and administrative roles).

186. See *About the Department of Defense (DOD)*, U.S. DEP'T OF DEFENSE, <http://www.defense.gov/about/> (last visited July 29, 2011) (describing the powers and responsibilities of the Secretary of Defense); *Secretary and Senior Officials*, U.S. DEP'T OF THE TREASURY, <http://www.treasury.gov/resource-center/faqs/About-Treasury/Pages/officials.aspx> (last

successors, the thought of the presidency falling upon one of those secondary officers is understandably disconcerting—which is why it is sensible that they would sit lower on the line of succession.

But what does not make sense is that the Secretary of Homeland Security sits at the very bottom of the line of presidential succession. She is entrusted with the high duty of running a department whose mission is to prevent terrorist attacks on the United States,<sup>187</sup> improve the nation's defenses against terrorism,<sup>188</sup> plan for and administer recovery programs in the aftermath of terrorist attacks,<sup>189</sup> and—among other emergency functions—to prepare for and respond to emergencies and crises, both natural and manmade.<sup>190</sup> If the folly of the presidential succession law were not yet clear, it should be now. How can one of the statutory successors best prepared to lead the nation in the aftermath of a crisis be consigned to the end of the line, behind the Secretaries of Agriculture, Housing and Urban Development, Education, and others whose work is not as closely connected to crisis management? That is only one of several worrisome problems that make the current line of succession a liability rather than an asset.

### C. Democratic Stability

The current succession law also raises significant concerns about democratic stability and legitimacy. In a time of crisis, there can be no greater need than stability in the administration of government to ensure that vital services continue with minimal impairment. But there is another type of stability that is just as critical in a time of crisis: stability in the country's leadership, both with respect to the people piloting the state and the direction they take to reach their objectives for the nation. The Founders saw this latter form of stability as a necessity.<sup>191</sup> Finding ways to maintain stability doubled as a cordon roping off the volatility of changing course in mid-stream—a menace that remains very real today given that statutory successors often represent parties different from the President's own. The Founders therefore looked askance at the “mutability” of personnel and policy because it would lead to dire difficulties for America,<sup>192</sup> not the least of which included risking the

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updated Mar. 8, 2011) (describing powers and responsibilities of the Secretary of the Treasury).

187. 6 U.S.C. § 111(b)(1)(A) (2006).

188. *Id.* § 111(b)(1)(B).

189. *Id.* § 111(b)(1)(C).

190. *Id.* § 111(b)(1)(D).

191. *See* THE FEDERALIST NO. 62, *supra* note 20, at 380 (James Madison).

192. *Id.*



loss of respect in the eyes of sister nations,<sup>193</sup> exposing the state to the possibility of incoherent laws lacking a unifying direction,<sup>194</sup> and undermining the people's faith in, attachment to, and reverence for their government.<sup>195</sup>

Consider the risk of the succeeding interloper: an individual designated by congressional statute to serve as acting President could conspire with Congress to hijack the presidency. Given that the Constitution provides that it is the responsibility of Congress to determine the time for choosing electors,<sup>196</sup> imagine the following: Congress could pass a statute designating the Secretary of State, for example, to serve as acting President if the circumstances warrant, following which the President and the Vice President would become unavailable to serve, at which point the Secretary of State would ascend to the presidency, pending the election of a new President.<sup>197</sup> But if Congress somehow refused to settle on a time to choose electors, the consequence would be to prevent the naming of a new President, and the larger consequence would be to leave the succeeding Secretary of State as acting President well beyond the next election and perhaps even indefinitely. That nefarious hypothetical scenario arose at the founding.<sup>198</sup>

A related concern persists to this day: conflicts of interest in presidential succession. Consider the case of presidential impeachment. The Constitution provides that the President is subject to removal "from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."<sup>199</sup> The text also provides that the House of Representatives "shall have the sole Power of Impeachment,"<sup>200</sup> and that "[t]he Senate shall have the sole Power to try

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193. *Id.* at 380-81.

194. *Id.* at 381.

195. *Id.* at 381-82.

196. U.S. CONST. art. II, § 1, cl. 4.

197. Akhil Amar interprets the founding regime—correctly in my view—as contemplating the possibility of a special election to fill a presidential vacancy in the event of a statutory succession to the presidency. See Akhil Reed Amar, Southmayd Professor of Law, Yale Univ., William Howard Taft Lecture on Constitutional Law: Presidents Without Mandates (with Special Emphasis on Ohio) (Oct. 28, 1998), in 67 U. CIN. L. REV. 375, 378 (1999). One hundred years later when Congress deliberated upon the revised sequence of 1886, legislators expressed concerns about holding a special election, which could be more disruptive than reassuring. John D. Feerick, *A Response to Akhil Reed Amar's Address on Applications and Implications of the Twenty-Fifth Amendment*, 47 HOUS. L. REV. 41, 65 (2010).

198. See LETTERS FROM THE FEDERAL FARMER TO THE REPUBLICAN 95-96 (Walter Hartwell Bennett ed., Univ. of Ala. Press 1978) [hereinafter LETTERS FROM THE FEDERAL FARMER]; see also THE FEDERALIST NO. 72, *supra* note 20, at 437-38 (Alexander Hamilton).

199. U.S. CONST. art. II, § 4.

200. *Id.* art. I, § 2, cl. 5.

all Impeachments.”<sup>201</sup> This interlocking web of procedural rights and responsibilities gives rise to a potential cradle of conflicted interests.

To see why, assume the vice presidency is vacant. Further assume a period of divided government in which different political parties control the presidency and Congress—an arrangement that has occurred more often than not in modern American history.<sup>202</sup> Speaker of the House Johnson, whose party commands a majority in the House, leads the call for impeaching President Smith, and Johnson is supported by the Senate’s senior statesman, President pro tempore Clark. If their congressional colleagues stand with them, there is no constitutional rule to prevent Speaker Johnson and Senator Clark from removing President Smith from the Oval Office, in so doing elevating Johnson to the presidency, if only as acting President. But the position of acting President is only minimally distinguishable from that of President, especially when considered against the backdrop of the problem of a succeeding interloper discussed above. Conflicts of interest in presidential succession are not only questions of theory; they are very real, and have indeed arisen in American history.<sup>203</sup>

The instability of the presidential succession regime is also at odds with the conventional wisdom that it is said to constitute a purely structural arrangement designed only to ensure the continuity of government and not to advance policy preferences.<sup>204</sup> That view is incorrect because the very first principle of presidential succession is in fact to disclaim policy-neutrality. Indeed, policy preferences stand at the very base of the succession regime, the first preference being for elected officeholders over appointed ones.<sup>205</sup> The choice to elevate elected officeholders over appointed ones represents a judgment that elected leaders are relatively more prepared and suitable for crisis leadership than appointed leaders.

There is of course great wisdom in placing elected leaders at the head of the line of statutory succession. The Founders would have

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201. *Id.* art. I, § 3, cl. 6.

202. See RICHARD S. CONLEY, *THE PRESIDENCY, CONGRESS, AND DIVIDED GOVERNMENT: A POSTWAR ASSESSMENT* 3 (2003).

203. See, e.g., Amar, *supra* note 197, at 385 (commenting on the conflict of interest of Senate President Benjamin Wade in the impeachment proceedings of President Andrew Johnson); Susan Low Bloch, *Cleaning Up the Legal Debris Left in the Wake of Whitewater*, 43 ST. LOUIS U. L.J. 779, 789 (1999) (expressing concerns about the role of the Speaker of the House and Senate President pro tempore during impeachment proceedings in the context of President Bill Clinton’s impeachment).

204. See Scott Dodson, *The Peculiar Federal Marriage Amendment*, 36 ARIZ. ST. L.J. 783, 799 (2004).

205. Mitchell E. Hochberg, Note, *Incapacitation, Succession, and the Papacy*, 85 B.U. L. REV. 601, 616 (2005).

endorsed this preference because it fulfills their expectation about the ultimate source of democratic legitimacy: citizen principals give their popular consent to the legislative and executive agents they send to the national capital. In the view of the Founders, those persons charged with the solemn duty of administering the powers of government must trace their power directly to the people, otherwise the “republican character” of the state would be “degraded.”<sup>206</sup> For the Founders, this was especially necessary for the House of Representatives and the President—each of whom was subject to periodic election and derived their legitimacy from the freely expressed will of the people.<sup>207</sup> To avoid any doubt about their intentions, the Founders made their case methodically and in no uncertain terms: “Who,” they asked, “are to be the objects of popular choice? Every citizen whose merit may recommend him to the esteem and confidence of his country.”<sup>208</sup> All representatives acting in the name of the people needed first to secure the consent of the governed.<sup>209</sup> That was the basic rule of American government, the very first of all first principles.

But if we are to hoist elected leaders over appointed ones, we should perhaps also differentiate among elected leaders themselves. It is not clear that the elected leaders who enjoy a privileged position in the succession sequence—the Speaker of the House and the Senate President pro tempore—are better prepared than other elected leaders to lead the nation in an emergency. As a matter of competence, we might argue that someone with executive experience leading a government could more capably assume the reigns of control at a moment’s notice. Perhaps a governor or even a mayor of a large city would have acquired experience more relevant to the presidency than a legislator. It is of course true that the Speaker of the House may have experience in the skillful management of congressional factions, and this may help pass legislation. But that expertise does not bear much relevance to running an administration. Similarly, the elderly Senate President pro tempore may draw upon her seniority to readily command the deference and respect of senatorial colleagues, but her advanced age may more often represent an impediment than an advantage. In contrast, the governor of a large, populous, diverse, and economically powerful state, for instance

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206. THE FEDERALIST NO. 39, *supra* note 20, at 241 (James Madison).

207. *See id.* at 242.

208. THE FEDERALIST NO. 57, *supra* note 20, at 351 (James Madison).

209. *See* THE FEDERALIST NO. 39, *supra* note 20, at 241 (James Madison) (“[W]e may define a republic to be . . . a government which derives all its powers directly or indirectly from the great body of the people . . .”).

California or New York,<sup>210</sup> would have the twin virtues of having been elected to her post—like both the Speaker of the House and the Senate President pro tempore—but moreover also having acquired relevant experience in executive government on a large scale. The same may be said of the mayor of a major city.

The prominence of mayors as prospective presidential candidates is a recent phenomenon. Given their relatively small electorate, the local issues that occupy their work, and the provincial focus of their outlook, there is no obvious reason to believe that the seat of the city should necessarily be regarded as a repository for presidential leadership.<sup>211</sup> After all, no person has ever gone directly from Mayor to President.<sup>212</sup> But when then-Mayor of New York City Rudy Giuliani exhibited his widely-praised leadership in the aftermath of September 11, 2001, the mayoralty was transformed into a springboard to the presidency. Giuliani ran for President and his successor, Michael Bloomberg, considered following suit.<sup>213</sup> Not all mayoralties, however, are perceived as a finishing school for presidential candidates.

There is something unique to signature cities like New York, Washington, and Los Angeles. Their mayoralties have become a new locus of power as homeland security has come to dominate the public consciousness and has intensified—and in many ways reoriented—the

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210. Governors from both California and New York have gone on to run for president. For example, New York Governors have a long history of running for president, many of them—Grover Cleveland, Martin Van Buren, Franklin Delano Roosevelt, and Theodore Roosevelt—successfully. SARAH F. LIEBSCHUTZ ET AL., *NEW YORK POLITICS & GOVERNMENT: COMPETITION AND COMPASSION* 48 (1998). From 1976 to 2004, three former California Governors sought the Presidency. Dennis W. Johnson, *First Hurdles: The Evolution of the Pre-Primary and Primary Stages of American Presidential Elections*, in *WINNING ELECTIONS WITH POLITICAL MARKETING* 177, 184 (Philip John Davies & Bruce I. Newman eds., 2006).

211. But mayors have played central roles in some important battles about constitutional meaning, for instance, with respect to equality. See Sylvia A. Law, *Who Gets to Interpret the Constitution? The Case of Mayors and Marriage Equality*, 3 *STAN. J. C.R. & C.L.* 1, 5-7, 14-15, 22-24 (2007) (describing the actions by local executives to support gay marriage in San Francisco, California; New Paltz, New York; and Multnomah County, Oregon). There also exists a growing body of scholarship arguing that cities and the mayors who lead them have an important role in constitutional enforcement. See, e.g., David J. Barron, *Why (and When) Cities Have a Stake in Enforcing the Constitution*, 115 *YALE L.J.* 2218, 2233, 2238 (2006) (arguing for local interpretation of the Constitution based on cities' subordination to, and independence from, state authority).

212. Grover Cleveland became President after having served as Mayor of Buffalo and then Governor of New York. ALYN BRODSKY, *GROVER CLEVELAND: A STUDY IN CHARACTER* 36 (2000). Other former mayors have run for President, though unsuccessfully. See Paul E. Peterson, *The American Mayor: Elections and Institutions*, 53 *PARLIAMENTARY AFF.* 667, 667 (2000).

213. The two most recent New York City mayors have either run for, or considered running for, the presidency. See Sam Roberts, *Suddenly, State Seems to Have No Shortage of Possible Presidents*, *N.Y. TIMES*, Aug. 27, 2006, at 25; Sara Kugler, *NY Mayors See Route to White House*, *USA TODAY* (Oct. 31, 2007, 9:35 PM), [http://www.usatoday.com/news/politics/2007-10-31-2161938412\\_x.htm](http://www.usatoday.com/news/politics/2007-10-31-2161938412_x.htm).

function of local government.<sup>214</sup> It is not difficult to understand why: the new age of terror has made cities targets for terrorist strikes and has consequently transformed their mayors into powerful symbols of security and leadership to whom citizens look for reassurance.<sup>215</sup> But more than symbolism, their experience in crisis management, public administration, and organization speaks better of their presidential potential as elected executives than their counterparts in the legislative branch.

The point is not that we should look to mayors as potential successors in the event of a presidential vacancy. It is instead that although a mayor of a foremost metropolitan city holds her office by virtue of election just like the Speaker of the House or the Senate President pro tempore, the mayor's office is a high executive one that entails responsibilities and demands competencies different from the ones we value in legislative officers. Indeed, there are qualitative differences between the lived experiences and leadership skills of persons elected to high executive offices, on the one hand, and, on the other, persons who hold legislative offices. And those differences matter most when the unexpected happens.

#### IV. THE SUCCESSION SOLUTION

In its final report on the attacks of September 11, 2001, the 9-11 Commission (the "Commission") issued an urgent call to action. America must quickly update the apparatus of government to help protect the nation against another terrorist attack: "As presently configured," wrote the Commission, "the national security institutions of the U.S. government are still the institutions constructed to win the Cold War,"<sup>216</sup> adding that "[t]he United States confronts a very different world today."<sup>217</sup> Indeed it does. Which is why, wrote the Commission, the United States must move aggressively to pivot away from the old order toward the new, more dangerous one.<sup>218</sup>

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214. See Stephanie Casey Price, *Legacy of a Mayor: Alice Rivlin in Conversation with Mayor Anthony Williams*, GEO. PUB. POL'Y REV., Spring-Summer 2006, at 7, 8 (explaining how local security concerns have evolved since September 11, 2001).

215. See Tom Ridge, Sec'y of Homeland Sec., Remarks to the U.S. Conference of Mayors (Jan. 19, 2005), available at [http://www.dhs.gov/xnews/speeches/speech\\_0238.shtm](http://www.dhs.gov/xnews/speeches/speech_0238.shtm) ("Since 9/11, mayors have become a symbol of . . . strength to the citizens [they] represent and three years later, mayors continue in their communities to be the most reassuring voice for citizens across the country when it comes to steps taken to combat international terrorism.").

216. THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 399 (2004).

217. *Id.*

218. *See id.*

Americans have in the past risen to conquer unconventional threats, and bravely stared down new global conditions that challenge the security of the nation. They have done so on the battlefield abroad, in civil and constitutional reconstruction in foreign states, and in economic development in allied nations.<sup>219</sup> The Commission's observations are just as relevant to wars abroad as they are to laws at home. The new threat of terrorism demands a similarly unconventional reorganization of government institutions. Some of these changes have already been completed, others are currently ongoing, and still others must be undertaken now, before the next strike.

One of the domestic institutions calling most profoundly for attention in the interest of security and stability is the presidency. The rules of presidential succession are not only outdated, written generations ago, but they are oriented toward values that have been supplanted by more enlightened ones. Where it may once have been acceptable to privilege politics over leadership and tradition over competence, the reverse is now true in the present age of terror. If there were any doubt of the premium that the nation must place on leadership and competence in the modern world, one need only read the solemn words of caution the Commission repeated to Americans: "An attack is probably coming; it may be more devastating still."<sup>220</sup> The problem of presidential succession has ballooned to grave proportions and calls for a reasoned, responsible, and imaginative response—just as the Commission demanded. The succession solution is therefore to renew the succession sequence in light of the new challenges posed by the omnipresent fount of global insecurity: terrorism.

#### A. *The Limits of the Conventional*

Scholars have suggested a number of innovative ideas for solving the succession problem. Generally, those ideas propose doing one or more of the following: (1) removing legislative officers from the line of succession; (2) adopting a Cabinet-centric succession sequence; (3) rearranging the order of Cabinet successors according to the relative importance, not seniority, of Cabinet departments; and among others; (4) adding non-Washington-based successors based outside of Washington to the order of precedence. Below, I review each of these categories of proposals and ultimately conclude that they fail to meet the pressing criteria to which a renewed line of succession should aspire.

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219. *See id.*

220. THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES: EXECUTIVE SUMMARY 17 (2004).

The first category of proposals advocates removing legislative officeholders from the line of presidential succession for two possible reasons, the first constitutional and the second prudential. According to observers like Akhil Amar<sup>221</sup> and M. Miller Baker<sup>222</sup> who advocate removing legislators in order to keep faith with the Constitution, the succession sequence should statutorily exclude legislators because they do not qualify as *officers* under the Succession Clause.<sup>223</sup> Philip Bobbitt argues that the Senate President pro tempore and the Speaker of the House should be dropped from the order of precedence because the former is likely to be too old to make an effective President and the latter is just as probable as not to hail from the party opposite the President's own.<sup>224</sup> This, to Bobbitt, is unpalatable, and therefore calls for a quick and easy statutory fix: remove them both from the line of succession.<sup>225</sup> Although this idea may help bring greater constitutional clarity to presidential succession, it is not clear that it would either conform to political realities or satisfy important prudential interests.

The second category of ideas to renew the succession regime proposes a structure of Cabinet succession. This suggestion follows from the prior one, which counsels Congress to strike the Speaker of the House and the Senate President pro tempore from the roster of statutory successors. Joel Goldstein and Howard Wasserman advocate substituting Cabinet secretaries for legislative officeholders. Goldstein believes that Cabinet members would make suitable statutory successors given their common party allegiance with the President.<sup>226</sup> He sees party allegiance as a non-trivial point of consistency that a successor must—as a matter of representative party government—share with the absent President.<sup>227</sup> For his part, Wasserman maintains that Cabinet succession would be better than legislative succession because the former is more consistent with the three structural principles that underpin the Constitution, namely, political partisanship, democracy, and the separation of

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221. See *Presidential Succession Act: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 108th Cong. 33 (2004) [hereinafter *Presidential Succession Act*] (testimony of Akhil Reed Amar, Southmayd Professor of Law and Political Science, Yale University).

222. See *Ensuring the Continuity of the United States Government*, *supra* note 136, at 12-13 (statement of M. Miller Baker, Esq., McDermott Will & Emery).

223. See *id.* at 37; *Presidential Succession Act*, *supra* note 221, at 33.

224. PHILIP BOBBITT, *TERROR AND CONSENT: THE WARS FOR THE TWENTY-FIRST CENTURY* 421 (2008).

225. *Id.*

226. Joel K. Goldstein, *Akhil Reed Amar and Presidential Continuity*, 47 *HOUS. L. REV.* 67, 94 (2010).

227. *Id.* at 93-94.

powers.<sup>228</sup> But while Cabinet succession avoids the problem of constitutional clarity, this proposal nonetheless fails to bring confidence that a statutory successor would possess the necessary presidential timbre to lead the nation.

There is an important added variation to Cabinet succession. This third category of proposals takes a step beyond simply removing legislative officeholders from the line of succession and elevating Cabinet officers directly below the Vice President. These proposals suggest rearranging the order of precedence among Cabinet secretaries according to their relative weight, importance, or readiness to assume the presidency rather than in order of departmental seniority. What animates this category of proposals is the view that membership in the Cabinet does not, in and of itself, qualify a Cabinet secretary for presidential service,<sup>229</sup> and that one cannot presume that the secretary of a Cabinet department that has been in existence for many years should outrank the secretary of a Cabinet department that has been in existence for only a few years.<sup>230</sup> On this theory, which makes eminent sense, it does not necessarily follow that the Secretary of Transportation, whose department was created in 1966, is better equipped to lead the nation in a time of crisis than the Secretary of Homeland Security, whose department was created four decades later in 2002.

Yet that is the basis of the current succession law: departmental seniority determines the order of precedence among Cabinet secretaries. This has understandably troubled many observers, including Baker, who recommended rearranging the line of statutory succession to begin with the Secretary of State and the Secretary of Defense, followed by the Attorney General and the Secretary of Homeland Security.<sup>231</sup> Though it is certainly a significant leap forward in redesigning the succession sequence for the better, this category of proposals nevertheless suffers the same deficiency as other Cabinet succession proposals: although it may be more likely that a given Secretary of State or a given Secretary of Homeland Security would be better prepared than a given Secretary

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228. Wasserman, *supra* note 177, at 409.

229. For example, M. Miller Baker states (quite rightly) that “[w]hat should be beyond reasonable dispute is that the mere holding of Cabinet office alone does not qualify the office holder for assuming the acting presidency.” *Presidential Succession Act*, *supra* note 221, at 37 (testimony of M. Miller Baker, Partner, McDermott Will & Emery).

230. *See id.* at 4 (testimony of Thomas H. Neale, Project Management Coordinator, Government and Finance, Congressional Research Service, Library of Congress) (arguing against the “customary” approach of placing the newest Cabinet secretaries “at the end of the line of succession[,]” and arguing for placing the Secretary of Homeland Security after the Attorney General).

231. *Id.* at 37 (testimony of M. Miller Baker, Partner, McDermott Will & Emery).



of Transportation or a given Secretary of Agriculture to assume the presidency in the event of a presidential vacancy, the risks of presidential roulette still loom large. In addition to these doubts about presidential quality, Cabinet succession and Cabinet rearrangement still do not address the prudential interests to which any succession regime should be attentive.

Some of the more innovative ideas, and indeed quite possibly more effective ones, have proposed expanding the list of successors beyond the usual Washingtonians. Geography was a critical consideration in the original design of the Constitution,<sup>232</sup> and perhaps the same should be true today in the constitutional renewal of the presidential succession regime. Recognizing the possibility of a mass strike in the heart of the capital that could decapitate the entire government, or much of it, commentators have recommended adding to the line of succession officeholders who do not work in Washington, for instance governors, prominent private citizens and leaders of industry. For instance, Senator Brad Sherman suggested adding the U.S. Ambassador to the United Nations to the end of the succession list,<sup>233</sup> and John Fortier advanced the creative idea of constituting a regional security advisory council of prominent politicians—both active and inactive—who are based outside the national capital region and would receive regular remote security briefings to prepare for the unhappy possibility of a catastrophic attack in Washington.<sup>234</sup> These proposals are responsive to some of the weaknesses in the presidential succession regime insofar as all statutory successors under the existing line of succession are currently based in Washington: from the Speaker of the House to the Senate President pro tempore, to each of the Cabinet secretaries, all are headquartered in the national capital.<sup>235</sup> This means that all of them could be incapacitated at once by a single blow. What would happen then? That is the question Sherman, Fortier, and others have sought to answer.

Nonetheless, it should come as no surprise that officials in the Administration have done their part to prepare for this contingency. In anticipation of a catastrophic attack, it has become custom to sequester in safety at least one Cabinet secretary during the President's annual

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

233. *Presidential Succession Act*, *supra* note 221, at 47 (statement of Sen. Brad Sherman of California).

234. *Ensuring the Continuity of the United States Government*, *supra* note 136, at 9-10 (statement of John C. Fortier, Executive Director, Continuity of Government Commission and Research Associate, American Enterprise Institute).

235. See *Presidential Succession Act*, *supra* note 221, at 2 (statement of Rep. Steve Chabot, Chairman, Subcomm. on the Constitution).

State of the Union address to a joint session of Congress,<sup>236</sup> as well as other high profile gatherings. The chosen Cabinet secretary is known as the “designated survivor.”<sup>237</sup> Spiriting away to safety a chosen successor while the nation’s leaders gather together en masse is an old practice whose origins date to the Cold War, a time of enduring uncertainty about nuclear disaster.<sup>238</sup> Since then, designated survivors for the State of the Union address have included Secretaries of the Interior (eighth in the line of the succession) Donald Hodel in 1988, Manuel Lujan in 1991, Bruce Babbitt in 1993, Gale Norton in 2002, and Dirk Kempthorne in 2008; Commerce Secretary (tenth in the line of succession) Donald Evans in 2004 and 2005; and recently Secretary of Housing and Urban Development (twelfth in the line of succession) Shaun Donovan in 2010.<sup>239</sup> These names do not immediately inspire the confidence.

Consider another example. In the summer of 2009, all of the customary dignitaries attended a joint session of Congress to hear the President’s health care address: Vice President Joe Biden, House Speaker Nancy Pelosi, Senate President pro tempore Robert Byrd, Secretary of State Hillary Clinton, Secretary of the Treasury Timothy Geithner, and Secretary of Defense Robert Gates. Everyone on the line of succession was present except the person chosen to serve as the designated survivor: Secretary of Energy Steven Chu.<sup>240</sup> But what assurances do the American people have that Secretary Chu would have been up to the task of leading the nation in the event of a catastrophic attack on Washington? Of course, there are no assurances that he, nor any other statutory successor, could help bring the nation out of its instability and sorrow. And that is precisely the problem. Not only would expanding the line of succession fail to address concerns about constitutional clarity, it would also fall short of the prudential interests that should be in the foreground of succession planning and of the need for proven presidential leadership in a time of crisis.

Those are the bases upon which we can distinguish the many ideas circulating to improve the current system of presidential succession. Yet

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236. Jerry H. Goldfeder, *Could Terrorists Derail a Presidential Election?*, 32 FORDHAM URB. L.J. 523, 563 (2005).

237. Ed O’Keefe, *HUD’s Shaun Donovan was Cabinet’s ‘Designated Survivor,’* WASH. POST (Jan. 27, 2010, 8:48 PM), [http://voices.washingtonpost.com/federal-eye/2010/01/huds\\_shaun\\_donovan\\_pulls\\_desig.html](http://voices.washingtonpost.com/federal-eye/2010/01/huds_shaun_donovan_pulls_desig.html) (internal quotation marks omitted).

238. See Juliet Lapidus, *Do Obama and Biden Always Fly in Separate Planes?*, SLATE (Apr. 13, 2010, 5:47 PM ET), <http://www.slate.com/id/2250705>.

239. O’Keefe, *supra* note 237.

240. Associated Press, *Energy Secretary Skips Obama Health Care Address*, SEATTLE TIMES (Sept. 9, 2009, 5:48 PM), [http://seattletimes.nwsource.com/html/politics/2009834162\\_apushealthcarechu.html](http://seattletimes.nwsource.com/html/politics/2009834162_apushealthcarechu.html).

what is common to each of the proposals under all four of these categories is that they are unworkable for one or more of the following reasons, each of which I discussed in the previous Part: the proposal collapses under the criticism of constitutional clarity; it does not recognize the importance of party continuity; it does not address the need for democratic stability; or it falls short of giving the nation a sense of security about the designated statutory successor's readiness to serve as President.<sup>241</sup> In order to meet these standards and to improve the presidential succession regime, something unconventional is needed both to make the nation safer in a time of crisis and to meet the high stakes of succession.

### B. *Temporary Presidential Succession*

The succession solution is to insert former living Presidents into the line of presidential succession, in reverse chronological order of service and according to party affiliation, and to remove the House Speaker and Senate President pro tempore. The new line of statutory successors would therefore proceed as follows: former President X, former President Y, former President Z, members of the Cabinet according to a revised congressionally-determined order that is not based on departmental seniority.<sup>242</sup>

To illustrate the line of succession more vividly, here is the order of presidential succession assuming it had been activated on March 1, 2010, under the administration of President Barack Obama: assuming Vice President Joe Biden were unavailable, the first four statutory successors would be former Presidents Bill Clinton, Jimmy Carter, George W. Bush, and George H. W. Bush, followed by the Cabinet. This is only the skeletal outline of the new order of precedence. A number of rules and wrinkles must accompany it.

The first qualification is that the succession of a former President to the presidency is only temporary. In the absence of the Vice President, the former President should fill a presidential vacancy until a special election is held to fill the office as soon as practicable. The details of how such a special election would proceed require careful attention and planning to ensure that the election is held neither too soon nor too late. But the Second Congress has given us a helpful start to designing the

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241. *See supra* Part III.

242. The order of precedence would vary according to the number of former living Presidents. As I discuss in greater detail in Part IV.B, there are further limitations that may limit the succession eligibility of former Presidents. Congress should also consider rearranging the order of Cabinet successors according to departmental service.

rules for a special election: in 1792, Congress provided for a special election in the event of a presidential and vice presidential vacancy.<sup>243</sup> Congress required the Secretary of State to notify all Governors of the vacancies and to publish an announcement of those vacancies across the United States.<sup>244</sup> The special election would take place no fewer than two months later.<sup>245</sup>

I would recommend at least two changes to this special election statute. First, the new succession statute should designate someone to notify states in the absence of the Secretary of State. Insofar as the new succession regime contemplates the possibility of a massive strike, we must posit the possibility of a simultaneous vacancy in the office of Secretary of State. That being the case, there would be no one to notify Governors and to launch the special election process unless there were someone appointed to act in lieu of the Secretary of State. Second, two months may be too little both for states to plan a special election in the midst of a catastrophe and for candidates to consider running for high office. The new statute should therefore stipulate a period of at least one year for the new election. That should offer sufficient time to Congress, states, candidates, and all parties to prepare for the special election. In any event, the 1792 special election procedures were well designed then, and could likewise be used to run a special presidential election today. Yet whether the same procedures and time intervals are used for a special election in a modern succession statute, the critical element of the new succession regime is precisely that it provides for temporary succession to the presidency by a former President.

But why only *temporary* succession service for former presidents? The age of former Presidents could be cause for concern were it otherwise. Americans may prefer an emergency presidential successor who combines similar parts of experience and wisdom with youthfulness and vigor, over someone whose age may suggest more of the former pair and less of the latter. Experience and wisdom would of course be indispensable in reassuring worried citizens, communicating with foreign heads of state, coordinating with domestic leaders, and making informed decisions about whether and how to respond to an aggressor state or stateless entity. Youthfulness and vigor would, for their part, be just as important in lifting the spirits of demoralized citizens, leading the work to rebuild and renew, and logging the necessarily long hours of crisis management in the aftermath of the devastation.

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243. Presidential Succession Act of 1792, ch. 8, § 10, 1 Stat. 240, 240-41, *repealed by* Presidential Succession Act of 1886, ch. 4, § 3, 24 Stat. 1, 2.

244. *Id.*

245. *Id.*

A close look at the actual age of former Presidents suggests that age might be only a minor concern. Former Presidents would generally bring an effective combination of experience, wisdom, youth and vigor. Over the course of the twentieth century, American Presidents have entered office at an average age of just under fifty-four years.<sup>246</sup> Even assuming each had served a full complement of two terms, their average age upon leaving office would be not quite sixty-four, which is still an age when retirement could be years away. The three most recent Presidents have entered office at relatively young ages: Barack Obama was forty-seven; George W. Bush, fifty-four; and Bill Clinton, forty-six.<sup>247</sup> It is true, however, that three of the prior four Presidents were over sixty at their inauguration: George H.W. Bush was sixty-four; Ronald Reagan, sixty-nine; and Gerald Ford, sixty-one.<sup>248</sup> It is also true that the two immediate post-Second World War Presidents were sixty (Harry Truman) and sixty-two (Dwight Eisenhower) when they moved into the White House.<sup>249</sup> But all other twentieth century Presidents were in their forties and fifties at inauguration: Theodore Roosevelt was forty-two; William Howard Taft, fifty-one; Woodrow Wilson, fifty-six; Warren Harding, fifty-five; Calvin Coolidge, fifty-one; Herbert Hoover, fifty-four; Franklin Delano Roosevelt, fifty-one; John F. Kennedy, forty-three; Lyndon B. Johnson, fifty-five; Richard Nixon, fifty-six; and Jimmy Carter, fifty-two.<sup>250</sup>

However, these numbers should not blind us to the reality that conceptions of age have evolved over time and will continue to do so in the years ahead. In the twentieth century, former Presidents have lived an average of about fourteen years after leaving office.<sup>251</sup> That is a reasonably long period. But as modern medicine continues to improve, the span of healthy lives will grow longer and it will not be surprising to see former Presidents leading active and dynamic lives after retirement from the presidency.<sup>252</sup> Still, Presidents will always have to deal with the physical and emotional burdens the White House places on the shoulders

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246. See BARBARA A. BARDES ET AL., *AMERICAN GOVERNMENT AND POLITICS TODAY: THE ESSENTIALS* 374 (2007).

247. *Id.* app. at A-16; Carl Hulse, *Obama is Sworn in as the 44th President*, N.Y. TIMES (Jan. 21, 2009), <http://www.nytimes.com/2009/01/21/us/politics/20web-inaug2.html>.

248. BARDES ET AL., *supra* note 246, app. at A-16.

249. *Id.*

250. *Id.*

251. See WENDY GINSBERG, CONG. RESEARCH SERV., RL 34631, *FORMER PRESIDENTS: PENSIONS, OFFICE ALLOWANCES, AND OTHER FEDERAL BENEFITS* 14 (2008), available at <http://www.fas.org/sgp/crs/misc/RL34631.pdf>.

252. MAX J. SKIDMORE, *AFTER THE WHITE HOUSE: FORMER PRESIDENTS AS PRIVATE CITIZENS* 8, 174 (2004).

of its occupant,<sup>253</sup> burdens whose effects may manifest themselves more acutely after their presidential service. One study confirms this very point: some Presidents have expired before what would otherwise have been their time.<sup>254</sup>

Nevertheless, whether one is younger or older, illness can strike at any age, and it does not always result in death. As a consequence, a former President may be living and carrying on relatively well, but not well enough to assume the command of the presidency as a statutory successor.<sup>255</sup> Case in point: twentieth-century Presidents have lived with a roster of worrying conditions and illnesses like cancer, heart disease, Addison's disease, strokes, diabetes, hyperthyroidism, or phlebitis;<sup>256</sup> others have experienced neurological impairment;<sup>257</sup> still others may have suffered from depression, paranoia and other behavioral disorders.<sup>258</sup> Perhaps most relevant are illnesses that strike after a presidency. For instance, President Ronald Reagan was diagnosed with Alzheimer's disease fewer than six years after his departure from office.<sup>259</sup>

This leads to the second qualification for temporary presidential succession: former Presidents must affirmatively accept the task of serving as a temporary successor if necessary. We may consider this second qualification as an opt-in requirement. Not all former Presidents may want to bear the weighty responsibility of filling a presidential vacancy. Having experienced the pressure of presidential leadership, some former Presidents may feel, or be deemed by others, physically, emotionally, or mentally unable, or quite simply insufficiently motivated to step into the White House at a time of crisis. It is of course difficult to imagine a former President disqualifying herself from eligibility as a temporary successor in the line of succession, given what is likely to

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253. See PAUL B. WICE, *PRESIDENTS IN RETIREMENT: ALONE AND OUT OF OFFICE* 9 (2009).

254. See ROSE McDERMOTT, *PRESIDENTIAL LEADERSHIP, ILLNESS, AND DECISION MAKING* 220 (2008).

255. Some Presidents may not even be well *while* in office. President James Garfield, who had been shot, was unable to govern as he lay in bed for months. See AMAR, *supra* note 71, at 448-49. President Woodrow Wilson presents another case. Although accounts differ, some have written that Wilson's stroke left him completely incapacitated, both physically and mentally. See PHYLLIS LEE LEVIN, *EDITH AND WOODROW: THE WILSON WHITE HOUSE* 350 (2001).

256. See Herbert L. Abrams, *Sudden Incapacitation*, in *PRESIDENTIAL DISABILITY: PAPERS, DISCUSSIONS, AND RECOMMENDATIONS ON THE TWENTY-FIFTH AMENDMENT AND ISSUES OF INABILITY AND DISABILITY AMONG PRESIDENTS OF THE UNITED STATES* 39, 43 (James F. Toole & Robert J. Joynt eds., 2001) [hereinafter *PRESIDENTIAL DISABILITY*].

257. See James F. Toole & Burton J. Lee, *Neurological Disorders*, in *PRESIDENTIAL DISABILITY*, *supra* note 256, at 45, 46.

258. See Jerrold M. Post, *Behavioral Disorders*, in *PRESIDENTIAL DISABILITY*, *supra* note 256, at 52, 55.

259. See RICHARD REEVES, *PRESIDENT REAGAN: THE TRIUMPH OF IMAGINATION* 487 (2005).

have been her life of prior public service and her readiness to serve her nation and fellow citizens as needed. But that option must be available to former Presidents if they are deemed unfit for presidential service, even if it is only temporary service pending a special election to fill the presidential vacancy.

But age is only one factor that may engender resistance to the proposal for temporary presidential succession. Another factor—one that is compelling in many respects—concerns the relative measure of democratic consent that former Presidents can claim in comparison to other possible statutory successors. That former Presidents are not currently imbued with the popular legitimacy that only a free election can offer could, for some, militate in favor of excluding former Presidents from the field of possible successors. On this theory, consistent with the prudential principle of democratic legitimacy, the Commander-in-Chief must command the popular consent of citizens.<sup>260</sup>

I agree that there is no higher democratic value than anchoring public authority in an election. But in a crisis, public values must bend toward the higher public needs of order, stability, and reconstruction. In such situations, compromising electoral legitimacy is a necessary concession that will ultimately serve the highest public values of all: establishing peace and ensuring good government. Temporary presidential succession offers a comfortable compromise between democratic and public values. It fulfills the latter by setting the state on a more certain course toward restoration. And it satisfies the former because, by virtue of her previous election, a former President may defensibly claim to have enjoyed a degree of democratic and plebiscitarian legitimacy that exceeds what all other legislative officers, and certainly all other Cabinet secretaries, can claim in their respective functions.<sup>261</sup>

Just as we have comfortably resolved the perceived problem of the age of former Presidents as well as the concern about their democratic legitimacy, we must still find similarly heartening solutions to other criticisms. For instance, what about repudiated Presidents: should they be included in the new line of statutory succession ahead of legislative officers and members of the Cabinet? After all, former Presidents may be *former* Presidents for a reason. They may have failed to win reelection, and therefore served only one term. They may have been impeached and convicted, or impeached alone. Or they may have been

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260. See *supra* note 209 and accompanying text (discussing the democratic concept of the consent of the governed).

261. See Juan J. Linz, *The Perils of Presidentialism*, in *PARLIAMENTARY VERSUS PRESIDENTIAL GOVERNMENT* 118, 119-21 (Arend Lijphart ed., 1992).

compelled to resign from office for their actions while in office. And there also exists the possibility that a former President may have left office, even as a two-term President, as a discredited leader who no longer enjoys the support of Americans. All of these are real possibilities that could raise doubts about the viability of elevating a former President to the presidency, even temporarily, in the event of presidential and vice presidential vacancies.

Which brings us to the third qualification for temporary presidential succession: the new line of succession would exclude former Presidents who have been impeached and convicted, and it would also exclude former Presidents who have resigned while in office. There is good reason to exclude former Presidents who fall under these categories: they may very well be discredited in the eyes of the very people whom they would be called to inspire with confidence in a time of crisis. To therefore thrust a repudiated former President back into power—even if only on a provisional basis until a special election were held—would do more harm than good and it would be worse than playing the odds of presidential roulette. It would undermine the purpose of temporary presidential succession, which is to draw upon the strengths of a competent, credible, and steady-handed leader whose executive experience, international stature, domestic repute, and moral clarity can help reset America onto its moorings.

However, neither single-term Presidents nor Presidents who have left office with low approval ratings should be excluded from the new line of succession. The reason why is borne out by social science statistics, which demonstrate that former Presidents quickly rehabilitate themselves in the eyes of Americans, if any rehabilitation is needed to begin with. Consider the most recent former President, George W. Bush, whose approval rating gained ten points within a year of his departure from office.<sup>262</sup> Similar trends exist for his living predecessors, former Presidents Jimmy Carter, George H. W. Bush and Bill Clinton: single-term Presidents Carter and Bush have seen their approval ratings double since their last months in office, while President Clinton's own approval rating has also risen since the end of his second term in 2001.<sup>263</sup>

What helps understand these data is that former Presidents typically evolve into nonpartisans and come to be viewed as nonpolitical statespersons. Though they of course remain associated in perception

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262. See Steven Thomma, *The Rehabilitation of George W. Bush*, MIAMI HERALD (May 2, 2010), [http://www.miamiherald.com/2010/05/02/1607521\\_the-rehabilitation-of-george-w.html](http://www.miamiherald.com/2010/05/02/1607521_the-rehabilitation-of-george-w.html).

263. See Paul Steinhauser, *Views Soften on 2 Former Presidents, CNN Poll Finds*, CNN.COM, <http://www.cnn.com/2009/POLITICS/01/07/polls.former.presidents/index.html> (last visited July 29, 2011).



and in fact with a political party, their post-presidential work tends to be detached from the partisan operations upon which they once relied as elected officers. Part of the explanation for the nonpartisan image of former Presidents is the long-standing convention that governs post-presidential remarks made in public: former Presidents do not criticize their successors.<sup>264</sup> As a consequence, former Presidents often become allies in the service of noble causes, and may develop a strong personal bond, despite having been political rivals when in office.<sup>265</sup>

The post-presidential turn to nonpartisanship, philanthropy and charitable engagement is best evidenced by the recent high-profile efforts of former Presidents. For instance, Presidents George W. Bush and Bill Clinton came together at the invitation of President Barack Obama to lead a humanitarian mission for Haiti.<sup>266</sup> Presidents Bill Clinton and George H.W. Bush joined forces to help build a tsunami relief fund.<sup>267</sup> President Jimmy Carter has founded the Carter Center, through which he supports Habitat for Humanity, serves as a mediator in foreign conflicts, and monitors elections abroad.<sup>268</sup> This is not a contemporary trend. Presidents past have likewise engaged in important public interest projects. For instance, President Rutherford Hayes led the Slater Education Fund, which helped improve educational opportunities for African-Americans,<sup>269</sup> and President Herbert Hoover was a key force in the creation of the United Nations International Children's Emergency Fund, an institution dedicated to ending starvation.<sup>270</sup>

In this respect, former Presidents attain a status approximating that of ceremonial presidents in parliamentary states. Quite apart from the

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264. See Alexander Bolton, *Gore's New Role is Old Standard*, THE HILL, Aug. 13, 2003, at 1; Raymond Hernandez, *After Sharing the White House, Sharing a Critique of the G.O.P.*, N.Y. TIMES, Aug. 30, 2004, at P18; Jeremy Wallace, *Local Bill Clinton Event Not Exactly a Sellout Yet*, SARASOTA HERALD-TRIB., Sept. 21, 2009, at BN1, available at <http://www.heraldtribune.com/article/20090921/COLUMNIST/909211039>; Bill Glauber, *Thatcher Plugs Her Book, Knocks Major*, BALT. SUN (June 14, 1995), [http://articles.baltimoresun.com/1995-06-14/news/1995165012\\_1\\_lady-thatcher-britain-prime-minister](http://articles.baltimoresun.com/1995-06-14/news/1995165012_1_lady-thatcher-britain-prime-minister); see also Eli Saslow, *Back in Texas, A More Simple Life for Bush*, WASH. POST, Apr. 11, 2009, at A1.

265. See David Shribman, *The Former Presidents Club*, PITT. POST-GAZETTE, Jan. 24, 2010, at B3, available at <http://www.post-gazette.com/pg/10024/1030448-372.stm>.

266. See Roger Runningen, *Ex-Presidents Bush, Clinton Join Obama to Aid Haiti (Update 2)*, BLOOMBERG BUS. WK., (Jan. 16, 2010, 1:23 PM EST), <http://www.businessweek.com/news/2010-01-16/ex-presidents-bush-clinton-join-obama-to-aid-haiti-update2-.html>.

267. See MARK K. UPDEGROVE, *SECOND ACTS: PRESIDENTIAL LIVES AND LEGACIES AFTER THE WHITE HOUSE* 234-35 (2006).

268. FRYE GAILLARD, *PROPHET FROM PLAINS: JIMMY CARTER AND HIS LEGACY* 48-51, 57-67 (2007).

269. See HANS L. TREFOUSSE, *RUTHERFORD B. HAYES* 137 (Arthur M. Schlesinger, Jr. ed., 2002).

270. See WILLIAM E. LEUCHTENBURG, *HERBERT HOOVER* 157 (Arthur M. Schlesinger, Jr. & Sean Wilentz eds., 2009).

critical difference that separates ceremonial presidents from former Presidents—the latter exercise executive functions and retain reserve powers, whereas the former have no official powers—there are some important similarities between the two with regard to their public perception. Both are visible symbols of the nation. Both are experienced and well-established figures in the political life of the country.<sup>271</sup> Neither is a policy-maker nor does either get entangled in the daily back-and-forth of political posturing.<sup>272</sup> Indeed, they are given ceremonial functions precisely because they are understood to disclaim any intent to influence the partisan political process.<sup>273</sup> Both instead more typically tend toward diplomatic and official duties on behalf of the state.<sup>274</sup>

But the main commonality between a parliamentary head of state (usually a president, though sometimes a monarch) and a former President is that both aspire to be seen, and are indeed often viewed, as nonpartisan and nonpolitical.<sup>275</sup> Both enjoy symbolic power: ceremonial presidents possess reserve powers that are rarely exercised but they hold no real political power; former Presidents likewise have no actionable power but do nonetheless have the emblematic trappings of power.<sup>276</sup> What perhaps best captures the image of former Presidents and ceremonial presidents is the following observation about what one scholar hopes an Australian head of state could embody: “a national leader who can speak from a non-partisan perspective, someone who can provide . . . moral and national leadership beyond the sphere of partisan politics.”<sup>277</sup>

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271. See MARGIT TAVITS, PRESIDENTS WITH PRIME MINISTERS: DO DIRECT ELECTIONS MATTER? 28 (2009).

272. See Kaare Strøm et al., *Dimensions of Citizen Control*, in DELEGATION AND ACCOUNTABILITY IN PARLIAMENTARY DEMOCRACIES 651, 673 (Kaare Strøm et al. eds., 2006) (stating that ceremonial leaders are not “serious policy-maker[s]”).

273. See RODNEY TIFFEN & ROSS GITTINS, HOW AUSTRALIA COMPARES 21 (2004) (explaining how modern monarchies “retain their privileges and ceremonial roles . . . in return for renouncing all attempts to influence politics”).

274. For example, former Presidents George H. W. Bush and Bill Clinton attended the funeral of Pope John Paul II as part of the official American delegation. See David E. Sanger, *U.S. Delegation with Bushes Prays at Bier*, N.Y. TIMES, Apr. 7, 2005, at A12.

275. See AREND LIJPHART, THINKING ABOUT DEMOCRACY: POWER SHARING AND MAJORITY RULE IN THEORY AND PRACTICE 83 (2008) (discussing the modalities of presidential selection that are likely to lead to nonpartisan and nonpolitical heads of state).

276. Like the Governor General of Canada, a former President possesses no real political power, largely because neither holds elected office. See Munroe Eagles & Sharon A. Manna, *Politics and Government*, in CANADIAN STUDIES IN THE NEW MILLENNIUM 65, 72 (Patrick James & Mark Kasoff eds., 2008).

277. Mark McKenna, *Monarchy: From Reverence to Indifference*, in AUSTRALIA’S EMPIRE 261, 286 (Deryck M. Schreuder & Stuart Ward eds., 2008).

The lofty status that former Presidents hold in the American imagination is now reflected in law. Many of the badges of post-presidential authority are expressly outlined in the Former Presidents Act of 1958 and its related provisions. Prior to 1958, former Presidents had often struggled through dire financial times.<sup>278</sup> But the Presidential Succession Act has effectively institutionalized the office of the former President.<sup>279</sup> The Presidential Succession Act defines a “former President” as someone who has been, but is no longer, President of the United States;<sup>280</sup> it excludes former Presidents who have been impeached and convicted.<sup>281</sup> Under the Presidential Succession Act, former Presidents are statutorily entitled to a monthly payment indexed according to the annual salary of a Cabinet secretary.<sup>282</sup> Former Presidents may also hire a staff,<sup>283</sup> they are entitled to office space,<sup>284</sup> and they are given Secret Service protection,<sup>285</sup> all of which is fully paid for by the federal treasury. The Presidential Succession Act therefore allows former Presidents to live in a way befitting the dignity of the office.<sup>286</sup>

### C. Competence and Continuity

In addition to addressing each of the concerns raised in the previous Part—namely constitutional clarity,<sup>287</sup> political realities,<sup>288</sup> and prudential interests<sup>289</sup>—redesigning succession rules to elevate a former President to the head of the line of statutory presidential successors would serve both the political imperative of party continuity in the

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278. For instance, President Harry Truman had to take out a loan from a bank for his moving expenses when he left the White House. Lisa Anderson, *The Ex-Presidents*, J. DEMOCRACY, Apr. 2010, at 64, 68. Before him, President Ulysses S. Grant descended into poverty following his Presidency. See John Y. Simon, *Ulysses S. Grant*, in THE PRESIDENTS: A REFERENCE HISTORY 241, 255 (Henry F. Graff ed., 3d ed. 2002). When the Former Presidents Act of 1958 came into force, the annual salary for former Presidents was greater than a physician’s average salary and four times a teacher’s median salary. STEVE NEAL, HARRY AND IKE: THE PARTNERSHIP THAT REMADE THE POSTWAR WORLD 302 (2001).

279. RUSS WITCHER, AFTER WATERGATE: NIXON AND THE NEWSWEEKLIES 24 (2000).

280. Former Presidents Act, 3 U.S.C. § 102 note, §§ (f)(1), (3) (2006).

281. See *id.* § (f)(2).

282. *Id.* § (a).

283. *Id.* § (b).

284. *Id.* § (c).

285. See 18 U.S.C. § 3056(a)(3) (2006) (authorizing the U.S. Secret Service to protect “[f]ormer Presidents and their spouses for their lifetimes”).

286. See ARTHUR M. SCHLESINGER, JR., THE CYCLES OF AMERICAN HISTORY 327 (Houghton Mifflin Co. 1986).

287. See *supra* Part III.A.

288. See *supra* Part III.B.

289. See *supra* Part III.C.

executive branch as well as the public interest of ensuring competence in presidential leadership. These two necessary features of presidential succession are not only critical in and of themselves, but they also help bridge the past with the present in two ways. First, temporary presidential succession aligns quite favorably with what the founding generation had in mind when it created the office of the presidency. What is more, temporary presidential succession also conforms to the modern American political order, which has evolved in material ways that depart from the original design. In this way, temporary presidential succession looks both backward and forward, paying heed to the founding wisdom that shaped the American polity while also recognizing that contemporary politics are considerably different from what the Framers had either crafted for themselves or anticipated for their posterity.

Begin first with the founding blueprint for the presidency. The authors of the Constitution had very particular ideas about presidential character, the kind of person who could authoritatively occupy the seat of executive power, and the features that make for an effective Commander-in-Chief. Predictably these qualities are not found easily in high circulation among conventional politicians. But given their acquired competence and lived experience, most Presidents come to possess these qualities by virtue of their office alone and some may already possess them prior to becoming Chief Executive.

Any discussion of presidential quality should begin, perhaps paradoxically, with the vice presidency. The creation of the understudy's office offers the clearest window into the founding meaning of presidential timbre. Granted, the vice presidency was not a central point of interest during the great Constitutional Convention debates in 1787 at the Philadelphia State House. Quite the contrary, the contours of the office itself were given barely a second thought until the final days of the revolutionary gathering that would create the United States.<sup>290</sup> The office itself was seen as relatively unimportant, mocked by critics as "an unnecessary part of the system,"<sup>291</sup> staffed by "that unnecessary officer the vice president, who for want of other employment is made president of the Senate."<sup>292</sup> But the importance of the vice presidency lay in its

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290. See Joel K. Goldstein, *Appendix B: An Overview of the Vice Presidency*, 45 *FORDHAM L. REV.* 786, 789 (1977).

291. LETTERS FROM THE FEDERAL FARMER, *supra* note 198, at 16.

292. George Mason, *Opposition to the Constitution (Sept. 7, 10, 15)*, in *THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES* 171, 174 (Ralph Ketcham ed., 1986).

primary function as a failsafe to provide a ready and reliable officer who would fill a presidential vacancy if one ever arose.<sup>293</sup>

The Founders had before them other options for presidential succession. They could have endorsed a suggestion to designate as presidential successor the Chief Justice of the United States.<sup>294</sup> But they did not. They could likewise have opted to follow Delaware in designating as joint vice presidents the respective heads of the two legislative chambers. But they made a calculated decision otherwise, deliberately setting aside the Delawarean model.<sup>295</sup> They instead chose to leave legislative officials out of the succession sequence altogether, identifying the Vice President as the first presidential successor and leaving to Congress the task of determining the number of slots, and subsequently filling those slots, along the line of presidential succession.<sup>296</sup>

But let us not confuse the office with its occupant. Although the office of the vice presidency itself was held in low regard, the Founders hoped its occupant would be regarded as a giant worthy of great admiration. To achieve this lofty ambition, the Founders relied on the intricacies of electoral design to engineer the selection of a Vice President who would be seen as possessing the presidential qualities needed to lead the nation in a time of crisis triggered by a presidential vacancy. Indeed, insofar as the Vice President could ascend to the presidency, thought the Founders, it was critical that the officeholder be imbued with a comparable measure of popular legitimacy. For the Founders, it was just as important for the Vice President to be regarded as competent as it was for the President.

The original method for selecting the President and Vice President was ultra-competitive and non-partisan. Candidates did not run waving political party banners, as is the case today when signs proclaiming candidates either Democrat or Republican blanket entire electoral districts. That was by design because the Founders, in designing the Electoral College, wanted to create what Ackerman and Fontana call a “*non-party republic*,” a nation where “great statesmen would transcend the dynamics of faction.”<sup>297</sup> They had taken their cue from the fathers of republican theory—Aristotle, Cicero, James Harrington, and Niccolò Machiavelli—each of whom may have sketched distinguishable

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293. See U.S. CONST. art. II, § I, cl. 6, amended by U.S. CONST. amend. XXV.

294. See Goldstein, *supra* note 290, at 789.

295. See THE FEDERALIST NO. 47, *supra* note 20, at 306-07 (James Madison).

296. See U.S. CONST. art. II, § I, cl. 6, amended by U.S. CONST. amend. XXV.

297. Bruce Ackerman & David Fontana, *Thomas Jefferson Counts Himself into the Presidency*, 90 VA. L. REV. 551, 559 (2004).

accounts of republican virtue but all of whom shared similar views on the deleterious consequences and divisiveness engendered by political parties.<sup>298</sup> And so the Founders organized the Electoral College in such a way as to discourage the rise of political parties at the presidential level and to instead invite the participation of the very best presidential candidates, even those candidates who might have otherwise found themselves on the same side of the political aisle in a world with political parties.<sup>299</sup> What the Founders proposed—and what was ultimately ratified by the states—was a presidential electoral system in which there would be no party tickets featuring joint presidential and vice presidential candidates, or separate presidential and vice presidential elections. There would instead be one single election for both the presidency and the vice presidency: the first-place finisher would become President and the vice presidency would be conferred upon the second-place contestant.<sup>300</sup>

For the Founders, that the Vice President could conceivably ascend to the presidency in the event of a presidential vacancy necessarily required that its occupant be selected in the same way as the President. “[A]s the Vice-President may occasionally become a substitute for the president,” wrote Alexander Hamilton, “all the reasons which recommend the mode of election prescribed for the one apply with great if not with equal force to the manner of appointing the other.”<sup>301</sup> Their objective was to find a way to clothe the Vice President with a comparable quality of legitimacy that the President would enjoy as President. The deeper founding foresight was therefore to construct an electoral system that would pit against one another “the most illustrious citizens of the Union, for the first office in it”<sup>302</sup> and ultimately facilitate the selection of only those candidates “who have become the most distinguished by their abilities and virtue, and in whom the people perceive just grounds for confidence.”<sup>303</sup>

At a higher level of abstraction, the founding judgment to create the vice presidency for the primary purpose of filling a vacancy in the presidency reflects the Founders’ preference for competence over theatre. They feared the rise of popular demagogues who might “rise into notice by their noise and arts[,]”<sup>304</sup> and consequently took great care

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298. *See id.* at 558.

299. *See id.* at 559.

300. U.S. CONST. art. II, § 1, cl. 3, *amended by* U.S. CONST. amend. XII.

301. THE FEDERALIST NO. 68, *supra* note 20, at 415 (Alexander Hamilton).

302. THE FEDERALIST NO. 66, *supra* note 20, at 404 (Alexander Hamilton).

303. THE FEDERALIST NO. 64, *supra* note 20, at 391 (John Jay).

304. LETTERS FROM THE FEDERAL FARMER, *supra* note 198, at 58.

in designing presidential election rules to facilitate the triumph of substantive leaders over purely charismatic figures. Hopeful of finding a way to “transform ambition into virtue[,]”<sup>305</sup> they intended that non-partisan statesmen seek the presidency with an eye to producing a winner who could “legitimately assert the claim to be president of all the people, since his selection would not divide the populace into strongly antagonistic parts.”<sup>306</sup> Only with a pan-American leader could the new republic begin to fashion its national identity, something that could not exist with thirteen disparate states composed of thirteen different peoples regarding the subnational governments as principals and the national government as their agent. The Founders therefore looked for special qualities in the President.

In creating the presidency, the Founders worked backward from the paradigm they wished to preclude in the new republic. The King of Great Britain was, for them, the example to avoid at all cost.<sup>307</sup> He, as leader, had achieved by force or acquiescence the unadulterated and totalizing powers of unilateralism, something otherwise abhorrent in a republic, particularly in one like the United States, where the powers of government were to be separated in an overlapping web of mutual control.<sup>308</sup> But beyond the King’s arrogation of disproportionately large and indeed unchecked powers, something else troubled the Founders about his privileged position: the King owed his station to royal lineage, not to popular consent. The former was regarded by the Founders as offering an insufficiently strong claim to legitimate authority, whereas the latter represented the apex of legitimacy.<sup>309</sup>

This explains the invention of the Electoral College, a modified form of direct popular election conducted through a representative body of citizens chosen for the specific purpose of presidential election. Choosing the President in this way—as opposed to bequeathing the mantle of the state to someone by reason of birth—would have two consequences. One was directed to the wider world and the other served a worthy domestic interest, yet both were eminently salutary from the perspective of the Founders.

First, the Electoral College’s solicitude for some form of mediated popular participation in the selection of the Chief Executive would be well in keeping with the aspirations of republicanism in the new

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305. JAMES W. CEASER, *PRESIDENTIAL SELECTION: THEORY AND DEVELOPMENT* 64 (1979).

306. *Id.* at 58-59.

307. See *THE FEDERALIST* NO. 69, *supra* note 20, at 422 (Alexander Hamilton) (contrasting the President’s powers with those of the King of Great Britain).

308. See *THE FEDERALIST* NO. 51, *supra* note 20, at 322-24 (James Madison).

309. See *THE FEDERALIST* NO. 69, *supra* note 20, at 416 (Alexander Hamilton).

republic, especially a young one aiming to mark a clear break from its colonial past. In this sense, “there is a total dissimilitude between *him* and a king of Great-Britain, who is an *hereditary* monarch, possessing the crown as a patrimony descendible to his heirs forever”;<sup>310</sup> whereas the President is freely chosen by citizens, not imposed upon people more accurately considered subjects. This would send an unmistakable signal to Great Britain and the entire world that the relationship between the citizen and the state in the United States would be something far different from how it had been understood elsewhere.

Second, the Electoral College itself would foster the selection of a specific kind of leader who could lay claim to national support and could in turn stand on a national mandate. More than this, however, the Electoral College would generate a man of great stature and accomplishment. In the Founders’ own words, the selection mechanism would give the “moral certainty” that the presidency will “seldom fall to the lot of any man who is not in an eminent degree endowed with the requisite qualifications.”<sup>311</sup> The Founders continued:

Talents for low intrigue, and the little arts of popularity, may alone suffice to elevate a man to the first honors in a single State; but it will require other talents, and a different kind of merit, to establish him in the esteem and confidence of the whole Union, or of so considerable a portion of it as would be necessary to make him a successful candidate for the distinguished office of President of the United States.<sup>312</sup>

The Electoral College was seen as a tool to guarantee “a constant probability of seeing the station filled by characters pre-eminent for ability and virtue.”<sup>313</sup>

The anti-modal leader was therefore the monarchic sovereign or the “professional politician,” whose interests were self-regarding, inward-looking, personal, and whom the Founders looked upon with piercing disdain.<sup>314</sup> Better, thought the Founders, to aspire to the standard set by Cincinnatus, the decorated war general whose selfless service earned him the eternal gratitude of his fellow citizens.<sup>315</sup> The Roman Senate had

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310. *Id.*

311. THE FEDERALIST NO. 68, *supra* note 20, at 414 (Alexander Hamilton).

312. *Id.*

313. *Id.*

314. See Ronald D. Rotunda, Speech, *Rethinking Term Limits for Federal Legislators in Light of the Structure of the Constitution*, 73 OR. L. REV. 561, 566 (1994) (“The Founders of our democracy regarded the spectacle of the ‘professional politician’ with contempt.”).

315. See CARL J. RICHARD, THE FOUNDERS AND THE CLASSICS: GREECE, ROME, AND THE AMERICAN ENLIGHTENMENT 70-72 (1994) (discussing President George Washington’s effort to model himself after Cincinnatus).



appointed him leader of the Roman forces and ruler of the land, and had given him the task of liberating the Roman Republic from the grip of the central Italian tribal warriors known as the Aequi, which he did and immediately thereafter voluntarily ceded his absolute control of the Republic in order to return to his farmhouse.<sup>316</sup> If those qualities seem familiar, they should: these are qualities that the Founders saw in the revolutionary general George Washington, who would become the first President of the United States—an office created in his image.<sup>317</sup> It was what Gordon Wood calls Washington’s “disinterestedness” that made him a great leader for the nation.<sup>318</sup> A leader so hesitant to be President that he considered resigning after only one term,<sup>319</sup> motivated neither by self-aggrandizement nor by self-interest, President Washington’s virtue was his creed of self-sacrifice in the service of the larger community. Indeed his reluctant grasp of power was the very source of his power: “Washington gained his power by his readiness to give it up.”<sup>320</sup>

But more than magnanimity, it was detachment and deliberation that the Founders thought indispensable to competent presidential management. A President should of course act in a way that, in good republican fashion, reflects considered judgment upon the inclinations of the governed, but a President should not simply poll her way through the policy choices that face the nation. No President should give “an unqualified complaisance to every sudden breeze of passion, or to every transient impulse which the people may receive from the arts of men, who flatter their prejudices to betray their interests.”<sup>321</sup> Presidential administrations should “withstand the temporary delusion in order to give them time and opportunity for more cool and sedate reflection.”<sup>322</sup> In order to resist the overwhelming pressure to follow the masses, the President must be resilient, assured, and oriented toward the interests of the nation. Standing on these strengths, the President can be better positioned to exercise the deliberative qualities of thought that foster disinterested—and therefore better—outcomes. This is the very essence

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316. JOHN E. FINN, *CONSTITUTIONS IN CRISIS: POLITICAL VIOLENCE AND THE RULE OF LAW* 16 (1991).

317. See Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the First Half-Century*, 47 *CASE W. RES. L. REV.* 1451, 1490 (1997).

318. See GORDON S. WOOD, *REVOLUTIONARY CHARACTERS: WHAT MADE THE FOUNDERS DIFFERENT* 42-45 (2006) (describing President George Washington’s desire to maintain his reputation for “disinterestedness”).

319. See RICHARD BROOKHISER, *GEORGE WASHINGTON ON LEADERSHIP* 73 (2008).

320. Gordon S. Wood, *The Greatness of George Washington*, in *GEORGE WASHINGTON RECONSIDERED* 309, 320 (Don Higginbotham ed., 2001).

321. *THE FEDERALIST* NO. 71, *supra* note 20, at 432 (Alexander Hamilton).

322. *Id.*

of the independence of thought and action that lies at the core of what the Founders envisioned in their first President, and in succeeding ones.

That is precisely the quality of competence the Founders believed should embody the person of the presidency. Convenience—though the Framers, as they observed Washington resign his command of the armed forces—should not trump more important values like competence. To make their case for competence over convenience, the Founders invoked the example of presidential transitions during war or emergency. In the context of defending the eligibility of sitting Presidents for reelection, they argued that it would be unwise to deprive the nation of presidential experience at a time when it most needed competent hands at the helm.<sup>323</sup>

What they were gesturing toward, rightly, is the benefit of presidential experience. It is a benefit that accrues to everyone, not only to the nation and its people in need of steady and proven leadership, but also to the new leader herself, who is asked to take command in the face of uncertainty. Her lived experiences as a former President can only help, not hurt, as she undertakes the responsibilities of the presidency. Even if those lived experiences have borne more miscalculations than not, she would have learned from those missteps. And insofar as no person can know what it is like to be President until she has been President and no person can know whether someone will make a good President until that person actually becomes President, the balance of probabilities must weigh in favor of betting that a former President will be better prepared to fulfill the duties of the office than a Cabinet member or a legislative officer. This is true as a general matter, but it is especially true in a time of crisis. Temporary presidential succession therefore serves the interest of ensuring that steady hands are manning the controls.

That is not the only concern that could be remedied by designating as presidential successor a former President. First, former Presidents are unlikely to be stationed in Washington, where a terrorist strike could inflict the most significant number of high-level government casualties.<sup>324</sup> Temporary presidential succession therefore addresses the concerns of Sherman and Fortier with some of the limitations of the existing line of statutory succession.<sup>325</sup> Second, a former President would command a measure of respect that even the senior-most member

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323. THE FEDERALIST NO. 72, *supra* note 20, at 438-39 (Alexander Hamilton).

324. For example, former President George W. Bush currently lives in Texas. *See* Saslow, *supra* note 264.

325. *See supra* notes 233-34 and accompanying text.

of the Cabinet could not.<sup>326</sup> Such a high standing in the eyes of Americans would be terribly important, especially in a time of emergency when citizens must have faith that the future of their nation is in able hands. The high regard in which a former President is held would be equally important because of how it would affect the behavior of foreign leaders, both friend and foe, to the United States. Their posture toward America could differ depending on whether the successor was an inexperienced novice hampered by indecision or a well-traveled and connected statesperson who is ready from day one to move expeditiously at a moment's notice. In the world of international affairs, the nation is more likely to enjoy the benefit of the doubt from abroad with a former President at the helm.

Temporary presidential succession also serves the interest of party continuity in the executive branch. Revising the succession sequence to insert a former President of the current President's party would ensure that a Democratic presidency remains Democratic, and likewise that a Republican one remains Republican. This differs from what would follow under today's presidential succession rules: in the absence of the Vice President, a Republican President may be succeeded by a Democratic Speaker of the House, and a Democratic President may be replaced by a Republican Speaker of the House.<sup>327</sup> Not only would such a shift undermine the freely expressed democratic will but it would moreover disrupt the political continuity of the governing administration, leading to a peculiar result in which the President may be replaced in office by her leading antagonist.

The founding succession regime did not contemplate the possibility of a mid-stream switch in presidential parties. There is an easy answer why: the Founders envisioned a world without political parties. They did not anticipate the rise of political parties,<sup>328</sup> let alone that parties would come to dominate the political process.<sup>329</sup> One need only recall the incompatibility of political parties with the original modalities for electing the President—pursuant to which the second place finisher

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326. See *supra* note 261 and accompanying text.

327. See *supra* notes 174-84 and accompanying text.

328. Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 269 (2000).

329. See Gavin M. Rose, *Taking the Initiative: Political Parties, Primary Elections, and the Constitutional Guarantee of Republican Governance*, 81 IND. L.J. 753, 783 (2006) (arguing that an "originalist interpretation" of the rights and responsibilities of political parties is problematic because the Founders did not anticipate "the dominant role that political parties would come to play in our society").

became Vice President—to see just how far removed political parties stood from the founding vision.<sup>330</sup>

But that the Founders could not have foreseen the possibility of a party switch in the presidency does not mean that we cannot predict how they would have viewed that possibility. The Founders would have found it abhorrent. The very thought of the presidency changing hands in the middle of a crisis would alarm them because they saw the office as the locus of dispassionate authority and as the embodiment of nonpartisan national leadership.<sup>331</sup> To allow political parties to hijack the office would have been inconsistent with their conscious design of the Constitution, which was constructed deliberately to discourage the formation of political parties.<sup>332</sup> For them, political parties aroused antipathy,<sup>333</sup> largely because of the problems associated with the “mischiefs of faction.”<sup>334</sup> One of those mischiefs was the obsession with seizing political power “to pursue . . . private self-interest at the expense of the common good,”<sup>335</sup> an ambition that was anathema to the aspirations the Founders held for the new republic. The Founders therefore rejected the self-interestedness of political parties and factions—groups whose divisive foundations breathed illegitimacy into their very mission.<sup>336</sup> Since then, of course, political parties have taken center stage in American constitutional politics.<sup>337</sup>

Would the founding succession regime have been different had the Founders foretold the rise of political parties? Probably. Indeed, the Constitution writ large would have been different under those circumstances.<sup>338</sup> But whether the Founders would have looked

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330. See Beverly J. Ross & William Josephson, *The Electoral College and the Popular Vote*, 12 J.L. & POL. 665, 676 (1996) (illustrating how the founding presidential election design resulted in different parties filling the offices of President and Vice President).

331. See Ackerman & Fontana, *supra* note 297, at 559.

332. See Steven G. Calabresi, *Political Parties as Mediating Institutions*, 61 U. CHI. L. REV. 1479, 1488 (1994); see also Steven M. Pysner, *Recess Appointments to the Federal Judiciary: An Unconstitutional Transformation of Senate Advice and Consent*, 8 U. PA. J. CONST. L. 61, 110 (2006) (noting that the Founders had hoped to discourage political parties).

333. See RICHARD HOFSTADTER, *THE IDEA OF A PARTY SYSTEM: THE RISE OF LEGITIMATE OPPOSITION IN THE UNITED STATES, 1780-1840*, at 9-24 (1970); Samuel Issacharoff, *Private Parties with Public Purposes: Political Parties, Associational Freedoms, and Partisan Competition*, 101 COLUM. L. REV. 274, 276-77 (2001); Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2320 (2006).

334. THE FEDERALIST NO. 10, *supra* note 20, at 81 (James Madison).

335. James A. Gardner, *Can Party Politics Be Virtuous?*, 100 COLUM. L. REV. 667, 668 (2000).

336. See Dmitri Evseev, *A Second Look at Third Parties: Correcting the Supreme Court's Understanding of Elections*, 85 B.U. L. REV. 1277, 1305 (2005).

337. See Gerald Leonard, *Party as a “Political Safeguard of Federalism”*: *Martin Van Buren and the Constitutional Theory of Party Politics*, 54 RUTGERS L. REV. 221, 225 (2001) (“[M]ass parties have, since the 1830s, had a central place in the constitutional system.”).

338. Stephen M. Griffin, *Rebooting Originalism*, 2008 U. ILL. L. REV. 1185, 1212.

favorably upon temporary presidential succession is unknowable. We can, however, extrapolate two plausible conclusions from their views. First, we may safely assume that the Founders had some very particular traits in mind for the person who would occupy the office of President of the United States. Disinterestedness, competence, experience, political legitimacy, and self-sacrifice—these were the watchwords for presidential stature. Second, they would have resisted, perhaps with express constitutional rules about presidential succession, the possibility of a presidential vacancy transferring the presidency to an opposing political party. On each of these counts, temporary presidential succession is not only responsive but it keeps faith with both the founding vision for American politics and its modern evolution.

#### D. Amending Presidential Succession

But in order to insert a former President into the line of succession, three items are necessary: first, congressional authorization; second, a new presidential succession law; and third, a constitutional amendment. The first is necessary because a former President cannot enter the line of succession without it. The second is necessary because the current presidential succession law does not contemplate the possibility of temporary presidential service. And the third may be necessary because absent a constitutional amendment a former President could be constitutionally barred from serving temporarily as President, even during an extraordinary time of emergency. Note the careful choice of words—*may* be constitutionally barred and not *is* constitutionally barred—because the circumstances under which a former President may serve more than two terms remain a point of some constitutional controversy.

Return to the question that framed our inquiry into constitutional clarity: who is an officer?<sup>339</sup> I raised this question to concretize the claim that the Constitution leaves unclear just who exactly is an officer for purposes of statutory succession. In order for a former President to serve as a statutory successor, she must first qualify as an “Officer” for succession purposes.<sup>340</sup> But it is not clear that a former President is an officer in this regard. Despite the “quasi-public” status of the Office of Former President established by the Former Presidents Act of 1958,<sup>341</sup>

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339. See *supra* Part III.A.

340. See U.S. CONST. art. II, § 1, cl. 6 (giving Congress the power to determine which “Officer” shall act as President in the case of dual death or disability), *amended by* U.S. CONST. amend. XXV.

341. John Whiteclay Chambers II, *Jimmy Carter’s Public Policy Ex-Presidency*, 113 POL. SCI. Q. 405, 416 (1998).

that statute is insufficient as it currently stands to conform to the strictures of the Succession Clause. Fortunately, the fix is not difficult: Congress need only insert a short section in the Former Presidents Act requiring Senate confirmation for a former President who accepts the invitation to opt-in to the line of succession. As a political consequence of this statutory revision, a former President would be subject to nomination and confirmation under the Appointments Clause in order to make official her role as a statutory successor.<sup>342</sup> The larger constitutional consequence of this minor legislative addition to the Former Presidents Act is equally significant because it would make a former President an “Officer” for purposes of the Succession Clause,<sup>343</sup> and therefore allow a former President to serve her country once again—this time as temporary President—yet only if necessary in a time of crisis.

In addition to this statutory enhancement to the Former Presidents Act, I would recommend two discretionary, though quite useful, complementary actions, both to be undertaken by the President. First, each newly elected President should, at the beginning of her term in office, issue an executive order ensuring that the executive branch is aware of its responsibilities in the event of a presidential succession. The order should inform all executive branch employees of the line of succession as it exists at that time and should moreover direct them to take their instructions from the designated successor in the eventuality that the statutory succession sequence is activated. The President should consider herself bound by a continuing duty to inform all executive branch employees of any changes in the line of the succession as they occur and, if necessary, to reissue orders as the need arises, for instance as a former President who has previously opted-in to the line of succession later opts-out for health or other reasons.

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342. The Appointments Clause declares that:

[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the [S]upreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. CONST. art. II, § 2, cl. 2. The authoritative Supreme Court interpretation of this Clause holds that all officers of the United States must be appointed in a manner consistent with this Clause and that “[n]o class or type of officer is excluded because of its special functions.” *Buckley v. Valeo*, 424 U.S. 1, 132 (1976). The Court also held that Senate confirmation is a requirement for “any appointee exercising significant authority pursuant to the laws of the United States.” *Id.* at 126. A former President filling a presidential vacancy would fall under these terms.

343. See U.S. CONST. art. II, § 1, cl. 6, amended by U.S. CONST. amend. XXV.

Alongside issuing an executive order outlining the procedures executive branch officials should follow in the event of temporary presidential succession, the President should ensure that former Presidents who opt-in to the line of succession are sufficiently apprised of national security information. This crucial change requires no legislative tinkering: Congress need not pass a law granting former President's permission to access these sensitive documents and details. Current law already provides a way for the President to appoint, without Senate confirmation, former Presidents to sit on two subcommittees of the National Security Council (the "Council"). The Council, which was established in 1947 as part of the National Security Act,<sup>344</sup> has a particularly relevant function with respect to temporary presidential succession: "to advise the President with respect to the integration of domestic, foreign, and military policies relating to the national security so as to enable the military services and the other departments and agencies of the Government to cooperate more effectively in matters involving the national security."<sup>345</sup> The Council is comprised of a number of high-level security officials, including the President, Vice President, Secretary of State, Secretary of Defense, and others including, at the discretion of the President, the Chairman of the Joint Chiefs of Staff.<sup>346</sup> Under the National Security Act, the President may designate persons of her choosing to sit on both the Committee on Foreign Intelligence<sup>347</sup> and the Committee on Transnational Threats.<sup>348</sup> The former is responsible for, among other tasks, conducting an annual assessment of American national security interests,<sup>349</sup> and the latter is charged with several tasks, including identifying and developing strategies to combat foreign threats.<sup>350</sup> Post-presidential service on either or both of these committees could offer former Presidents a useful window into the evolving national security challenges facing the country, and would prepare them for the contingency of temporary presidential succession.

The second step to take toward making temporary presidential succession possible is to amend the presidential succession law. To mitigate the risks of presidential roulette, I have proposed a period of temporary presidential succession during which former Presidents are

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344. 50 U.S.C. § 402(a) (2006).

345. *Id.*

346. *Id.* § 402(a), (e).

347. *Id.* § 402(h)(2)(E).

348. *Id.* § 402(i)(2)(F).

349. *Id.* § 402(h)(4)(A).

350. *Id.* § 402(i)(4)(A)–(B).

placed at the top of the line of statutory succession in reverse chronological order of service beginning with former Presidents of the same party as the unavailable President. The revised line of statutory succession would therefore read largely the same as the current list of statutory successors, but with two principal amendments, as I have discussed above.<sup>351</sup> First, the new Presidential Succession Act would reflect the insertion of former Presidents ahead of the legislative officers and Cabinet secretaries. Second, the Presidential Succession Act would provide that a succeeding former President remains in office and serves only until such time as a special election is held, and the ballots are duly counted, to fill the presidential vacancy.

Yet these statutory amendments alone could be insufficient to consummate this change. The Constitution could also perhaps require an amendment of its own. Here is why: it currently limits Presidents to no more than two four-year terms of presidential service.<sup>352</sup> In order to authorize a former President to fill a presidential vacancy, even temporarily, it may be necessary to amend the Constitution to provide for that contingency because the Twenty-Second Amendment is insufficiently clear as to whether it would permit such an arrangement. And in order to avoid a constitutional quagmire at a time of crisis, it is best to amend the Constitution to leave no doubt about the constitutionality of temporary presidential succession.

Consider the text of the Constitution. The original document did not adopt a presidential term limit,<sup>353</sup> stating instead quite simply that the President of the United States “shall hold his Office during the Term of four Years,”<sup>354</sup> therefore making the President continually eligible for reelection. It was not a foregone conclusion, though, that the President would not be subject to term limits when the Framers gathered at the Constitutional Convention. Quite the contrary, some advocated rather ardently in favor of term limits for the Chief Executive. George Mason, for example, called for a single term of seven years with no possibility for reelection, while Gunning Bedford urged a three-year presidential term, renewable only twice.<sup>355</sup> Charles Pinckney argued, and Elbridge Gerry agreed, that the President should be eligible to serve no more than six years in any twelve-year period, whereas Pierce Butler was opposed

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351. See *supra* Part IV.B.

352. See U.S. CONST. amend. XXII, § 1.

353. This was true of all federal offices. See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC: 1776-1787*, at 521 (1969).

354. U.S. CONST. art. II, § 1, cl. 1.

355. 1 RECORDS OF THE FEDERAL CONVENTION, *supra* note 17, at 68-69.



to any reelection for the President.<sup>356</sup> Therefore, the Anti-Federalists, by and large, supported presidential limits.<sup>357</sup> And during the early years of statehood, Congress periodically considered, but did not ultimately adopt, proposals to limit presidential service, beginning with one failed suggestion in 1803 of a three-term limit.<sup>358</sup>

The constitutional drafters reasoned that it would be unwise to render former Presidents ineligible for reelection. And rightly so, because why exclude from presidential service a person who has formerly served as President by simple virtue of the fact that she has been President? This is the very question Alexander Hamilton pondered aloud when he defended the constitutional Framers' choice not to impose term limits on the President:

That experience is the parent of wisdom is an adage the truth of which is recognized by the wisest as well as the simplest of mankind. What [is] more desirable or more essential than this quality in the governors of nations? Where more desirable or more essential than in the first magistrate of a nation?<sup>359</sup>

The same reasoning suggests a similar conclusion in defense of temporary presidential succession. It would be irresponsible to cast aside the suggestion that a former President should be placed at the front of the line of statutory successors. Not only would the nation find refuge during a time of crisis in the former President's lived experience as Commander-in-Chief, but it would also rest secure in the knowledge that a new President would shortly be elected after the storm had lapsed.

Though the founding constitutional text did not impose a presidential term limit, early American political practice did in fact adhere to an unwritten two-term limit. The custom of serving no more than two terms began with President Washington,<sup>360</sup> whose gallant choice to step down despite the likelihood that he would have been reelected for a third consecutive term demonstrated his willingness "to subordinate personal ambition for the public good."<sup>361</sup> By demurring on the possibility of serving a third term, President Washington helped

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356. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 111-12 (Max Farrand ed., rev. ed. 1966).

357. See FOUNDING THE AMERICAN PRESIDENCY 97 (Richard J. Ellis ed., 1999).

358. Jack M. Beermann & William P. Marshall, *The Constitutional Law of Presidential Transitions*, 84 N.C. L. REV. 1253, 1260-61 (2006).

359. THE FEDERALIST NO. 72, *supra* note 20, at 438 (Alexander Hamilton).

360. See JAMES L. SUNDQUIST, CONSTITUTIONAL REFORM AND EFFECTIVE GOVERNMENT 41 (1986).

361. Colleen J. Shogan, *The Moralist and the Cavalier: The Political Rhetoric of Washington and Jefferson*, 28 N. KY. L. REV. 573, 581 (2001).

appease fears among early Americans that the President would effectively hold life tenure in the absence of a fixed term limitation.<sup>362</sup> And so began the presidential custom of serving for no more than two terms<sup>363</sup>—a tradition which survived until the administration of President Franklin Delano Roosevelt.

President Roosevelt was ready to follow the Washingtonian tradition of two-term service but the onset of the Second World War compelled him to pursue the presidency for a third time.<sup>364</sup> And so he ran for a third term in 1940, and won, and he ran again in 1944, and won a fourth term.<sup>365</sup> President Roosevelt passed away the following year in 1945.<sup>366</sup> Though President Roosevelt's multiple reelections may have helped bring stability to the nation, not everyone was pleased with President Roosevelt's four-term presidency.<sup>367</sup> Fearing the concentration of power in the presidency<sup>368</sup> and in an act that Arthur Schlesinger has described as "posthumous revenge,"<sup>369</sup> Congress acted quickly to enshrine in the Constitution the presidential custom that President Washington had begun 150 years earlier. In a remarkable show of unity of purpose, it took Congress barely two months in 1947 to pass the Twenty-Second Amendment from the day the amendment was introduced in the House of Representatives through its adoption in the House and subsequently in the Senate.<sup>370</sup> By 1951, forty-one states had ratified the amendment,<sup>371</sup> making formal what effectively had been, until the Roosevelt years, an informal amendment to the Constitution.<sup>372</sup>

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362. See CHARLES O. JONES, *THE AMERICAN PRESIDENCY* 13-14 (2007).

363. But both Presidents Ulysses S. Grant and Theodore Roosevelt launched failed attempts for a third presidential term. Grant sought, but lost, his party's presidential nomination in 1880. See FRANKLIN SPENCER EDMONDS, *ULYSSES S. GRANT* 322-24 (1915). For his part, Roosevelt was an unsuccessful third-party presidential candidate in 1912. See DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 138 (2010).

364. See JEREMY ROBERTS, *FRANKLIN D. ROOSEVELT* 79-81 (2003).

365. See SEAN DENNIS CASHMAN, *AMERICA ASCENDANT: FROM THEODORE ROOSEVELT TO FDR IN THE CENTURY OF AMERICAN POWER, 1901-1945*, at 407-08, 483-84 (1998).

366. See ROBERTS, *supra* note 364, at 100.

367. See ROBERT DALLEK, *HARRY S. TRUMAN* 131 (Arthur M. Schlesinger, Jr. & Sean Wilentz eds., 2008) (reporting that many observers saw the passage of the Twenty-Second Amendment as an "act of revenge by the Republicans against Franklin Roosevelt"); George Anastaplo, *Amendments to the Constitution of the United States: A Commentary*, 23 *LOY. U. CHI. L.J.* 631, 825 (1992) (stating that the Twenty-Second Amendment was an attempt by the Republicans to "repudiate the invincible Franklin Roosevelt").

368. See MATTHEW SOBERG SHUGART & JOHN M. CAREY, *PRESIDENTS AND ASSEMBLIES: CONSTITUTIONAL DESIGN AND ELECTORAL DYNAMICS* 88 (1992); JOHN R. VILE, *A COMPANION TO THE UNITED STATES CONSTITUTION AND ITS AMENDMENTS* 207 (5th ed. 2010).

369. ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* xv (2004).

370. See David E. Kyvig, *Afterword* to UNINTENDED CONSEQUENCES OF CONSTITUTIONAL AMENDMENT 235, 236 (David E. Kyvig ed., 2000).

371. See MATTHEW T. CORRIGAN, *AMERICAN ROYALTY: THE BUSH AND CLINTON FAMILIES*

The Twenty-Second Amendment comes in two parts. The second section imposes a deadline of seven years for states to ratify it.<sup>373</sup> But it is the first section that is relevant for our purposes because it sets the parameters for presidential term limits:

No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once. But this Article shall not apply to any person holding the office of President when this Article was proposed by the Congress, and shall not prevent any person who may be holding the office of President, or acting as President, during the term within which this Article becomes operative from holding the office of President or acting as President during the remainder of such term.<sup>374</sup>

This passage may be understood as consisting of four subsidiary rules: (1) a person may be elected only twice to the presidency (the “two-term rule”); (2) if a person, say a Vice President, has either been or acted as President for more than two years of a term for which another person was elected, that person may be elected on her own right only once to the presidency (the “greater-than-two-year rule”); (3) but if that person has either been or acted as President for two or fewer years of some other person’s elected term, that person is eligible to be elected on her own right twice to the presidency (the “fewer-than-two-year rule”); and (4) these rules do not apply to the President, acting or otherwise, at the time either when the Amendment was proposed or when it becomes operative (the “Truman rule”). Therefore, a person may be elected President on her own right to two full four-year terms, for a total of eight years, and she may serve up to two years of a term to which another person was elected, thus amounting to an upward limit of ten years of presidential service. That much appears to be clear from the text of the Twenty-Second Amendment.

But the Twenty-Second Amendment offers no guidance as to whether a former President may serve temporarily as a statutory successor to the presidency. With respect to whether a former single-

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AND THE DANGER TO THE AMERICAN PRESIDENCY 6-7 (2008).

372. See SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN FIX IT)* 155 (2006); JOHN R. VILE, *CONSTITUTIONAL CHANGE IN THE UNITED STATES: A COMPARATIVE STUDY OF THE ROLE OF CONSTITUTIONAL AMENDMENTS, JUDICIAL INTERPRETATIONS, AND LEGISLATIVE AND EXECUTIVE ACTIONS* 23 (1994).

373. U.S. CONST. amend. XXII, § 2.

374. *Id.* § 1.

term President could serve temporarily as a statutory successor, there are three possible scenarios: (1) a former single-term President; (2) a former single-term President who has held the presidency or acted as President for more than two years of a term to which another person was elected; and (3) a former single-term President who has held the presidency or acted as President for two or fewer years of a term to which another person was elected. Temporary presidential succession should pose no constitutional difficulty under the first scenario because statutory succession to the presidency constitutes neither an “election” to the presidency under the two-term rule nor would it be barred by either the greater-than-two-year rule or the fewer-than-two-year rule. For the same reasons, temporary presidential succession would comport with the Constitution under the second and third scenarios of statutory succession for a single-term President.

The question is resolved in similar fashion in the context of a former two-term President. Under those circumstances, we can conceive of two possibilities: (1) a former two-term President who has not held the presidency or acted as President for any part of a term to which another person was elected; and (2) a former two-term President who has held the presidency or acted as President for two or fewer years of a term to which another person was elected. On both of these facts, temporary presidential succession would be permissible under the Twenty-Second Amendment because, under the two-term rule, statutory succession to the presidency cannot be interpreted as an “election” to the presidency and it is also evident that the greater-than-two-year and the fewer-than-two-year rules remain undisrupted.

Indeed, temporary presidential succession does not appear to pose a constitutional problem to begin with because the Twenty-Second Amendment creates a temporal relationship between the greater-than-two and the fewer-than-two rules, on the one hand, and, on the other, a subsequent election to the presidency. Reconsider the relevant text of the Amendment: “[N]o person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once.”<sup>375</sup> One reading of this passage could insist that if a person has been elected President more than once, she may not succeed to the presidency for a period longer than two years. But that reading would be incorrect. This particular passage in the Twenty-Second Amendment creates within itself two elements that foreclose this reading: dominant rules and a dependent variable, the dominant rules

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375. *Id.*

being the greater-than-two-year and fewer-than-two-year rules, and the dependent variable being the possibility of a subsequent election to the presidency. The correct reading of the passage is this: if the greater-than-two-year rule applies to a person, then that person may not be elected to the presidency; but if the fewer-than-two-year rule applies to a person, then that person may be elected to the presidency.

One could perhaps make a plausible claim that temporary presidential succession is constitutionally problematic if the word “elected” were not so prominent in the text of the Twenty-Second Amendment. The constitutional prohibition applies only to the *election* of a President *more than twice*.<sup>376</sup> It does not constrain the presidential service by *succession*.<sup>377</sup> That would be the consequence of temporary presidential succession. Even if the succeeding former President had previously been elected twice to the presidency, she would nonetheless be constitutionally eligible to serve temporarily as President because she would have ascended to the presidency by virtue of statutory succession not presidential election.

This is an important distinction that becomes even sharper in another context: whether a former two-term President may serve as Vice President. It has become a recurring parlor game among political observers to wonder whether former two-term President Bill Clinton could serve as a vice presidential candidate on a Democratic presidential ticket. The question arose when Vice President Al Gore secured the Democratic presidential nomination in 2000,<sup>378</sup> later when Senator John Kerry earned the nod in 2004,<sup>379</sup> and most recently in 2008 when President Barack Obama, then a senator, won the nomination.<sup>380</sup>

To answer whether President Clinton could constitutionally fill the bottom of a ticket, we must look beyond the Twenty-Second Amendment because it does not speak to presidential eligibility for vice presidential service. It addresses more squarely the question whether a former two-term President may run for a third-term. Here, of course, the answer is clear: no, because “[n]o person shall be elected to the office of

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376. See *id.* (emphasis added).

377. See *id.* (emphasis added).

378. See, e.g., Tony Mauro, *Would the Constitution Prevent a Gore-Clinton Ticket?*, LEGAL INTELLIGENCER, July 21, 2000, at 7; Jack Shafer, *Vice President Bill Clinton? Take 3*, SLATE (Sept. 7, 2000, 3:18 PM ET), <http://www.slate.com/id/1006013>.

379. See, e.g., Stephen Gillers, Op-Ed, *The Next Best Thing to Being President*, N.Y. TIMES, Mar. 3, 2004, at A23; Joshua Spivak, *Bill Clinton for Vice President? Forget It*, HIST. NEWS NETWORK (Mar. 22, 2004), <http://hnn.us/articles/4165.html>.

380. See, e.g., Andrew Malcolm, *Bradley Says “No” to Obama VP Job. What About Clinton? Not Her. Him!*, L.A. TIMES (July 29, 2008, 2:12 AM), <http://latimesblogs.latimes.com/washington/2008/07/obama-vp.html>.

the President more than twice” under the Twenty-Second Amendment.<sup>381</sup> We must instead look to the Twelfth Amendment, which reads that “no person constitutionally ineligible to the office of the President shall be eligible to that of Vice-President of the United States.”<sup>382</sup> It should therefore follow that if a person is constitutionally ineligible to run for President, then she cannot run for Vice President.

Return, then, to the hypothetical case of vice presidential candidate Bill Clinton: would such an arrangement have been constitutional? The answer is no, insofar as Clinton had already served two terms as President, and would therefore be barred by the Twenty-Second Amendment from running again for President. By virtue of his ineligibility to run for President under the Twenty-Second Amendment, he would likewise be ineligible to run for Vice President under the terms of the Twelfth Amendment.

The concept of constitutional eligibility is directly relevant to temporary presidential succession. A former President remains eligible to hold the presidency so long as it does not occur by election. If it occurs via succession, there is no constitutional infirmity with that presidency. Neither the Twelfth Amendment, nor the Twenty-Second Amendment, nor the Constitution’s age, residency and citizenship requirements<sup>383</sup> bar a former President—even a former two-term President—from succeeding to the presidency as a statutory successor. Note, however, that while a former two-term President is not prohibited from filling a presidential vacancy as a *statutory* successor, she is constitutionally forbidden from filling a presidential vacancy as a *constitutional* successor. That is because a former two-term President cannot succeed via the vice presidency, which—as we have discussed above—is an office for which a former two-term President is not eligible. In contrast, a former single-term President would indeed be eligible to serve as Vice President, and would therefore also be eligible to fill a presidential vacancy as a constitutional successor, because she would have been constitutionally eligible to run for President according to the terms of the Twelfth Amendment.<sup>384</sup>

In order to assuage concerns about a possible constitutional challenge to the new succession sequence during a time of national leadership crisis—something that a simultaneous constitutional crisis would only exacerbate—the most reasonable course of action may be to shelter the new presidential succession rules under the cover of

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381. U.S. CONST. amend. XXII, § 1.

382. U.S. CONST. amend. XII.

383. See U.S. CONST. art. II, § 1, cl. 5.

384. Compare U.S. CONST. amend. XII, with U.S. CONST. amend. XXII, § 1.

constitutional unassailability that only a constitutional amendment can provide. Although a revised presidential succession law would outline the rules and modalities of temporary presidential succession, some may nonetheless regard the law as providing an insufficient safeguard against a constitutional challenge. That being the case, the succession solution would be to take a step further than legislative revision: to entrench the text of the revised presidential succession law as an amendment to the Constitution.

### E. *The Challenge of Constitutional Amendment*

Perhaps the challenge of revising the presidential succession regime is little more than an unrealistic pursuit of perfection,<sup>385</sup> one that is bound to fail along the labyrinthine steps of constitutional amendment. With the constitutional amendment rules being what they are—perhaps the most difficult textual amendment procedure of any constitutional state in the world<sup>386</sup>—the prospect may be slim for mounting a successful effort to amend the text of the Constitution. Nevertheless, there is good reason to believe that a succession amendment is indeed achievable, not only because it is possible, but more importantly because the existing succession rules are wanting.

The Constitution generally requires two-thirds agreement from each congressional chamber and the consent of three-quarters of state legislatures to pass an amendment.<sup>387</sup> Cobbling together supermajority agreement in Congress and then securing special supermajority concurrence among the states—what amounts to no less than “a remarkable act of supermajoritarian will”<sup>388</sup>—makes for an extraordinarily complicated and prolonged process.<sup>389</sup> As Stephen Griffin has observed (correctly in my view), this heightened threshold of agreement comes terribly close, as a practical matter, to requiring

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385. See Adam M. Samaha, *Undue Process*, 59 STAN. L. REV. 601, 603-04 (2006).

386. See LEVINSON, *supra* note 372, at 21, 160.

387. U.S. CONST. art. V.

388. Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1, 45 (1998).

389. See NEAL DEVINS & LOUIS FISHER, *THE DEMOCRATIC CONSTITUTION* 23 (2004); see also Michael J. Gerhardt, *The Limited Path Dependency of Precedent*, 7 U. PA. J. CONST. L. 903, 960 (2005); Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, 88 AM. POL. SCI. REV. 355, 364 (1994); Richard A. Posner, *Past-Dependency, Pragmatism, and Critique of History in Adjudication and Legal Scholarship*, 67 U. CHI. L. REV. 573, 599 (2000); John C. Roberts & Erwin Chemerinsky, *Entrenchment of Ordinary Legislation: A Reply to Professors Posner and Vermuele*, 91 CALIF. L. REV. 1773, 1786 (2003); G. Alan Tarr & Robert F. Williams, *Getting from Here to There: Twenty-First Century Mechanisms and Opportunities in State Constitutional Reform*, 36 RUTGERS L.J. 1075, 1075-76 (2005).

unanimous consent to pass an amendment.<sup>390</sup> This is the “infamous inflexibility”<sup>391</sup> that has come to characterize the amendment process under Article V, whose founding design was intended to be difficult.<sup>392</sup> The Founders constructed this complex process of amendment in order to assure apprehensive states that they “would remain independent and important political communities, and that the terms of their union with one another could be altered only if substantial obstacles were overcome.”<sup>393</sup> Indeed, Sanford Levinson may be correct when he suggests that the purpose of Article V was quite simply to make “it extremely difficult to engage in formal amendment.”<sup>394</sup> To say that amending the Constitution is difficult is, as Walter Dellinger warns, a subjective assessment.<sup>395</sup> But the numbers themselves cannot lie. The tangible difficulty of amending the Constitution becomes clear when presented with two jarring facts: there have been well over ten thousand attempts to amend the text of the Constitution since its ratification over two hundred years ago<sup>396</sup> but it has been successfully amended fewer than thirty times.<sup>397</sup>

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390. See Stephen M. Griffin, *The Nominee is . . . Article V*, 12 CONST. COMMENT. 171, 172 (1995).

391. William E. Scheuerman, *Time to Look Abroad? The Legal Regulation of Emergency Powers*, 40 GA. L. REV. 863, 875 (2006).

392. See Jason Mazzone, *Unamendments*, 90 IOWA L. REV. 1747, 1833 (2005). But see Ronald D. Rotunda & Stephen J. Safranek, *An Essay on Term Limits and a Call for a Constitutional Convention*, 80 MARQ. L. REV., Fall 1996, at 227, 228 & n.8 (arguing that the Article V amendment process was intended to be *easier* than its counterpart under the Articles of Confederation).

393. Henry Paul Monaghan, *We the People[s], Original Understanding, and Constitutional Amendment*, 96 COLUM. L. REV. 121, 130 (1996).

394. Sanford Levinson, *The Political Implications of Amending Clauses*, 13 CONST. COMMENT. 107, 120 (1996).

395. See Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 HARV. L. REV. 386, 427 (1983).

396. Donald J. Boudreaux & A.C. Pritchard, *Rewriting the Constitution: An Economic Analysis of the Constitutional Amendment Process*, 62 FORDHAM L. REV. 111, 152 (1993). But see Sanford Levinson, *Bush v. Gore and the French Revolution: A Tentative List of Some Early Lessons*, LAW & CONTEMP. PROBS., Summer 2002, at 7, 34 (“[I]t is difficult to come up with empirical proof of the proposition that the relative infrequency of serious attempts to amend the Constitution is the result of Article V . . .”).

397. The number may be as low as eighteen, if one considers that although there have been twenty-seven textual amendments to the Constitution, ten of those amendments were achieved in a single shot via the Bill of Rights. Even still, whether the number of textual amendments is twenty-seven or eighteen—or another number for that matter—it is certainly true that the number of textual amendments to the Constitution does not reflect the total number of times the Constitution has been amended. See Sanford Levinson, *How Many Times Has the United States Constitution Been Amended? (A) <26; (B) 26; (C) 27; (D) >27: Accounting for Constitutional Change, in RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 13, 25-32 (Sanford Levinson ed., 1995).



Amending the Constitution should of course be undertaken with the gravest of care. After all, there is a reason why constitutional designers impose special rules for amending a constitution. If it were just as easy to amend a constitution as it is to amend an ordinary law, there would be nothing special, more authoritative, or more meaningful about it than a statute. It may admittedly be unwise to fiddle with the constitutional text because frequent constitutional changes breed uncertainty, which itself undermines the stability that government requires to function properly.<sup>398</sup> Stability was in fact a chief objective in the minds of the Framers as they set out to establish the parameters for amending the Constitution. Other objectives which Article V serves are popular legitimacy and federalism,<sup>399</sup> the former oriented toward ensuring that any amendment may be said to flow from the durable will of the people,<sup>400</sup> and the latter permeating the entire constitutional text and indeed its very genesis. The high procedural hurdles of Article V that citizens and legislators must clear in order to perfect a constitutional amendment also entail considerable investments of time and cost, which together serve an important purpose of diluting the passions that may otherwise suffuse the daily business of popular politics.<sup>401</sup>

But the calcification of the constitutional text may portend some negative consequences, especially if it is indeed true that “the desirable rigor of [A]rticle V necessarily tends to threaten a *rigor mortis* for the entire Constitution,”<sup>402</sup> as William Van Alstyne has warned. For instance, by making it excruciatingly difficult to amend the Constitution, Article V privileges the views of the judiciary over those of citizens and their legislative agents, therefore effectively shielding courts from answerability.<sup>403</sup> It also forecloses, or at the very least narrows, the possibility of success by popular movements militating for new and more expansive rights.<sup>404</sup> In this way, constitutional malleability may

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398. See Stephen M. Griffin, *The Problem of Constitutional Change*, 70 TUL. L. REV. 2121, 2137 (1996).

399. See Brannon P. Denning, *Means to Amend: Theories of Constitutional Change*, 65 TENN. L. REV. 155, 175-78 (1997).

400. See Michael C. Hanlon, Note, *The Need for a General Time Limit on Ratification of Proposed Constitutional Amendments*, 16 J.L. & POL. 663, 672 (2000).

401. See Doni Gewirtzman, *Our Founding Feelings: Emotion, Commitment, and Imagination in Constitutional Culture*, 43 U. RICH. L. REV. 623, 646-47 (2009).

402. William Van Alstyne, Perkins Professor of Law, Duke Univ., David C. Baum Memorial Lecture: Notes on a Bicentennial Constitution: Part I, Processes of Change (Feb. 20, 1984), in 1984 U. ILL. L. REV. 933, 949.

403. See John Ferejohn & Lawrence Sager, *Commitment and Constitutionalism*, 81 TEX. L. REV. 1929, 1960 (2003).

404. See William E. Forbath, *The Politics of Constitutional Design: Obduracy and Amendability—A Comment on Ferejohn and Sager*, 81 TEX. L. REV. 1965, 1973-76 (2003).

more easily accommodate pressing adjustments to the Constitution when the circumstances warrant quick action,<sup>405</sup> as is the case now.

Against this byzantine backdrop of the history of constitutional amendment, the United States may be better served by the existing order of succession, not necessarily because it is optimal but because it is settled. For many constitutional provisions, it matters less what the rule is than whether a rule exists at all. Daryl Levinson makes this point particularly well with reference to the Twenty-Fifth Amendment, which enshrines rules for presidential succession, presidential disability, and vice presidential vacancy.<sup>406</sup> For Levinson, “the overwhelming advantages of coordination dominate any incentive for substantive conflict,” especially in the case of presidential succession because “agreement on *some* rule is so much more important than the particular substantive rule.”<sup>407</sup> David Strauss takes a similar view of the coordinating value of succession rules: “many constitutional amendments, although not important in the way that amendments are usually thought to be, still serve a nontrivial purpose,” further specifying that constitutional provisions like the rules of succession “address matters that must be settled one way or another—but how they are settled is not so important. An analogy is to the rule that traffic must keep to the right.”<sup>408</sup>

Though the coordinating function of law is undeniable,<sup>409</sup> so too is its expressive function.<sup>410</sup> The expressive function of law may be understood as “the effects of law on social attitudes about relationships, events, and prospects, and also the ‘statement’ that law makes

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405. See Bruce E. Cain & Roger G. Noll, *Malleable Constitutions: Reflections on State Constitutional Reform*, 87 TEX. L. REV. 1517, 1518 (2009).

406. See U.S. CONST. amend. XXV.

407. Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 905 n.198 (1999). The coordination value of presidential succession rules is different from the virtue of veil of ignorance rules insofar as the latter is concerned not with process but rather instead with impartiality. See Adrian Vermeule, *Veil of Ignorance Rules in Constitutional Law*, 111 YALE L.J. 399, 408-09 (2001). The coordination value of presidential succession rules is likewise distinguishable from the advantage of constitutional precommitment because the former is not infused with social values, as is the latter. See Gregory P. Magarian, *How to Apply the Religious Freedom Restoration Act to Federal Law without Violating the Constitution*, 99 MICH. L. REV. 1903, 1919 (2001).

408. David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1487 (2001).

409. See, e.g., JULES L. COLEMAN, *THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY* 92-94 (2001); H. L. A. HART, *THE CONCEPT OF LAW* 55-61 (2d ed. 1994); ANDREI MARMOR, *LAW IN THE AGE OF PLURALISM* 160-71 (2007).

410. See, e.g., Nigel Walker & Michael Argyle, *Does the Law Affect Moral Judgments?*, 4 BRIT. J. CRIMINOLOGY 570, 570 (1964) (“[O]ne of the functions of the criminal law . . . is to inform members of a society of at least some of the moral attitudes of that society, and so to influence their own moral attitudes.”).

independently of such effects,”<sup>411</sup> writes Cass Sunstein, taking care to stress that when the law makes a statement instead of controlling behavior, it is discharging a distinguishable function.<sup>412</sup> That statement, which we may discern from a law “[m]erely by virtue of what it says,” compels and constrains human behavior on the strength of “its power to give a signal about what it is right to do, and also to provide information about what other people think that it is right to do.”<sup>413</sup> This is how the law manages to set, correct, or reinforce social norms without recourse to the use of force or other related physically coercive techniques of social control.<sup>414</sup> One might regard the expressive function of law as something akin to coordination-plus, the plus being the law’s choice of how to coordinate actions and which values to promote.<sup>415</sup>

Succession rules perform an expressive function that extends beyond simple coordination. True, succession rules in a liberal democracy predetermine the actions of political actors by settling on a procedure in advance of a contingency. But succession rules should also be seen as proclaiming the values that sustain the democratic order. The American presidential succession regime—both as it stands today, and how I suggest it be renewed—reflects values that speak to the core of the project of American democracy. The succession regime presently stands on substantive values of continuity and democracy. But with the new model of presidential succession proposed in these pages, the three additional values of competence, leadership, and partisanship would fortify the succession rules.

These five values—competence, continuity, leadership, partisanship, and democracy—are each pivotal to a successful regime of presidential succession. They infuse succession with something that eludes a simple rule of coordination mandating that traffic must keep to the right side of the road. Rather, these five values color the rules of succession with a deep meaning that speaks both to presidential merit and social order. Buoyed by substantive values of liberal democracy, succession rules make clear that it is indeed important *how* and *why* succession proceeds, not simply that it proceeds at all. And by anchoring itself in these five values, the new model of presidential succession heeds the wisdom of the founding generation while at the same time

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411. Cass R. Sunstein, *Problems with Rules*, 83 CALIF. L. REV. 953, 970 (1995).

412. See Cass R. Sunstein, *On the Expressive Function of Law*, E. EUR. CONST. REV., Winter 1996, at 66, 67.

413. CASS R. SUNSTEIN, WHY SOCIETIES NEED DISSENT 211 (2003).

414. See Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2032-33 (1996).

415. See Eric Fleisig-Greene, *Law’s War with Conscience: The Psychological Limits of Enforcement*, 2007 BYU L. REV. 1203, 1208-09.

acknowledging the political forces that have shaped the modern American polity. Therefore to regard succession rules as performing a purely coordinating function—as some scholars have argued by claiming that it does not matter where one statutory successor stands in relation to another in the line of presidential succession<sup>416</sup>—is to miss the important societal purpose succession rules serve in communicating values that bind citizens to the state, and give moral and procedural legitimacy to its governing structures.

It would also be a mistake to concede the amendment battle before it has even begun. Although American history has demonstrated with little doubt that passing a constitutional amendment is much easier said than done, one should not underestimate how much the new global calculus of counterterrorism has focused the American mind. For despite the suggestion that the United States could not come together on an amendment,<sup>417</sup> it is difficult to believe that Congress and the states could not muster the political will to pass a presidential succession amendment deemed critical the nation's security.

What leads me to this conclusion is the revealing social science data that confirms the enduring fears of Americans about the level of preparedness for another strike. In 2009, fewer Americans thought they were more safe than in 2007, and the number of Americans who regarded the nation “about as safe” as before the attacks of September 11, 2001, increased by forty-eight percent.<sup>418</sup> By 2010, nearly seventy percent of Americans qualified as “very likely” a terrorist attack by foreigners on American soil within the next year; a similarly high proportion of Americans (fifty-eight percent) foresaw a terrorist attack by Americans.<sup>419</sup> As of June 2010, Americans still regard terrorism as the top threat to the United States.<sup>420</sup> As recently as September 2010, over seventy-one percent of Americans believed the United States was likely, within the next ten years, to suffer an attack comparable to the devastation of September 11, 2001.<sup>421</sup> Given this precarious security

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416. See MIKHAIL FILIPPOV ET AL., *DESIGNING FEDERALISM: A THEORY OF SELF-SUSTAINABLE FEDERAL INSTITUTIONS* 149-50 (2004).

417. See, e.g., James C. Ho, *Ensuring the Continuity of Government in Times of Crisis: An Analysis of the Ongoing Debate in Congress*, 53 CATH. U. L. REV. 1049, 1070 (2004).

418. *Americans Divided on Safety After 9/11*, ANGUS REID PUBLIC OPINION (May 7, 2009), [http://www.angus-reid.com/polls/view/33380/americans\\_divided\\_on\\_safety\\_after\\_9\\_11](http://www.angus-reid.com/polls/view/33380/americans_divided_on_safety_after_9_11).

419. *Civil Unrest: Americans Clearly Troubled by Recent Anti-Government Activity*, ANGUS REID PUB. OPINION (Apr. 12, 2010), [http://www.visioncritical.com/wp-content/uploads/2010/04/2010.04.12\\_Militias\\_USA.pdf](http://www.visioncritical.com/wp-content/uploads/2010/04/2010.04.12_Militias_USA.pdf)

420. See Lydia Saad, *Federal Debt, Terrorism Considered Top Threats to U.S.*, GALLUP (June 4, 2010), <http://www.gallup.com/poll/139385/Federal-Debt-Terrorism-Considered-Top-Threats.aspx>.

421. *71% Say Another 9/11 Is Likely to Happen in Next 10 Years*, RASMUSSEN REP. (Sept. 11,

context of the day and how highly probable Americans perceive the likelihood of another strike, I suspect it would be possible to gather the requisite popular and legislative approval.

Over the course of American history, constitutional amendments have followed from periods of intense political engagement. Structural constitutional changes in particular have often been precipitated by the fear of an impending constitutional crisis or the reality of a lived one.<sup>422</sup> Public opinion, if aligned against the risks associated with an existing constitutional structure or political arrangement, is a terribly powerful force for spurring constitutional renewal when necessary to avert problems, either perceived or actual.<sup>423</sup> This was the subtext for the Twentieth Amendment,<sup>424</sup> which put an end to the “intolerable violation of democratic principles” posed by a lame-duck Congress.<sup>425</sup> The same undercurrent was apparent in the enactment of the Twenty-Second Amendment,<sup>426</sup> which itself was a response to fears about a monarchical presidency.<sup>427</sup> The same pattern of crisis and response recurs elsewhere in the story of amendments to the Constitution.

For instance, the Twelfth Amendment was a direct response to the electoral crisis that erupted in the presidential election of 1800 pitting then-Vice President Thomas Jefferson against Aaron Burr.<sup>428</sup> The Jeffersonians, writes Bruce Ackerman, “drafted the Twelfth Amendment with one goal in mind: to avoid turning 1804 into a replay of the electoral crisis of 1800.”<sup>429</sup> At the time, the presidential election rules

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2010) [http://www.rasmussenreports.com/public\\_content/politics/general\\_politics/september\\_2010/71\\_say\\_another\\_9\\_11\\_is\\_likely\\_to\\_happen\\_in\\_next\\_10\\_years](http://www.rasmussenreports.com/public_content/politics/general_politics/september_2010/71_say_another_9_11_is_likely_to_happen_in_next_10_years).

422. On this point, I distinguish amendments that have adjusted the mechanics of American government from those that have expanded rights for Americans. There is of course an important connection between the structure of the Constitution and the rights that it affords. For example, the Constitution’s separation of powers makes possible the very rights that the Bill of Rights preserves by frustrating the concentration of power in the hands of one branch of government. See Walter Berns, *The Constitution as a Bill of Rights*, in HOW DOES THE CONSTITUTION SECURE RIGHTS? 50, 60 (Robert A. Goldwin & William A. Schambra eds., 1985); M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 626-27 (2001).

423. See Paul Boudreaux, *Federalism and the Contrivances of Public Law*, 77 ST. JOHN’S L. REV. 523, 596 (2003).

424. U.S. CONST. amend. XX.

425. BRUCE ACKERMAN, THE CASE AGAINST LAMEDUCK IMPEACHMENT 8 (1999).

426. U.S. CONST. amend. XXII.

427. See Paul Finkelman, *Antifederalists: The Loyal Opposition and the American Constitution*, 70 CORNELL L. REV. 182, 197 (1984) (reviewing THE COMPLETE ANTI-FEDERALIST (Herbert J. Storing ed., 1981)).

428. See Samuel Issacharoff, *The Enabling Role of Democratic Constitutionalism: Fixed Rules and Some Implications for Contested Presidential Elections*, 81 TEX. L. REV. 1985, 2000-02 (2003).

429. Bruce Ackerman, Sterling Professor of Law and Political Sci., Yale University, 2006 Oliver Wendell Holmes Lectures: The Living Constitution (Oct. 3-5, 2006), in 120 HARV. L. REV. 1737, 1766 n.91 (2007).

called for electors to cast two undifferentiated ballots for President and Vice President, meaning that there were no separate presidential and vice presidential elections. The Constitution provided that the candidate with the highest number of votes became President and the second-highest became Vice President.<sup>430</sup> President Jefferson and Burr scored the same number of electoral votes, which triggered an “ultimate moment of crisis.”<sup>431</sup> It took what Akhil Amar calls “an extended crisis triggered by several glitches in the Framers’ electoral machinery” for change to come.<sup>432</sup> It eventually came in the form of the Twelfth Amendment, which created the Electoral College.<sup>433</sup>

But the Twenty-Fifth Amendment may be the best example of trepidation converging with the possibility of a constitutional crisis to hasten the adoption of significant structural constitutional change. The Amendment sets forth procedures for filling a vice presidential vacancy as well as for filling a presidential vacancy in the event of a presidential disability.<sup>434</sup> Prior to the 1960s, a vacancy in the vice presidency had never been much to worry about. Indeed, through 1967 when the Twenty-Fifth Amendment was ratified, the United States had operated relatively well without a Vice President during sixteen of thirty-six presidential administrations.<sup>435</sup> That was the consequence of a vice presidential vacancy pre-Twenty-Fifth Amendment: the office remained vacant until the next presidential election. But together with President Dwight Eisenhower’s recurring illness while in office<sup>436</sup> and the assassination of President John F. Kennedy in 1963,<sup>437</sup> the new Cold War context prompted quick congressional action on a new amendment to allay Americans fearful of foreign threats to the United States at the height of the struggle for supremacy and security in the synonymous era of the nuclear arms race.<sup>438</sup> If any crisis may be said to have quickened

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430. See U.S. CONST. art. II, § 1, cl. 3, amended by U.S. CONST. amend XII.

431. Joanne B. Freeman, *The Election of 1800: A Study in the Logic of Political Change*, 108 YALE L.J. 1959, 1986 (1999).

432. Akhil Reed Amar, Southmayd Professor of Law and Political Science, Yale Univ., Kormendy Lecture: Some Thoughts on the Electoral College: Past, Present, and Future (Oct. 23, 2006), in 33 OHIO N.U. L. REV. 467, 469 (2007).

433. U.S. CONST. amend. XII.

434. U.S. CONST. amend. XXV.

435. See Michael Nelson, Op-Ed, *America’s Understudy*, PALM BEACH POST (Fla.), May 26, 1991, at 1E, available at 1991 WLNR 1228793.

436. Sindler, *supra* note 107, at 365.

437. Sanford Levinson & Jack M. Balkin, *Constitutional Crises*, 157 U. PA. L. REV. 707, 735 (2009).

438. See Eric A. Richardson, Comment, *Of Presumed Presidential Quality: Who Should Succeed to the Presidency When the President and Vice President are Gone?*, 30 WAKE FOREST L. REV. 617, 623 (1995).

this constitutional change, it is the element of uncertainty that the Cold War descended upon the presidency.

It is true, though, that crises can either incite change or, as Adrian Vermeule observes, they can erect barriers to change in the interest of stability in the face of uncertainty: “[C]risis has two effects pulling in opposite directions: crisis destabilizes institutions, but it also tends to create new political constraints that shore up those institutions against change.”<sup>439</sup> But one exception to Vermeule’s observation, which Vermeule himself recognizes, has been presidential succession because, on that subject, the parties that may otherwise normally find themselves opposed to one another may agree on a new amendment because it will rarely be possible to predict how a new structural rule will privilege one side over another.<sup>440</sup> What is more, perhaps the exception for presidential succession is only a subsidiary species of a larger category of exceptions. Because the exception for presidential succession may be more accurately viewed as falling under an exception for amendments to the Office of President of the United States. Consider that four of the seventeen amendments ratified since the Bill of Rights—and three of the last eight amendments—have involved the presidency.<sup>441</sup> This pattern suggests that Americans may be amenable to reshaping the institution of the presidency when the public interest demands it. And now is as good a time as any to amend presidential succession.

## V. CONCLUSION

Constitutional change is terribly difficult in the United States. It usually takes a tragedy or an imminent disaster to galvanize the movement for a significant reorganization of an existing public institution. Indeed, the impetus for constitutional change is usually at its strongest in an emergency when time is a luxury in short supply.<sup>442</sup> But the project to fix the problematic line of presidential succession must begin now, before a crisis, so that it is shielded from the exigencies that emergencies necessarily entail.<sup>443</sup>

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439. Adrian Vermeule, *Political Constraints on Supreme Court Reform*, 90 MINN. L. REV. 1154, 1169 (2006).

440. *Id.* at 1172.

441. See William Josephson & Beverly J. Ross, *Repairing the Electoral College*, 22 J. LEGIS. 145, 150 n.27 (1996).

442. See JON ELSTER, *ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT, AND CONSTRAINTS* 145 (2000).

443. Some have made a similar observation with respect to designing rules to ensure the continuity of the judiciary in the event of a crisis. See Randolph Moss & Edward Siskel, *The Least Vulnerable Branch: Ensuring the Continuity of the Supreme Court*, 53 CATH. U. L. REV. 1015, 1042 (2004).

The new threat of terrorism has introduced a disconcerting measure of uncertainty into the stability of American public institutions. The current presidential succession regime exacerbates that uncertainty by making it possible for an inexperienced politician to ascend to the presidency at a time when what America needs most at the helm is a competent statesperson. The existing Presidential Succession Act sets the line of statutory succession according to the wrong values: it privileges politics and tradition over leadership and competence. I have therefore proposed to amend the line of succession in the interest of the right values.

The line of succession should be revised to insert former living Presidents—in reverse chronological order of service beginning with former Presidents of the same party as the unavailable President—into the line of succession and to concurrently remove the House Speaker and Senate President pro tempore. Congress should also revise the order in which members of the Cabinet ascend to the presidency. Under this new presidential succession sequence, a former President would serve only temporarily until a special election was held to elect a new head of state. The new succession law would except former Presidents who have resigned, been impeached and convicted, or opted out of the line of succession for reasons of health or otherwise.

Neither the House Speaker nor a Cabinet secretary nor certainly the Senate President pro tempore can offer America the proven leadership that a former President can. Until an emergency envelops the United States and unpredictably catapults a statutory successor into the presidency, no one can know whether that successor will prove up to the task of leading the nation back to normalcy. The designated successor could very well exhibit great leadership as an accidental President but the odds are just as strong that she would fall far short. And that is precisely the problem: the current line of succession compels America to play a precarious game of presidential roulette that is not worth playing at any time, let alone at the height of a crisis.

Much of the needed statutory framework is already in place to permit a seamless transition to this new regime of temporary presidential succession. But it could require a new constitutional amendment to permit two-term Presidents to fill a vacancy in the event of a tragedy. Nevertheless, the high political and social investment involved in proposing and passing a constitutional amendment would be well worth the effort to correct the imbalance that currently governs succession to the presidency—a costly imbalance in which politics and tradition outweigh leadership and competence to the detriment of the nation.