
THE INELIGIBILITY CLAUSE'S LOST HISTORY:
PRESIDENTIAL PATRONAGE AND CONGRESS, 1787–1850

Few current constitutional provisions are considered less relevant than the Ineligibility Clause,¹ which renders a member of Congress (MC) ineligible for appointment to any federal civil office that has been created or had its emoluments increased during the MC's elected term. Republican and Democratic administrations, characterizing the clause as incoherent and asserting that the policy behind it was easily evaded by appointment to preexisting office, have restricted the clause to its narrowest, most formalistic meaning.² The "Saxbe fix," through which Congress removes an MC's ineligibility by reducing an office's salary,³ is another example of confining the clause's applicability. Some commentators have even advocated reading the clause out of the Constitution.⁴ Labeled "obscure"⁵ and "esoteric,"⁶ the clause has largely disappeared from public debate.

Yet its contemporary irrelevance obscures how significant the Ineligibility Clause once was. During the Republic's first six decades, Presidents, MCs, and commentators debated not whether the clause should be evaded or ignored, but rather whether its prohibition should be expanded to achieve its broader purposes. Designed to preserve the separation of powers, legislative accountability, and MCs' disinterestedness by inhibiting office hunting, the clause, Justice Story reported, had been deemed an "admirable provision against venality, though not perhaps sufficiently guarded to prevent evasion."⁷ Given the evasion

¹ U.S. CONST. art. I, § 6, cl. 2 ("No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time."). The Ineligibility Clause is also known as the Emoluments Clause.

² See Memorandum from Christopher Schroeder, Acting Assistant Att'y Gen., Office of Legal Counsel, to the Counsel to the President (July 26, 1996), available at <http://www.usdoj.gov/olc/peterfinal.htm> (discussing Memorandum from Antonin Scalia, Assistant Att'y Gen., Office of Legal Counsel, to Hugh M. Durham, Chief, Legislative & Legal Section, Office of Legislative Affairs (Nov. 22, 1974)).

³ See John F. O'Connor, *The Emoluments Clause: An Anti-Federalist Intruder in a Federalist Constitution*, 24 HOFSTRA L. REV. 89, 93 (1995).

⁴ See, e.g., MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 33–53 (1999) (using the Ineligibility Clause as a paradigmatic example of a constitutional provision that a "constitutionally conscientious" official may legitimately disregard, *id.* at 51); Roderick M. Hills, Jr., *Federalism and Distrust* 2–3 (Oct. 14, 2009) (unpublished manuscript, on file with the Harvard Law School Library) (using the clause as an example of a provision that is ignored).

⁵ Posting of Sarah Wheaton to *The Caucus: The New York Times Politics Blog*, <http://thecaucus.blogs.nytimes.com> (Dec. 11, 2008, 16:59 EST).

⁶ Posting of Peter Baker to *The Caucus: The New York Times Politics Blog*, <http://thecaucus.blogs.nytimes.com> (Dec. 2, 2008, 20:56 EST).

⁷ 2 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 864, at 330 (1833).

made possible by appointments to preexisting offices, leading MCs from all major parties advocated strengthening the clause through broad interpretation or constitutional amendment.

From 1789 to 1850, over thirty amendments were proposed that would have rendered MCs ineligible for all federal civil appointments — including preexisting offices and, under some proposals, even elected offices like the presidency — during their elected terms, and often for an additional period after their terms. Amending the clause to inhibit office hunting was among the era’s most salient issues. In his final act as Senator, for example, Andrew Jackson called for such an amendment, without which “corruption will become the order of the day.”⁸ Emulating his foe, two decades later Henry Clay advocated an amendment to bolster the clause in a last senatorial address.⁹ Confronted with a text considered too weak to accomplish its goals, Jackson, Clay, and others sought to strengthen the clause, not ignore it.

Like the Ineligibility Clause itself, this antebellum history has been neglected.¹⁰ Most articles discussing the clause do so only tangentially¹¹ or mainly in reference to the Saxbe fix.¹² Articles that do address the clause’s history tend to view it through the lens of the clause’s contemporary insignificance, and therefore contain important misconceptions or omissions about the earlier history.¹³ Yet the clause, once lauded in valedictory addresses, invoked religiously,¹⁴ and embraced by statesmen of all persuasions, was not predestined to irrelevance.

This Note attempts to restore the Ineligibility Clause’s lost history. Drawing upon congressional debates and records of appointments, it

⁸ Letter from Andrew Jackson to the Tennessee Legislature (Oct. 7, 1825), in 29 NILES’ WKLY. REG. 156, 157 (1825).

⁹ See CONG. GLOBE, 27th Cong., 2d Sess. 376 (1842) (statement of Sen. Clay).

¹⁰ Even Professor David Currie’s four-volume history of the Constitution in Congress devotes only a sentence to the Ineligibility Clause amendments. See DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS 336 (2001).

¹¹ See, e.g., Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 CORNELL L. REV. 1045, 1063–64 (1994) (discussing the Ineligibility Clause in reference to the Incompatibility Clause); Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 358–61 (2009) (discussing the clause as one of many clauses geared to prevent corruption); Adrian Vermeule, *Veil of Ignorance Rules in Constitutional Law*, 111 YALE L.J. 399, 400 (2001) (treating the clause as one of many “veil of ignorance rules”).

¹² See, e.g., O’Connor, *supra* note 3 (discussing the Saxbe fix and the clause’s Antifederalist roots); Michael Stokes Paulsen, *Is Lloyd Bentsen Unconstitutional?*, 46 STAN. L. REV. 907 (1994).

¹³ For example, Professor Daryl Levinson has assumed that the “kinds of economic self-dealing that the Framers tried to guard against with . . . the Emoluments Clause . . . have mostly failed to materialize.” Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 926 (2005). Many antebellum MCs thought otherwise. Also, in their Incompatibility Clause article, Professors Steven Calabresi and Joan Larsen offer a “Scorecard on ‘Corruption’” for “the last two hundred years” by analyzing “patronage appointments,” Calabresi & Larsen, *supra* note 11, at 1078, yet they cite evidence from only the last century. *Id.* at 1078–85.

¹⁴ See, e.g., 2 REG. DEB. 1740 (1826) (statement of Rep. Mitchell); Letter from Andrew Jackson to the Tennessee Legislature, *supra* note 8, at 157.

provides a first account of patronage and the Ineligibility Clause in Congress from 1789 to 1850. Although there were major efforts to amend the clause to tighten its gaps, including some that succeeded in the states, none succeeded at the federal level for at least two reasons. First, the perceived connection between office hunting and corruption depended on the perceiver's current political position — those who advocated amendment when out of power embraced appointments of MCs when in power. Second, with the rise of political parties, the notion of checks and balances increasingly developed along party rather than institutional lines. Party politics was seen partly to reduce the need for a broader clause because appointments came to be viewed as promoting the legitimate end of shared ideology, not corruption.

I. CREATION AND EARLIEST INTERPRETATIONS

A. *Legacy from the Constitutional Convention and Ratification*

The controversy at the Constitutional Convention over the Ineligibility Clause's prohibitions set terms for debate that persisted throughout the antebellum era. Proponents of a broader clause, which would have prevented MCs from being appointed to preexisting offices, highlighted the dangers of patronage directed at MCs to good government and the separation of powers. Those supporting a clause with fewer restrictions feared depriving the President of able officers.

Encompassing the broader spirit, the Virginia Plan, which first outlined the Constitution at the Convention, proposed to make MCs ineligible for all federal offices, including the presidency, during their term plus an unspecified period thereafter,¹⁵ later suggested to be one year.¹⁶ Supporters justified this on the ground that allowing appointments would corrupt MCs by opening them to improper considerations of private gain, removing their accountability to the people, and leaving them susceptible to executive influence. Criticizing Britain's "flimsy exclusion," Pierce Butler complained that Britain's "venality and corruption" resulted from office hunting in Parliament.¹⁷ George Mason echoed that the Constitution must "remove the temptation."¹⁸

Others countered fear of corruption with alarm about the quality of government. Broad ineligibility would make legislative service less attractive and also could prevent executive offices from being filled by the best men. James Wilson feared that the Constitution might render

¹⁵ 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 20–21 (Max Farrand ed., rev. ed. 1966) (proposed May 29, 1787).

¹⁶ *Id.* at 235 (proposed June 13, 1787).

¹⁷ *Id.* at 379 (statement of Pierce Butler on June 22, 1787).

¹⁸ *Id.* at 380 (statement of George Mason on June 22, 1787).

MCs “ineligible to Nat[ional] offices, [and] by that means take away its power of attracting those talents which were necessary to give weight to the Govern[ment] and to render it useful to the people.”¹⁹

Faced with competing concerns, Madison advocated “a middle ground between an eligibility in all cases, and an absolute disqualification.”²⁰ He would disqualify MCs only for offices that were created or had their emoluments increased during the MCs’ term.²¹ Most delegates first rejected the idea. Legislative service, they thought, should be motivated only by concern for public good, not self-interest. “Instead of excluding merit,” Mason noted, “the ineligibility will keep out corruption, by excluding office-hunters.”²² The compromise allowed exceptions that would permit evasion, thus defeating the clause’s purpose. Roger Sherman observed that legislators could be appointed to preexisting offices, giving “too much influence to the [e]xecutive.”²³ When the compromise first came to a vote by state delegation in June, it lost 2–8–1, and the delegates agreed to limit the ineligibility of representatives to their term of office²⁴ and of senators to their term plus one year.²⁵ Yet, when the compromise was reintroduced in August, it lost only 5–5–1,²⁶ and in September, it passed 5–4–1.²⁷ Because the Convention notes are sparse, it is impossible to decipher why the votes changed and enabled the compromise to slip into the Constitution.

During the ratification debates, Antifederalists decried the provision as fatally weak. The Federal Farmer regretted what would have been the “valuable effects” of the broader provision,²⁸ which Luther Martin insisted was “essentially necessary to preserve the integrity, independence, and dignity of the legislature, and to secure its members from corruption.”²⁹ At Virginia’s convention, Patrick Henry complained that the clause was “no restraint on corruption,”³⁰ and William Grayson agreed that the “clause might as well not be guarded at all, as

¹⁹ 2 *id.* at 288 (statement of James Wilson on Aug. 14, 1787).

²⁰ 1 *id.* at 388 (statement of James Madison on June 23, 1787).

²¹ *Id.* at 386.

²² 2 *id.* at 491 (statement of George Mason on Sept. 3, 1787).

²³ *Id.* at 490 (statement of Roger Sherman on Sept. 3, 1787).

²⁴ 1 *id.* at 390 (June 23, 1787).

²⁵ *Id.* at 429 (June 26, 1787).

²⁶ 2 *id.* at 289 (Aug. 14, 1787).

²⁷ *Id.* at 492 (Sept. 3, 1787).

²⁸ Letters from the Federal Farmer, Letter XIII (Jan. 14, 1788), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 301, 303 (Herbert J. Storing ed., 1981).

²⁹ Luther Martin, Mr. Martin’s Information to the General Assembly of the State of Maryland, *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 28, at 27, 52 (emphasis omitted).

³⁰ 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 368 (Jonathan Elliot ed., Philadelphia, J.B. Lippincott Co. 2d ed. 1891) [hereinafter ELLIOT’S DEBATES].

in this flimsy manner.”³¹ Madison countered that there was no danger because when MCs went to Congress “the old offices [would] be filled” and they would be ineligible for new offices.³² The Ineligibility Clause’s author may have failed to realize that the President would have unilateral power to dismiss executive officers,³³ or underestimated just how many preexisting offices would be open to MCs.

When Virginia ratified the Constitution, it proposed the first amendment to the clause, providing that MCs would be ineligible for federal civil office during their elected terms.³⁴ New York and North Carolina produced similar amendments,³⁵ and others were introduced during the First Congress in the House and Senate.³⁶ None, however, advanced to committee, and only one similar amendment was proposed in the next eight Congresses.³⁷ During these first two decades, MCs who opposed patronage’s influence over Congress largely confined themselves to battles over interpretation rather than amendment, seeking to imbue the text with a broad antipatronage “spirit.”

B. *Early Lessons from the Washington Administration*

Although Washington avoided accusations of improper patronage, his experience demonstrated two enduring features of the appointments process. First, the Ineligibility Clause as ratified was at most an inconvenience rather than a substantive check on appointments. Second, the President’s need to fill key offices with reliable men, like those who had demonstrated their loyalty in Congress, was real.

The most significant Ineligibility Clause dilemma that arose under Washington’s administration was one in which President Washington himself confessed error, during his first appointment of a current or recent MC to a salaried office.³⁸ In February 1793, Washington nominated William Paterson to the Supreme Court. Paterson, however, had earlier served in the First Congress as a senator whose term would not expire until March 4, 1793, five days after Washington had nominated him. Because the First Congress had created the associate justice seat, Paterson was ineligible for it until his term expired. Washington deemed the nomination null, and resubmitted it on March 4.³⁹

³¹ *Id.* at 375.

³² *Id.* at 373.

³³ *Cf.* THE FEDERALIST NO. 77, at 459 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

³⁴ 3 ELLIOT’S DEBATES, *supra* note 30, at 659.

³⁵ 1 *id.* at 330 (New York); 4 *id.* at 245 (North Carolina).

³⁶ *See* 1 ANNALS OF CONG. 762 (Joseph Gales ed., 1834); JOURNAL OF THE SENATE 125 (1st Cong., 1st Sess. 1789).

³⁷ *See* 3 ANNALS OF CONG. 663 (1793).

³⁸ *See* Saikrishna Bangalore Prakash, *The Executive’s Duty To Disregard Unconstitutional Laws*, 96 GEO. L.J. 1613, 1660 (2008).

³⁹ *Id.*; *see also* H.R. DOC. NO. 19-164, at 6 (1826).

Washington's appointment of Paterson complied with the clause's text but narrowly construed its spirit. Its purpose was partly to inhibit MCs from filling offices they had created.⁴⁰ On the Senate Judiciary Committee, Paterson had been instrumental in drafting the Judiciary Act of 1789, and he had even penned the section establishing the office to which he was appointed.⁴¹ Furthermore, the clause was designed to limit the President's ability to give offices to supporters in Congress, like Paterson, but the appointment rewarded a pro-administration MC with an office soon after his ineligibility had expired.

When Washington tried to distribute offices across party lines, however, his administration was frustrated. His second appointment of an MC was anti-administration Senator James Monroe as minister to France.⁴² Washington believed that Monroe secretly sent confidential information to his anti-administration colleagues back home and did not adequately defend the Jay Treaty to the French.⁴³ Washington recalled him and tried to replace him with Charles Cotesworth Pinckney, an administration supporter who would become a two-time Federalist presidential nominee, but France refused to receive Pinckney.⁴⁴

Having seen how unreliable officers could frustrate an administration, a lesson Federalists later invoked to argue against broader ineligibility,⁴⁵ Washington did not appoint other anti-administration MCs.⁴⁶ On the whole, he largely avoided appointing MCs altogether, with Paterson and Oliver Ellsworth, whom he appointed as Chief Justice despite his similarly instrumental role in drafting the Judiciary Act,⁴⁷ being the chief exceptions. He appointed only seven recent or current MCs to salaried offices, fewer appointments than the one-term Adams presidency and fewer than half of the Jefferson, Madison, and Monroe presidencies,⁴⁸ though, of course, government grew in the interim.

C. *The Adams Administration and Federalist Foreign Ministries*

Although Washington's appointments did not draw anti-administration MCs' ire, the Ineligibility Clause emerged as a partisan weapon during the Adams Administration. Administration opponents characterized the clause as having an antipatronage spirit, extending

⁴⁰ See Vermeule, *supra* note 11, at 422.

⁴¹ See CHARLENE BANGS BICKFORD & KENNETH R. BOWLING, *BIRTH OF THE NATION: THE FIRST FEDERAL CONGRESS, 1789-1791*, at 46 (1989).

⁴² H.R. DOC. NO. 19-164, at 6.

⁴³ See Arthur Scherr, *The Limits of Republican Ideology: James Monroe in Thermidorian Paris, 1794-1796*, *MID-AM.: AN HIST. REV.*, Winter 1997, at 5, 34.

⁴⁴ JOSEPH M. LYNCH, *NEGOTIATING THE CONSTITUTION 166* (1999).

⁴⁵ See 7 *ANNALS OF CONG.* 875-77 (1798) (statement of Rep. Harper).

⁴⁶ See H.R. DOC. NO. 19-164, at 6, 8.

⁴⁷ See BICKFORD & BOWLING, *supra* note 41, at 46.

⁴⁸ See H.R. DOC. NO. 19-164, at 6-12.

beyond its text, that Federalists were violating. Supporters, conversely, invoked the lessons of Washington's administration to argue that appointing MCs was a legitimate means to ensure loyalty.

During the Adams Administration, MCs began to express concerns that patronage would risk corrupting Congress because executive office salaries were much higher than MCs' salaries were, as they would remain throughout the antebellum era. From 1789 to 1815, MCs received a per diem pay rate while Congress was in session, which was, with a brief exception, \$6.⁴⁹ Annual pay varied based on session length but averaged less than \$1000.⁵⁰ When the Compensation Act of 1816 established an annual salary of \$1500, voters were outraged at the "salary grab," and the next Congress reduced pay to an \$8 per diem.⁵¹ From 1817 to 1850, annual pay averaged less than \$1250.⁵²

Many executive office salaries dwarfed those figures. In 1789, the presidential and vice-presidential salaries were established at \$25,000 and \$5000.⁵³ The Secretary of State and Secretary of Treasury salaries were originally set at \$3500, increased to \$5000 in 1799, and increased again to \$6000 in 1819. The Attorney General salary, which was lowest among Cabinet positions, increased from \$1500 to \$3500 between 1789 and 1819.⁵⁴ By 1815, salaries were \$5000 for port collectors and \$2000 for postmasters.⁵⁵ Ambassadors were compensated particularly well; the authorized salary for a minister plenipotentiary was \$9000.⁵⁶

Less than a year into Adams's presidency, Republican opposition to appointments of MCs to foreign ministries sparked the first constitutional battle over the Ineligibility Clause.⁵⁷ In his last year in office, Washington had appointed two Federalist MCs as foreign ministers, and Adams followed by appointing an MC as the first minister plenipotentiary to Portugal,⁵⁸ a nation that Republicans thought merited only a minister resident. Objecting to the ministries' budget and wary

⁴⁹ See IDA A. BRUDNICK, CONG. RESEARCH SERV., SALARIES OF MEMBERS OF CONGRESS 4 (2008), available at <http://www.senate.gov/reference/resources/pdf/97-1011.pdf>.

⁵⁰ Average salary may be calculated by multiplying the per diem rate by the number of days that a Congress was in session and dividing by two. For session lengths, see Office of the Clerk, U.S. House of Representatives, Session Dates of Congress, http://clerk.house.gov/art_history/house_history/session_dates/sessionsall.html (last visited Mar. 27, 2010).

⁵¹ See ROBERT V. REMINI, HENRY CLAY 143-48 (1991).

⁵² Cf. 2 REG. DEB. 1740-41 (1826) (statement of Rep. Mitchell) (observing that an office "the fees of which are above 1200 dollars annual income . . . is better than a seat here, in a pecuniary point of view").

⁵³ Hubert Bruce Fuller, *Congressional Salary Legislation*, 188 N. AM. REV. 539, 540 (1908).

⁵⁴ See MARY L. HINSDALE, A HISTORY OF THE PRESIDENT'S CABINET 274 (1911).

⁵⁵ See Fuller, *supra* note 53, at 547.

⁵⁶ See *id.* at 542; see also REMINI, *supra* note 51, at 134 (describing Clay's salary as minister plenipotentiary at the Ghent peace negotiations ending the War of 1812).

⁵⁷ See LYNCH, *supra* note 44, at 169-75.

⁵⁸ H.R. DOC. NO. 19-164, at 6, 8 (1826).

of patronage, Republican Representative John Nicholas moved to reduce the grade and salaries of the ministers to Portugal, Prussia, and Spain.⁵⁹ Federalists rebuked Nicholas by contending that the Constitution did not permit House intrusion into the foreign ministries. Once the Senate had confirmed the officers, they argued, it was the House's constitutional duty to approve the appropriations for their support.⁶⁰

Nicholas countered by interjecting the Ineligibility Clause into the dispute. He argued that, to prevent corruption, the Constitution contained a general principle against patronage. It was "the duty of a Legislature to guard cautiously its own independence, and to limit, as far as consistent with the general welfare, the influence of Executive patronage."⁶¹ Otherwise, "thirst for office" would result in a Congress devoted to the President's views, violating the "principle of checks and balances."⁶² Having "clear" proof that Adams would not appoint MCs who did not share his vision, Nicholas found that it threatened liberty when "we see the most lucrative offices, the most tempting and most honorable . . . filled by draughts from the Legislative body."⁶³

Albert Gallatin agreed that Adams's patronage of MCs was dangerous. After reading aloud the Ineligibility Clause, Gallatin said that although appointment of MCs "might not be expressly against the letter of the Constitution[,] it was certainly against its *spirit*."⁶⁴ In light of this spirit, he argued for a broad construction, one that would prohibit presidential appointment of an MC to any civil office, regardless of whether it had been created or had its emoluments increased during the MC's service in Congress. Federalists would have none of Gallatin's reading. James Bayard questioned "how that gentleman's sagacity found a spirit not expressed in the Constitution."⁶⁵ Indeed, because the Framers had rejected the expansive reading that Gallatin desired, he found a spirit that was against the majority of the Framers' intent.

Federalist Robert Harper offered a new argument in favor of appointing MCs. Although he once believed in equitable patronage, Monroe's experience in France convinced him that Presidents required officers who would execute their policies. Because MCs were known to support or to oppose the administration, he considered them an especially appropriate source.⁶⁶ The increasing legitimacy of parties thus diminished, not enhanced, the need for a broad Ineligibility Clause.

⁵⁹ See 7 ANNALS OF CONG. 849–52 (1798) (statement of Rep. Nicholas).

⁶⁰ See *id.* at 859–62 (statement of Rep. Sitgreaves); *id.* at 867–69 (statement of Rep. Smith); *id.* at 890–93 (statement of Rep. Griswold).

⁶¹ *Id.* at 849 (statement of Rep. Nicholas).

⁶² *Id.* at 850.

⁶³ *Id.* at 851.

⁶⁴ *Id.* at 889 (statement of Rep. Gallatin).

⁶⁵ *Id.* at 897 (statement of Rep. Bayard).

⁶⁶ *Id.* at 875 (statement of Rep. Harper).

Nicholas's motion failed in a party-line 52–48 vote.⁶⁷ Broad construction of the clause had failed, but not decisively. Contrary to most early debates, such as over the national bank, Republicans had argued for broad construction and Federalists sought a narrower one. Because a Federalist administration controlled patronage, it was in Republicans' interest to read the clause broadly. Yet because the clause arose from an old-line republican tradition,⁶⁸ one wary of corruption and large government, Republicans were also following in their ideological forbearers' footsteps when they argued for expansive ineligibility. The real test would be whether they supported broad interpretation or amendment even when their party won the presidency.

Adams appointed only Federalist MCs to office. From 1797 through 1800, he appointed MCs to two Cabinet positions, two judgeships, and two ambassadorships; and after having lost the election of 1800, he more than doubled his previous patronage of MCs. Through his "midnight" appointments of January–March 1801, he appointed six MCs to office, including three to judgeships, and recently departed Representative and then-Secretary of State John Marshall to the Chief Justiceship.⁶⁹ The midnight appointments were particularly offensive to Republicans, who repealed the new judgeships after Jefferson took office.⁷⁰ Then in power, they would have a chance to amend the Ineligibility Clause to reconcile the text with what they deemed its spirit.

II. THE JEFFERSONIAN-ERA AMENDMENTS

A. *Presidential Patronage from Jefferson to Monroe*

The period from Jefferson to Monroe illustrates two partially conflicting features of the antebellum efforts to reform the Ineligibility Clause. First, even with their party in power, many Republicans continued to advocate amendment to ward off their fear of corruption. Second, even though the party in power had a strong history of advocating a broader clause, reform ultimately failed.

The election of 1800 resulted in a tie between the two Republicans, Thomas Jefferson and Aaron Burr, throwing the election to the House. With Republicans controlling only half of the state delegations, the House's first thirty-five ballots failed to break the tie, and rumors abounded that patronage would settle the election.⁷¹ Historians credit Federalist James Bayard, Delaware's lone representative, for initiating

⁶⁷ 8 ANNALS OF CONG. 1234 (1798).

⁶⁸ See generally O'Connor, *supra* note 3.

⁶⁹ H.R. DOC. NO. 19-164, at 6, 8 (1826). Two MCs declined their appointments.

⁷⁰ See ROBERT V. REMINI, *THE HOUSE* 80 (2006).

⁷¹ See EDWARD J. LARSON, *A MAGNIFICENT CATASTROPHE* 262–68 (2007).

the bargaining.⁷² He named two port collectors whom he wanted to retain their jobs under Jefferson and withdrew his vote for Burr, paving the way for other Federalists to do so, and Jefferson prevailed.⁷³

A broader Ineligibility Clause would not have prevented patronage of Bayard's port collectors, but other representatives themselves benefited from patronage that did implicate the clause. The next year, as Republicans continued to assail Adams's appointments, Bayard turned to Jefferson's earliest ones. He pointed out that "every man, on whose vote the event of the election hung, has since been distinguished by Presidential favor."⁷⁴ Edward Livingston, who cast a deciding vote in New York's delegation, was appointed a U.S. Attorney. William Claiborne, Tennessee's lone representative, was appointed Governor of the Mississippi Territory. James Linn, who cast an equally decisive vote for New Jersey, was appointed a Supervisor of Revenue.⁷⁵ Bayard could have mentioned George Dent, who was appointed a U.S. Marshal after being the first Federalist to declare for Jefferson and by doing so preventing Maryland's ballot from going to Burr.⁷⁶

Like Adams, Republican Presidents patronized MCs. In his first year, Jefferson filled ten offices with current or recent MCs. Gallatin, who had criticized Adams's patronage of MCs, became Secretary of Treasury only months after leaving the House. In his next seven years, Jefferson filled fourteen more offices with MCs.⁷⁷ Madison pursued a similar course. He appointed twenty current or recent MCs,⁷⁸ including John Quincy Adams, who was nominated for the first American ministry to Russia within a year of rejecting the Federalist Party and resigning his Senate seat.⁷⁹ James Monroe appointed twenty-seven Republican MCs to office but no Federalists, though by that time there were few Federalist MCs left to appoint.⁸⁰

Republicans received over ninety-five percent of the MC patronage during these administrations, but with Federalists increasingly marginalized, it was mainly Republicans who condemned the appointments. They criticized patronage with the same objections they made against Adams: first, it unnecessarily enlarged government by incentivizing Congress to create new offices; and second, it corrupted Congress.

Their first amendment to preclude office hunting came closest to receiving the requisite congressional supermajority. In 1810, with leg-

⁷² JOHN FERLING, *ADAMS VS. JEFFERSON 189-91* (2004); LARSON, *supra* note 71, at 267.

⁷³ LARSON, *supra* note 71, at 267-68.

⁷⁴ 11 ANNALS OF CONG. 640 (1802) (statement of Rep. Bayard).

⁷⁵ *Id.* at 640-41; H.R. DOC. NO. 19-164, at 9 (1826).

⁷⁶ *See* H.R. DOC. NO. 19-164, at 9; LARSON, *supra* note 71, at 244.

⁷⁷ H.R. DOC. NO. 19-164, at 6, 8-9.

⁷⁸ *Id.* at 7, 9.

⁷⁹ *See id.* at 7; ROBERT V. REMINI, *JOHN QUINCY ADAMS 39-41* (2002).

⁸⁰ H.R. DOC. NO. 19-164, at 7, 9-10.

islative independence as his object, former House Speaker Nathaniel Macon, an old-style republican wary of executive power, proposed to prohibit MCs from being appointed to office during their elected term and any presidential term in which they had served.⁸¹ His proposal, he explained, would “complete the intention of the framers,” “prevent party spirit from going too far for office,” and preclude a party from “secur[ing] to itself some sort of power in other departments, when it could not retain it in the Legislature.”⁸² Adams was not his only target. “The practice of bestowing offices on members of the Legislature” in the last administration, he said, “had already obtained to an extent not before known.”⁸³ Since there was not such a “poverty of talent in the nation” requiring the appointments, he sought to prohibit them.⁸⁴

Many Republicans supported the proposal. John Smilie agreed that the Ineligibility Clause was insufficient and that “the abuses now” were “nearly as great as if no such exclusion existed.”⁸⁵ William Burwell added that MCs should embrace the chance to show that “in giving their suffrage for a President, they were not influenced by interested motives.”⁸⁶ Others, however, believed that amending sent the wrong signal. Lemuel Sawyer called the amendment an insult. Whatever the merits of including a stronger Ineligibility Clause in the original Constitution, amending it implied that MCs “are no longer fit to be trusted, but must be bound down, the degraded victims of our own unbridled ambition!”⁸⁷ Adam Boyd added that the amendment insulted the President by implying that he bribed Congress.⁸⁸

The few Federalists who spoke on the issue endorsed Macon’s amendment and said they wished it went even further.⁸⁹ Josiah Quincy delivered the most elaborate sermon against what he called the “palpably defective” Ineligibility Clause. “All the numerous allurements of existing offices, all the rich reward of established salaries,” he regretted, “are permitted to play with their bewitching infatuation before our eyes. So long as a man does not attempt to take the fruit of the seed of his own sowing, he may botanize at his pleasure in this great Executive garden”⁹⁰ Quincy decried that the Ineligibility Clause’s form was preserved while “its spirit is perishing.”⁹¹

⁸¹ 21 ANNALS OF CONG. 2028 (1810) (statement of Rep. Macon).

⁸² 22 ANNALS OF CONG. 454 (1810) (statement of Rep. Macon).

⁸³ *Id.*

⁸⁴ *Id.* at 455.

⁸⁵ *Id.* at 458 (statement of Rep. Smilie).

⁸⁶ *Id.* at 456 (statement of Rep. Burwell).

⁸⁷ *Id.* at 842 (1811) (statement of Rep. Sawyer).

⁸⁸ *Id.* at 455 (1810) (statement of Rep. Boyd).

⁸⁹ *See, e.g., id.* at 841 (1811) (statement of Rep. Hubbard).

⁹⁰ *Id.* at 845 (statement of Rep. Quincy).

⁹¹ *Id.* at 846.

Yet when the House voted in 1811, Macon's amendment received 71 of the 111 votes, three shy of the two-thirds requirement.⁹² Since many more representatives spoke for it than against it, the debates do not provide clear evidence as to why it failed to obtain the needed supermajority. Some opponents felt it was substantively flawed because it would prevent the President from appointing MCs who could be a "useful class of people" to him.⁹³ Others objected to the form of amendment, criticizing it for implying there was a patronage problem.

Over the next dozen years, similar amendments were introduced in the House.⁹⁴ Thomas Cobb's proposal in 1820 to prohibit the appointment of MCs during their term and for one year afterward received the most discussion. Cobb acknowledged that his amendment had been discussed at the Philadelphia Convention and in 1810, and that in "both instances, and especially the latter, it seems to have been well received; and yet was rejected for causes not now easy to be traced or understood."⁹⁵ Because office hunting continued to pervade Congress, he said, his amendment would "secure more effectually the independence of the legislative branch of the Government."⁹⁶ His amendment, though, failed by an 87-72 vote,⁹⁷ criticized for its "improper and unfounded distrust of the members of Congress."⁹⁸ Such distrust, however, soon became a powerful rallying point.

B. The Corrupt Bargain and Jacksonian Amendments

The election of 1824 provided the strongest impetus yet to strengthen the Ineligibility Clause. Despite the fervor, Congress did not endorse an amendment, and the failure of reformers under such auspicious circumstances suggested that the window for change was closing.

In the early nineteenth century, presidential candidates were generally designated by congressional party caucuses.⁹⁹ This practice sparked fears that MCs might trade their caucus votes for future offices, which likely motivated Representative James Blair's proposal to prohibit the appointment of any MC who had served during the two years preceding a presidential election.¹⁰⁰ The concern was even more acute if the House itself might again choose the President. In 1823, envisioning a repeat of the election of 1800, Representative Alexander

⁹² *Id.* at 899.

⁹³ *Id.* at 843 (statement of Rep. Sawyer).

⁹⁴ See 32 ANNALS OF CONG. 1744-45 (1818); 35 ANNALS OF CONG. 935 (1820); 39 ANNALS OF CONG. 1752 (1822).

⁹⁵ 36 ANNALS OF CONG. 1849 (1820) (statement of Rep. Cobb).

⁹⁶ *Id.*

⁹⁷ *Id.* at 1859.

⁹⁸ *Id.* at 1856 (statement of Rep. Simkins).

⁹⁹ See CQ PRESS, PRESIDENTIAL ELECTIONS, 1789-2000, at 13, 17 (2002).

¹⁰⁰ See 39 ANNALS OF CONG. 1752 (1822).

Smyth proposed an amendment that whenever the House chose a President, no representative from the House's election could be appointed by the President so chosen.¹⁰¹ The House never voted on it.

Smyth, of course, was correct that no candidate would receive an Electoral College majority and so the House would decide the election of 1824, choosing among Andrew Jackson, John Quincy Adams, and William Crawford. Given the influence of the fourth-place candidate, House Speaker Henry Clay, among the western delegations, the election's outcome was effectively in Clay's hands, even though his own state legislature had instructed the Kentucky delegation to vote for Jackson,¹⁰² who received the most popular and Electoral College votes.

Adams met with Clay, and the present-day consensus is that although no explicit deal was struck, Clay understood he could become Secretary of State if Adams were elected.¹⁰³ Adams may have made other "bargains" too,¹⁰⁴ and he prevailed on the House's first vote, winning a bare majority of delegations. Within a week, Adams appointed Clay Secretary of State notwithstanding public talk everywhere of a "corrupt bargain," and Clay was vilified, including by Jackson and his supporters, who insisted that corruption had occurred because of deficiencies in the Constitution.¹⁰⁵ They proposed a host of amendments, including several to fortify the Ineligibility Clause.

Even before the next Congress convened, Tennessee proposed an amendment to prevent MCs from being appointed during their elected term and for six months thereafter.¹⁰⁶ The state also nominated Senator Jackson for the presidency, and Jackson resigned so that he would not appear to be using his legislative seat to promote his aspiration for an executive office, even an elected one. In his letter of resignation, Jackson argued that Tennessee's proposal was well intentioned but insufficient. To prevent corruption from becoming "the order of the day," he endorsed an amendment to make MCs ineligible for federal office during the terms in which they were elected plus two additional years. He would allow an exception only for appointments to judicial office. "We know human nature to be prone to evil: we are early taught to pray, that we may not be led into temptation; and hence the opinion, that, by constitutional provision, all avenues to temptation, on the part of our political servants, should be closed."¹⁰⁷

¹⁰¹ 40 ANNALS OF CONG. 489, 509–10 (1823) (statement of Rep. Smyth).

¹⁰² See REMINI, *supra* note 51, at 253–60.

¹⁰³ See *id.* at 258; HARRY L. WATSON, LIBERTY AND POWER 81 (1990).

¹⁰⁴ REMINI, *supra* note 51, at 262–64.

¹⁰⁵ *Id.* at 265–68.

¹⁰⁶ See JOURNAL OF THE HOUSE OF REPRESENTATIVES 109 (19th Cong., 1st Sess. 1826); JOURNAL OF THE SENATE 74 (19th Cong., 1st Sess. 1826).

¹⁰⁷ Letter from Andrew Jackson to the Tennessee Legislature, *supra* note 8, at 157.

When Congress reconvened, Tennessee's MCs introduced their legislature's resolution, Thomas Cobb reintroduced his amendment,¹⁰⁸ and James Mitchell proposed his own amendment to disqualify MCs for all federal offices during their term of office and for one year thereafter. "I am one of those who believe in the fall of man, and its vast effects, and that we are, in a state of nature, both corrupt and corruptible," Mitchell explained.¹⁰⁹ He counted at least 9838 federal offices emanating from the President, a thousand of which he said paid more than congressional salaries did.¹¹⁰ He wanted none of those baits near him. "The People send us here as their servants, to be placed upon the national watch-tower of their liberties . . . ; therefore, we ought not to desert it for any other office upon earth."¹¹¹ The strengthened Ineligibility Clause would ensure that MCs fulfilled their elected duty.

The Senate sent the proposals to a committee headed by Thomas Hart Benton, a leading Jacksonian. Benton's committee unanimously endorsed an amendment providing that MCs would be ineligible for civil office until the expiration of the presidential term during which they had served. The committee report reminded the Senate that similar proposals had been favored in the Constitutional Convention's first vote, by several state ratifying conventions, and by the House majority in 1811.¹¹² The Ineligibility Clause, it continued, "[did] not go far enough to accomplish the object it had in view" because it permitted office hunting, a fatal presence that entailed MCs' "devotion to the will of the President and neglect of the interests of their constituents."¹¹³ Even if congressional experience were valuable for important offices, to allow exceptions would "still leave open the door to that sort of tampering with the independence of members which the purity of the government, and the ruling principle of the constitution, require to be closed up forever."¹¹⁴ Such appointments also defeated the Constitution's intent that MCs would periodically retire from public life.

The Senate favorably received Benton's amendment, and the only criticism came from two Jacksonians who proposed additional ineligibility because they thought the amendment did not go far enough.¹¹⁵ Congress had many proposed amendments relating to the election of 1824,¹¹⁶ however, and the Senate continued to postpone debate on the Ineligibility Clause ones. The House asked Adams for a listing of all

¹⁰⁸ 2 REG. DEB. 19-20 (1825).

¹⁰⁹ *Id.* at 1740 (1826) (statement of Rep. Mitchell).

¹¹⁰ *Id.*

¹¹¹ *Id.* at 1744.

¹¹² S. DOC. NO. 19-52, at 1-2 (1826).

¹¹³ *Id.* at 2-3.

¹¹⁴ *Id.* at 5.

¹¹⁵ See 2 REG. DEB. 114 (1826) (statement of Sen. Dickerson); *id.* (statement of Sen. Randolph).

¹¹⁶ See generally CURRIE, *supra* note 10, at 341-43.

MCs who had ever received appointments,¹¹⁷ but it did not debate the clause's substantive merits before Congress adjourned.

In the next Congress, Smyth reintroduced an amendment prohibiting an MC from being appointed during his or the President's term of office.¹¹⁸ First, he asked, "As the people are irrevocably bound by the contract for two years, is it unreasonable to hold the Representative also bound?"¹¹⁹ Second, he feared patronage that could unduly reward supporters.¹²⁰ Yet party enmity ran too high for the Jacksonians to obtain bipartisan support for an antipatronage amendment, as anti-Jacksonians objected when Jacksonians criticized John Quincy Adams's patronage. For example, John Wright, who, like Adams, would be defeated in 1828, insisted that "charges of corruption, founded on the circumstances attending the election of Mr. Jefferson," were "stronger than any connected with the election of Mr. Adams."¹²¹ George McDuffie told his ally Smyth to wait until the Jacksonians triumphed in the next election when anti-Jacksonian obstacles to amendment "would probably be removed."¹²²

During the Adams Administration, the Jacksonians never did pass an amendment that their leader insisted was necessary to prevent corruption from becoming "the order of the day." Yet, other than during his first weeks in office, when he appointed four MCs to high offices, Adams kept his power to appoint MCs in check. He appointed only six current or recent MCs to salaried office,¹²³ fewer than all who came before him. He also may have learned to disguise his patronage. Like Clay, Daniel Cook had voted for Adams against his constituents' express wishes. For his "betrayal," he was defeated in the next election, but Adams then awarded him a confidential diplomatic junket to Cuba paid out of the President's contingent secret service fund, obscuring evidence of any bargain between them.¹²⁴ The Ineligibility Clause amendments may also have failed because they were not considered as important as those relating to reforming the Electoral College, on which Congress spent more time.¹²⁵ Finally, the Jacksonians knew they would win the election of 1828 — and that they would soon control the patronage and therefore might not wish to limit themselves.

¹¹⁷ See 2 REG. DEB. 868–72 (1826).

¹¹⁸ 5 REG. DEB. 119 (1828).

¹¹⁹ *Id.* at 123 (statement of Rep. Smyth).

¹²⁰ *Id.* at 124.

¹²¹ 4 REG. DEB. 1447 (1828) (statement of Rep. Wright).

¹²² 5 REG. DEB. 125 (1828) (statement of Rep. McDuffie).

¹²³ See H.R. DOC. NO. 22-76, at 2–3 (1833).

¹²⁴ See REMINI, *supra* note 51, at 264 & n.43.

¹²⁵ See generally CURRIE, *supra* note 10, at 335–43.

III. THE JACKSONIAN-ERA AMENDMENTS

A. *The Jackson Administration and Anti-Jacksonian Amendments*

When Jackson was swept into office partly on the strength of resentment surrounding patronage, prospects for reform seemed at their height. In retrospect, however, the most important development of the Jacksonian Era was the full normalization of presidential patronage in Congress and its integration into the strengthening party system.

By February 1829, it was clear that Jacksonians had won the election of 1828 in a landslide and might even have won enough seats in Congress to pass an Ineligibility Clause amendment along to the states. Yet Wright, the recently defeated Anti-Jacksonian, preempted them. As the 20th Congress concluded, a House committee reported that it could come to no resolution on Smyth's amendment.¹²⁶ Wright, once Smyth's opponent, endorsed the idea and proposed his own similar Ineligibility Clause amendment. "If these principles, in 1825," Wright said, calling upon the opposing party's chieftain,

were so deeply impressed on the General's mind as to induce him to recommend a change of the fundamental law of the nation to bring them into action, I cannot believe, that, in the short period of three years, they will have lost so much of their force, as not to be thought worthy of being practised upon in the administration of the Government.¹²⁷

Yet Smyth no longer wanted to curtail patronage. He suggested that Jackson even had the obligation to appoint MCs. Is Jackson, he asked, "without an amendment, precluded from appointing members of Congress?"¹²⁸ No, he said. "'Let there be no change by usurpation.' The President will be sworn to preserve the constitution as it stands."¹²⁹ Congress adjourned without voting on the amendment.

No President before Jackson had advocated broader ineligibility prohibitions than he had. Upon entering office, however, Jackson reversed course. In his first two months, he appointed ten current or immediately departed MCs to office, exceeding the total of his predecessor's administration. His initial Cabinet contained *only* appointed MCs: recently departed senator Martin Van Buren as Secretary of State, and then-current MCs as Secretary of the Treasury, Secretary of War, Secretary of the Navy, and Attorney General. Nor did Jackson restrict his initial patronage to the Cabinet. His ambassadors to Britain, France, Russia, and Colombia were taken from Congress, and he

¹²⁶ See JOURNAL OF THE HOUSE OF REPRESENTATIVES 78 (20th Cong., 2d Sess. 1828).

¹²⁷ 5 REG. DEB. 367 (1829) (statement of Rep. Wright).

¹²⁸ *Id.* at 371 (statement of Rep. Smyth).

¹²⁹ *Id.*

appointed several MCs as customs collectors too.¹³⁰ Never before had Congress experienced so much patronage in such a short period.

Those seeking explanation awaited his First Annual Message to Congress. Jackson said that, although it was constitutional, he generally opposed appointing MCs. Nonetheless, because they may be best qualified for important offices, he expanded his exception to ineligibility from the judicial offices alone to include the Cabinet and ambassadorships.¹³¹ The House took his general remarks against appointments to unimportant offices seriously enough to look into another Jackson-proposed amendment,¹³² though nothing became of it. Others were unimpressed. William Slade later called his 1829 message “an artful abandonment of the profession of 1825,” one “intended to prepare the way for the practical abandonment of it which followed.”¹³³

Jackson’s message did retreat from the earlier amendments. The Cabinet exception was new. Clay, after all, had been appointed Secretary of State by Adams, and Benton specifically refused to endorse any exception for “important” offices. Moreover, Jackson’s message said nothing about recently departed MCs, even though his earlier proposal had advocated a two-year ban and Jacksonians had rebuked the first Adams for appointing MCs who had lost their offices. Within his first year, Jackson appointed recently departed MCs to postmaster and customs collector, hardly important positions. During his first term, he appointed to office twenty-one present or recently departed MCs.¹³⁴

Anti-Jacksonians often criticized Jackson for violating his avowed principles. “[T]he President when before the people,” one said, “was opposed to the appointment of members of Congress to places of high trust and great emolument. Among his first acts after his inauguration, was the appointment of men of this description, all of course his ardent friends and active partisans.”¹³⁵ Another later noted that his successor “may reward members of Congress with executive appointments, or denounce such appointments as making corruption the order of the day . . . and not depart from the footsteps of his predecessor.”¹³⁶

Jackson’s supporters were not silent. Like Smyth, Richard French contended that Jackson was obligated to appoint MCs to office. If the President had “assumed to himself to determine, not according to the constitution, but according to his own sovereign will, who were and who were not eligible to office under the General Government,” he

¹³⁰ See H.R. DOC. NO. 22-76, at 2, 4 (1833).

¹³¹ JOURNAL OF THE HOUSE OF REPRESENTATIVES 16 (21st Cong., 1st Sess. 1829).

¹³² See *id.* at 31, 242.

¹³³ CONG. GLOBE, 25th Cong., 2d Sess. app. at 326 (1839) (statement of Rep. Slade).

¹³⁴ See H.R. DOC. NO. 22-76 (1833).

¹³⁵ 8 REG. DEB. 2412 (1832) (statement of Rep. Pearce).

¹³⁶ 13 REG. DEB. 1258 (1837) (statement of Rep. Robertson).

would have amended the Constitution himself and “been guilty of the high crime of usurpation.”¹³⁷ The future President James Buchanan, whom Jackson had appointed minister to Russia and whom President James Polk would appoint Secretary of State, offered a better defense. He wondered why Congress would advocate depriving the President “of the services of so many distinguished Senators and Representatives” and also “deprive them of the pleasure of serving him.”¹³⁸

Anti-Jacksonians, though, noted that even if some MCs were best qualified, that could “be no justification of the abuse of this privilege which has been practised of late,”¹³⁹ particularly because Jackson had been “elected to make an alteration in the practice of the Government, and a change in the constitution, by which the people would be shielded from the danger of having the fountain of the legislative power poisoned with corruption.”¹⁴⁰ Some Jacksonians were still in favor of antipatronage Ineligibility Clause amendments, but as the 1830s advanced, the new Whig Party became the driving force behind them.

The first Jacksonian-era amendment was advanced in 1832 by Charles Wickliffe, a Jacksonian still dissatisfied with the John Quincy Adams Administration and not pleased by Jackson’s patronage either.¹⁴¹ Yet Adams, then a Massachusetts representative, objected, calling it “one of the most pernicious alterations in the constitution that could be proposed.”¹⁴² He would remain a strong advocate of executive patronage. In eulogizing James Madison, he criticized the contemporary “morbid terror of patronage, this patriotic anxiety lest corruption should creep in by appointments of members of Congress to office,” and he counted the Founding Fathers who would have been excluded from office during the Revolutionary Era if a strong Ineligibility Clause had been in place under the Continental Congress.¹⁴³

Others proposed similar amendments over the next five years,¹⁴⁴ but none received substantial floor debate until 1838, during Van Buren’s presidency. Henry Wise proposed to prohibit MCs from being appointed to office during their terms and for two years thereafter, and his amendment was unanimously supported by nine representatives in committee.¹⁴⁵ “[I]n the language of General Jackson,” Wise quoted, “so

¹³⁷ 12 REG. DEB. 3692 (1836) (statement of Rep. French).

¹³⁸ CONG. GLOBE, 26th Cong., 2d Sess. app. at 201 (1841) (statement of Sen. Buchanan).

¹³⁹ CONG. GLOBE, 25th Cong., 2d Sess. app. at 561 (1838) (statement of Rep. Bell).

¹⁴⁰ 12 REG. DEB. 2896 (1836) (statement of Rep. Allan).

¹⁴¹ 9 REG. DEB. 893–94 (1832).

¹⁴² *Id.* at 906 (statement of Rep. Adams).

¹⁴³ JOHN QUINCY ADAMS, AN EULOGY ON THE LIFE AND CHARACTER OF JAMES MADISON 28 (1836).

¹⁴⁴ CONG. GLOBE, 23d Cong., 2d Sess. 52 (1834); *id.* at 181 (1835); CONG. GLOBE, 24th Cong., 1st Sess. 165 (1836); CONG. GLOBE, 25th Cong., 2d Sess. 190 (1838).

¹⁴⁵ CONG. GLOBE, 25th Cong., 2d Sess. 134–35 (1838).

long as the Executive held this dangerous power, ‘corruption would be the order of the day;’ and no man could more fully have demonstrated the truth of the proposition than the man himself who had advanced it.”¹⁴⁶ Several Whigs supported Wise, including former House Speaker John Bell, who said that during Jackson’s administration, “members of this House were understood or believed to have voted for the Administration, from day to day, and month to month, under a promise of office,” where they would be “secure from the storms and strife of Congressional service.”¹⁴⁷ Yet when Democrats endorsed the resolution, partisan charges crippled the proposal. Disturbed by the attacks on Jackson, one Democrat pledged to produce more evidence of corruption under Adams than could be found under Jackson.¹⁴⁸ Wise objected,¹⁴⁹ and another Whig added that he was glad to see Democrats supporting the amendment because they had repeatedly blocked his ineligibility amendments.¹⁵⁰ The debate descended into partisanship.

The last major push for amendment came from Clay himself, who, unlike Adams, had grown to disfavor appointments of MCs. In 1841, he proposed an amendment aimed at reducing presidential power that included as one of its planks a prohibition on the appointment of MCs to offices during their elected terms.¹⁵¹ Such an amendment would have precluded then-Speaker Clay from choosing to become Secretary of State, a decision that scholars have called his worst political error,¹⁵² a judgment with which Clay concurred.¹⁵³ What likely motivated Clay was his opposition to Jackson and President John Tyler, most of whose Clay-backed Cabinet resigned after his second bank veto.¹⁵⁴ If Tyler could not have drawn upon his supporters in Congress as replacements, he may not have been able to have acted so independently from his original Cabinet. Reading the Ineligibility Clause broadly, Clay invoked its purposes of limiting improper executive influence and encouraging MCs to put their constituents first.¹⁵⁵ He soon became ill and retired to Kentucky. In his triumphal resignation speech, he touched on only one matter before Congress — the amendment.¹⁵⁶

The Senate never voted on his resolution. Levi Woodbury, a Democrat whom Jackson had once plucked from Congress to serve as Sec-

¹⁴⁶ *Id.* app. at 33 (statement of Rep. Wise).

¹⁴⁷ *Id.* app. at 561 (statement of Rep. Bell).

¹⁴⁸ *Id.* app. at 33 (statement of Rep. Yell).

¹⁴⁹ *See id.* app. at 34 (statement of Rep. Wise).

¹⁵⁰ *Id.* (statement of Rep. Underwood).

¹⁵¹ CONG. GLOBE, 27th Cong., 2d Sess. 69 (1841) (statement of Sen. Clay).

¹⁵² *See, e.g.,* REMINI, *supra* note 79, at 74; WATSON, *supra* note 103, at 82.

¹⁵³ *See* REMINI, *supra* note 51, at 272.

¹⁵⁴ *See id.* at 597–98.

¹⁵⁵ CONG. GLOBE, 27th Cong., 2d Sess. 164–66 (1842) (statement of Sen. Clay).

¹⁵⁶ *See id.* at 376.

retary of the Navy, pointed out that Whig President William Harrison “had previously denounced the appointment of members of Congress themselves to office,” as Clay’s amendment did, but then proceeded to “select four out of six of his Cabinet from those very members of Congress.”¹⁵⁷ Indeed, his Secretary of State Daniel Webster, Secretary of War John Bell, Attorney General John Crittenden, and Postmaster General Francis Granger came directly from Congress. Moreover, Bell had been one of the Whigs’ leading critics of Jackson’s and Van Buren’s practice of appointing MCs to office, and Crittenden was Clay’s hand-selected successor in the Senate charged with promoting his amendments. Clay’s amendment did not survive.

From 1842 to 1850, Whigs introduced several similar amendments, but they were not debated.¹⁵⁸ The Democrat Jackson and the Whig Harrison had campaigned against the practice but filled their cabinets with MCs. Presidential appointment of MCs had become “the order of the day,” and increasingly fewer MCs came to see it as corrupt.

B. *The Ineligibility Clause and the States*

Although the Jacksonians and Whigs failed in their efforts to amend the Ineligibility Clause to make its text conform to the broad reading of its spirit, the effort succeeded elsewhere. In the nineteenth century, as states increasingly shifted the appointments power to their governors’ hands, some state constitutional conventions featured debates about whether the state should have no ineligibility at all, ineligibility modeled on the federal Constitution, or broad ineligibility for all legislators.¹⁵⁹ Like the Philadelphia Convention, many state conventions adopted the federal compromise prohibiting legislators from being appointed to offices during their terms if the offices had been created or their emoluments increased during those terms.¹⁶⁰

Yet some states went further, adopting broad versions of the Ineligibility Clause that the Framers had rejected. The New York Constitution of 1846, for example, provided: “No member of the Legislature shall receive any civil appointment within this State, or to the Senate of the United States, from the Governor, the Governor and Senate, or from the Legislature, during the term for which he shall have been elected . . .”¹⁶¹ Illinois, Maryland, and Michigan adopted similarly broad clauses disqualifying legislators from appointments during their

¹⁵⁷ *Id.* app. at 162 (statement of Sen. Woodbury).

¹⁵⁸ CONG. GLOBE, 27th Cong., 2d Sess. 350 (1842); CONG. GLOBE, 29th Cong., 1st Sess. 226 (1846); CONG. GLOBE, 31st Cong., 1st Sess. 631 (1850).

¹⁵⁹ *See, e.g.*, ROBERT F. WILLIAMS, *THE NEW JERSEY STATE CONSTITUTION* 67 (1990).

¹⁶⁰ *E.g.*, DEL. CONST. of 1831, art. II, § 12; N.J. CONST. of 1844, art. IV, § 5, cl. 1; PA. CONST. of 1838, art. I, § 19; WIS. CONST. of 1848, art. IV, § 12.

¹⁶¹ N.Y. CONST. of 1846, art. III, § 7.

terms.¹⁶² Michigan still retains a broad clause today.¹⁶³ These state provisions suggest that the federal efforts to reconstruct the Ineligibility Clause were not just political grandstanding predestined to fail. A diverse group of states, representing the North, South, and West, actually wrote such clauses into their constitutions.

IV. CONCLUSION

For 220 years, Presidents, MCs, and commentators have recognized that the Ineligibility Clause imposes no effective limits on MCs obtaining executive office. Today, even the clause's ineffective limits are criticized as "suboptimal,"¹⁶⁴ to be evaded or ignored. Appointments and elections of MCs to executive office are commonplace and celebrated. Professor Michael Gerhardt, for example, writes that the benefits of appointing MCs are "fairly obvious," helping a President "build bridges with members of Congress" and bringing "expertise in the ways of the nation's Capitol and familiar faces to an administration."¹⁶⁵ Likewise, while from 1789 to 1850 only eight percent of leading presidential or vice-presidential candidates were current or recent MCs, over the last sixty years the rate has been five times greater.¹⁶⁶

The antebellum response to MCs seeking offices was often different. Instead of being viewed as building bridges and bringing expertise, appointments of MCs were condemned as improper collusion and violations of rotation-of-office principles. Even presidential candidacy was said to be unseemly for an MC.¹⁶⁷ Broader ineligibility was supported by a House majority in 1811, unanimously endorsed by Senate and House committees in 1826 and 1838, and adopted in several states.

Yet no proposal to broaden the Ineligibility Clause succeeded. One reason for the failure was the widespread hypocrisy manifested by reformers. Many espoused radically inconsistent views of appointing MCs depending on which party was in power. When out of power, Republicans opposed John Adams's appointment of MCs as ambassadors; in power, Republican MCs became Jefferson's ambassadors.

¹⁶² See ILL. CONST. of 1848, art. III, § 7; MD. CONST. of 1851, art. III, § 24; MICH. CONST. of 1850, art. IV, § 18.

¹⁶³ MICH. CONST. art. IV, § 9 ("No person elected to the legislature shall receive any civil appointment within this state from the governor, except notaries public, from the legislature, or from any other state authority, during the term for which he is elected.")

¹⁶⁴ Mark V. Tushnet, *The Hardest Question in Constitutional Law*, 81 MINN. L. REV. 1, 29 (1996).

¹⁶⁵ MICHAEL J. GERHARDT, *THE FEDERAL APPOINTMENTS PROCESS* 147 (2000).

¹⁶⁶ From 1789 through 1848, only five out of the sixty-four victorious or runner-up presidential or vice-presidential candidates were current MCs or had left congressional office within the previous year. During the equivalent span, from 1948 through 2008, twenty-four of the candidates were current MCs or had left congressional office within the previous year.

¹⁶⁷ See Letter from Andrew Jackson to the Tennessee Legislature, *supra* note 8, at 157.

Jackson, when out of power, warned that patronage would make corruption “the order of the day”; in power, he made patronage the order of the day. Whigs were no better — Harrison campaigned against appointments of MCs but filled his Cabinet with them. Clay, when his party was in power, accepted the most important Cabinet office; out of power, he decried similar appointments.

In addition to pursuing their self-interest, some would-be reformers may not have realized the benefits of appointing MCs until they were in power. Representative Harper changed his mind after Monroe’s debacle in France convinced him that the President needed officers whose records confirmed their loyalty. Jackson, too, once supported a broader clause but, as President, recognized the necessity of obtaining officers of “the best talents and political experience” on whom he could rely,¹⁶⁸ like MCs known to endorse his views. These benefits led the future President Buchanan accurately to predict, before Harrison’s inauguration, that Whigs, despite their protestations, would ultimately “follow in the footsteps” of Democrats by appointing MCs.¹⁶⁹

Thus, another cause for the proposed amendments’ ultimate failure may be that American party politics had changed. MCs advocated the broader clause because they distrusted parties and believed in a robust separation of powers: Congress was intended to check the President, they thought, and when MCs supported the President, there was a danger that they were motivated by the prospect of personal or party gain, not by what policies were best. Many supporters of the broader clause, including the Antifederalists during the ratification debates, former Speaker Mason in 1811, and Senator Clay in 1841, believed in a larger agenda of limiting executive power. The increasing legitimacy of parties countered this fear: when MCs supported the President, they were perceived to do so out of shared ideology, and when the President appointed them, he did so not necessarily to reward past favors but to ensure that his officers would execute his policies. The Ineligibility Clause serves as another example of how, contrary to the Framers’ assumptions, American political cooperation and competition became channeled through parties, not branches of government, as institutional lines came to count less than party ones.¹⁷⁰ The porousness of the Ineligibility Clause facilitated not corruption, as Jackson predicted, but rather a continuation of the robust party spirit that he helped to build.

¹⁶⁸ JOURNAL OF THE HOUSE OF REPRESENTATIVES 16 (21st Cong., 1st Sess. 1829) (quoting Jackson).

¹⁶⁹ CONG. GLOBE, 26th Cong., 2d Sess. app. at 201 (1841) (statement of Sen. Buchanan).

¹⁷⁰ Cf. Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312 (2006) (arguing that, contrary to the Framers’ assumptions, American political cooperation and competition has been channeled through parties, not branches of government).