A DISTINCT SYSTEM FOR PRESIDENTIAL SUCCESSION ON INAUGURATION DAY: GETTING THE MOST OUT OF SECTION 3 OF THE TWENTIETH AMENDMENT

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The current presidential-succession statute uses the same line of succession for every conceivable situation. But there are many different types of potential succession scenarios. Succession need not—and should not—be governed by a one-size-fits-all approach.

Before the Twentieth Amendment was ratified in 1933, the Constitution authorized Congress to provide only for double vacancies during the term, when there already is a President and Vice President. Recognizing this gap, Section 3 of the Twentieth Amendment empowered Congress to cover inauguration-day double vacancies: at the outset of a term, when nobody is available to become President or Vice President in the first place.

Significantly, Section 3 gives Congress much more flexibility for inauguration-day double vacancies than Article II allows for middle-of-the-term ones. But Congress has never fully embraced its Section 3 powers: When Congress wrote the current succession law in 1947, it chose a monolithic system that ignored the distinctive needs of inauguration-day succession and left Section 3's flexibility unused. The time for Congress to make full use of its Section 3 powers is long overdue. Moreover, Section 3 has been largely neglected by scholars. The time for a full-length published treatment of Section 3 is overdue as well.

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INTRODUCTION

Of all the statutes in the United States Code that have never been used, the ones governing presidential succession are probably the most important. Not once in 235 years has presidential power transferred past the Vice President.[1] Nevertheless, it is crucial to know who *would* become Acting President if all hell were to break loose and leave Americans without a President or Vice President.

Different types of hell might break loose, though. One succession system might be best for when something happens to both the President and Vice President in the middle of a term. A completely different system might be ideal for a disputed election that remains unresolved on Inauguration Day. Still other systems might be optimal on Inauguration Day when the President-elect and Vice President-elect have died, are disabled, have renounced their offices, or are not constitutionally qualified for office. In 2024—in the wake of the January 6 insurrection and given the unprecedented elderliness of major presidential candidates—these matters seem particularly salient.

Unfortunately, the current succession statute uses the same line of succession for every conceivable double vacancy.[2] The point of this Article is that presidential succession need not be governed by a one-size-fits-all approach—and that it should not be.

Before the Twentieth Amendment was ratified in 1933, the Constitution only clearly authorized Congress to provide for regular double vacancies: during a term, when there already is a President and Vice President and something happens to both of them, requiring an Acting President to step in (what this Article calls "Article II

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[1] Historical folklore has it that Senator David Rice Atchison was Acting President for a day in 1849 because the new President and Vice President took their oaths a day late when Inauguration Day fell on a Sunday. But Atchison's alleged one-day presidency never happened. *See* Senate Hist. Off., *David Rice Atchison: (Not) President for a Day*, U.S. SENATE: SENATE STORIES (Nov. 13, 2020), https://www.senate.gov/artandhistory/senate-stories/no-david-rice-atchison-was-not-president-for-a-day.htm [https://perma.cc/6ALK-V3KT].

[2] *See* 3 U.S.C. § 19.

succession").[3] Recognizing this gap, Section 3 of the Twentieth Amendment empowered Congress explicitly to cover inauguration-day double vacancies:[4] at the outset of a term, when nobody is available to become President or Vice President (what this Article calls "Section 3 succession").[5]

Significantly, Section 3 gives Congress much more flexibility for inauguration-day double vacancies than Article II allows for middle-of-the-term ones. Article II seemingly does not allow for a selection process, just a predefined line of succession.[6] For inauguration-day double vacancies, by contrast, Section 3 allows for either a predefined line of succession or a selection process.[7] Moreover, Article II limits its line of succession to "Officer[s],"[8] while Section 3 provides no such constraint for inauguration-day succession.[9]

But Congress has never fully embraced its Section 3 powers. For the first fourteen years after Section 3's ratification, Congress did not even use its new authority. Then, in 1947, when Congress revised the succession law and finally added Section 3 coverage, it chose a monolithic system that ignored the distinctive features of inauguration-day succession and left Section 3's flexibility unused.[10]

Proactivity is not Congress's strongest suit. When it comes to presidential succession, though, proactivity is essential. The time for Congress to make full use of its Section 3 powers is long overdue. Additionally, there has been no in-depth scholarly treatment of Section 3 and inauguration-day double vacancies, and only a few commentators

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3 *See* U.S. CONST. art. II, § 1, cl. 6. *But see infra* notes 111, 174 and accompanying text (providing examples of those who believed that Article II could cover inauguration-day succession). A Vice President who succeeds to the presidency to fill a permanent vacancy, such as one caused by death, resignation, or removal, becomes President. *See* U.S. CONST. amend XXV, § 1. By contrast, anyone further down in the line of succession only becomes Acting President, even when filling permanent double vacancies. *See id.* art. II, § 1, cl. 6.

4 Section 3 also covers single vacancies, providing that if the President-elect is dead when it is time to swear in, the Vice President-elect becomes President, and that in other, potentially temporary circumstances where there is not a President able to be sworn in, the Vice President-elect acts as President until the President is able. *See* U.S. CONST. amend. XX, § 3.

5 *See id.*

6 *See id.* art. II, § 1, cl. 6 (empowering Congress only to specify "what Officer shall then act as President" when there is a double vacancy). To be precise, Article II might allow for a special election (this is a disputed point). *See infra* note 31 and accompanying text. Regardless, the person acting as President during the pendency of that election apparently must be a predesignated officer and not the product of an on-the-fly process.

7 *See* U.S. CONST. amend. XX, § 3; *infra* Section III.B.3.b.

8 U.S. CONST. art. II, § 1, cl. 6.

9 *See id.* amend. XX, § 3; *infra* Section III.B.3.b.

10 *See infra* Section III.C.

have addressed Section 3's untapped potential even briefly.[11] The time for a full-length published treatment of Section 3, like this Article, is overdue as well.

Part I of this Article starts with a brief discussion of principles: What characteristics have been considered important in the design of presidential succession laws, and how do those characteristics vary for inauguration-day double vacancies? Part II turns to the under-explored law and history of inauguration-day succession, focusing on the pre-Twentieth Amendment period. Part III continues, looking at the law and history of Section 3 of the Twentieth Amendment and subsequent developments. Part IV concludes with some general suggestions for legislation that would take proper advantage of Section 3.

I. SUCCESSION LAW PRINCIPLES

The characteristics of a good succession law might differ depending on the type of vacancy to be filled. The differences between middle-of-the-term (Article II) succession and inauguration-day (Section 3) succession are particularly stark. This part of the Article will discuss some of those characteristics and differences, reinforcing the argument that the current, one-size-fits-all line of succession (Speaker of the House, President Pro Tempore of the Senate, Cabinet members[12]) is flawed. Later, in Part IV, these characteristics and differences will inform the Article's suggestions for Section 3 legislation.

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11 Among those few are Roy E. Brownell II & John Rogan, *An Anniversary Best Uncelebrated: The 75th Year of the Presidential Succession Act of 1947*, 1 FORDHAM L. VOTING RTS. & DEMOCRACY F. 35, 40–41 (2022); John C. Fortier & Norman J. Ornstein, *Presidential Succession and Congressional Leaders*, 53 CATH. U. L. REV. 993, 1006–11 (2004); Joel K. Goldstein, *Taking from the Twenty-Fifth Amendment: Lessons in Ensuring Presidential Continuity*, 79 FORDHAM L. REV. 959, 1023–25, 1034–36 (2010) [hereinafter Goldstein, *Taking*]; Joel K. Goldstein, *Akhil Reed Amar and Presidential Continuity*, 47 HOUS. L. REV. 67, 89–92 (2010) [hereinafter Goldstein, *Continuity*]; Brian C. Kalt, *The Twentieth Amendment, the Presidential Succession Act of 1947, and Pre-Inaugural Problems*, 91 FORDHAM L. REV. ONLINE 29, 29–31 (2022) [hereinafter Kalt, *Twentieth Amendment*]; John Rogan, *Reforms for Presidential Candidate Death and Inability: From the Conventions to Inauguration Day*, 90 FORDHAM L. REV. 583, 603 (2021); Ruth C. Silva, *The Presidential Succession Act of 1947*, 47 MICH. L. REV. 451, 464 n.54 (1949). Another example of the under-consideration of Section 3, pointed out to me by Roy Brownell, is that White House contingency plans for succession have ignored inauguration-day succession as well. *See* OFF. OF WHITE HOUSE COUNSEL, CONTINGENCY PLANS—DEATH OR DISABILITY OF THE PRESIDENT (1993), https://ir.lawnet.fordham.edu/twentyfifth_amendment_executive_materials/10 [https://perma.cc/4AVX-UC6P] (containing plans from the Reagan, Bush, and Clinton administrations).

12 3 U.S.C. § 19.

A. *General Principles*

Among the most important Article II succession principles are continuity, democratic legitimacy, and swift certainty. These are ideals, not requirements—they may conflict with each other, leaving no way to achieve all of them simultaneously. The point, though, is that all three of these principles play out very differently in Section 3 contexts.

1. Continuity

The ideal of continuity suggests that there be as little political disruption as possible when power passes from an absent or disabled President.[13] The simplest version of succession, in which a Vice President takes over from a President, exemplifies this ideal. The Vice President is picked specifically to be the President's understudy. They wake up every morning knowing that they might need to assume power that day at a moment's notice. In recent decades, Vice Presidents have functioned as key insiders in the administration,[14] which makes it much easier for them to step into the presidential role smoothly when necessary.

The current succession statute has been criticized as deficient with regard to continuity because it puts the Speaker of the House next in line after the Vice President.[15] The Speaker is a legislator rather than an executive, and the Speaker is not privy to the inner workings of the White House in the way the Vice President and Cabinet are.[16] Even worse, the Speaker is often a member of the opposition party; suddenly losing a

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13 *See* David A. Crockett, The Contemporary Presidency*: Unity in the Executive and the Presidential Succession Act*, 34 PRESIDENTIAL STUDS. Q. 394, 395–96, 404, 408–10 (2004).

14 *See generally* JOEL K. GOLDSTEIN, THE WHITE HOUSE VICE PRESIDENCY: THE PATH TO SIGNIFICANCE, MONDALE TO BIDEN (2016). This reflects an important point: the succession law itself does not dictate everything about how any given succession will go; a lot depends on the specific choices that a particular administration makes about individual roles and institutional design. When Harry S. Truman was Vice President, he was kept in the dark about a lot of important things; when Truman became President upon President Roosevelt's death, he had no idea that the United States had developed an atomic bomb. *See id.* at 21.

15 *See, e.g.*, BRIAN C. KALT, CONSTITUTIONAL CLIFFHANGERS: A LEGAL GUIDE FOR PRESIDENTS AND THEIR ENEMIES 98–100 (2012) [hereinafter KALT, CLIFFHANGERS]; AM. ENTER. INST., CONTINUITY OF GOV'T COMM'N, CONTINUITY OF GOVERNMENT: PRESIDENTIAL SUCCESSION 8–9 (2022), https://www.aei.org/wp-content/uploads/2022/12/Continuity-of-Government.pdf?x85095 [https://perma.cc/59LV-46L2]; Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113, 131 (1995); Fortier & Ornstein, *supra* note 11. That said, Section 2 of the Twenty-Fifth Amendment, which allows Presidents to nominate people to fill vice-presidential vacancies, greatly reduces the chances of such a party switch. *See* U.S. CONST. amend. XXV, § 2; Goldstein, *Taking*, *supra* note 11, at 984.

16 *See* KALT, CLIFFHANGERS, *supra* note 15, at 97–100.

President and Vice President would be disruptive enough to the country without adding an ideological 180-degree turn in the White House to the mix.[17]

But these are middle-of-the-term problems; the need for continuity looks substantially different for Section 3 succession than it does for Article II succession. Inauguration Day is the time *designated* for discontinuity and ideological 180-degree turns in the White House.[18] Whatever other problems there might be with having the Speaker become Acting President in a Section 3 succession scenario, discontinuity would not be among them.

2. Democratic Legitimacy

The ideal of democratic[19] legitimacy suggests that Acting Presidents should have been validated by the electorate in some way, at least indirectly. Presidents and Vice Presidents have the most democratic legitimacy of anyone in the country; they are the only officials in America elected by a national constituency. As such, it would be problematic for an Acting President to wield supreme executive power without any sort of validation from the sovereign people.

From 1886 to 1947, the line of succession consisted solely of the Cabinet.[20] When Congress enacted the current succession statute in 1947, it placed the Speaker of the House and President Pro Tempore of the Senate ahead of the Cabinet, and the main reason was that Speakers and Presidents Pro Tempore are elected officials, while Cabinet members are not.[21] Speakers are only elected to Congress by the voters of one district, but they are elected to the speakership by the entire House. As such, they

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17 *See id.* at 99–100. A Speaker who succeeded permanently to the acting presidency despite being from the opposition party could do the honorable thing: nominate a new Vice President from the same party as the old President, then resign. There was a time when such a thing was imaginable. *See id.* at 100 (noting pledge by Democratic Speaker Carl Albert to do just this during Watergate). But the immense power of the presidency, coupled with the intense partisan polarization now typical in the United States, makes such an expectation seem naïve.

18 *See Examination of the First Implementation of Section Two of the Twentieth-Fifth Amendment: Hearing on S.J. Res. 26 Before the Subcomm. on Const. Amends. of the S. Comm. on the Judiciary*, 94th Cong. 50 (1975) (statement of Antonin Scalia, Assistant Att'y Gen., Office of Legal Counsel) ("It is the presumption of our system that major changes of direction in the executive branch of Government are to be made no more frequently than every 4 years.").

19 The United States is not a democracy in the Athenian sense of having decisions made directly by the citizenry. Rather, it is a democratic-republican system in which the people are the ultimate sovereign and govern themselves by regularly electing their leaders. This Article uses the term "democratic" in that latter sense.

20 *See* Act of Jan. 19, 1886, ch. 4, 24 Stat. 1, 1–2 (repealed 1947).

21 *See* KALT, CLIFFHANGERS, *supra* note 15, at 87; *infra* text accompanying notes 296–297.

derive indirect democratic legitimacy from the House's national constituency.[22] So does the President Pro Tempore in the Senate.

This is just a matter of degree, though. Cabinet members are nominated by the President (indirectly lending the President's own democratic legitimacy) and confirmed by the Senate (earning the same indirect legitimacy that the Senate President Pro Tempore's selection confers).[23] And the idea of succession favoring elected officials was rejected in 1967, when Section 2 of the Twenty-Fifth Amendment provided for Presidents to fill vice-presidential vacancies by appointment, subject to confirmation by the House and Senate.[24] Gerald Ford, the first such unelected Vice President, succeeded to the presidency; no Speaker ever has.[25]

In any case, things look different on Inauguration Day than in the middle of the term. Whatever the benefits of including the Cabinet in Article II succession, it is problematic to use the Cabinet for Section 3 succession. The old President or their party's candidate might have been defeated in the election. If a member of the outgoing, rejected administration became Acting President, they would do so with the *opposite* of democratic legitimacy.[26]

By contrast, the Speaker and the President Pro Tempore typically will have their usual levels of democratic legitimacy on Inauguration Day—if not more, given the recency of their selections.[27] That said, if there is a disputed and unresolved presidential election, the disputed vote counts might spill over into congressional contests. If party control of the House or Senate hangs in the balance, then the Speaker or President Pro Tempore might have a less-than-ideal amount of democratic legitimacy. And even if the results of the congressional election were clear, the results

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22 The President has a slightly larger constituency than Congress, because residents of Washington, D.C. can vote for President but not for representatives or senators. *See* U.S. CONST. amend. XXIII.

23 *Id.* art. II, § 2, cl. 2.

24 *Id.* amend. XXV, § 2. *But see* Arthur M. Schlesinger, Jr., *On the Presidential Succession*, 89 POL. SCI. Q. 475, 475–76 (1974) (criticizing Section 2 for that reason).

25 Indeed, only one Speaker of the House has ever become President by any means and that one, James K. Polk, served as a state governor in between. *See* KALT, CLIFFHANGERS, *supra* note 15, at 99.

26 *See* Fortier & Ornstein, *supra* note 11, at 1007; Goldstein, *Taking*, *supra* note 11, at 1024–25; *infra* text accompanying notes 166–169 (chronicling the raising of this objection during debate on the 1886 succession law).

27 The Speaker would have just been elected to the House, the President Pro Tempore might have just been elected to the Senate, and both of them would have just been chosen as officers of their respective chambers. It is worth noting that the longstanding norm is for President Pro Tempores to be the most senior members of the majority party—which reduces the legitimizing function of their selection, and also casts doubt on the wisdom of having them in the line of succession. *See* KALT, CLIFFHANGERS, *supra* note 15, at 97–98.

of the presidential election might have been too, making it less acceptable to have a Speaker from the losing presidential party become Acting President.

A related problem could arise if the presidential election is thrown into the House of Representatives, the vice-presidential election is thrown into the Senate, and both chambers are deadlocked as January 20 rolls around.[28] The Speaker would be first in line to be Acting President, despite potentially having a key role in preserving the deadlock, rewarding the Speaker's subversion of the constitutional process by catapulting the Speaker into the White House.[29] While the chances of such a thing happening are small,[30] it does underscore how different democratic legitimacy might look in Section 3 scenarios.

On a separate note, Section 3 offers enhanced opportunities for providing democratic legitimacy on the spot. Special presidential elections are constitutionally questionable for Article II succession and are not authorized by current law, but they would be on solid ground for Section 3 succession.[31] Aside from full-blown special presidential elections, Section 3 legislation can also provide indirect democratic legitimacy—in ways that Article II cannot—because Section 3 allows for all sorts of methods such as, say, having the House of Representatives choose an Acting President.

3. Swift Certainty

The ideal of swift certainty suggests that when there is a vacancy, it should be filled immediately and decisively. The Constitution established the President as the 24-7-365 embodiment of the federal government's executive power.[32] The nuclear-age imperative to have an Acting President available at a moment's notice was one of the inspirations for

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28 *See* U.S. CONST. amend. XII; Brian C. Kalt, *Of Death and Deadlocks: Section 4 of the Twentieth Amendment*, 54 HARV. J. ON LEGIS. 101, 108–09 (2017) [hereinafter Kalt, *Deadlocks*] (discussing ways in which deadlocks could occur); *see also Selection of an Acting President in the Case of Failure to Qualify of Both President-Elect and Vice-President Elect: Hearing on H.R. 1121*, 80th Cong. 14 (1947) (statement of Rep. Kefauver) [hereinafter *Hearing on H.R. 1121*] (discussing quorum-related deadlocks).

29 *See* Fortier & Ornstein, *supra* note 11, at 1008.

30 One reason the risk is low is that the Speaker would only be Acting President until either a President or Vice President was elected. The Speaker, in other words, would need to resign from the House and from the speakership for the chance to be President for a potentially very short span.

31 *See* Amar & Amar, *supra* note 15, at 137–38 & n.144 (advocating special elections but noting constitutional objections); Charles S. Hamlin, *The Presidential Succession Act of 1886*, 18 HARV. L. REV. 182 (1905) (opposing special elections and discussing constitutional issues).

32 *See* KALT, CLIFFHANGERS, *supra* note 15, at 16–17.

the Twenty-Fifth Amendment, which provides a fast, clear process for transferring power from disabled Presidents to able Vice Presidents.[33]

Once again, though, this ideal plays out differently for Section 3 succession than it does for Article II succession. If a President and Vice President depart or become disabled at the same time, a successor is needed instantly to avoid a power vacuum, which could be critical in the midst of a crisis that requires someone at the helm. But if the President-elect and Vice President-elect both die, there is no such power vacuum; the previous administration is still in office. Unless the inauguration is imminent, there is no threat to swift certainty. This opens up the possibility of using a slower Section 3 process to select an Acting President, rather than relying on an instant, hardwired, predetermined Article II line of succession. Congress did not recognize this distinction in 1947 when it applied the Speaker-first line of succession to all situations.

Unfortunately, certainty may be weaker on Inauguration Day than it is later in the term. The Speaker of the House is supposed to be elected on January 3, two-and-a-half weeks before January 20, but that is only if all goes well; sometimes it does not.[34] A succession crisis might make this even worse—a hotly contested Speaker election could be even harder to resolve if it looked like the winner might have to resign on January 20 to serve as Acting President.[35]

The current succession law provides a backstop: The Cabinet is next in line if there is no Speaker or President Pro Tempore.[36] But at noon on January 20, the Cabinet is at its emptiest. The new Cabinet has not been nominated yet, let alone confirmed.[37] And typically, almost all of the old

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33 *See* BRIAN C. KALT, UNABLE: THE LAW, POLITICS, AND LIMITS OF SECTION 4 OF THE TWENTY-FIFTH AMENDMENT 54–55 (2019) [hereinafter KALT, UNABLE].

34 Beyond just the contentious, multi-day Speaker election in 2023, past Speaker elections have taken as long as two months to resolve. *See* Clare Foran, Manu Raju, Annie Grayer & Melanie Zanona, *McCarthy Elected House Speaker After Days of Painstaking Negotiations and Failed Votes*, CNN (Jan. 7, 2023, 9:11 AM), https://www.cnn.com/2023/01/06/politics/mccarthy-speaker-fight-friday/index.html [https://perma.cc/QPU8-HNA4] (describing 2023 Speaker election); Brian C. Kalt, *Swearing in the Phoenix: Toward a More Sensible System for Seating Members of the House of Representatives at Organization*, 105 MARQ. L. REV. 1, 20 (2021) (discussing two-month-long Speaker elections in 1855 and 1859); *id.* at 7 (describing the normal process for electing Speakers).

35 *See* 3 U.S.C. § 19(a)(1) (requiring the Speaker to resign from the speakership and the House before becoming Acting President).

36 *See id.* § 19(d).

37 Some have proposed having cooperative outgoing Presidents nominate the incoming President's Cabinet choices so that the Senate can confirm them, and they can be in place on Inauguration Day. *See, e.g.*, Second Fordham Univ. Sch. of L. Clinic on Presidential Succession, Report, *Fifty Years After the Twenty-Fifth Amendment: Recommendations for Improving the Presidential Succession System*, 86 FORDHAM L. REV. 917, 956–57 (2017).

administration's Cabinet members will have left office, leaving a bevy of acting secretaries who may be ineligible under the current law to be in the line of succession.[38]

B. *Distinctive Inauguration-Day Issues and Postures*

Article II succession occurs when both the President and Vice President have suffered some combination of removal, death, resignation, or an inability to discharge the powers and duties of the presidency.[39] Section 3 succession overlaps with these categories, but some Section 3 scenarios are different or distinct. This Section of this Article will examine these differences and distinctions, further underscoring the benefit of legislating a Section 3 succession system that is separate from the Article II succession system.

1. Removal, Death, or Resignation

The first three categories of Article II vacancies do not present any significant incongruities with Section 3. Removal (that is, impeachment and conviction) cannot apply to Presidents-elect and Vice Presidents-elect, because they cannot be removed from an office they have not yet entered.[40]

Death can apply under Section 3, but it presents no special issues. As discussed earlier, Section 3 deaths would play out differently from Article II deaths.[41] The timing of a Section 3 death could make things tricky.[42] But the "death" part would not vary. Dead is dead, the same for Presidents as for Presidents-elect, and the same for Vice Presidents as for Vice Presidents-elect.

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[38] *See id.* at 956; Fordham Univ. Sch. of L. Clinic on Presidential Succession, Report, *Ensuring the Stability of Presidential Succession in the Modern Era*, 81 FORDHAM L. REV. 1, 16 (2012). The succession law requires that Cabinet members in the line of succession be Senate-confirmed, but acting secretaries typically will have been Senate-confirmed to some other position; the statute leaves it unclear whether this is enough. *See* 3 U.S.C. § 19(e); AM. ENTER. INST., *supra* note 15, at 9; Fortier & Ornstein, *supra* note 11, at 1009. At the margins, though, outgoing Cabinet members might be less prone to resign before January 20 if there is a Section 3 succession scenario brewing.

[39] *See* U.S. CONST. art. II, § 1, cl. 6.

[40] Theoretically, it is possible for a President-elect and Vice President-elect to be impeached, convicted, and disqualified based on their conduct in some other office. If that were to happen, though, it would not be a removal. Rather, it would be a constitutional disqualification, which is covered below. *See infra* Section I.B.4.

[41] *See supra* Section I.A.

[42] Timing could be an issue because there is some question as to when a person becomes President-elect. *See infra* text accompanying notes 359–364.

Resignation is somewhere in between—it cannot apply directly to Section 3 because one cannot resign from an office one has not yet entered, but a President-elect or Vice President-elect could create a perfectly analogous vacancy by renouncing their election and refusing to take the oath of office.[43] Again, the difference in timing between Section 3 and Article II might have an impact here, but one would be dealing with quitters in both scenarios.

2. Inability

When Section 3 was added to the Constitution, there was not much difference between how Article II treated an "[i]nability to discharge the [p]owers and [d]uties" of the presidency and how Section 3 (which does not specifically mention inability, but was meant to cover it) did.[44] That was not a good thing. Article II provided neither a standard nor a process for determining inability.[45] As a result, whenever a President was completely incapacitated—and there were several such incidents—nobody ever invoked Article II to transfer power to the Vice President.[46] There are multiple legal and political reasons why this was so, and most of them would have applied with equal force in a Section 3 situation.[47] One can imagine, therefore, that it would be similarly tricky to invoke Section 3 in the case of a disabled President-elect or Vice President-elect.

There was one difference, though. One source of the reluctance to declare an Article II "inability" was the possibility that it would cast the President out of office permanently because it was not clear that Presidents would retake their powers if they recovered.[48] By contrast, Section 3 makes this crystal clear, providing that if both the President-elect and Vice President-elect fail to "qualify" (a designation that includes being disabled, among other things[49]), the Acting President holds power only until one of them does qualify.[50] Section 3 thus removed this particular disincentive to declaring inability.

The problems with Article II's treatment of presidential disability were partially solved in 1967 by the Twenty-Fifth Amendment. The

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43 *See infra* text accompanying notes 249–251.

44 U.S. CONST. art. II, § 1, cl. 6; *see id.* amend. XX, § 3; *infra* Section III.B.3.a.

45 *See* KALT, UNABLE, *supra* note 33, at 29.

46 *See id.* at 30–36.

47 *See id.* In addition to the lack of a process or standard for determining inability or resolving disputes, Presidents and their inner circles were reluctant to give up power and Vice Presidents were wary of looking like usurpers. *See id.* at 31–32.

48 *See id.* at 31–32, 34.

49 *See infra* Section III.B.3.a.

50 *See* U.S. CONST. amend. XX, § 3.

Amendment provided a process for power to transfer from incapacitated Presidents to their able Vice Presidents and then back again.[51] But the Twenty-Fifth Amendment only covers Article II scenarios, not Section 3 scenarios, and it covers only single vacancies, not double ones.[52] As such, there are still no standards or processes established for determining inability in Section 3 succession, making it unlikely that any but the most indisputable inabilities will ever be declared.

3. Disputed or Pending Election

One thing Section 3 covers that Article II does not is a disputed or unresolved election. As discussed above, election-related double vacancies can be dissimilar from their Article II counterparts—the Article II ideals of continuity, democratic legitimacy, and swift certainty all apply very differently.[53] Conversely, election-related succession implicates different ideals.

With their frightening uncertainty and their tremendously high stakes, disputed presidential elections can put a lot of strain on the nation and its institutions. If the dispute is so severe that it remains unresolved on Inauguration Day, that strain will be greatly multiplied if there is no sensible plan for a caretaker acting presidency. The Acting President would ideally be someone who can foster stability and calm (or at least not make things worse) as the deeply divided country works to settle the election.

Stability and calm would also be imperative for an unresolved contingent election (one thrown into the House of Representatives for President and the Senate for Vice President).[54] A line of succession that includes only partisan politicians might struggle to provide this stability and calm. This is a very different imperative from the ideal of continuity that is so important in Article II succession—in the middle of the term, however deeply the country is divided, one side controls the White House, and neutrality is not part of the equation.[55]

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[51] *See id.* amend. XXV, §§ 3–4.

[52] *See id.*

[53] *See supra* Section I.A.

[54] *See* U.S. CONST. amend. XII.

[55] *See supra* Section I.A.1.

4. Failure to Meet Constitutional Qualifications

The Constitution provides several qualifications for the presidency but leaves it unclear how to enforce them. Putting the enforcement problem to one side, though, Section 3 succession would apply whenever the President-elect and Vice President-elect do not meet the qualifications for office. As discussed later in this Article, Section 3's drafters meant to include many different things when they spoke of a would-be President's failure to "qualify," and among them—perhaps the most obvious one linguistically—was constitutional "qualifications" for the presidency.[56] By contrast, it is harder to see how these qualifications could touch off an Article II succession episode.[57]

In addition to the most commonly understood qualifications (age, citizenship, and residency[58]), the Constitution offers several other restrictions on who can serve as President: impeachment disqualification,[59] term limits,[60] the Incompatibility Clause,[61] and Section 3 of the Fourteenth Amendment.[62] Some of these disqualifications might be temporary or curable;[63] Section 3 offers the flexibility to treat these differently from the permanent or incurable ones.

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56 *See infra* text accompanying note 265. William Josephson has contended (unpersuasively, given the evidence marshaled in this Article) that a lack of constitutional qualifications is the *only* cause of a double vacancy that Section 3 covers. William Josephson, *Senate Election of the Vice President and House of Representatives Election of the President*, 11 U. PA. J. CONST. L. 597, 615–16 (2009).

57 *See* Daniel P. Tokaji, *The Justiciability of Eligibility: May Courts Decide Who Can Be President?*, 107 MICH. L. REV. FIRST IMPRESSIONS 31, 33–41 (2008) (explaining the difficulties associated with enforcing the President's constitutional qualifications).

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

59 *See id.* art. I, § 3, cl. 7.

60 *See id.* amend. XXII, § 1.

61 *See id.* art. I, § 6, cl. 2 (precluding federal officers from simultaneously serving in Congress).

62 *See id.* amend. XIV, § 3 (disqualifying certain insurrectionists, rebels, and traitors from office).

63 A President-elect who, say, does not turn thirty-five or does not hit the fourteen-year residency mark until February could still take office then. *See id.* art. II, § 1, cl. 5. A member of Congress can resign from their position to avoid the Incompatibility Clause. *See id.* art. I, § 6, cl. 2. An insurrectionist can have their disqualification removed by a congressional vote under the terms of Section 3 of the Fourteenth Amendment. *See id.* amend. XIV, § 3. But someone who is not a natural-born citizen will never become one, a two-termer will always be a two-termer, and there is no way to undo an impeachment disqualification. *See id.* art. II, § 1, cl. 5; *id.* amend. XXII, § 1; *id.* art. I, § 3, cl. 7.

C. *Section 3's Promise*

Part I of this Article has attempted to make clear just how different Section 3 succession scenarios can be from Article II succession scenarios. Part II will consider how Section 3 scenarios were handled before there was a Section 3, and Part III will look at how they have been handled since. (Short version: The handling was less than robust in both periods.) That discussion will tee up Part IV, which will offer some suggestions for how Congress can improve on this record.

II. PRE-TWENTIETH AMENDMENT SUCCESSION LAW HISTORY

Failing to account adequately for inauguration-day vacancies is something of an American tradition. Before Section 3 was enacted, such vacancies received only partial or uncertain treatment, if any. Luckily, no such vacancies ever arose.

A. *Influences: States and Governors Before the Constitution*

State constitutions drafted from 1776 to 1787 all provided for gubernatorial succession.[64] But they provided little if any guidance on inauguration-day succession.

In the eight states of the Mid-Atlantic and South, there was no need to consider inauguration-day vacancies. These states had the legislature choose the Governor (or the President, as some called the office), so there was no gap between a Governor's selection and the start of their service.[65]

In the other five states, in the Northeast, Governors (or Presidents) were popularly elected in a lengthier process,[66] so it was possible for an

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[64] *See* CHARTER OF CONN. of 1662; DEL. CONST. of 1776, art. VII; GA. CONST. of 1777, arts. XXIII, XXIX; MD. CONST. of 1776, arts. XXV, XXXII; MASS. CONST., pt. 2, ch. 2, §§ I–III; N.H. CONST. pt. 2, Executive Power.—President; N.J. CONST. of 1776, arts. VII–VIII; N.C. CONST. of 1776, art. XIX; N.Y. CONST. of 1777, arts. XX–XXI; PA. CONST. of 1776, ch. II, § 20; CHARTER OF R.I. AND PROVIDENCE PLANTATIONS of 1663; S.C. CONST. of 1778, art. VIII; VA. CONST. of 1776; *see also* JOHN D. FEERICK, FROM FAILING HANDS: THE STORY OF PRESIDENTIAL SUCCESSION 36–38 (1965) (summarizing early state provisions).

[65] *See* DEL. CONST. of 1776, art. VII; GA. CONST. of 1777, arts. II, XXIII; MD. CONST. of 1776, art. XXV; N.J. CONST. of 1776, art. VII; N.C. CONST. of 1776, art. XV; PA. CONST. of 1776, ch. II, § 19; S.C. CONST. of 1778, art. III; VA. CONST. of 1776.

[66] *See* CHARTER OF CONN. of 1662; MASS. CONST. pt. 2, ch. 2, § I, arts. II–III (amended 1855); N.H. CONST. pt. 2, Executive Power.—President (amended 1792, 1966); N.Y. CONST. of 1777, arts. XX–XXI; CHARTER OF R.I. AND PROVIDENCE PLANTATIONS of 1663.

election winner to die before the start of their term. But none of these states addressed that possibility explicitly.

In Massachusetts and New Hampshire, the regular line of succession applied so broadly that it might have covered the death of an election winner between election day and counting day.[67] Specifically, both states provided for succession "[w]henever the chair" of the Governor or President was vacant because of their death, absence from the state, "or otherwise."[68] Here, "otherwise" could include the legislature counting the votes and determining that the person chosen to be Governor was dead. (Massachusetts went further and provided for double vacancies, using the same "otherwise" catch-all.[69])

While Massachusetts's and New Hampshire's succession clauses could have been more explicit regarding inauguration-day vacancies, the other three northeastern states offered no coverage at all. Connecticut's and Rhode Island's succession provisions said nothing explicit about inauguration-day vacancies, nor did they provide implicit coverage through a catch-all "otherwise" clause.[70] New York's succession clause most closely resembled the soon-to-be-drafted federal one. It specified that power could transfer for one of five reasons: the impeachment, removal, death, resignation, or absence from the state of the Governor.[71] Seemingly left uncovered, then, was a vacancy arising from a sixth reason: the old gubernatorial term expiring without anyone set to begin the new one.

In sum, as the Framers headed to the Constitutional Convention, the topic of inauguration-day vacancies did not represent well-trodden ground. If the issue was on the Framers' radar screen at all, it was not accompanied by any robust models of state constitutional drafting. Thus,

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67 *See* MASS. CONST. pt. 2, ch. 2, § I, art. III (specifying the first Monday in April as gubernatorial election day and the last Wednesday in May as the day the legislature formalized the results) (amended 1855); N.H. CONST. pt. 2, Executive Power.—President (specifying "some day in the month of March" as the time for people to vote for state President and the first Wednesday in June as the day the legislature formalized the results) (amended 1877, 1889, 1982).

68 MASS. CONST. pt. 2, ch. 2, § II, art. III (amended 1855); N.H. CONST. pt. 2, Executive Power.—President (amended 1889). Both states' constitutions originally provided for an annual election, but there was no indication that the incumbent's term would end before the newly elected executive's term began. *See* MASS. CONST. pt. 2, ch. 2, § I, art. II (amended 1821); N.H. CONST. pt. 2, Executive Power.—President (amended 1877).

69 MASS. CONST. pt. 2, ch. 2, § III, art. VI.

70 *See* CHARTER OF CONN. of 1662; CHARTER OF R.I. AND PROVIDENCE PLANTATIONS of 1663; *see also* FEERICK, *supra* note 64, at 28 (describing instances of the pre-independence legislature selecting replacements for dead Governors). Connecticut's Charter spoke of the Deputy Governor stepping in upon the Governor's "Absence by occasion of Sickness, or otherwise by his Leave or Permission." CHARTER OF CONN. of 1662.

71 N.Y. CONST. of 1777, arts. XX–XXI.

it was not surprising that the Constitution would pay no particular attention to inauguration-day vacancies.

B. *Creating the Gap: The Original Constitution*

The line of succession past the Vice President did not receive much attention at the Constitutional Convention and during the ratification process; neither did inauguration-day vacancies.[72]

The Constitution's Succession Clause offers little guidance:

> In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.[73]

In other words, the Vice President is first in line; beyond that, the Constitution leaves it to Congress to legislate the line of succession. But the Clause limits the line to "Officer[s]," and it applies explicitly only to the specific categories of removal, death, resignation, and inability.[74]

The important point for the purposes of this Article is that the Succession Clause appears to speak only to a *sitting* President and Vice President *becoming* unavailable. On its face, the Clause says nothing about a new term beginning without anyone poised to become President or Vice President. Indeed, not much in the original Constitution or in the debates accompanying its drafting and ratification mentioned inauguration-day succession.[75]

To be sure, one could argue—and people have argued[76]—that the Succession Clause does cover inauguration-day vacancies from death and disability. Perhaps when the term begins, the President-elect and Vice President-elect become President and Vice President even if they are dead

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72 The portion of the Succession Clause covering succession past the Vice President was not added to the draft until September 7, fifteen weeks into the sixteen-and-a-half-week convention. *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 535 (Max Farrand ed., 1911). The ratification debates did not get into succession in any significant way. *See* THOMAS H. NEALE, CONG. RSCH. SERV., R46450, PRESIDENTIAL SUCCESSION: PERSPECTIVES AND CONTEMPORARY ISSUES FOR CONGRESS 2–3 (2020); *see also* FEERICK, *supra* note 64, at 40–56 (chronicling convention and ratification treatment of succession).

73 U.S. CONST. art. II, § 1, cl. 6.

74 *Id.*

75 *See supra* note 72.

76 *See, e.g.*, *infra* note 111; *infra* text accompanying note 174.

or disabled and unable to take the oath. Then, the succession rules kick in because the President and Vice President are dead or disabled. There is something to this argument with regard to disability, but it is quite odd to think that a corpse can become President. Among other people,[77] the proponents and drafters of Section 3 of the Twentieth Amendment did not read the Succession Clause this way.[78] Section 3 would have been written very differently, if at all, had the "corpse inauguration" interpretation been accepted. Moreover, even if that interpretation were accepted, it would only apply to death and disability; the Succession Clause could still have a gap for inauguration-day vacancies caused by unresolved elections and other failures to qualify.

One prominent early commentator, St. George Tucker, noted the Succession Clause's unresolved-election gap—but praised it.[79] In his 1803 treatise, Tucker surmised that the only way a President would fail to be elected in a timely manner would be if the citizenry grew "weary of the present constitution and government" and, by refusing to elect a President, used the constitutional gap as a way to wind down the entire system.[80] This was a positive feature of the Constitution, Tucker said, because "it . . . furnishe[d] the means of a peaceable dissolution of the [Republic]."[81]

Thirty years later, Supreme Court Justice and constitutional scholar Joseph Story also took note of the Succession Clause's inauguration-day gap (or, as he put it, double vacancies caused "by mere efflux of time" as opposed to the constitutionally specified categories of "removal, death, resignation, or inability").[82] He rejected Tucker's notion that a nonelection would gently dissolve the constitutional government.[83] Leaving the White House empty would paralyze, rather than dissolve, the

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77 *See infra* text accompanying notes 111, 178.

78 *See* U.S. CONST. amend. XX, § 3 (providing for the death of a President-elect).

79 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA. app. at 320 (Philadelphia, Birch & Small 1803); *see* U.S. CONST. art. II, § 1, cl. 3 (providing the process for electing the President but making no provision for the failure to make a timely choice).

80 1 TUCKER, *supra* note 79, app. at 320.

81 *Id.*

82 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1474, 1476, at 334–36 (Boston, Hilliard, Gray, & Co. 1833). Story disagreed subtly with Tucker regarding the gap's existence, saying "[n]o provision seems to be made, *or at least directly made*, for the case of the non-election of any president and vice-president at the period prescribed by the constitution." *Id.* § 1476, at 335 (emphasis added). But if the Constitution provided something indirectly here, Story did not say how or what. *Cf. infra* text accompanying notes 146–147 (discussing the Necessary and Proper Clause's possible application).

83 *See* 3 STORY, *supra* note 82, § 1476, at 335.

government, Story said, and that would be "an evil of very great magnitude."[84]

Story also noted that an inauguration-day gap could arise in other, less intentional ways. Specifically, he noted the possibilities of (1) an election thrown into Congress (after nobody won an electoral-vote majority) that remained deadlocked at the start of the new term, and (2) the death of both the President-elect and Vice President-elect (seemingly rejecting the "corpse inauguration" interpretation of the Succession Clause).[85]

Story thus warned both that the Succession Clause left a gap for inauguration-day double vacancies and that this gap was a problem. It would be almost 100 years before Congress would agree and, in response, pass Section 3 of the Twentieth Amendment.

C. *The 1792 Act*

Congress passed its first presidential-succession law in 1792, featuring a two-person line of succession: the President Pro Tempore of the Senate followed by the Speaker of the House.[86] Tracking the Succession Clause, it applied upon the "removal, death, resignation or inability both of the President and Vice President of the United States," and thus did not purport to cover double vacancies arising from the expiration of the incumbents' terms.[87] (That said, if such a situation had arisen—as it almost did in 1801—some people surely would have tried to invoke the law anyway.)[88]

Also tracking the Succession Clause, the Act specified that the Acting President would serve "until the disability be removed or a

84 *Id.*

85 *Id.* § 1476, at 336.

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

87 *Id.*; *see* U.S. CONST. art. II, § 1, cl. 6.

88 During the deadlocked 1800 election, when the Jefferson-Burr tie threw the election into the House, some scheming Federalists (who had just lost the election) apparently considered extending the deadlock to March 4 and then invoking the succession law to install a (Federalist) President Pro Tempore of the Senate into power. *See* Kalt, *Deadlocks*, *supra* note 28, at 106–07 (describing the deadlock); BRUCE ACKERMAN, THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY 41–46 (2005) (describing a contemporaneous essay by John Marshall that argued that the Succession Clause would apply but that it was unconstitutional for the President Pro Tempore to be in the line of succession); Letter from Thomas Jefferson to Aaron Burr (Dec. 15, 1800), *in* 32 THE PAPERS OF THOMAS JEFFERSON 306–07 (Barbara B. Oberg ed., 2005) (describing Federalist intentions); Letter from Hugh Henry Brackenridge to Thomas Jefferson (Jan. 19, 1801), *in* 32 THE PAPERS OF THOMAS JEFFERSON, *supra* note 88, at 483–88 (informing Jefferson of the Federalist plan but doubting its legality given the limited applicability of the succession law).

President shall be elected."[89] Picking up the last part of that phrase, the Act provided for a special election to pick a new President and Vice President "whenever the offices of President and Vice President shall both become vacant," unless it was in the last few months of the term.[90] The broad term "whenever" could have been applied to inauguration-day double vacancies; when the previous presidential term expired, the offices of President and Vice President would "become vacant" if nobody could swear in and fill them. But the constitutionality of such a broad reading of the Act would have been questionable, given the Succession Clause's limited scope.[91] Even to the extent that such a special election might have been constitutional, moreover, the election would take several months,[92] leaving the presidency empty in the meantime.

Justice Story raised this issue in his 1833 treatise, in which he contrasted the Succession Clause's inauguration-day gap with the comprehensive language of the 1792 Act's special-election provision.[93] That provision, he wrote, "ha[d] undertaken to provide for *every* case of a [double] vacancy."[94] But Story questioned whether special elections were constitutional.[95] This led him to advocate for a constitutional amendment to "clear away every doubt, and thus prevent a crisis dangerous to our future peace, if not to the existence of the government."[96]

D. *The Twelfth Amendment*

The Twelfth Amendment, ratified in 1804, marked the Constitution's first explicit foray into inauguration-day succession. It specified that if a presidential election was thrown into the House of Representatives and remained unresolved at the start of a new term, the Vice President would serve out the term as President.[97] This new coverage was helpful, but it still left holes.

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89 Act of Mar. 1, 1792, § 9; *see* U.S. CONST. art. II, § 1, cl. 6.

90 Act of Mar. 1, 1792, § 10.

91 *See supra* Section II.B.

92 *See* Act of Mar. 1, 1792, § 10 (specifying a special-election process that would require at least two months, and possibly more than a year).

93 3 STORY, *supra* note 82, §§ 1476–77, at 336.

94 *Id.* § 1477, at 336 (emphasis added).

95 *Id.* § 1477, at 337. Story questioned the constitutionality of special elections in general, not just ones spurred by inauguration-day double vacancies. *Id.*

96 *Id.*

97 *See* U.S. CONST. amend. XII. *But see infra* note 110 (discussing an alternative interpretation under which the Vice President would act as President after March 4 only until the House made a choice).

The Amendment's main thrust was reforming presidential and vice-presidential elections. The original Constitution provided that each member of the Electoral College would cast two votes for President, and that the runner-up in the presidential election would become Vice President.[98] The Vice President's legitimacy as a successor would have been based on having been a formidable presidential candidate, second only to the departed President.[99] The Twelfth Amendment established separate voting for President and Vice President, cementing the practice of two-person party tickets.[100] Now, the Vice President's legitimacy as a successor would stem from having been chosen by their party and the Electoral College for the specific position of understudy to their running mate. The Twelfth Amendment thus embraced party continuity as a principle of presidential succession.

More relevant to this Article, the Amendment also overhauled contingent elections. Under the original Constitution, when no presidential candidate won a majority in the Electoral College, the House chose a President from among the five top vote-getters, with each state delegation getting one vote and the winner needing a majority of states.[101] Whoever finished second would become Vice President, with the Senate breaking any vice-presidential ties.[102] With up to five candidates, and with a majority of states needed to reach a decision, the probability was high that the House would deadlock. If the deadlock remained unresolved on March 4 (the starting date back then for congressional and presidential terms),[103] there would be no winner and no runner-up. In other words,

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98 *See* U.S. CONST. art. II, § 1, cl. 3.

99 *Cf.* 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 107 (Jonathan Elliot ed., 2d ed. 1836) (statement of James Iredell) ("Thus, sir, two men will be in office at the same time; the President, who possesses, in the highest degree, the confidence of his country, and the Vice-President, who is thought to be the next person in the Union most fit to perform this trust.").

100 *See* U.S. CONST. amend. XII; TADAHISA KURODA, THE ORIGINS OF THE TWELFTH AMENDMENT: THE ELECTORAL COLLEGE IN THE EARLY REPUBLIC, 1787–1804, at 108–09 (1994).

101 *See* U.S. CONST. art. II, § 1, cl. 3. If, as it happened in 1800, multiple candidates tied for first place and each had a majority, the House would choose a winner from just those candidates. Such a multiplicity of majority-winners was possible because each elector cast two ballots. *See id.*

102 *See id.*

103 On September 13, 1788, the Articles of Confederation government set March 4, 1789, as the date the new government would start; the Constitution had just been ratified and this timeline allowed time to elect and assemble the new government. *See* 34 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789 , at 523 (Roscoe R. Hill ed., 1937); *see also* Act of Mar. 1, 1792, ch. 8, § 12, 1 Stat. 239, 241 (repealed 1886) (confirming March 4 as the starting date for presidential terms); Josephson, *supra* note 56, at 610. In 1933, the Twentieth Amendment changed the start of presidential terms to January 20, and the start of congressional terms to January 3. *See* U.S. CONST. amend. XX, § 1.

there would be an inauguration-day double vacancy.[104] As discussed above, the 1792 succession statute would not have applied on its face because the statute—mirroring the Succession Clause—only covered removal, death, resignation, and inability.[105]

The Twelfth Amendment diminished this risk. It reduced the number of candidates in the House from five to three, making it easier for one candidate to win a majority of state delegations.[106] The Amendment also fully separated out the vice-presidential contingent election in the Senate—now, instead of a House deadlock guaranteeing a double vacancy, a double vacancy would require both the presidential and the vice-presidential election to be thrown into Congress,[107] and both the House and the Senate to be deadlocked.[108] Moreover, a vice-presidential contingent election would include only the top two finishers, making a Senate deadlock much less likely than in the three-candidate House.[109]

Finally, the Amendment provided that if the House failed to make a choice by March 4—causing an inauguration-day vacancy—"then the Vice-President shall act as President, as in the case of the death or other

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104 *See* KURODA, *supra* note 100, at 105 (noting contemporaneous concerns about an interregnum in 1801 if the contingent election was not resolved by March 4).

105 *See supra* text accompanying notes 87–89.

106 *See* U.S. CONST. amend. XII. *But see* Kalt, *Deadlocks*, *supra* note 28, at 109 & n.33 (noting how the potential for split delegations in the House boosts chances of a deadlock).

107 One might expect in a post-Twelfth Amendment world of party tickets and running mates that a contingent presidential election would always be accompanied by a contingent vice-presidential election, but there has never been a double contingent election. The only contingent presidential election occurred in 1825, with the House selecting John Quincy Adams over Andrew Jackson and William H. Crawford—but Adams and Jackson had the same running mate, John C. Calhoun, who won an outright majority of the electors for the vice presidency. *See* Kalt, *Deadlocks*, *supra* note 28, at 110. The only contingent vice-presidential election was in 1837, when Martin Van Buren won a presidential majority, but his running mate, Richard M. Johnson, was deprived of a vice-presidential majority when Virginia's racist electors refused to vote for him. *See id.* at 111. Johnson won the contingent election in the Senate. *Id.*

108 *Cf. supra* note 88 (discussing scheming around the pre-Twelfth Amendment deadlock in the 1800 election). In the original Constitution, the Vice President was not required to win a majority of the electors, and the Twelfth Amendment could have kept this feature, with the Senate getting involved only if there was a tie as in the original Constitution. *See* U.S. CONST. art. II, § 1, cl. 3 (providing for the Senate to break any ties in the vote for Vice President); 13 ANNALS OF CONG. 84 (1803) (showing proposed language to this effect during the debate on what would become the Twelfth Amendment); *id.* at 91–92 (statement of Sen. Bradley) (objecting to the possibility of a Vice President who lacked an Electoral College majority and proposing alternative language). This would have eliminated the chances of a vice-presidential deadlock almost entirely. But the final version of the Amendment also threw the vice-presidential election into the Senate if nobody had a majority, which increased the chances of a vice-presidential contingent election and thus a deadlock. *See* U.S. CONST. amend. XII.

109 *See* U.S. CONST. amend. XII. Technically, the Amendment qualifies "the two highest numbers" for the contingent election, so in the case of a tie, the Senate might consider more than two candidates. *Id.*

constitutional disability of the President."[110] This clause reflected an understanding that the Succession Clause's categories (removal, death, resignation, and inability) did not cover a deadlocked election.[111]

While this was an improvement, it still left other potential inauguration-day vacancies unaddressed. If a presidential election was disputed but not thrown into the House (as would happen in 1877, when both sides claimed to have a majority of the electoral votes)[112] and still unresolved on Inauguration Day, the Twelfth Amendment's provision would not apply. Nor would the Amendment apply if the election had a decisive winner but the President-elect died. Logically, one might assume that the new Vice President would become President,[113] but nothing in the original Constitution or the Twelfth Amendment clearly said that, and one can imagine a losing candidate calling for a do-over.

More to the point of this Article, the Twelfth Amendment offered no coverage for inauguration-day *double* vacancies. Significantly, this was not just an oversight on Congress's part. During debate on the Twelfth Amendment, then-Senator John Quincy Adams suggested empowering Congress to legislate for inauguration-day double

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110 *Id.*, *amended by* U.S. CONST. amend. XX, § 3. This wording presumably meant that the House's time to make a choice would have expired, and that the Vice President would act as President for the entire term (as would happen if the President died), though the text could be clearer on this point. *See, e.g.*, 13 ANNALS OF CONG. 669 (1803) (statement of Rep. Elliot) (making this assumption); H.R. REP. NO. 68-513, at 6 (1924) (noting ambiguity and suggesting that it be clarified with what would become Section 3 of the Twentieth Amendment); H.R. REP. NO. 69-311, at 4–5 (1926) (same); H.R. REP. NO. 70-309, at 5 (1928) (same); *Proposed Amendment to the Constitution of the United States Fixing the Commencement of the Terms of President and Vice President and Members of Congress, and Fixing the Time of the Assembling of Congress: Hearings on S.J. Res. 22 & H.J. Res. 93 Before the H. Comm. on Election of President, Vice President, & Reps. in Cong.*, 68th Cong. 40 (1924) [hereinafter *Hearings on S.J. Res. 22*] (statement of Sen. Norris) (interpreting the Twelfth Amendment as making the Vice President act as President for the entire term if the House misses the deadline). *But see* THOMAS H. NEALE, CONG. RSCH. SERV., RL20300, ELECTION OF THE PRESIDENT AND VICE PRESIDENT BY CONGRESS: CONTINGENT ELECTION 2 (2004) (saying that the Twelfth Amendment provides for the Vice President to act as President only until the House makes a choice).

111 *See* 13 ANNALS OF CONG. 703–04 (1803) (statement of Rep. Gregg) (depicting the Twelfth Amendment as adding another item to Article II's list of types of vacancies covered); *cf. id.* at 128–32 (debating proposal to choose the President by lot if a time limit for selection is not met). Not everyone thought that there was a gap here. *See, e.g.*, *id.* at 133 (statement of Sen. Bradley) (expressing belief "that, if the House made no choice, the Vice President would administer the Government").

112 *See infra* Section II.E.2.

113 13 ANNALS OF CONG. 21 (1803) (statement of Sen. Hillhouse) (assuming that if a President died the day after their election the Vice President-elect would "supply his place"); *id.* at 198 (statement of Sen. Pickering) (alluding casually to a Vice President serving "for four years, if the President should die between the time of his election and the period of his taking upon himself the Government").

vacancies.[114] Specifically, Adams proposed that if the House failed to make a timely choice in a contingent election, and "if the office of Vice President be also vacant, then the said powers and duties of President of the United States shall be discharged by such person as Congress may by law direct, until a new election shall be had, in manner already prescribed by law."[115]

Adams's proposal spurred a spirited debate and multiple alternative suggestions.[116] When the language that would eventually appear in the Twelfth Amendment was proposed—covering a single vacancy but not a double one—Adams kept pushing:

> Mr. ADAMS had no sort of objection to this addition to the paragraph; it reached his ideas as far as it went; but he conceived that though this made a very necessary provision for the case of the President, it did not go far enough, inasmuch as no provision was made in case there should be no Vice President. He would submit this case to gentlemen, that if there was no Vice President existing nor any more than a President chosen, in the event of a high state of party spirit, would it be difficult to foresee that there would be much room left for contention and evil? Unless provision should be made against the contingency, therefore, the amendment would be imperfect, in his mind. . . . [H]e thought it worth while to employ two lines to provide against the danger.[117]

After the Senate approved the single-vacancy language,[118] Adams formally moved to add his double-vacancy provision to it.[119] In response, nobody argued that the Succession Clause already covered inauguration-day double vacancies; the only argument leveled against Adams's motion was that "the case proposed to be provided against . . . [was] so extreme as likely never to happen."[120] In any case, Adams's motion failed.[121] Another senator tried again, suggesting differently worded language to provide for inauguration-day double vacancies, but this attempt to

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114 *See id.* at 132 (statement of Sen. Adams).

115 *Id.*

116 *See id.* at 132–39.

117 *Id.* at 136 (statement of Sen. Adams).

118 *See id.* at 137.

119 *Id.* (statement of Sen. Adams).

120 *Id.* (statement of Sen. Jackson). This expression—opposing adding language to a constitutional amendment because it seems unneeded, even though the addition could not hurt and nobody had substantive objections to it—is reminiscent of a similar one that would occur many years later during the drafting of the Twenty-Fifth Amendment. *See* KALT, UNABLE, *supra* note 33, at 47.

121 *See* 13 ANNALS OF CONG. 139 (1803) (reporting the failure of Adams's amendment by voice vote).

provide "some organ to keep the wheels of Government in motion" failed as well.[122]

When the Senate's version passed and was sent to the House, Representative James Elliot moved to strike the single-vacancy language.[123] Elliot thought that in a contingent-election scenario, the possibility of a Vice President swooping in to capture the presidency could lead to intrigue and obstruction of the House's duty to choose a President.[124] The need to provide for emergencies won out, though; Elliot's motion was defeated.[125] After further debate, the House approved the Twelfth Amendment, single-vacancy language and all.[126] The prospects of having no one at the helm ("that anarchy should ensue")[127] or having to improvise ("that . . . desperate measures be resorted to for carrying on the Government")[128] were too dangerous to countenance.[129] But this sentiment did not lead anyone in the House to repeat Adams's call to cover double vacancies.

E. *Near Misses Before the Twentieth Amendment*

Luckily, while the original Constitution and the Twelfth Amendment make no clear provision for inauguration-day double vacancies, none has ever occurred. There have been close calls, though.[130]

122 *Id.* (statement of Sen. Hillhouse); *id.* (reporting failure of Hillhouse's proposal by voice vote).

123 *See id.* at 668 (statement of Rep. Elliot).

124 *See id.* at 669 (statement of Rep. Elliot); *see also id.* at 706–07, 772–74 (statement of Rep. Eustis) (same); *id.* at 734 (statement of Rep. Taggart) (same); *id.* at 739–40 (statement of Rep. Thatcher) (same); *id.* at 717–18 (statement of Rep. Goddard) (opposing giving the Senate what should be the House's power to select the President); *id.* at 754–55 (statement of Rep. Dennis) (same).

125 *See id.* at 675; *id.* at 702–03 (statement of Rep. Gregg); *see also id.* at 670 (statement of Rep. Holland) ("Some great disaster might occur—for instance, the House might fall, and crush the members to death.").

126 *See id.* at 775–76.

127 *Id.* at 768 (statement of Rep. J. Randolph).

128 *Id.* (statement of Rep. Elliot).

129 *See id.* at 703 (statement of Rep. Gregg) (arguing that it was better to have the vice-presidential backstop "than to suffer the office to become vacant, and thereby expose [them]selves to all the evils incident to such a state of things, as would be unavoidably produced thereby"); *see also id.* at 695–96 (statement of Rep. J. Randolph) (further defending the Senate's language); *id.* at 726 (statement of Rep. G.W. Campbell) (same).

130 In addition to the two cases discussed in this Section, see also *supra* note 88 (discussing the Election of 1800).

1. Double Death (1853)

The closest the nation came to a pre-inaugural double death was probably in 1853. While Franklin Pierce was President-elect, he and his wife Jane were injured in a serious train accident that gruesomely killed their son Benny.[131] Meanwhile, Pierce's running mate, William King, fell ill with tuberculosis during the campaign, was sworn into office in Cuba while trying to recuperate there, and died just a few weeks into the term without having performed any vice-presidential duties.[132] Had Pierce been sitting next to Benny on the train, and had King's tuberculosis progressed more quickly, there could have been a double vacancy on March 4, 1853.

When the choice is between (1) ignoring legal niceties and (2) having no functioning government, people understandably tend to favor Option 1. Thus, one suspects that had there been a double death in 1853, Senate President Pro Tempore David Atchison would have claimed presidential power, even though the Succession Clause and the 1792 succession law did not purport to cover the situation.[133] Similarly, the Secretary of State might have invoked the 1792 law to call a special election, despite the questionable constitutionality of such a move.[134] But the more sensible path was to remove all doubt by passing a constitutional amendment, as Justice Story had earlier suggested.[135] Doing so would allow for a solution that was not just carefully considered, proactive, and practical, but also unquestionably constitutional.

2. Disputed Election (1877)

Another close call came after the Election of 1876. Because of a bitter dispute over electoral votes from four states, the winners of the election—President Rutherford B. Hayes and Vice President William Wheeler—

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131 *See* MICHAEL F. HOLT, FRANKLIN PIERCE 50 (Arthur M. Schlesinger, Jr. & Sean Wilentz eds., 2010).

132 *See William R. D. King (1853)*, UNIV. VA. MILLER CTR., https://millercenter.org/president/pierce/essays/king-1853-vicepresident [https://perma.cc/FNJ6-EZ9X].

133 *See* Act of Mar. 1, 1792, ch. 8, § 9, 1 Stat. 239, 240 (repealed 1886); *supra* text accompanying note 88.

134 *See* Act of Mar. 1, 1792, ch. 8, § 10; *supra* text accompanying note 91.

135 *See supra* text accompanying note 96.

were not declared until two days before the start of the term, with the help of an ad hoc electoral commission.[136]

As the dispute between the Republican Hayes and his Democratic opponent Samuel Tilden played out, the two sides expended most of their political energy trying to win the White House, not making contingency plans for what would happen if March 4 rolled around without a President or Vice President. But that issue was recognized even if others predominated. As a House committee staffer later described the problem, "The danger was twofold: either that after the 4th of March the country would have no President, or that it would have two would-be Presidents, each recognized as regular by his millions of followers, and each assuming to exercise the executive function."[137]

At a House Democratic caucus meeting in February—once it looked like the Electoral Commission would favor the Republican Hayes—Speaker of the House Samuel Randall raised the possibility that Democrats could stall through March 4.[138] The idea was to leave the election unresolved and tee up a new one under the special-election provisions of the 1792 succession law.[139] Later, though, when some House Democrats actually tried to employ these dilatory tactics, Randall shut them down, "to their surprise and indignation."[140]

Randall also floated the idea of amending the 1792 law, so that if no result was reached by March 4, outgoing Secretary of State Hamilton Fish would serve as "[A]cting [P]resident until a new election could be held."[141] That idea did not go anywhere in the caucus. But later in February, Democrats tried to address inauguration-day double vacancies more generally. Representative David Field introduced a bill to amend the line of succession to cover double vacancies arising from *any* cause, not just the constitutional categories of removal, death, resignation, or inability.[142]

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136 *See* WILLIAM H. REHNQUIST, CENTENNIAL CRISIS: THE DISPUTED ELECTION OF 1876, at 178–79, 201 (2004). To be precise, it was obvious weeks before that Hayes would win; the delay after that was about finalizing the terms of the political compromises. *See* EDWARD B. FOLEY, BALLOT BATTLES: THE HISTORY OF DISPUTED ELECTIONS IN THE UNITED STATES 117 (2016).

137 Milton Harlow Northrup, *A Grave Crisis in American History: The Inner History of the Origin and Formation of the Electoral Commission of 1877*, 62 CENTURY MAG. 923, 923 (1901).

138 *See* ROY MORRIS, JR., FRAUD OF THE CENTURY: RUTHERFORD B. HAYES, SAMUEL TILDEN, AND THE STOLEN ELECTION OF 1876, at 230 (2003).

139 *See id.*; *supra* text accompanying notes 90–91.

140 PAUL LELAND HAWORTH, THE HAYES-TILDEN DISPUTED PRESIDENTIAL ELECTION OF 1876, at 258 (1906). House Democrats continued to be indignant and passed a resolution the day before the inauguration saying that the election result was fraudulent, and that Tilden was the rightful winner. *See* 5 CONG. REC. 2225–27 (1877).

141 MORRIS, *supra* note 138, at 230.

142 *See* 5 CONG. REC. 1980 (1877). Field's bill kept the Senate President Pro Tempore first in line, followed by the Speaker of the House, but added the Secretary of State third. *Id.*

Field said that his intentions were not just to ameliorate the "present exigency," but to preserve stability in the case of any inauguration-day double vacancy, including those caused by double deaths.[143] If such an event occurred and the gap had not been filled, Field said, "anarchy would follow."[144] With his bill, by contrast, the powers of the presidency "would . . . pass[] easily and harmlessly into the hands of an administrator" until the election could be resolved, or a new one could be held.[145]

Apparently recognizing that Article II's Succession Clause did not authorize this, Field located Congress's power to pass his bill in Article I, in the Necessary and Proper Clause.[146] Having a President at the helm was certainly essential—necessary and proper—to a functioning government, and Field declared to his colleagues that it was their "duty as guardians of the public tranquillity and the rights of all citizens and all authorities, to provide for this emergency."[147]

Objectors, mostly Republicans, noted two main problems with Field's idea. "The first [wa]s constitutional": If the Succession Clause only gave Congress the power to provide for specific types of double vacancies—removal, death, resignation, or inability, but not inauguration-day vacancies—could the Constitution really be interpreted as elsewhere, giving Congress an implicit power to provide for other types of vacancies?[148]

The second objection was practical. The bill would have applied upon "the failure of the two Houses of Congress to ascertain and declare an election before [March 4]."[149] But this would provide a perverse incentive: even if the result of the election was crystal clear, either chamber could negate the result simply by refusing to certify it.[150] Indeed, the bill kept the President Pro Tempore of the Senate first in the line of succession; they might use their pull in the Senate to obstruct the declaration and vault themselves into the White House.[151]

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143 *Id.* at 1982 (statement of Rep. Field).

144 *Id.*

145 *Id.*

146 *See id.*

147 *Id.*; *see id.* at 1984 (statement of Rep. Field).

148 *Id.* at 1982 (statement of Rep. Kasson); *see id.* at 1984 (statement of Rep. Buckner).

149 *Id.* at 1980.

150 *See id.* at 1982–83 (statement of Rep. Kasson); *id.* at 1983 (statement of Rep. Lawrence); *id.* at 1983–84 (statement of Rep. Banks).

151 *See id.* at 1983 (statement of Rep. Lawrence). This also proved a bridge too far for Democrats like Representative Lawrence Neal, who vastly preferred the moderate Hayes as President to the more radical Republicans who dominated the Senate. *See id.* (statement of Rep. Neal) (fomenting against Sen. Oliver Morton in particular).

The House passed the bill 140 to 109, with Democrats heavily favoring it (138 to 13), while Republicans and Independents strongly opposed it (2 to 96).[152] With Hayes's victory finally in sight, Republicans had no desire to open the door to alternative outcomes. The bill moved to the Republican-controlled Senate, where it died in committee.[153]

This failure exposes a paradox regarding attempts to fill constitutional gaps like these. Under normal circumstances, there is little interest in working to fend off future, hypothetical, remote threats—this was probably what killed John Quincy Adams's earlier, proactive attempt to cover some inauguration-day double vacancies.[154] But when the threats become present and real, as they did in 1877, it becomes too difficult to craft sensible, bipartisan, neutral solutions amid the high stakes and the partisan heat of the moment—this was probably what killed David Field's attempt to cover all inauguration-day double vacancies.

F. *The 1886 Act and Its Aftermath*

In 1886, Congress repealed the 1792 succession law and replaced it with a new one.[155] This change did nothing to improve coverage for inauguration-day double vacancies.

The 1886 law took the President Pro Tempore and the Speaker out of the line of succession and instead designated the members of the Cabinet, starting with the Secretary of State.[156] Rather than mandate a special election, the Act only required the Acting President to convene a special session of Congress if it was not already in session—presumably so that it could decide on the fly whether to legislate a special election.[157] As with the 1792 law, though, the 1886 law limited itself to double vacancies in the constitutional categories of "removal, death, resignation, or inability," and so did not purport to cover inauguration-day double vacancies.[158]

Once again, Congress was aware of this gap even as it left it uncovered. When a House committee reported favorably on the succession bill,[159] Representative William Cooper submitted a minority

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152 *See id.* at 1984; *House Vote #285 in 1877 (44th Congress)*, GOVTRACK, https://www.govtrack.us/congress/votes/44-2/h285 [https://perma.cc/GZM9-SYAV] (tallying the vote by party affiliation).

153 *See* 5 CONG. REC. 1974 (1877).

154 *See supra* text accompanying notes 114–121.

155 *See* Act of Jan. 19, 1886, ch. 4, 24 Stat. 1 (repealed 1947).

156 *See id.*

157 *See id.* at 1–2; Hamlin, *supra* note 31, at 191 (analyzing the 1886 law's intentions).

158 *See* Act of Jan. 19, 1886, ch. 4.

159 H.R. REP. NO. 49-26 (1886).

report opposing it specifically because it did not cover inauguration-day vacancies.[160] Citing Justice Story's recognition of the gap and the similar observations of legal scholar George Curtis, Cooper noted that the only inauguration-day vacancy explicitly covered by the Constitution was in the Twelfth Amendment for elections thrown into the House that were not decided by March 4.[161] As such, Cooper fretted, there was no coverage for dead or disabled Presidents-elect, or for double vacancies of any sort.[162]

What did this have to do with the proposed law? Cooper noted that the 1792 law mandated a special election if there was an inauguration-day double vacancy, and he lamented that the new law would eliminate that coverage.[163] Cooper recognized that some had questioned the constitutionality of the special-election provision (though he, like David Field nine years earlier, thought that the Necessary and Proper Clause allowed it).[164] But, Cooper continued, something was better than nothing: "[I]s it not better, even conceding the questionableness of the constitutionality of this section, that it stand, than that it be repealed with nothing to take its place?"[165]

Cooper raised a further objection. To those who interpreted the new proposed law loosely, such that it *would* cover inauguration-day double vacancies by implication, he warned that a Secretary of State from an outgoing administration could become President for four years and beyond.[166] This would flout "[t]he fundamental idea of the Constitution . . . that the President should be elected."[167] Indeed, this four-year Acting President might be from a party that the voters had emphatically rejected at the polls.[168] Far better, Cooper pleaded, to explicitly apply the new law to all vacancies and to retain a special-election provision.[169]

But Cooper's was a lonely voice. The committee majority did not address his arguments, and nobody else on the committee endorsed his

160 *Id.*, pt. 2, at 1.

161 *See id.* at 2; U.S. CONST. amend. XII; 2 GEORGE TICKNOR CURTIS, HISTORY OF THE ORIGIN, FORMATION, AND ADOPTION OF THE CONSTITUTION OF THE UNITED STATES 402–03 (1858); *supra* text accompanying notes 110–111.

162 *See* H.R. REP. NO. 49-26, pt. 2, at 1–3.

163 *See id.* at 3–4.

164 *See id.* at 3; *supra* text accompanying notes 146–147.

165 H.R. REP. NO. 49-26, pt. 2, at 4.

166 *See id.*

167 *Id.* at 5.

168 *Id.* at 4.

169 *See id.* at 4–5.

dissenting views.[170] Nor did inauguration-day vacancies receive any mention in the Senate debates.[171] When the House deliberated over the bill, Cooper pressed his points again and proposed an amendment to cover inauguration-day vacancies.[172] But the lengthy debate mostly ignored him, and his motion failed.[173]

To be sure, there were some mentions of inauguration-day double vacancies during these proceedings, but they generally reflected a blithe assumption by some that the 1886 bill *would* cover them.[174] Again, Cooper had broached the possibility of such a loose interpretation in his minority report when he complained about the outgoing Secretary of State taking power.[175] The representatives who debated Cooper on the Secretary of State point disagreed over how bad a problem that would be compared to the pitfalls of the 1792 law.[176] But the larger point is that they seemed to assume that the new law would cover inauguration-day double vacancies even without Cooper's amendment.

Writing some years later in a popular periodical, Senator Henry Cabot Lodge weighed in on this philosophical disagreement between pragmatically making do and following the letter of the law.[177] Lodge noted how the Constitution technically left the case of a pre-inaugural double death "wholly uncovered,"[178] and then he expressed that "some way out of the grave situation thus created would no doubt be found."[179] But Lodge was unhappy about that, complaining that such a solution "would have to be extra-constitutional and through an assumption of

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170 *See id.* at 6; H.R. REP. NO. 49-26; 17 CONG. REC. 538 (1886) (listing members of the committee).

171 When the House first considered the Senate-passed bill, Cooper complained that the government printer had not included Cooper's minority views along with the majority report. *See* 17 CONG. REC. 640–41 (1886). The printer also had not printed enough copies of the majority report. *Id.* at 641. Rectifying this delayed the House's consideration of the bill for a day. *Id.*; *id.* at 664–65 (resuming consideration).

172 *See id.* at 666–68, 692.

173 *See id.* at 692 (noting failure of motion). Another motion, made either by Cooper or by Representative George Adams, would have expanded the Twelfth Amendment's provision for deadlocked contingent-election failures to cover dead and disabled Presidents-elect as well. *See id.* This failed too. *Id.* at 693; *cf. id.* at 668 (statement of Rep. Eden) (opposing Cooper's suggestion on grounds that such a change required a constitutional amendment).

174 *See, e.g.*, *id.* at 665 (statement of Rep. Perkins); *id.* at 679–80 (statement of Rep. Rowell); *id.* at 686 (statements of Rep. Dibble); *id.* (statement of Rep. Rockwell); *id.* at 688 (statement of Rep. Baker).

175 *See supra* text accompanying note 166.

176 *See, e.g.*, 17 CONG. REC. 679–80 (1886) (statement of Rep. Rowell); *id.* at 686 (statement of Rep. Dibble).

177 Henry Cabot Lodge, *The Senate*, 34 SCRIBNER'S MAG. 541, 543 (1903).

178 *Id.*

179 *Id.*

power by Congress."[180] To Lodge, the Constitution's omission here was "serious, if not perilous."[181]

Around the time Lodge expressed these sentiments, other members of Congress began picking up where Cooper had left off, reflecting an assumption that the Succession Clause did not, in fact, cover inauguration-day vacancies. These members introduced multiple constitutional amendments to authorize Congress to plug those holes, foreshadowing Section 3 of the Twentieth Amendment.[182]

For instance, an 1896 House resolution sought to rewrite the Succession Clause by adding inauguration-day coverage.[183] It provided that if the President-elect were to "die, decline, or become unable to discharge the duties" of the presidency, the Vice President-elect would "be inaugurated as President" and serve in their stead.[184] If both the President-elect and Vice President-elect died, declined, or were unable, Congress's power to legislate a line of succession with "Officer[s]" in it would apply.[185] But the resolution died in committee.[186]

In the next Congress, an essentially identical constitutional amendment was introduced in the Senate.[187] The Judiciary Committee, concerned that the resolution did not cover unresolved elections, rephrased it to be more general, covering any situation not already specified in the Succession Clause in which there was "no person entitled to hold the office."[188] The Senate approved the resolution unanimously—but the House ignored it.[189] This pattern repeated itself several times.[190]

Multiple proposed constitutional amendments at this time combined coverage of inauguration-day vacancies with changes to the dates of congressional and presidential terms. The Senate approved one

180 *Id.*

181 *Id.*

182 H.R. DOC. NO. 70-551, at 78 (1929) (counting twenty-four unsuccessful resolutions on inauguration-day succession introduced after 1898).

183 H.R. Res. 144, 54th Cong. (1896).

184 *Id.*

185 *Id.*

186 *See* H.R. DOC. NO. 70-551, at 77.

187 S. Res. 86, 55th Cong. (1898).

188 31 CONG. REC. 2767–68 (1898) (statement of Sen. Hoar).

189 *Id.* at 4574; H.R. DOC. NO. 70-551, at 77–78.

190 *See, e.g.*, S.J. Res. 1, 57th Cong. (1901); 35 CONG. REC. 1109 (1902); *see also* H.R. REP. NO. 61-769, at 1, 5 (1910) (noting that the Senate had passed "several" constitutional-amendment resolutions to cover inauguration-day vacancies); 2 GEORGE F. HOAR, AUTOBIOGRAPHY OF SEVENTY YEARS 168 (1903) (lamenting the House's refusal to act on the succession resolutions that he had "repeatedly" gotten passed in the Senate and despairing "that nothing w[ould] be done about the matter until" there was an actual inauguration-day double vacancy).

in 1909; the inauguration-day vacancy portion was similar to the ones that passed the Senate in 1898 and 1902.[191]

Once again, though, the House passed nothing. The House Judiciary Committee held a hearing in 1909 on inauguration-day succession,[192] and it issued positive reports in 1910[193] and 1912[194] on resolutions that would have changed the starting dates of terms and filled the inauguration-day succession gap.[195] In 1910, Representative Robert Henry, frustrated at the House's inaction, made a lengthy speech in the House in which he read the committee report verbatim.[196] The opposition focused entirely on the changes to terms' starting dates, but, in any case, the House fell just short of the requisite two-thirds majority.[197]

In sum, until the Twentieth Amendment, the potential problem of inauguration-day succession was widely acknowledged but never resolved. Still, awareness increased at each new step, setting the stage for the Twentieth Amendment to fill the gaps once and for all.

III. SECTION 3 OF THE TWENTIETH AMENDMENT AND BEYOND

When Congress finally addressed the weaknesses in the Constitution's coverage of inauguration-day succession, it was an act of prudence and foresight. Section 3 of the Twentieth Amendment gave

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191 S. Res. 102, 60th Cong. (1909); 43 CONG. REC. 1661, 1679–81 (1909).

192 *Proposing an Amendment to the Constitution of the United States Providing for Succession to the Presidency and Vice-Presidency: Hearing on H.J. Res. 264 Before the H. Comm. on the Judiciary*, 60th Cong. (1909) (endorsing a constitutional amendment to cover inauguration-day succession).

193 H.R. REP. NO. 61-769, at 4 ("If this article of the Constitution is to be amended it is beyond all question that it should be so amended as to provide for the omitted case in which there may be no President or Vice-President. These cases are more numerous and more likely than is generally realized.").

194 H.R. REP. NO. 62-239, at 6 (1912) ("The manifest hiatus in the Constitution rendering possible absolute chaos in Government for four years should be speedily cured by the adoption of this amendment before some great national calamity befalls our people by reason of the serious omission in the Constitution as herein pointed out."). The report also excerpted an article that went into more detail about the constitutional gap. *See id.* at 18–23 (reprinting J. Hampden Dougherty, *Presidential Succession Problems, and Change of Inauguration Day*, 42 FORUM 523 (1909)).

195 *See* H.R.J. Res. 174, 61st Cong. (1910); H.R.J. Res. 204, 62d Cong. (1912); B.M. Crowe, The History of the Twentieth Amendment to the Constitution of the United States 19–20 (May 26, 1969) (M.A. thesis, University of Houston) (on file with author).

196 *See* 45 CONG. REC. 6366–68 (1910); Crowe, *supra* note 195, at 25.

197 The controversial proposal was to push terms' starting dates into the spring, when the weather would be warmer. *See* 45 CONG. REC. 6359–69 (1910) (featuring a debate in which no one opposed the succession reforms, but ending with a 138–72 vote); H.R. DOC. NO. 70-551, at 78 (1929) (suggesting that the defeat was because of the unrelated topics and not the succession reform); Crowe, *supra* note 195, at 25.

Congress a comprehensive and flexible power to address every sort of inauguration-day double vacancy. Unfortunately, though, Congress has underused its Section 3 power, patching holes in a cursory way that has cried out for improvement ever since.

A. *The Twentieth Amendment in General*

The principal aim of the Twentieth Amendment was to reform the awkward timeline of federal elections and terms.[198] Section 3 was peripheral, appended in a rare instance of congressional proactivity.

Before the Twentieth Amendment, congressional and presidential terms started and ended on March 4, a date chosen by happenstance rather than by the Constitution.[199] The Constitution directed Congress to assemble each year on the first Monday in December.[200] This meant that a few weeks after each November election,[201] there began a lame-duck session that could run all the way to the end of the term in March. These sessions spurred complaints, particularly when the outgoing Congress passed consequential legislation after an election in which many members were defeated or in which partisan control of a chamber changed.[202] Then, the new Congress usually would not convene for its first session until the following December, nine months into its term and thirteen months after its election.[203]

In 1922, Senator George Norris began pushing a constitutional amendment to start terms in January instead of March (shortening the lame-duck period) and to start congressional sessions in January rather than December (i.e., two months after the election instead of thirteen for the first session, and long before the lame-duck period for the second

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198 The legislative history of the Twentieth Amendment is discussed in greater detail in Kalt, *Deadlocks*, *supra* note 28, at 113–18, from which Section III.A has been adapted.

199 *See supra* note 103.

200 U.S. CONST. art. I, § 4, cl. 2. The Clause permitted Congress to legislate a different starting day. *Id.*

201 Congress did not set a uniform election day ("the first Tuesday after the first Monday in November") for House elections until 1872. *See* Kalt, *Deadlocks*, *supra* note 28, at 114 n.58. Before that, some states held their House elections much later, which caused problems whenever the President called a special session of Congress before that. *Id.*

202 *See* GEORGE W. NORRIS, FIGHTING LIBERAL: THE AUTOBIOGRAPHY OF GEORGE W. NORRIS 332 (1945); David E. Kyvig, *Redesigning Congress: The Seventeenth and Twentieth Amendments to the Constitution*, *in* THE AMERICAN CONGRESS 356, 363–64 (Julian E. Zelizer ed., 2004).

203 *See* Kyvig, *supra* note 202, at 363. Before the Twentieth Amendment rendered the practice moot, every outgoing President called a special session of just the Senate for the beginning of the term, so that it could confirm the new President's nominees. *See* Brian C. Kalt, *Keeping Tillman Adjournments in Their Place: A Rejoinder to Seth Barrett Tillman*, 101 NW. U. L. REV. COLLOQUY 108, 108–09 (2007).

session).[204] Norris's proposal also decoupled presidential and congressional terms, making the former start weeks after the latter.[205]

Norris's proposed amendment passed the Senate easily but died in the House, despite a favorable committee report and widespread support among House members.[206] This pattern repeated itself for the next several Congresses; the Senate would repass Senator Norris's resolution, the House committee would report it favorably, and the House leadership would kill it one way or another.[207]

After Democrats took control of the House in December 1931, the amendment finally made it through both chambers, winning the required two-thirds majorities in March 1932.[208] The necessary three-quarters of the states' legislatures ratified the Twentieth Amendment by January 1933.[209]

B. *The Legislative History of Section 3 in Particular*

1. First Steps: Indecisive Contingent Elections

The provisions that would become Section 3 evolved gradually during the ten years it took the Twentieth Amendment to get through Congress. The initial seed from which Section 3 would grow appeared in Senator Norris's first resolution, introduced in 1922 during the lame-

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204 S.J. Res. 253, 67th Cong. (as reported by S. Comm. on Agric. & Forestry, Dec. 5, 1922); *see* RICHARD LOWITT, GEORGE W. NORRIS: THE PERSISTENCE OF A PROGRESSIVE, 1913–1933, at 155–56 (1971) (describing Norris's proposal). Norris was drawing on earlier efforts by others. *See* Kalt, *Deadlocks*, *supra* note 28, at 114 & n.63; Crowe, *supra* note 195, at 38; *supra* text accompanying notes 182–197.

205 *See* S.J. Res. 253 (as reported by S. Comm. on Agric. & Forestry, Dec. 5, 1922); Kyvig, *supra* note 202, at 365 (describing Norris's proposal). Norris intended this to improve the legitimacy of contingent presidential and vice-presidential elections by having the just-elected Congress conduct them instead of the outgoing one. *See* Kalt, *Deadlocks*, *supra* note 28, at 115 & n.65.

206 *See* 64 CONG. REC. 3540–41 (1923) (recording 63–6 Senate vote); H.R. REP. NO. 68-513 (1924); 69 CONG. REC. 4358 (1928) (statement of Rep. Kvale) (stating that a majority in the House had supported the 1924 resolution); LOWITT, *supra* note 204, at 157 (describing opposition among House leadership); NORRIS, *supra* note 202, at 337–39.

207 *See* Kalt, *Deadlocks*, *supra* note 28, at 116–18 & n.78 (recounting the fate of resolutions from 1924 through 1931).

208 *See* H.R. REP. NO. 72-633, at 3–4 (1932) (Conf. Rep.); 75 CONG. REC. 5086 (1932) (recording 74–3 Senate vote); *id.* at 5027 (recording House approval); LOWITT, *supra* note 204, at 517 (describing the effects of the change in House leadership); NORRIS, *supra* note 202, at 341–42.

209 *See* Kyvig, *supra* note 202, at 367–68 (describing the ratification process).

duck session of the Sixty-Seventh Congress.[210] If a presidential election was thrown into the House and the House had not made a choice by Inauguration Day, Norris still wanted the Vice President to act as President for the entire term, just as he believed the Twelfth Amendment provided.[211] Because his resolution was changing Inauguration Day from March to January, though, Norris had to rewrite the Twelfth Amendment's deadline.[212] But the full Senate stripped that and other material out; the resolution it approved simply provided new starting dates for terms and congressional sessions.[213]

When the House committee got the resolution, it restored Norris's contingent-election provision but changed and enhanced it.[214] First, the committee softened the deadline, allowing the House to retain its power to choose the President; if the House failed to make a choice by Inauguration Day, the Vice President would act as President, but only for as long as it took the House to make its tardy choice.[215] Second, in a long-belated nod to John Quincy Adams,[216] the committee provided for a double failure:

> Congress may by law provide for the case where the Vice President [also] has not been chosen before the time fixed for the beginning of his term, declaring what officer shall then act as President, and such officer shall act accordingly until the House of Representatives chooses a President, or until the Senate chooses a Vice President.[217]

This provision was quite limited, covering only those inauguration-day double vacancies caused by laggardly contingent elections (a risk that was heightened by the shortening of the lame-duck period).[218] But even

[210] S.J. Res. 253, § 1 (as reported by S. Comm. on Agric. & Forestry, Dec. 5, 1922) (unenacted). Norris's resolution was the result of his committee's transformation of a simpler resolution, S. Con. Res. 29, that Senator Thaddeus Caraway had introduced. *See* 63 CONG. REC. 25–27 (1922) (introducing and discussing S. Con. Res. 29). Caraway's resolution had simply called on defeated incumbents to refrain from participating in lame-duck sessions. *See* Kalt, *Deadlocks*, *supra* note 28, at 114 (discussing Caraway's initiative and its assignment to Norris's Agriculture Committee).

[211] S.J. Res. 253, § 1 (as reported by S. Comm. on Agric. & Forestry, Dec. 5, 1922) (unenacted); 65 CONG. REC. 4327 (1924) (statement of Sen. Norris); U.S. CONST. amend. XII; *supra* note 110.

[212] S.J. Res. 253, § 1 (as reported by S. Comm. on Agric. & Forestry, Dec. 5, 1922) (unenacted); *see* U.S. CONST. amend. XII.

[213] *See* S.J. Res. 253 (as passed by Senate, Feb. 13, 1923).

[214] *See* H.R. REP. NO. 67-1690, at 2–3 (1923) (accompanying S.J. Res. 253).

[215] *See id.* at 3. The committee's version also made it clear that it would be the new Vice President that would do this, not the outgoing one; some people had been concerned about the Twelfth Amendment's ambiguity on this point. *See id.*; H.R. REP. NO. 68-513, at 3 (1924) (accompanying S.J. Res. 22).

[216] *See supra* text accompanying notes 114–121.

[217] H.R. REP. NO. 67-1690, at 3 (1923) (accompanying S.J. Res. 253).

[218] *See infra* Section III.A.

this was an improvement over the existing Constitution, which had no such coverage. More importantly, as this provision evolved into Section 3 its scope would greatly expand.

Norris tried again in 1923 in the Sixty-Eighth Congress. His initial resolution again simply updated the Twelfth Amendment's deadline.[219] The Senate Judiciary Committee replaced this with language that tracked the House committee's broader provision from the previous Congress.[220]

In its report, the Senate committee expressed concern that the Constitution's gap regarding double contingent-election failures was tempting a "dangerous emergency."[221] While "[t]his condition has, it is true, never happened in the history of the country, and while it may never happen," the committee said, "it does seem very important that some constitutional provision be enacted."[222] It is unlikely that if such a crisis arose, Congress would simply throw up its hands and give up on the country having a President. The committee's point here was not to do something instead of nothing. Rather, the point was to do something proactive, certain, and lawful instead of something ad hoc, ambiguous, and lawless.[223]

The full Senate made two small amendments before approving the resolution in March 1924.[224] The House committee rejected both of these changes, reporting the same version of Section 3 that it had in the previous Congress.[225] This was a moot point, though, as the House

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219 *See* S.J. Res. 22, 68th Cong. § 3 (as introduced in Senate, Dec. 10, 1923).

220 *See* S.J. Res. 22, § 3 (as reported by Sen. Comm. on the Judiciary, Feb. 23, 1924); *supra* text accompanying notes 214–217.

221 S. REP. NO. 68-170, at 4 (1924) (accompanying S.J. Res. 22); *see Hearings on S.J. Res. 22*, *supra* note 110, at 48 (statement of Sen. Norris) (saying that if a double deadlock "occurred after an exciting campaign, it might mean revolution").

222 S. REP. NO. 68-170, at 4; *see* 65 CONG. REC. 4411 (1924) (statement of Sen. Norris) (lamenting the original Constitution's deficiency here).

223 *Hearings on S.J. Res. 22*, *supra* note 110, at 42, 49 (statement of Sen. Norris) (commenting disapprovingly that Congress would act extralegally in such a situation); *cf. supra* text accompanying notes 179–181.

224 NORRIS, *supra* note 202, at 337; *see* 65 CONG. REC. 4418 (1924) (recording 63–7 Senate vote). The first change was that, not wanting to give the House unlimited time to make a choice in a contingent election, the Senate gave the House only until March 4; after that the Vice President would serve out the whole term. *See* S.J. Res. 22, § 3 (as passed by Senate, Mar. 18, 1924); 65 CONG. REC. 4410 (1924) (statement of Sen. Norris) (explaining the workings and origin of the March 4 deadline). The second change was that instead of saying that Congress "may" legislate to cover the case of a double contingent-election failure, the Senate language said that Congress "shall" do so. *See* S.J. Res. 22, § 3 (as passed by Senate, Mar. 18, 1924).

225 *See* S.J. Res. 22, § 3 (as reported by H. Comm. on Election of President, Vice President, and Reps. in Cong., Apr. 15, 1924). Unlike Senator Norris—who interpreted the Twelfth Amendment as making the Vice President-elect the President for the entire term if the House did not complete a contingent election by March 4—the House committee thought that the Twelfth Amendment

leadership once again did not allow the resolution to come up for a House vote.[226]

2. Second Steps: Deaths and Double Deaths

In February 1926, in the Sixty-Ninth Congress, the Senate again passed the Norris resolution.[227] On the House side, the committee did significant work that, among other changes, brought Section 3 closer to its final form.[228] The committee kept the same provisions on untimely contingent elections that it had reported in the previous Congress.[229] Added to that, though, were new provisions that covered the deaths of election winners:

> If the President elect dies before the time fixed for the beginning of his term, then the Vice President elect shall become President; and the Congress may by law provide for the case of the death both of the President elect and Vice President elect before the time fixed for the beginning of the term . . . .[230]

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could be read as giving the House more time, such that whomever it eventually chose would displace the Vice President at that point. But the committee wanted to make the softness of the deadline clear in the new amendment. H.R. REP. NO. 68-513, at 5 (1924) (accompanying S.J. Res. 22); *see Hearings on S.J. Res. 22*, *supra* note 110, at 42–44 (debating the proper interpretation of the Twelfth Amendment and the merits of hard versus soft deadlines).

226 *See* S. REP. NO. 69-12, at 1 (1925) (describing the fate of the resolution in the previous House).

227 H.R. REP. NO. 69-362, at 9 (1926) (accompanying S.J. Res. 9). The Senate relented on the March 4 contingent-election deadline, agreeing with the House committee to let the House make a choice however long it took. *See supra* note 225.

228 *See Proposed Amendment to the Constitution of the United States Fixing the Commencement of the Terms of President and Vice President and Members of Congress, and Fixing the Time of the Assembling of Congress: Hearings Before the Comm. on Election of President, Vice President & Reps. in Cong. of the H.R. on H.J. Res. 56, H.J. Res. 164, S.J. Res. 9*, 69th Cong. 25–26 (1926) [hereinafter *Hearings on H.J. Res. 56*] (statement of Rep. Ralph F. Lozier) (describing efforts of himself and Representatives White, Gifford, and Free in committee); H.R. REP. NO. 69-311, at 5–8 (1926) (discussing additions). The other provision that the committee added was one that would evolve into Section 4 of the Twentieth Amendment; it empowered Congress to legislate for the case of the death of one of the candidates in a contingent presidential or vice-presidential election. *See* H.R. REP. NO. 69-362, at 9 (1926) (accompanying S.J. Res. 9). *See generally* Kalt, *Deadlocks*, *supra* note 28.

229 *See* H.R. REP. NO. 69-362, at 9 (accompanying S.J. Res. 9) ("If the House of Representatives has not chosen a President, whenever the right of choice devolves upon them, before the time fixed for the beginning of his term, then the Vice President chosen for the same term shall act as President until the House of Representatives chooses a President; and the Congress may by law provide for the case where the Vice President has not been chosen before the time fixed for the beginning of his term, declaring what officer shall then act as President, and such officer shall act accordingly until the House of Representatives chooses a President, or until the Senate chooses a Vice President.").

230 *See id.*; *supra* text accompanying note 113.

The language empowering Congress to "provide for the case" of a pre-inaugural double death paralleled the middle-of-the-term succession language in Article II.[231] But Article II limited Congress to "declaring what Officer shall then act as President."[232] The House committee's language contained no such restriction for inauguration-day double vacancies; "provid[ing] for the case" was meant to allow a broader range of options, including a special election.[233]

The committee had considered adding coverage for when an election winner renounced the office but opted against it because the prospect "seem[ed] entirely too remote."[234] The committee also opted against adding coverage for disability, since Article II succession had no standards or process in place for determining "inability," and adding coverage for inauguration-day disability would suffer from the same fatal inadequacy.[235]

Unfortunately, the House leadership again kept the resolution from coming up for a vote.[236] In each of the next three Congresses, Senator Norris introduced his resolution and the Senate passed it.[237] Norris never incorporated the House committee's new language, though. This was not because he opposed the enhanced Section 3—the opposite was true.[238] Rather, Norris knew that it would be easier to get the Senate to approve something it had already approved. Then, if the House ever passed its enhanced version of the resolution, the Senate could simply accept the House's improvements when the conference committee met to iron out the differences between the two versions.[239]

3. Final Steps: Failure to Qualify; Person; Manner

The last stage in Section 3's evolution commenced in 1928 in the Seventieth Congress. The Senate passed essentially the same resolution it

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231 U.S. CONST. art. II, § 1, cl. 6.

232 *Id.*

233 *See* 69 CONG. REC. 4209 (1928) (statement of Rep. Lozier) (explaining the desire to allow for a special election).

234 H.R. REP. NO. 69-311, at 5.

235 *Id.*; *see supra* Section I.B.2.

236 *See* 69 CONG. REC. 952 (1928) (statement of Sen. Norris) (recounting treatment of his Senate-passed resolutions in previous terms of the House); *id.* at 4205–06 (statement of Rep. Lozier) (recounting and criticizing intransigence of the House's leadership toward Norris's efforts).

237 *See* S.J. Res. 47, 70th Cong. (as passed by Senate, Jan. 4, 1928); S.J. Res. 3, 71st Cong. (as passed by Senate, June 4, 1929); S.J. Res. 14, 72d Cong. (as passed by Senate, Jan. 6, 1932).

238 *See* Kalt, *Deadlocks*, *supra* note 28, at 118 n.79 (documenting Norris's support).

239 *See id.* at 118 (documenting Norris's strategy).

had two years earlier,[240] and the House committee reported out essentially the same enhanced version it had two years earlier.[241] But then, unlike the previous three Congresses in which the House leadership had frozen the resolution out, the committee's version actually made it to the House floor for debate and a vote (which failed). During the debate, Section 3 took a major step toward its final form when Representative Clarence Lea successfully proposed an amendment.

a. Failure to Qualify

On the floor on March 6, Lea stated clearly for the record what his new language was meant to accomplish: to "provide for *every* vacancy that may occur" on Inauguration Day, not just deaths and unsettled contingent elections.[242] Lea argued that while the existing language tried "to define several particular causes of vacancies," it was more "important . . . to fill the vacancy that occurs, regardless of how it occurs."[243]

Toward that end, the first version of Lea's proposed language said:

> If a President is not chosen before the beginning of a presidential term, or the President elect dies, or fails to qualify or enter on the execution of his office, then the Vice President elect shall act as President until the disability be removed or a President shall be elected. Congress may provide for filling a vacancy in the office of Vice President due to a nonelection or to a contingency not otherwise provided for in the Constitution.[244]

Lea's first category of vacancy, "not chosen," seemingly expanded coverage for unresolved elections. Instead of only covering unresolved contingent elections, it could have applied to any failure to choose a President before Inauguration Day, including disputes like the one in 1876. Lea's second category, death, was self-explanatory and the same as the existing resolution.[245]

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240 S.J. Res. 47, § 3 (as passed by Senate, Jan. 4, 1928). The new bill had minor grammatical changes. *Compare id.*, *with* S.J. Res. 9, 69th Cong. § 3 (as passed by Senate, Feb. 15, 1926).

241 S.J. Res. 47, §§ 3–4 (as reported by H. Comm. on Election of President, Vice President, and Reps. in Cong., Jan. 20, 1928). The new bill had minor grammatical changes. *Compare id.*, *with* S.J. Res. 9, 69th Cong. §§ 3–4 (as reported by H. Comm. on Election of President, Vice President, and Reps. in Cong., Feb. 24, 1926).

242 69 CONG. REC. 4209 (1928) (statement of Rep. Lea) (emphasis added); *see Proposed Constitutional Amendment: Hearing Before the H. Comm. on the Election of President, Vice President & Reps. in Cong. on S.J. Res. 14*, 72d Cong. 8–11 (1932) [hereinafter *Hearing on S.J. Res. 14*] (statement of Rep. Lea) (reiterating his intention "to cover all possible cases").

243 69 CONG. REC. 4210 (1928) (statement of Rep. Lea).

244 *Id.*

245 *See* S.J. Res. 47, §§ 3–4 (as reported by H. Comm. on Election of President, Vice President, and Reps. in Cong., Jan. 20, 1928).

The third category was entirely new: a President-elect who "fails to qualify or enter on the execution of his office."[246] Lea did not define these terms but, given his stated purpose of covering every kind of inauguration-day vacancy, it must have been meant as a catch-all. Once the "disability [was] removed,"[247] the now-qualified President-elect would take over from the Vice President-elect, so a failure to qualify had to be something that made the President-elect unable to become President. This comports with a definition of "qualify" in the contemporaneous edition of *Black's Law Dictionary*: "To take the steps necessary to prepare one's self for an office . . . as by taking oath . . . ."[248] A failure to qualify could come from not meeting constitutional eligibility requirements (like being shy of one's thirty-fifth birthday) or, more broadly, any other sort of unwillingness or inability to take the oath to become President.

Bolstering that broad reading, Lea listed Presidents-elect who were unable or unwilling to become President as examples of "fail[ing] to . . . enter on the execution of [the] office."[249] Specifically, he posited a President-elect who was incapacitated by insanity, and (quaintly) a President-elect who declined to accept the office after he had been exposed as corrupt.[250] Then, he characterized the corruption scenario as both a "refus[al] to accept the duties of the office" and a "refus[al] to qualify."[251] In other words, Lea conflated "qualifying" with "entering on the execution of the office"; the two categories were not as distinct as his phrasing might have suggested.

Lea's language covered vice-presidential vacancies with a simpler, more expansive catch-all: Congress could provide not just for a failure to elect a Vice President but for any sort of vacancy "not otherwise provided for in the Constitution."[252] Unfortunately, this different wording just added to the inconsistency and confusion.

Three days later, on the House floor, Lea offered clearer language—language that was almost exactly what would eventually be added to the

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246 *Id.*

247 *Id.*

248 *Qualify*, BLACK'S LAW DICTIONARY (2d ed. 1910). In his analysis of the Amendment's phrase "failure to qualify," Michael Rosin argues that to qualify is to take the oath of office. *See* Michael L. Rosin, Why Did the Framers of Section 3 of the Twentieth Amendment Employ the Term *Failed to Qualify*? (June 3, 2024) (unpublished manuscript) (on file with author).

249 *See* 69 CONG. REC. 4209–10 (1928) (statement of Rep. Lea).

250 *See id.* at 4209.

251 *Id.*

252 *Id.* at 4210. The breadth of this language suggests that it could have been used to fill vice-presidential vacancies that arose in the middle of a term, a scenario that would eventually be covered by the Twenty-Fifth Amendment. *See* U.S. CONST. amend. XXV, § 2.

Constitution. Specifically, Lea used "qualify" more consistently as the general catch-all:

> If the President elect dies, then the Vice President elect shall become President. If a President is not chosen before the time fixed for the beginning of his term, or if the President elect fails to qualify, then the Vice President elect shall act as President until a President has qualified; and the Congress may by law provide for the case where neither a President elect nor a Vice President elect has qualified, declaring who shall then act as President or the manner in which a qualified person shall be selected, and such person shall act accordingly until a President or Vice President has qualified.[253]

This new version contained multiple important changes. First, Lea separated out death; if the President-elect died, the Vice President-elect would become President, not just Acting President.[254]

Second, perhaps recognizing the messiness of his previous draft, Lea folded "fail[ing] to enter on the execution of his office" into "fail[ing] to qualify."[255] Lea still treated an unresolved election separately—there is, after all, a clear difference between (1) nobody being chosen and (2) somebody being chosen who fails to qualify. But in both scenarios, no President would have qualified, and the Vice President-elect would act as President only "until a President has qualified." Qualifying thus entailed being elected and being able to take the oath of office and serve.

Lea's final sentence empowered Congress to act when neither a President-elect nor a Vice President-elect "has qualified." The part of the resolution Lea was trying to amend referred only to double death, and Lea's announced intention here was to make that coverage broader—indeed, comprehensive.[256] In other words, a double failure to qualify would encompass any two vacancies, whether from death, an unresolved election, disability, or any other cause.[257]

This text was, admittedly, still not as clear on its face as it might have been, given the way that the first two sentences separated out death and failure to choose from failure to qualify. But "qualify" still covered

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253 69 CONG. REC. 4425 (1928).

254 At that time, the question of whether, in the middle of the term, a Vice President who succeeds a dead President becomes President or merely Acting President had been settled as a practical matter by the precedent established by (not-Acting) President John Tyler, but it would not be settled officially until the ratification of the Twenty-Fifth Amendment in 1967. *See* KALT, UNABLE, *supra* note 33, at 30–31; U.S. CONST. amend. XXV, § 1.

255 *Compare* text accompanying note 253, *with* text accompanying note 244.

256 *See supra* text accompanying notes 242–243.

257 *See* H.R. REP. NO. 72-345, at 4 (1932) (accompanying S.J. Res. 14) (making this point); S. REP. NO. 72-26, at 5 (1932) (accompanying S.J. Res. 14) (same); H.R. REP. NO. 72-633, at 3–4 (1932) (Conf. Rep.) (accompanying S.J. Res. 14) (same); *see also* Goldstein, *Continuity*, *supra* note 11, at 89 n.80.

everything. The separation reflected the difference between nobody winning versus there being winners who did not qualify. In both cases, though, there would be a double failure to qualify.

Helpfully, Lea explained to all present exactly what he meant. Lea's speech is worth excerpting in detail, because of its critical importance in assessing what the House—which approved the text soon after—thought it was saying here.

Lea began by identifying the problem he was trying to solve:

> Following any presidential election we may find ourselves with a vacancy in the Presidency without a constitutional method of filling it. There may be a failure to elect a President, the elected candidate may die, or there may be a physical or mental inability of the elected candidate, without a qualified person to take his place. No one can measure the untoward results that might follow.[258]

After noting that the existing resolution only covered deaths and failed elections, Lea highlighted the broader coverage that his amendment would provide. Although his comments focused mainly on mental and physical disabilities that made the President-elect "incapable of taking his oath and becoming President,"[259] he reiterated that his language was intended to be comprehensive:

> The fundamental purpose of the amendment I offer is to provide for filling vacancies *in every case which may occur before the President elect is installed in his office*. The Constitution now provides for filling every vacancy that may occur after the President has taken his oath at the beginning of his term. The weakness of section 3, as I see it, is that it fails to provide for all the vacancies covered in the Constitution.[260]

Article II refers to four types of vacancies: removal, death, resignation, and inability.[261] Lea's text did not follow this typology. It mentioned death, but omitted removal and resignation (which would not apply before someone has taken office), and added unresolved elections (which would not apply after someone had taken office). Departing further, Lea's phrasing did not mention inability explicitly as Article II had; Lea referred only to failure to qualify.[262] But he had already made clear that this was supposed to include everything, including disability.[263] In his remarks, Lea suggested further that renouncing the office and

258 *See* 69 CONG. REC. 4425 (1928).

259 *See id.*

260 *Id.* (emphasis added); *see also* NORRIS, *supra* note 202, at 342 (characterizing Section 3 as eliminating any "contingency where the country will be without a chief magistrate").

261 U.S. CONST. art. II, § 1, cl. 6.

262 69 CONG. REC. 4425 (1928).

263 *See supra* text accompanying notes 258–259.

refusing to take the oath would count as a failure to qualify as well.[264] In a later hearing Lea included "legal inability" alongside mental and physical inability, giving as an example a President-elect who it was discovered was not a "native born citizen."[265]

After Lea's explanation, there was a brief peripheral discussion and his amendment was accepted by voice vote.[266] It seems clear that the House understood what Lea's language was doing here. By using the term "qualify" to cover all aspects of being selected and taking office, Lea's amendment extended Section 3 to cover any sort of inauguration-day vacancy or double vacancy.

b. Person; Manner

Lea's amendment introduced another important change to Section 3. The committee-approved resolution had empowered Congress to pass a law "declaring what officer shall then act as President, and such officer shall act accordingly"; this paralleled Article II's language on double vacancies in the middle of a term.[267] Lea's version expanded Congress's options to "declaring *who* shall then act as President *or the manner* in which a qualified *person* shall be selected, and *such person* shall act accordingly."[268]

In other words, Lea's language did not limit Congress to legislating a fixed line of succession for inauguration-day double vacancies. Congress could also legislate a process (a "manner") for choosing an Acting President from a pool of candidates. And whether it provided a fixed line of succession or a process, the pool could include any qualified person, not just "officers."

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264 *See* 69 CONG. REC. 4209–10 (1928).

265 *Hearing on S.J. Res. 14*, *supra* note 242, at 8–9; *see* 75 CONG. REC. 3830 (1932) (statement of Rep. Jeffers) (mentioning ineligibility as a type of failure to qualify); *supra* Section I.B.4.

266 The main part of the discussion consisted of the committee chairman, Representative Charles Gifford, explaining that the committee supported the amendment, and that the reason it had not previously incorporated it was that when Lea presented his ideas to the committee, he did not yet have adequate language. *See* 69 CONG. REC. 4425 (1928) (statement of Rep. Gifford). In making this statement, Gifford referred to failing to qualify casually, as if it were obvious what it meant. *See id.*

267 S.J. Res. 47, 70th Cong. § 3 (as reported by H. Comm. on Election of President, Vice President, and Reps. in Cong., Jan. 20, 1928) (unenacted); U.S. CONST. art. II, § 1, cl. 6.

268 69 CONG. REC. 4425 (1928) (emphasis added).

Lea did not mention this change in his comments, let alone explain it.[269] At the time, nobody else commented on it either.[270] But less explanation was needed here than for the "qualify" language—the meaning of these changes was clear from the plain text.

c. Fruition

Soon after Lea's amendment was approved, the House voted down the Section 3 resolution, 209 to 157, thirty-five votes shy of the two-thirds majority needed for a constitutional amendment.[271] But in the next (Seventy-First) Congress, after the Senate passed the same stripped-down version of the resolution it had in 1928,[272] the House easily passed a version of the resolution (290 to 93) that featured Lea's Section 3 language.[273]

The House's action came too late—ironically, it occurred during the lame-duck session—to negotiate any suitable agreement with the Senate.[274] But soon after Democrats took control of the House in the Seventy-Second Congress, both chambers repassed their respective versions of the resolution, leaving plenty of time for a conference committee.[275]

As planned,[276] the conference committee accepted the substance of the House's version of Section 3 and—in finalizing the language that would soon be approved by Congress, ratified by the states, and added to the Constitution—made some textual changes.[277] One change was for clarity and precision. The House's version of Section 3's opening phrase had said, "If the President elect dies, then the Vice President elect shall

269 In a later hearing, Lea cited the "manner" language when he said that Section 3 meant Section 4 was no longer needed; if there was a double-deadlocked contingent election, Section 3 legislation could provide some selection method to use at that point. *See Hearing on S.J. Res. 14*, *supra* note 242, at 10–11. This was a misguided comment, though, because Section 4 was about providing a fairer way to resolve a contingent election with a death in it, not about deadlocks that prevented any choice from being made. *See generally* Kalt, *Deadlocks*, *supra* note 28.

270 *Cf. infra* text accompanying notes 290–291, 295 (describing Representative Estes Kefauver using and touting Section 3's flexibility a few years later).

271 *See* 69 CONG. REC. 4430 (1928).

272 S.J. Res. 47, § 3 (as passed by Senate, Jan. 4, 1928).

273 *See* S.J. Res. 3, 71st Cong. § 3 (as passed by Senate, June 7, 1929); S.J. Res. 292, 71st Cong. § 3 (as passed by House, Feb. 24, 1931); 74 CONG. REC. 5907–08 (1931).

274 *See* Kalt, *Deadlocks*, *supra* note 28, at 117 n.78.

275 *See* S.J. Res. 14, 72d Cong. (as reported by S. Comm. on the Judiciary, Jan. 4, 1932); S.J. Res. 14 (as reported by H. Comm. on Election of President, Vice President, and Reps. in Cong., Feb. 2, 1932); 75 CONG. REC. 1384 (1932); *id.* at 4059–60.

276 *See supra* text accompanying note 239.

277 *See* H.R. REP. NO. 72-633, at 3–4 (1932) (Conf. Rep.) (accompanying S.J. Res. 14).

become President."[278] This could have been read to require an unintended and absurd result: that the Vice President-elect would become President immediately upon the President-elect's death, rather than only on January 20. Thus, the committee changed it to say: "If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President."[279]

The House conferees described the other alterations as "changes in phraseology" that "retain[ed] the substance of the House provision."[280] One was to change tense, switching from "dies" to "shall have died," from "is not chosen" to "shall not have been chosen," from "fails to qualify" to "shall have failed to qualify," and from "has qualified" to "shall have qualified."[281] Similarly minor was a change from "where" to "wherein."[282]

The final change was to the House's phrase "declaring who shall then act as President, or the manner in which a qualified person shall be selected."[283] The conferees made the structure of the sentence more parallel, changing "a qualified person" to "one who is to act."[284]

4. The Promise of Section 3

The most important thing that the legislative history of Section 3 reveals is the meaning of the somewhat cryptic phrase "failure to qualify." As described above, it was understood to encompass any sort of inauguration-day vacancy—anything that prevents a President-elect, or both a President-elect and Vice President-elect, from being chosen and swearing into office.

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278 S.J. Res. 14, § 3 (as reported by H. Comm. on Election of President, Vice President, and Reps. in Cong., Feb. 2, 1932).

279 H.R. REP. NO. 72-633, at 2, 4.

280 *Id.* at 4.

281 S.J. Res. 14, § 3 (as reported by H. Comm. on Election of President, Vice President, and Reps. in Cong., Feb. 2, 1932); H.R. REP. NO. 72-633, at 2.

282 S.J. Res. 14, § 3 (as reported by H. Comm. on Election of President, Vice President, and Reps. in Cong., Feb. 2, 1932); H.R. REP. NO. 72-633, at 2.

283 69 CONG. REC. 4425 (1928).

284 S.J. Res. 14, § 3 (as reported by H. Comm. on Election of President, Vice President, and Reps. in Cong., Feb. 2, 1932); H.R. REP. NO. 72-633, at 2. While there is no indication from the legislative history that anybody intended this, one could read this change as weakening any requirement that Acting Presidents meet the constitutional qualifications set by the Constitution for eligibility to the *office* of President; Acting Presidents do not hold the office of President, they just have the powers and duties that go with it. *See* James C. Ho, *Unnatural Born Citizens and Acting Presidents*, 17 CONST. COMMENT. 575, 580–84 (2000) (citing this distinction as a reason why it would be constitutional to have an Acting President who does not satisfy the constitutional qualifications for being President). The current succession law limits succession to people who are constitutionally eligible to hold the office, though. *See* 3 U.S.C. § 19(e).

The other significant feature of Section 3 is its relative flexibility. Section 3 succession can be dealt with separately from Article II succession. The text makes clear that Section 3 Acting Presidents need not be "officers," and that they can be selected via a process instead of only from a predetermined line of succession. While this added flexibility did not draw much attention at the time, inauguration-day succession differs from middle-of-the-term succession in many ways that make this flexibility useful and welcome.[285]

C. *Half-Hearted: The 1947 Act*

The proactive, reformist spirit that spurred Section 3's creation and adoption did not carry over to the years following its ratification.[286] The New Deal dominated the agenda, and then World War II did; succession-law arcana took a backseat.[287]

There were minor efforts made to implement Section 3 and use its flexibility. For instance, in March 1933, a few weeks after the Twentieth Amendment was ratified, Representative Charles Gifford introduced two bills that provided for the House of Representatives to elect an Acting President if neither a President-elect nor Vice President-elect had qualified.[288] Both bills died in committee.

After Gifford's attempts, little happened until Representative Estes Kefauver came to Congress.[289] Kefauver's first Section 3 bill, introduced in 1940, took advantage of Section 3's flexibility; it provided that in a Section 3 scenario, the Speaker of the House (or, in the absence of a Speaker, the President Pro Tempore of the Senate) would act as President

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285 *See supra* Part I.

286 *See* Kalt, *Deadlocks*, *supra* note 28, at 118.

287 *See id.* at 147.

288 The first bill was H.R. 14796, 72d Cong. § 8 (1933). It provided for a partisan nominating process, and an election that (like contingent elections) gave each state delegation one vote. *Id.* § 8(b)–(d). It also allowed the House to vote before Inauguration Day in the case of a double death. *Id.* § 8(e). The bill had no chance of passing, as Gifford introduced it on the last day of the Seventy-Second Congress, but he introduced the second bill, with an identical provision, a week later at the outset of the Seventy-Third Congress. *See* H.R. 43, 73d Cong. § 8 (1933). Gifford's bills also attempted to implement Section 4 of the Twentieth Amendment. *See* H.R. 14796, § 9; H.R. 43, § 9. A passage in my Article about Section 4 overlooked these bills (as well as H.R. 20311, 90th Cong. (1968)) and erroneously suggested that Congress had not seen any such attempts before the 1990s. *See* Kalt, *Deadlocks*, *supra* note 28, at 118–19.

289 A pair of unsuccessful succession bills introduced in 1934 ignored Section 3, confining themselves to Article II succession. *See* S. 3082, 73d Cong. § 16 (1934); H.R. 9017, 73d Cong. § 16 (1934). More encouraging but no more consequential, a representative in 1936 introduced an article into the *Congressional Record* that called for Congress to use its Section 3 authority to provide for the case of an inauguration-day double vacancy. *See* 80 CONG. REC. 4763–64 (1936) (statement of Rep. Reece).

until a President or Vice President qualified.[290] This would have been a distinct system from the Article II succession law then in place, which had only the Cabinet in line.[291]

Kefauver's bill failed to become law, as did his identical bills in 1941 and 1943, though the 1941 bill did pass the House.[292] His Section 3 bills took different tacks in 1945 (proposing Cabinet succession),[293] and 1947 (having the House select an Acting President),[294] but again to no avail. Notably, though, when Kefauver discussed his 1941 bill on the House floor, he specifically touted the flexibility under Section 3 to select "any person" as opposed to just officers, and to provide a track separate from Article II's line of succession.[295]

Kefauver's earnest focus on implementing Section 3 was overtaken in 1945 by a sudden and intense national interest in Article II succession. When President Franklin D. Roosevelt died a few months into his term, Vice President Harry Truman succeeded him and faced nearly four years without a Vice President of his own. Contemplating the prospect of being succeeded by the Secretary of State, Truman called for Congress to reform the 1886 succession law.[296] Specifically, Truman believed that putting recently elected officials (the Speaker of the House and the President Pro Tempore of the Senate) ahead of appointed ones (the Cabinet) was more democratic.[297] For whatever it was worth, Kefauver had agreed—his first Section 3 bills had favored the Speaker for precisely that reason.[298]

Truman's call prompted the introduction of several succession-reform bills. Some ignored Section 3 succession altogether,[299] while others simply added "failure to qualify" to the list of ways a double vacancy might arise.[300] As such, they did not provide a line of succession—let alone a process—that was any different for inauguration-day double

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290 H.R. 9462, 76th Cong. (1940).

291 *See* Act of Jan. 19, 1886, ch. 4, 24 Stat. 1, 1–2 (repealed 1947).

292 *See* H.R. 2532, 77th Cong. (1941); H.R. 678, 78th Cong. (1943); Estes Kefauver, *We Might Not Have a President*, 111 NEW REPUBLIC 596, 597 (1944) (describing fate of bills).

293 *See* H.R. 455, 79th Cong. (1945).

294 *See* H.R. 1121, 80th Cong. § 2 (1947). The Speaker and President Pro Tempore were designated as backups. *Id.* § 3.

295 *See* 87 CONG. REC. 3260 (1941) (highlighting Congress's power under Section 3 to designate "any person whomsoever it desires to act as President"); *id.* at 3261 (noting that the continuity benefits of using the Cabinet for Article II succession might not apply to inauguration-day succession).

296 *See* H.R. DOC. NO. 79-246 (1945) (statement of President Harry S. Truman).

297 *See id.*

298 *See* Kefauver, *supra* note 292, at 597.

299 *See, e.g.*, H.R. 3515, 79th Cong. (1945); S. 1169, 79th Cong. (1945); S. 1343, 79th Cong. (1945).

300 *See, e.g.*, H.R. 3206, 79th Cong. § 6 (1945); H.R. 3587, 79th Cong. (1945); H.R. 4263, 79th Cong. (1945); H.R.J. Res. 230, 79th Cong. (1945).

vacancies than for middle-of-the-term ones. In other words, these bills made no attempt to use Section 3's flexibility.

One of the bills that simply added "failure to qualify" to the list of vacancy scenarios made it through the House.[301] But Section 3 was left out of the discussion on the House floor almost entirely, probably reflecting the House's limited bandwidth and how much more pressing Article II succession seemed at that moment. The debate was mainly a tussle over the wisdom and constitutionality of having special elections and of having the Speaker in the line of succession.[302]

Section 3 did come up one time, when Kefauver noted briefly that the bill would fill the inauguration-day succession gap.[303] Kefauver also mentioned that the House had approved his 1941 Section 3-only bill, which put the Speaker first in line.[304] But Kefauver's point was not about Section 3, it was that the earlier House had endorsed Speaker succession. In other words, while his 1941 bill would have set up a Section 3 line of succession that differed from the Article II line, Kefauver apparently did not see that difference as a virtue in itself; in the 1945 debate, he wanted the Speaker first in both lines.

In any case, the House bill died in committee in the Senate. In the next Congress, President Truman renewed his call for succession reform, prompting another round of bills.[305] Once again, none called for distinct systems for Section 3 versus Article II succession. And once again, some bills ignored Section 3,[306] while others—including Senate Bill 564, which was eventually enacted—just added "failure to qualify" to the list of ways a double vacancy might arise.[307]

As in the previous Congress, the discussion focused on the merits and the constitutionality of special elections and Speaker succession, to the exclusion of any meaningful discussion of Section 3.[308] In hearings and reports on these bills, Section 3 barely registered. One Senate hearing

301 H.R. 3587; 91 CONG. REC. 7028 (1945) (noting passage of bill). The bill also provided that, as Section 3 required, an Acting President would hand power back once a President or Vice President had qualified. H.R. 3587, § a.

302 *See* 91 CONG. REC. 7012–28 (1945).

303 *Id.* at 7017 (statement of Rep. Kefauver).

304 *Id.*; *see supra* text accompanying note 292.

305 *See* H.R. DOC. NO. 80-89 (1947).

306 *See, e.g.*, H.R. 163, 80th Cong. (1947); S. 139, 80th Cong. (1947) (as introduced in Senate Jan. 10, 1947); S. 536, 80th Cong. (1947).

307 *See, e.g.*, H.R. 1121, 80th Cong. (1947); H.R. 2749, 80th Cong. (1947); S. 564, 80th Cong. (1947) (enacted).

308 *See* S. REP. NO. 80-80 (1947); H.R. REP. NO. 80-817 (1947); *Succession to the Presidency: Hearings on S. Con. Res. 1, S. 139, S. 536, & S. 564 Before the S. Comm. on Rules & Admin.*, 80th Cong. (1947) [hereinafter *Hearings on S. Con. Res. 1*]; 93 CONG. REC. 7598–99, 7691–713, 7766–86, 8620–35 (1947).

saw a brief discussion of what the Twentieth Amendment meant by "qualify," but that was about it.[309]

In the Senate's lengthy floor debate on Senate Bill 564, Section 3 received only a few perfunctory mentions.[310] The title of the bill ("A bill [t]o provide for the performance of the duties of the office of President in case of the removal, resignation, or inability both of the President and Vice President") did not even include "failure to qualify."[311]

On the House side, Section 3 received more attention, though still not much. Most mentions were perfunctory, akin to those in the Senate.[312] Representative Kefauver did devote some space to explaining and endorsing the Section 3 portion of the bill.[313] He first noted that current law made "no provision whatsoever" for inauguration-day succession.[314] He then noted how an inauguration-day double vacancy might arise, and how damaging such a thing would be.[315] He concluded by mentioning his unsuccessful legislative attempts to close the Section 3 gap (which

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309 *See Hearings on S. Con. Res. 1*, *supra* note 308, at 41–43, 48–49. The discussion seemed to agree that anything needed to be elected and become President was included under "qualify," and that someone who did not want to be Acting President would thereby fail to qualify. *Id.*

310 *See* 93 CONG. REC. 7701 (1947) (statement of Sen. Wherry) (noting that the bill implements Section 3); *id.* at 7705 (statement of Sen. Wherry) (explaining to an unenlightened colleague how the bill covers a double-death scenario); *id.* at 7770 (statement of Sen. Hatch) (criticizing the bill, erroneously, for not implementing Section 3); *id.* at 7773 (statement of Sen. Green) (noting that the bill implements Section 3).

311 *See* S. 564 (as introduced in Senate, Feb. 11, 1947); 93 CONG. REC. 7786 (1947) (updating title after passage but still not mentioning failure to qualify).

312 *See* 93 CONG. REC. 8626 (1947) (statement of Rep. Robsion) (making cursory mention of Section 3 in a lengthy analysis of the bill); *id.* at 8634 (statements of Reps. Mathews and Michener) (listing Section 3 as the basis for the bill's coverage of "failure to qualify"); *cf. id.* at 8620 (statement of Rep. Michener) (listing the "substantial changes in existing law" that the bill wrought and not including the Section 3 component among them).

313 *See id.* at 8627–28 (statement of Rep. Kefauver); *see also id.* at 703–04 (statement of Rep. Kefauver) (making similar comments in an earlier speech).

314 *See id.* at 8627 (statement of Rep. Kefauver).

315 *See id.* Kefauver noted that, unlike federal law, Georgia's state law covered inauguration-day vacancies for the governor there. *Id.* at 8627 (statement of Rep. Kefauver). In fact, Georgia had recently experienced significant tumult over the application of that law, as Kefauver noted in a congressional hearing on the succession bill. *See Hearing on H.R. 1121*, *supra* note 28, at 10–11 (statement of Rep. Kefauver). *See generally* CHARLES S. BULLOCK III, SCOTT E. BUCHANAN & RONALD KEITH GADDIE, THE THREE GOVERNORS CONTROVERSY: SKULLDUGGERY, MACHINATIONS, AND THE DECLINE OF GEORGIA'S PROGRESSIVE POLITICS (2015) (describing Georgia's crisis, in which the Governor-elect died and the outgoing Governor, the second-place candidate, and the Lieutenant Governor-elect all claimed the governorship).

included the Section 3-only bill he had introduced that year[316]) and his appreciation "that at long last [Congress was] going to remedy it."[317]

This time, however, Kefauver did not note Section 3's greater flexibility, let alone call for amending the bill to use that flexibility. This was probably wise, given that the bill was about to pass and any "improvements" to it would have served only to derail its progress. That said, 1947 seems to have been the last, best opportunity in the last ninety-one years to achieve nuanced Section 3 legislation—and that opportunity was missed.

D. *Recent History*

Since 1947, presidential succession has received a lot of attention from legislators, scholars, and other critics of the 1947 succession law. The fundamental structure of the law has remained unchanged, though. More to the point of this Article, very little of this attention has distinguished between Article II succession and Section 3 succession or discussed Section 3's flexibility.

Numerous unsuccessful bills have been introduced to reform the succession law, but most would have done nothing to change the current law's one-size-fits-all approach.[318] Dismayingly, some proposals ignored Section 3 succession altogether, limiting themselves to Article II situations and leaving out "failure to qualify."[319]

One exception is a 2004 bill introduced by Representative Brad Sherman.[320] In it, Sherman proposed removing the Speaker and President Pro Tempore from the Article II line of succession but keeping them for Section 3 succession.[321] While Sherman's bill does not use of all of Section 3's flexibility, it is notable for its attempt to use *any* of it. But Sherman

316 *See supra* note 294 and accompanying text. In a hearing on his Section 3-only bill, Kefauver made the hyperbolic statement that "making certain that we have someone to act as President in the event of the failure of the President-elect and the Vice-President-elect to qualify are among the most important problems facing the Congress and the American people today." *Hearing on H.R. 1121*, *supra* note 28, at 2 (statement of Rep. Kefauver).

317 *See* 93 CONG. REC. 8628 (1947) (statement of Rep. Kefauver).

318 *See, e.g.*, H.R. 11230, 93d Cong. (1973); H.R. 3816, 107th Cong. (2002); H.R. 2319, 108th Cong. (2003); H.R. 2749, 108th Cong. (2003); S. 2073, 108th Cong. (2004); S. 920, 109th Cong. (2005); H.R. 1943, 109th Cong. (2005); H.R. 540, 110th Cong. (2007); H.R. 6557, 111th Cong. (2010).

319 *See* S. Con. Res. 14, 81st Cong. (1949) (calling for the creation of a joint congressional committee to study various succession problems but omitting Section 3 scenarios); S. Con. Res. 2, 83d Cong. (1953) (same); H. Con. Res. 245, 88th Cong. (1963) (same).

320 H.R. 5390, 108th Cong. (2004).

321 *Id.* § a(2)(A).

introduced several other bills between 2002 and 2012 to amend the line of succession, which all took a one-size-fits-all approach.[322]

There have been multiple congressional hearings regarding succession, including some focusing specifically on pre-inaugural succession.[323] Section 3 has gotten more attention in these settings, if not in a way that led to any laws being passed. Specifically, witnesses called attention to such knotty questions as when a winning candidate actually becomes President-elect for Section 3 purposes.[324]

One (and only one) witness, John Fortier, discussed one (and only one) aspect of Section 3's flexibility: its separate, looser standard ("person" rather than "officer") for who can be in the line of succession. Foreshadowing Representative Sherman's bill,[325] Fortier suggested using the Speaker of the House and President Pro Tempore of the Senate for Section 3 succession (avoiding the Cabinet from the previous, possibly rejected, administration) and using the Cabinet for Article II succession (avoiding the Speaker and President Pro Tempore and the argument that they are not "officers").[326]

Fortier, writing with Norman Ornstein, has repeated this suggestion,[327] as have John Rogan and Roy E. Brownell II.[328] Professor Joel Goldstein has too, and has also noted the different needs of different Section 3 scenarios.[329] They stand out from the many other scholars who have written countless articles about countless other succession issues but who have given short shrift to the power and potential of Section 3. This Article is an attempt to stimulate further discussion of Section 3 and inspire creative thinking—not just about having a distinct Section 3 line

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322 *See* H.R. 3816; H.R. 2749; H.R. 1943; H.R. 540; H.R. 6557.

323 *See Presidential Succession Between the Popular Election and the Inauguration: Hearing Before the Subcomm. on the Const. of the S. Comm. on the Judiciary*, 103d Cong. (1994) [hereinafter *Presidential Succession Hearing*]; *Ensuring the Continuity of the United States Government: The Presidency: Joint Hearing Before the S. Comm. on the Judiciary & the S. Comm. on Rules & Admin.*, 108th Cong. (2003) [hereinafter *Ensuring Continuity*]; *Presidential Succession Act: Hearing Before the Subcomm. on the Const. of the H. Comm. on the Judiciary*, 108th Cong. (2004) [hereinafter *PSA Hearing*].

324 *See, e.g.*, *Presidential Succession Hearing*, *supra* note 323, at 7, 9, 36–37; *PSA Hearing*, *supra* note 323, at 5, 21.

325 *See supra* text accompanying notes 320–321.

326 *See Ensuring Continuity*, *supra* note 323, at 10–11, 21, 52–53 (testimony of John C. Fortier, Executive Director, Continuity of Gov't Comm'n).

327 Fortier & Ornstein, *supra* note 11, at 1006–11; *see* CONTINUITY OF GOV'T COMM'N, *supra* note 15, at 15 (featuring similar suggestions from a commission that included Fortier and Ornstein).

328 Brownell & Rogan, *supra* note 11, at 40–41; Rogan, *supra* note 11, at 603.

329 Goldstein, *Taking*, *supra* note 11, at 1023–25; *see id.* at 1034–36 (noting different sets of issues in failure-to-elect situations versus double-death situations); Goldstein, *Continuity*, *supra* note 11, at 89–92.

of succession and one that may include non-officers, but also about having a Section 3 process rather than a predetermined line of succession.[330]

IV. Some Modest Proposals

This Article will conclude by kicking off that "further discussion," making some general suggestions for inauguration-day succession. Specifically, this Part will suggest a few things that Congress might want to consider if and when it summons the will to take up Section 3 legislation.

A. *Multiplicity*

Section 3 gives Congress the power to provide a multiplicity of succession systems in one law, with different solutions for different double-vacancy scenarios.[331]

Perhaps a presidential election is disputed or ongoing, and the country needs someone in charge while the process plays out. In that scenario, an ideal Acting President would be a stable, calming, relatively neutral caretaker figure (if such a person exists anymore).[332] By contrast, if the election yielded a clear winner but the President-elect and Vice President-elect both died, the ideal Acting President would be someone equipped to fill the entire four-year term, and who reflects the preferences that the voters just expressed. In between these two scenarios, an election might yield a clear winner but see a double vacancy arise out of temporary disability or qualification issues.

Having the same succession system for such disparate scenarios is suboptimal. Doing so produces a flawed result for at least one of the scenarios, and maybe for all of them. Congress should embrace its power to provide a multiple-track Section 3 law.

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330 *See generally* Kalt, *Twentieth Amendment*, *supra* note 11 (presenting these themes in a panel discussion).

331 Nothing in Article II precludes Congress from doing the same for middle-of-the-term scenarios as well, but Congress has never done so.

332 *See* Kalt, *Twentieth Amendment*, *supra* note 11.

B. *Process Instead of Line*

When Congress legislates with regard to inauguration-day double vacancies, Section 3 allows it to provide a line of succession ("declaring who shall then act as President"), or, alternatively, to provide a selection process ("declaring . . . the manner in which one who is to act shall be selected").[333] There are situations in which it might be preferable to provide a process rather than a line, and processes offer some general advantages as well.

One good candidate scenario for using a process instead of a line is when both the President-elect and Vice President-elect are permanently eliminated well before January 20. In such a case, the main disadvantage of processes—that they take time, while presidential succession requires immediacy—is not an issue, because the person selected would not become Acting President for as many as thirty-seven days.[334]

Processes also may be better than lines when the Acting President needs to be a neutral, consensus figure, like during the resolution of an unfinished or disputed election.[335] To the extent that a fixed line of succession would include the holders of particular congressional or executive posts, those people would most likely be partisans, and might also be intimately involved in the deadlocked election. A process that requires agreement across party lines (like, say, a three-fourths consensus among the Majority and Minority Leaders in the House and Senate) would allow for the identification and selection of a relative moderate: someone that both sides trust to keep the ship of state sailing ahead, rather than rocking perilously in the stormy political sea.

To be sure, that storminess might make such consensus hard to achieve, especially in the current partisan, polarized era, and especially in the midst of a high-stakes deadlock. As such, a thoughtfully designed process would need a default provision, because it is so essential that *someone* be Acting President if no timely consensus is reached. If one side expects a partisan advantage from the default result, though, this would reduce that side's incentive to work toward a consensus.[336] As such, the default provision would itself need to contain some element of neutrality (like selecting a federal judge) or failing that, randomness (such

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333 *See supra* text accompanying notes 6–9.

334 *See supra* Section I.A.3. The Electoral College "votes on the first Tuesday after the second Wednesday in December," which can be as early as December 14, thirty-seven days before January 20. *See* 3 U.S.C. § 7.

335 *See supra* text accompanying note 332.

336 *See* Fortier & Ornstein, *supra* note 11, at 1008 (noting that having the Republican Speaker first in line would have made Republicans more amenable to leaving the disputed 2000 election unresolved).

as having a random drawing from among the most senior state governors, two from each party, to take just one example).

A key advantage of processes over lines is that they require less foresight. There is no way to know in advance who the best person in the country to be Acting President will be on some future January 20. Rather than try to foretell the post at which one would find the best candidate, a process can identify the best candidate on the fly. Depending on the process, the initial pool of candidates could be vast. Being able to pick the person best suited at that moment to be Acting President could yield vastly better results than simply assuming far in advance that the Speaker (or the Secretary of State, or whoever) would be the optimal choice.

Another advantage of processes over lines is that they can supply more focused democratic legitimacy. The Speaker of the House's democratic legitimacy is based on being elected by the House of Representatives, but the House is electing them to be Speaker.[337] Even if the process for selecting an Acting President is as simple as, say, having the House choose one of its members by majority vote, that person would have the added legitimacy that comes from being selected by the House specifically to be Acting President.[338]

The ultimate democratic legitimacy would come from a special presidential election. This process would be most appropriate for "permanent" double vacancies, where the winner would be filling the great bulk of the four-year term. (A special election would take some time, requiring a good caretaker Acting President in the meantime.[339]) While Section 3 legislation could mandate a special election that runs just like a regular presidential election and employs the electoral college, it would not be confined to that model. By giving Congress the broad ability to legislate "the manner in which one who is to act shall be selected,"[340] Section 3 opens the door to all sorts of modifications to a national election, like a limited candidate pool or instant runoff voting.

Moreover, the process need not entail a national election. If a President-elect and Vice President-elect win in a landslide but then both die, the best process would be one that respects the voters' expression rather than scheduling a do-over. This might entail something like reconvening the electors who voted for the winning ticket and having them ratify a new choice made by the decedents' political party. It could

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337 Worse yet, the President Pro Tempore is selected without legitimating anything but their seniority. *See supra* note 27.

338 *Cf. Hearings on H.J. Res. 93*, *supra* note 228, at 20 (suggesting that after a double death the House chooses by a majority vote whomever it likes as President, and the Senate a Vice President).

339 *See supra* Section I.B.3.

340 U.S. CONST. amend. XX, § 3.

also entail a choice made by the senior leadership from the decedents' political party, perhaps ratified by a congressional vote.[341]

These are just possibilities. The point is that Section 3 gives Congress tools to design a process that might meet the needs of the moment better than a predetermined line of succession would.

C. *Not Just "Officers"*

Because Section 3 succession is not limited to "officers" the way Article II succession is, there are many more people to choose from when designing Section 3 succession. That flexibility is helpful.

One benefit is a reduction in potential constitutional challenges. The current succession law puts the Speaker of the House and President Pro Tempore of the Senate in the front of the line, on the basis that they are "officers" of their respective chambers.[342] Unfortunately, they are not officers "of" or "under" the United States, and this has led to centuries of skepticism about the constitutionality of their places in line—never a good thing when one is striving for swift and certain transfers of power.[343] But this is only an issue for Article II succession; there is no "officer" problem with the Speaker or President Pro Tempore being in a Section 3 line of succession.[344] Nor is there an issue with favoring certain obvious alternative candidates, like the House or Senate Minority Leader (who are not considered officers of the House or Senate[345]) when the President is from a different party than the Speaker or President Pro Tempore.[346]

Section 3's flexibility here opens up all kinds of creative opportunities for succession design. A Section 3 law could include not just current federal officers and members of Congress, but also former officials, state officials, and many more.[347] This is especially helpful given the ability under Section 3, just discussed, to have a selection process

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[341] *Cf.* Rogan, *supra* note 11, at 591 (making a similar suggestion for candidate deaths before the Electoral College votes).

[342] *See* Fordham Univ. Sch. of L. Clinic on Presidential Succession, *supra* note 38, at 39; Goldstein, *Taking*, *supra* note 11, at 1021.

[343] *See* KALT, CLIFFHANGERS, *supra* note 15, at 85–92.

[344] *See* Edward B. Foley, *Preparing for a Disputed Presidential Election: An Exercise in Election Risk Assessment and Management*, 51 LOY. U. CHI. L.J. 309, 328 n.42 (2019); Fortier & Ornstein, *supra* note 11, at 1007–08; Goldstein, *Taking*, *supra* note 11, at 1023–24.

[345] *See* KALT, CLIFFHANGERS, *supra* note 15, at 92, 213–14 n.24.

[346] *See* CONTINUITY OF GOV'T COMM'N, *supra* note 15, at 5 (proposing succession systems that use members of the dead President-elect's party); *cf.* Fordham Univ. Sch. of L. Clinic on Presidential Succession, *supra* note 38, at 100–01 (noting legislative proposal to include in the line of succession legislative leaders from the President's own party).

[347] *See* Fortier & Ornstein, *supra* note 11, at 1008 (noting eligibility of people outside the government).

instead of a pre-determined line of succession.[348] A well-designed process could quickly winnow a wide pool down to a short list, and the more options there are, the better the chances are of homing in on a suitable candidate.

To take one example, elder statespeople who are above the fray—former Presidents, Vice Presidents, or high-ranking Cabinet members whose power-seeking days are behind them—might be well-suited to filling in for a week or two as a caretaker Acting President while the country settles a disputed election. Some sort of screening process or criteria would be needed—perhaps James Baker and Robert Rubin are too old; perhaps Hillary Clinton and Dick Cheney are too controversial; and so on. But one can imagine a sufficient consensus forming around, say, Condoleezza Rice or Tom Daschle. Perhaps political polarization is such that there are no potential compromise candidates in the country anymore. The point is that Section 3 at least puts these public figures on the table as a possibility. If their list of potential candidates is long enough, those carrying out the selection process could afford to be picky.

D. *Not the Incumbents or Candidates*

While Section 3 provides an extremely deep pool of potential Acting Presidents, anti-totalitarian considerations should preclude Congress from including incumbent Presidents or Vice Presidents or candidates from the last election among them.[349] There are three different postures that the incumbents or candidates could be in when an inauguration-day double vacancy strikes, and in all three of them it would be bad—and perhaps dangerous—not to show the incumbent or candidate the door.

One posture is that of a candidate (incumbent or non-incumbent) who just lost the election decisively, after which something happened to the winners. It is a foundation of the American presidential system that the loser must go away.[350] To have it any other way—to say that the losers must go unless the winners "somehow" become dead, disabled, or disqualified—creates perverse incentives and is just asking for trouble.

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[348] *See supra* Section IV.B.

[349] Concededly, a handful of states allow governors to serve past the usual end of their terms if a successor has not yet been chosen and qualified. *See, e.g.*, GA. CONST. art. V, § 1, para. 1; MONT. CONST. art. VI, § 1; N.D. CONST. art. V, § 1; *cf.* 1958 CONST. art. 7 (Fr.) (same with regard to the President of France). The U.S. Constitution provides an extra layer of protection against states becoming dictatorships, though. *See* U.S. CONST. art. IV, § 4 (guaranteeing to every state a republican form of government).

[350] *Cf.* Jack M. Beermann & William P. Marshall, *The Constitutional Law of Presidential Transitions*, 84 N.C. L. REV. 1253, 1272–73, 1272 n.79 (2006) (suggesting that the Constitution requires the incumbent to leave in this situation).

Another posture is that of a candidate (incumbent or non-incumbent) who just competed in an election that remains unresolved on Inauguration Day. Making such a candidate eligible to be Acting President again creates perverse incentives—to create a dispute or deadlock, or to sustain one—and again is asking for trouble. This is particularly a problem when the candidate is the incumbent President, given the many things Presidents can do to affect election disputes.[351]

The third posture is that of an incumbent who was not seeking re-election, perhaps because of term-limits. Due to a constitutional loophole in the Twenty-Second Amendment, a Section 3 succession law could allow a term-limited incumbent to remain in office.[352] If the inauguration-day double vacancy was because of something necessarily temporary and short-lived, this might not be the end of the world.[353] But given the potential for an incumbent President or their followers to create a dispute, to prolong a deadlock, or to cause the death of the winning candidates, opening the door to a term-limited incumbent serving as Acting President would be a terrible idea. Indeed, such a Section 3 law would enable Presidents to install themselves in office permanently without actually violating the law or the Constitution, by quadrennially engineering the election of a ticket of stalking-horse cronies who would then dutifully renounce their offices before Inauguration Day. Presidential term limits have been interpreted in ways that violate their spirit—or are even flat-out ignored—in enough other countries that nobody should write off such a possibility.[354] Instead, Congress should rule out this and the other possibilities by making incumbents and candidates from the last election ineligible for Section 3 succession.

E. *Practically Limited Power*

As a constitutional matter, an Acting President has all of the powers of a regular President, from commanding the military, to nominating and

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351 For a particularly timely exposition of this point, see Lisa Marshall Manheim, *Presidential Control over Disputed Elections*, 81 OHIO ST. L.J. ONLINE 215 (2020).

352 *See* KALT, CLIFFHANGERS, *supra* note 15, at 154–55 (explaining the loophole); Stephen Gillers, *Who Says the Election Has a Dec. 12 Deadline?*, N.Y. TIMES (Dec. 2, 2000), https://www.nytimes.com/2000/12/02/opinion/who-says-the-election-has-a-dec-12-deadline.html [https://perma.cc/7Q37-ZFD3] (noting this possibility during the 2000 recount and surmising that "Clinton would be willing to stay on for a few weeks").

353 *See* Fortier & Ornstein, *supra* note 11, at 1009–10 (considering this approach in the event of a disputed election); *see also Hearings on H.J. Res. 56*, *supra* note 228, at 18 (statement of Rep. Rathbone) (opining that a brief holdover by an incumbent would be unobjectionable).

354 *See generally* Tom Ginsburg, James Melton & Zachary Elkins, *On the Evasion of Executive Term Limits*, 52 WM. & MARY L. REV. 1807 (2011).

firing executive branch officials, to issuing executive orders, to pardoning whomever they please. This is as it should be—the whole point of having an Acting President is so that someone can exercise the powers of the presidency.

But not all Acting Presidents are alike. If the President-elect and Vice President-elect die, and the Acting President serves out the full four-year term, the Acting President should be free to carry out an ambitious vision and make full use of their powers. By contrast, Acting Presidents who serve temporarily for just a few days should use their powers more sparingly, leaving weighty actions and grand agendas for the long-termers that succeed them. Those designing a Section 3 law or implementing a Section 3 process should bear this in mind and favor Acting Presidents who will respect these norms.

F. *Filling in Blanks: The Necessary and Proper Clause*

A final consideration for Congress in designing Section 3 legislation is that Section 3 is not the only source of congressional authority here. Congress has substantial power under the Necessary and Proper Clause to fill in blanks and add details that Section 3 does not explicitly address.

A key example here is inability. As discussed earlier, the original Constitution said that power should transfer any time the President or Acting President suffers an "inability," but this requirement was never followed when Presidents were incapacitated until the Twenty-Fifth Amendment supplied an inability-declaration process.[355] Unfortunately, the Amendment's process does not apply to Presidents-elect,[356] and waiting until after noon on Inauguration Day to invoke the Twenty-Fifth Amendment probably would not work, especially for double vacancies.[357] Realistically, then, with no standards or process for declaring the inability of a President-elect or Vice President-elect, it would take a case that is completely beyond dispute—being comatose, for instance—before Section 3 would likely be invoked.

But Congress *can* provide standards and processes. Section 3 could be used in an inability case if one knows who declares the inability, how

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355 *See supra* Section I.B.2.

356 *See* U.S. CONST. amend. XXV, §§ 3–4 (applying the provisions only to sitting Presidents); *supra* text accompanying note 52.

357 *See* U.S. CONST. amend. XXV, §§ 3–4 (applying only when there is a Vice President, and assigning a prominent role to the Cabinet); Rogan, *supra* note 11, at 603 (discussing this problem); KALT, UNABLE, *supra* note 33, at 148–52 (noting uncertainty regarding the ability of acting Cabinet members to participate in Twenty-Fifth Amendment proceedings).

conflicts are settled, and so on. The Necessary and Proper Clause gives Congress the power to provide such implementation details.[358]

Another example is the definition of President-elect. Section 3 is the only place in the Constitution that uses the term "President Elect," but it leaves unclear whether a winning candidate attains that status for Section 3 purposes when the Electoral College votes (in mid-December),[359] when Congress counts the votes (on January 6),[360] or at some other point.[361] The most common interpretation is that the winner becomes President-elect when the Electoral College casts its votes in December,[362] an interpretation that would avoid possible complications in the event that the President-elect dies between then and January 6. There is also a good argument that Section 3 would work just fine under either date.[363] In the absence of certainty, though, it would be useful for Congress to use its Necessary and Proper Clause power to nail down this detail.[364]

This being American constitutional law, Congress's powers here are contestable. Somebody who loses out because of Congress's definition of "President Elect" or "inability" might sue and say that the Constitution

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358 *See* U.S. CONST. art. I, § 8, cl. 18; Rogan, *supra* note 11, at 603–04.

359 *See* 3 U.S.C. § 7.

360 *See id.* § 15; THOMAS H. NEALE, CONG. RSCH. SERV., RS22992, THE PRESIDENT-ELECT: SUCCESSION AND DISABILITY ISSUES DURING THE TRANSITION PERIOD 3–4 (2008) (noting this interpretation).

361 To begin the flow of resources for a presidential transition, the Presidential Transition Act empowers the administrator of the General Services Administration to designate "the apparent successful candidate[]" after the November popular vote as the President-elect. 3 U.S.C. § 102 (Presidential Transition Act of 1963 § 3(c)); *cf.* THOMAS H. NEALE, CONG. RSCH. SERV., RL31761, PRESIDENTIAL SUCCESSION: AN OVERVIEW WITH ANALYSIS OF LEGISLATION PROPOSED IN THE 108TH CONGRESS 10 (2005) (describing uncertainty over the timing of attaining President-elect status).

362 The House committee report accompanying the final, successful resolution that became the Twentieth Amendment stated:

> [T]he committee uses the term "President elect" in its generally accepted sense, as meaning the person who has received the majority of the electoral votes . . . . It is immaterial whether or not the votes have been counted, for the person becomes the President elect as soon as the votes are cast.

H.R. REP. NO. 72-345, at 6 (1932); *see* THOMAS H. NEALE, CONG. RSCH. SERV., R44648, PRESIDENTIAL ELECTIONS: VACANCIES IN MAJOR-PARTY CANDIDACIES AND THE POSITION OF PRESIDENT-ELECT 5 (2020) (citing "[t]he balance of scholarly opinion"). Unsuccessful legislation has been introduced to cement this interpretation. *See, e.g.*, S. 2562, 103d Cong. (1994); S. 1997, 104th Cong. (1996).

363 *See Presidential Succession Hearing*, *supra* note 323, at 44 (statement of Lawrence D. Longley, Prof., Lawrence Univ.) (explaining that the votes would have been proper when cast and so would be counted on January 6); Rogan, *supra* note 11, at 601; *see also* CONTINUITY OF GOV'T COMM'N, *supra* note 15, at 15–16 (suggesting clarificatory legislation to ensure this result).

364 *See* AM. BAR ASS'N, ELECTING THE PRESIDENT: A REPORT OF THE COMMISSION ON ELECTORAL COLLEGE REFORM 33 (1967).

defines things differently, that the Necessary and Proper Clause does not apply, or any one of a number of other creative legal arguments. But that is no reason for Congress to hold back. Clear congressional specifications, even if contestable in court the first time they are used, are better than no guidance at all.

CONCLUSION

Even though the United States has never had to deal with inauguration-day succession, it was dangerous to neglect it in the original Constitution. Section 3 was a prudent step forward. Implementing Section 3 in the 1947 succession law was a further step forward, even if it was done somewhat blithely.

Still, the country deserves a more careful and thoughtful plan for inauguration-day succession—one that actually uses the tremendous flexibility that Section 3 affords Congress. There are many reasons why Congress has never used that flexibility, and why Congress is unlikely to do so now. But that does not change the many reasons why Congress should.