

A CONSTITUTIONAL ANALYSIS OF GUBERNATORIAL SUCCESSION PROVISIONS IN VERMONT

INTRODUCTION

On Wednesday, August 14, 1991, Vermonters awoke to the stunning news that their Governor, Richard Snelling, had died.¹ In the state's history, governors have failed to complete their full elected terms in office only three times.² Vermont had not faced a vacancy in its highest executive office since 1950.³ Later that day, Lieutenant Governor Howard Dean was informed of the Governor's death, and took an oath from Vermont Supreme Court Chief Justice Frederic Allen to uphold the duties and responsibilities of Vermont's highest elective office to his fullest ability.⁴

Although somewhat experienced in state politics,⁵ Dr. Howard Dean had expressed a desire not to run for the office of Governor during the 1990 election due to his commitment to the practice of medicine and to his young family.⁶ Suddenly, Dean was thrust into the position of being Vermont's chief executive officer, despite his predilection to remain in state government only as Lieutenant Governor.⁷ Shortly after assuming the duties as Vermont's chief executive officer, Dean questioned whether he could appoint a new lieutenant governor to fill this now vacant office for the year and four months remaining in the term. Turning to the office of Attorney General, Dean requested an

1. Dennis Havesi, *Richard A. Snelling, 64, Is Dead; Governor of Vermont for 9 Years*, N.Y. TIMES, Aug. 15, 1991, at D22.

2. *A Guide to the Papers of Vermont's Governors*, 18 STATE PAPERS OF VERMONT 133 app. (Julie P. Cox comp., 1985); Op. Att'y Gen. 91-15F 1, 7 (Vt. Sept. 3, 1991). Prior to Governor Snelling's death, two Governors had died in office: Thomas Chittenden in 1797 and Peter Washburn in 1870. *Id.* In addition, Governor Ernest W. Gibson, Jr. resigned from office in 1950. *Id.*

3. *A Guide to the Papers of Vermont's Governors*, *supra* note 2, at 133-40.

4. Havesi, *supra* note 1, at D22.

5. Prior to winning a seat in the Vermont House of Representatives in 1982, Dean had been a 1980 delegate for President Carter at the Democratic National Convention. Bob Hohler, *For Dean, Governor's Job Means End of Medical Practice*, THE BOSTON GLOBE, Aug. 16, 1991, at B19. Dean then served as assistant minority leader in the Vermont House of Representatives before being elected Lieutenant Governor in 1986. *Id.* Dean was serving his third term as Lieutenant Governor when Governor Snelling died. *Id.*

6. *Id.*

7. *Id.*

advisory opinion as to whether he could utilize the governor's power of appointment to fill this vacancy.⁸

In an opinion dated September 3, 1991, Vermont Attorney General Jeffrey Amestoy ruled that Dean could not exercise the governor's power of appointment to fill the vacant lieutenant governor's office.⁹ The ultimate effect of this ruling was that Howard Dean would provide the state's only executive leadership for the remainder of former Governor Snelling's term.

This unusual series of events raises several important issues concerning the structure and function of the executive branch of state government. First, these events led to an intensive examination of the duties and responsibilities of the state executive branch, and the division of power between Vermont's governor and lieutenant governor. Second, the Attorney General's interpretation of the Vermont constitutional provisions dictating gubernatorial succession should be scrutinized to determine whether this interpretation is consistent with the language of the document, the framers' intent, and contemporary readings of similar constitutional provisions in other state constitutions. Finally, the issue of perceived inadequacies in Vermont's gubernatorial succession provisions have arisen. These events have led to an inspection of Vermont's frame of government and to proposals to clarify the current law regarding the line of succession and the structure of the executive branch.

This note examines gubernatorial succession law in Vermont and addresses the issues raised by Governor Snelling's death. Part I discusses the duties and responsibilities required of state governors and lieutenant governors, and will introduce gubernatorial succession law generally. Part II undertakes a comprehensive analysis of the language and amendments of the Vermont Constitution in an effort to discover the intent of the framers concerning gubernatorial succession. Part III provides a critical analysis of the Vermont Attorney General's opinion, which concluded that a succeeding governor does not possess the power to appoint an interim lieutenant governor. Part IV analyzes and discusses recent statutory and constitutional proposals to revise

8. See VT. STAT. ANN. tit. 17, § 2623 (1982).

9. Op. Att'y Gen., *supra* note 2, at 1.

Vermont's gubernatorial succession provisions, and outlines an alternative approach to clarify this law in a manner consistent with the framers' original intent.

I. BACKGROUND

A. *Role of Governor and Lieutenant Governor in State Governance*

To understand fully the importance of gubernatorial succession law, it is necessary to discuss the roles assumed by governors and lieutenant governors in managing state affairs. Because of the similarities in their primary duties and responsibilities, the typical U.S. governorship has been described "as a small-scale edition of the American presidency."¹⁰ As the ceremonial head-of-state, governors generally represent the state in relations with the federal government and other states, lead state military troops when not called into service by the federal government, and direct state law enforcement activities.¹¹ As the leader of the state's executive branch, governors usually supervise central state government administration and are influential in formulating and initiating policy, including legislative efforts.¹² The administrative powers possessed by most governors include the power to supervise the executive branch, to oversee state fiscal management, and to appoint and remove various state officers.¹³

The Vermont Constitution provides the full range of executive duties and responsibilities to be exercised by the governor, or in his absence, by the lieutenant governor.¹⁴ The primary duties listed in the constitution include the power to appoint and commission all officers, to supply every vacancy in state office, to correspond with the leaders of other states, to oversee state government generally, to grant pardons, to ensure that laws are faithfully executed, to finance legislative appropriations, to direct

10. DANIEL R. GRANT & H.C. NIXON, *STATE AND LOCAL GOVERNMENT IN AMERICA* 245 (4th ed. 1982); see also ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, *STATE CONSTITUTIONS IN THE FEDERAL SYSTEM* 41 (1989) (analogizing gubernatorial duties to those of the President of the United States, though on a smaller scale).

11. GRANT & NIXON, *supra* note 10, at 248.

12. *Id.*

13. *Id.* at 263.

14. VT. CONST. ch. II, § 20.

state trade, to call special legislative sessions, to command state military forces, and generally to oversee state government.¹⁵

A governor's powers are limited to those duties and responsibilities expressly delegated or implied by the state constitution. The amount of power vested in the state's highest executive may vary considerably from state to state due to differences in state constitutions. Thus, it is significant to consider the relative amount of power vested in the governor's office by the Vermont Constitution because the framers' conception of executive power bears directly on any interpretation of constitutional provisions and impacts the scope of proposed amendments.

Many early state constitutions, including Vermont's, limited state executive offices to comparatively short terms, usually one or two years, as a check on the abuse of power. The framers of these constitutions felt that short elective terms would make the executive more attentive to the wishes of the state's constituents. Today, critics suggest that short terms may result in increased administrative inefficiency.¹⁶ Despite this concern, the prospect of being voted out of office after a short tenure may diminish the likelihood of a governor acting beyond the designated bounds of authority.¹⁷ Recent trends indicate that many states are adopting measures to strengthen appreciably the powers of their highest executives.¹⁸ Nevertheless, Vermont continues to retain a relatively weak governorship. Two manifestations of this relatively weak executive branch are Vermont's retention of a two year term of office¹⁹ and the lack of a ticket election system.²⁰

15. *Id.*

16. See FRANK BRYAN & JOHN MCCLAUGHRY, *THE VERMONT PAPERS: RECREATING DEMOCRACY ON A HUMAN SCALE* 152 (1989).

17. *Id.*

18. COLEMAN B. RANSONE, JR., *THE AMERICAN GOVERNORSHIP* 27-32 (1982). These gubernatorial strengthening measures can be divided into three categories: (1) changes in the term of governor from two to four years; (2) measures adopted that ease restrictions on seeking re-election, together with an increasing percentage of governors seeking and winning re-election; and (3) an increase in the "ticket" elections of governors and lieutenant governors. *Id.* at 30-31 (see information contained in chart).

19. VT. CONST. ch. II, § 49.

20. *Id.* § 47. "Ticket" elections are ones in which voters choose from candidates that have aligned themselves by political affiliation on party "tickets." See 4 A *DICTIONARY OF AMERICAN ENGLISH ON HISTORICAL PRINCIPLES* 2318 (Sir William A. Craigie & James R. Hulbert eds., 1944).

The duties of a lieutenant governor are far less extensive than a governor's responsibilities. Most lieutenant governors function primarily as a contingent executive, presiding over the state senate and acting as governor when the governor is incapacitated or absent from the state.²¹ Because of their potential power to influence legislation, lieutenant governors presiding over legislative bodies have a great opportunity to help or to hinder the governor's policies and political agenda.²² Recognizing the limited roles lieutenant governors usually play in performing more important state business, several states have done away with this office. These states have vested the contingent executive responsibilities in another state officer, such as the secretary of state or president pro tempore of the state senate. As of 1990, eight states no longer had the office of lieutenant governor.²³

In Vermont, the most distinct and clearly defined duty of the lieutenant governor is president of the senate,²⁴ which involves presiding over the senate during the six months that the legislature is in session. However, when the governor is away from the state, or otherwise occupied, the lieutenant governor may exercise the chief executive duties and responsibilities without becoming governor.²⁵ In these situations, the lieutenant governor may not preside over the Vermont Senate, and the senate must choose one of its own members to assume this role.²⁶ In what may be perceived as a fairly radical recommendation for change, two contemporary reformers propose that the Vermont Senate be eliminated in favor of a unicameral legislature,²⁷ and that the lieutenant governor serve as the secretary of civil and military affairs.²⁸ This proposal is consistent with recent efforts in several states to streamline state government by eliminating the office of lieutenant governor.

21. GRANT & NIXON, *supra* note 10, at 254.

22. RANSONE, *supra* note 18, at 32.

23. Thad L. Beyle, *The Powers of the Governors*, in STATE GOVERNMENT: CQ'S GUIDE TO CURRENT ISSUES AND ACTIVITIES 1990-1991, at 121, 123 (Thad L. Beyle ed., 1990).

24. VT. CONST. ch. II, § 19; *see infra* note 46 (providing the relevant text of this provision).

25. *See* VT. CONST. ch. II, § 20.

26. *Id.* § 19.

27. BRYAN & MCCLAUGHRY, *supra* note 16, at 147.

28. *Id.* at 153.

B. Gubernatorial Succession Law

Given the governor's importance as the administrative leader of state government with responsibility for directing the most vital state functions, the line of gubernatorial succession must be clear and unambiguous. Since executive disability provisions dictate the line of succession to the state's highest executive office, these provisions are an important aspect of a sovereignty's plan of government. In the past, however, gubernatorial succession provisions have been largely ignored despite the frequency of executive disability in several states.²⁹ More recently, several states have amended their constitutions to clarify the lines of gubernatorial succession.³⁰

In the event of a permanent vacancy in the governor's office, stability and a smooth transition to new executive leadership will be realized only if the line of succession is clear and self-executing. In addition, the power of the succeeding executive should be clearly spelled out by, or should be implicit from, the language of the gubernatorial succession provisions. Frequently, however, vacancy and succession issues have spurred political controversy, instability, and bitterness.³¹ A successor to the governor's office "may serve as 'governor' or as 'acting governor' according to constitutional language and interpretation."³² Constitutional language indicating that the lieutenant governor or other state administrator "becomes" governor upon the governor's resignation, impeachment, recall, or death means that the governor's replace-

29. Richard H. Hansen, *Executive Disability: A Void in State and Federal Law*, 40 NEB. L. REV. 697, 698 (1961).

30. GRANT & NIXON, *supra* note 10, at 255; see also W. Brooke Graves, *Use of the Amending Procedure Since World War II*, in MAJOR PROBLEMS IN STATE CONSTITUTIONAL REVISION 100, 111-13 (W. Brooke Graves ed., 1978) (discussing the earlier efforts undertaken by various states to review their gubernatorial succession provisions).

31. GRANT & NIXON, *supra* note 10, at 254; see also, e.g., Richard H. Abramson, Comment, *Brown v. Curb: The Lieutenant Governor's Powers When the Governor Is Outside the State*, 68 CAL. L. REV. 796, 796-98 (1980) (dispute between California Governor Brown and Lieutenant Governor Curb over the extent of the gubernatorial successor's power when the governor is absent from the state); *Brown v. Curb*, 603 P.2d 1357 (Cal. 1979) (same); *State ex rel. Ashcroft v. Blunt*, 813 S.W.2d 849 (Mo. 1991) (dispute concerning governor's power to act when absent from the state for an extended period of time).

32. GRANT & NIXON, *supra* note 10, at 254.

ment steps into the office as if elected to the position.³³ Such an executive would possess full governing powers, including the right to appoint a successor to vacant lower offices, as long as that power is one of the regular gubernatorial functions.

This clear and self-executing model for gubernatorial succession is desirable for several reasons. First, under such a system the constitution specifically states that the contingent executive becomes governor upon a permanent vacancy, which necessarily grants the new executive full governing powers. As a result, the state is never without a chief executive who is authorized to use the full range of gubernatorial power necessary to direct state activities effectively. Second, the explicit nature of the succession provision allows little room for controversy or dispute when a governor is permanently incapacitated. A smooth transition to new executive leadership is desirable during times of uncertainty in state government. Finally, this succession model follows the method employed by the Twenty-Fifth Amendment of the U.S. Constitution for succession to the presidency.³⁴ The method of succession agreed upon by the states for the nation's highest executive office logically should suffice for the governors' offices of individual states.

The other important category of constitutional language governing gubernatorial succession law involves the use of the term "devolve." If the powers of the governor devolve upon some lower state executive, then the executive retains the lower office achieved through the election process while acting as the state's chief executive officer.³⁵ Thus, a lieutenant governor acting in

33. See, e.g., PA. CONST. art. IV, § 13 (amended 1967). This provision states: In the case of the death, conviction on impeachment, failure to qualify or resignation of the Governor, the Lieutenant Governor shall become Governor for the remainder of the term and in the case of the disability of the Governor, the powers, duties and emoluments of the office shall devolve upon the Lieutenant Governor until the disability is removed.

Id.

34. U.S. CONST. amend. XXV, § 1. "In case of the removal of the President from office or of his death or resignation, the Vice President shall become President." *Id.*

35. See *Ashcroft*, 813 S.W.2d at 852-54 (discussing the extent of gubernatorial powers that devolve upon the lieutenant governor when the governor leaves the state); PA. CONST. art. IV, § 13 (upon a governor's temporary disability, gubernatorial power devolves upon the lieutenant governor until the disability is removed); see also *supra* note 33 (providing the text of Pennsylvania Constitution article IV, section 13).

place of a deceased governor would not be able to use the gubernatorial power of appointment to name a successor to the lieutenant governor's office because that office technically would not be vacant. Vermont Attorney General Jeffrey Amestoy employed this reasoning in his interpretation of the gubernatorial succession provisions of the Vermont Constitution.³⁶ This interpretation has precipitated the present controversy, and has led to several legislative proposals to clarify the Vermont gubernatorial succession provisions.

This model for gubernatorial succession is less desirable for several reasons. First, such unclear language and division of responsibility upon a governor's absence has sparked controversy and disagreement in several states.³⁷ Second, in the event of a governor's permanent incapacitation, resignation, removal, or death, the state is left with an incomplete executive branch for the remainder of the term. This may have significant negative repercussions on the efficient administration of state government.³⁸

To determine which model the Vermont gubernatorial succession provisions follow, it is necessary to analyze the language employed by the Vermont Constitution in the relevant provision.

II. A CONSTITUTIONAL ANALYSIS OF VERMONT'S GUBERNATORIAL SUCCESSION PROVISIONS

A. *Present Constitutional and Statutory Provisions*

This section of the note analyzes the express language of the present Vermont Constitution, as well as statutory provisions adopted by the Vermont Legislature that impact gubernatorial succession law. In addition, the historical predecessors of the Vermont Constitution are analyzed to determine the framers'

36. Op. Att'y Gen., *supra* note 2, at 1.

37. See *Ashcroft*, 813 S.W.2d at 852-53 (discussing split of authority as to what constitutes an "absence" that transfers political control); *Brown*, 603 P.2d at 1362 (same); *Sawyer v. First Judicial Dist. Court*, 410 P.2d 748, 749 (Nev. 1966) (finding that the governor is effectively absent when state's need for a gubernatorial act arises while governor not physically present).

38. See *infra* note 95 and accompanying text.

intent concerning gubernatorial succession. Although the Vermont Attorney General's constitutional interpretation relied extensively on judicial opinions concerning the similar provisions of other state constitutions, such an effort will not be undertaken here because the language employed by these other constitutions is not identical to that used in the Vermont Constitution.³⁹

Although the original Vermont Constitution of 1777 recognized the importance of gubernatorial succession by providing some indication that the governor's powers were to be exercised in his absence,⁴⁰ this document does not contain an express delegation of the line of succession. The provisions establishing the frame of government may not have been scrutinized carefully, however, as the Vermont Constitution was drawn up and adopted over a six-day period in July, 1777.⁴¹ Furthermore, the Vermont document is believed to have been "copied almost word for word from the constitution which Pennsylvania had adopted a year earlier."⁴² Nevertheless, the provisions contained in the original constitution provide the framework upon which the present plan of state government, including Vermont's gubernatorial succession law, is based.⁴³

The current Vermont Constitution is similar in structure to the original constitution of 1777. Chapter one sets out a declaration of rights for Vermont citizens,⁴⁴ and chapter two establishes a "Plan or Frame of Government."⁴⁵ No section within chapter

39. See *infra* notes 86-93 and accompanying text.

40. VT. CONST. of 1777, ch. II, §§ 1, 3, 18. For instance, section 18 of this early state constitution reads in relevant part:

The Governor, *and in his absence* the Lieutenant or Deputy Governor, with the Council—seven of whom shall be a quorum—shall have power to commissionate all officers (except those who are appointed by the General Assembly), agreeable to this frame of government, and the laws that may be made hereafter; and shall supply every vacancy in any office, occasioned by death, resignation, removal or disqualification, until the office can be filled in the time and manner directed by law or this constitution.

Id. § 18 (emphasis added).

41. LAWS OF VERMONT 1777-1780, at 4 (12 STATE PAPERS OF VERMONT, Allen Soule ed., 1964).

42. *Id.*

43. *Id.*

44. VT. CONST. ch. I.

45. VT. CONST. ch. II.

two directly addresses succession to the office of governor in the event of the governor's death or disability. Several sections refer to the exercise of the governor's power by the lieutenant governor in the governor's absence.⁴⁶ Consistent with the treatment of gubernatorial succession in the original Vermont Constitution of 1777, a direct line of succession for the governor's office is not contained in the current version of the document. The present constitution is also silent about the power a succeeding executive possesses in the event that a permanent vacancy occurs in the governor's office.

Despite the silence concerning gubernatorial succession, the present constitution empowers the Vermont Legislature to establish executive succession provisions within the Vermont statutes when both the governor and lieutenant governor are incapacitated.⁴⁷ The legislature has exercised this express delegation of power by creating a line of succession in anticipation of this occurrence.⁴⁸ In the event both offices are simultaneously vacant, the powers and responsibilities of the governor's office

46. Section one states: "The Commonwealth or State of Vermont shall be governed by a Governor (or Lieutenant-Governor) . . ." VT. CONST. ch. II, § 1. Section three states: "The Supreme Executive power shall be exercised by a Governor, or in his absence, a Lieutenant-Governor." *Id.* § 3. Section 19 provides in relevant part that "[t]he Lieutenant-Governor shall be President of the Senate, except when he shall exercise the office of Governor." *Id.* § 19. Section 20 states in relevant part that "[t]he Governor, and in his absence, the Lieutenant-Governor, shall have power to [carry out all executive duties]; and shall supply every vacancy in any office, occasioned by death or otherwise, until the office can be filled in the manner directed by law or this Constitution." *Id.* § 20. Section 22 states: "All commissions shall be . . . signed by the Governor, and in his absence by the Lieutenant-Governor, and attested by the Secretary; which Seal shall be kept by the Governor." *Id.* § 22. Section 24 provides in relevant part that:

The Legislature shall provide by general law what officer shall act as Governor whenever there shall be a vacancy in both the offices of Governor and Lieutenant-Governor, occasioned by a failure to elect, or by the removal from office, or by the death or resignation of both Governor and Lieutenant-Governor, or by the inability of both Governor and Lieutenant-Governor to exercise the powers and discharge the duties of the office of Governor; and such officer so designated, shall exercise the powers and discharge the duties appertaining to the office of Governor accordingly until the disability shall be removed, or a Governor shall be elected.

Id. § 24.

47. VT. CONST. ch. II, § 24; *see supra* note 46 (providing the relevant text of this provision).

48. VT. STAT. ANN. tit. 3, § 1(a) (1985). "When there is a vacancy in the offices of governor and lieutenant governor, the speaker of the house of representatives shall act as governor." *Id.*

pass to the speaker of the house of representatives.⁴⁹ A related legislative provision mandates that the lieutenant governor, or the speaker of the house if the lieutenant governor is unavailable, act as governor while the governor is absent from the state.⁵⁰ If both the offices of governor and lieutenant governor are vacant and the speaker of the house is unavailable, then the president pro tempore of the senate, the secretary of state, or the treasurer, in that order, shall act as governor.⁵¹ Because these provisions do not operate in the event of a vacancy in either the office of the governor or lieutenant governor, the situation that spurred the present controversy is left unresolved.

Complicating the basic gubernatorial succession scheme established by the Vermont Constitution and statutes, the constitution grants executive power to "supply every vacancy in any office, occasioned by death or otherwise, until the office can be filled in the manner directed by law or this Constitution."⁵² This provision gives the governor power of appointment for all vacant state offices. In addition, the Vermont Legislature clarified this executive power by including within the Vermont statutes a provision allowing the political party of the person vacating a state office to recommend a successor.⁵³ "[T]he governor may request the political party of the person whose death or resignation created the vacancy to submit one or more recommendations as to a successor."⁵⁴ However, the governor may disregard the recommendation of the party committee and ultimately may appoint any "qualified person" to fill a vacancy in

49. *Id.*

50. *Id.* § 1(b). "When the governor is absent from the state, the lieutenant governor shall act for him, and when both the governor and lieutenant governor are absent from the state, the speaker of the house shall act as governor." *Id.*

51. VT. STAT. ANN. tit. 20, § 183 (1987). This provision reads:

In the event that there is a vacancy in both the offices of governor and lieutenant governor within the meaning of the constitution and the speaker of the house of representatives is unavailable, the president pro tempore of the senate, the secretary of state and the treasurer, shall, in the order named, act as governor until such vacancy is terminated, or until a governor is elected, or until such speaker or a preceding interim successor becomes available.

Id.

52. VT. CONST. ch. II, § 20.

53. VT. STAT. ANN. tit. 17, § 2623 (1982).

54. *Id.*

state office "for the remaining portion of the [unexpired] term."⁵⁵ For purposes of this section of the statute, "state office" encompasses the offices of "governor, *lieutenant governor*, state treasurer, secretary of state, auditor of accounts, and attorney general."⁵⁶ Thus, the state constitution and statutes provide a scheme whereby the supreme executive, whose power may be exercised by the lieutenant governor when the governor is absent, possesses the power to appoint replacements for any vacancy in state office, including the office of lieutenant governor. These provisions potentially allow Howard Dean, as acting Vermont Governor, to exercise the constitutional power of executive appointment to name an acting lieutenant governor for the remainder of the unexpired two year term.

The express language of the Vermont Constitution does not directly address whether a person succeeding to the governor's office due to a permanent vacancy possesses the full range of gubernatorial power. There is, however, a constitutional grant of authority for the governor's power to be "exercised by" the lieutenant governor. In the event both offices are vacant, the gubernatorial duties are exercised by another state officer as determined by the state legislature. Although the Vermont Legislature has acted upon this authority, the factual situation of the current controversy is reduced to whether the lieutenant governor "becomes" governor, or is merely acting as governor upon the governor's death. The express language of the Vermont Constitution does not answer this question. To determine which alternative the framers intended through their use of the language "exercised by," it is helpful to consider early constitutional amendments to the frame of government provisions.

B. Historical Constitutional Analysis

The first Vermont Constitution was adopted during a six-day constitutional convention held in Windsor in July, 1777.⁵⁷ This convention took place during the political uncertainties facing the colonies caused by the Revolutionary War. At this time, the entire northern New England region was under siege by an

55. *Id.*

56. *Id.* § 2103 (33) (emphasis added).

57. LAWS OF VERMONT 1777-1780, *supra* note 41, at 4.

offensive lodged by the British against Fort Ticonderoga.⁵⁸ Despite this imminent military threat, the convention succeeded in passing the state's first constitution. The original Vermont Constitution was essentially a verbatim copy of the Pennsylvania Constitution of 1776 with a different preamble and changes made to fewer than fifty lines in the two chapters.⁵⁹ This subsection analyzes the frame of government created by the original constitution and will discuss relevant changes made to subsequent versions of the constitution adopted in 1787 and 1793. The purpose of this analysis is to attempt to uncover the framers' intent concerning gubernatorial succession in the event of a permanent vacancy in the governor's office.

As previously mentioned, the Vermont Constitution of 1777 did not contain a specific provision addressing gubernatorial succession in all circumstances, but it did create the general executive scheme upon which the present state constitution is based.⁶⁰ In all three versions of the state constitution,⁶¹ the executive powers are contained in several sections of chapter two. Chapter two, section one of each version lists the powers of state government authorized by the Vermont Constitution. The language of this section in the present constitution is almost identical to the language of the original Vermont Constitution of 1777, except that the title "Lieutenant-Governor" has been

58. 1 RECORDS OF THE COUNCIL OF SAFETY AND GOVERNOR AND COUNCIL OF THE STATE OF VERMONT 62-65 (E.P. Walton ed., 1873) [hereinafter 1 RECORDS OF THE COUNCIL OF SAFETY AND GOVERNOR].

59. *Id.* at 83.

60. See *supra* note 40 and accompanying text.

61. The original Vermont Constitution of 1777 was adopted on July 8, 1777. 1 RECORDS OF COUNCIL OF SAFETY AND GOVERNOR, *supra* note 58, at 81. This version was superseded by the Vermont Constitution of 1786, which was adopted on March 2, 1787. 3 RECORDS OF THE GOVERNOR AND COUNCIL OF THE STATE OF VERMONT 133 n.1 (E.P. Walton ed., 1875) [hereinafter 3 RECORDS OF THE GOVERNOR]. This version was superseded by the adoption of the Vermont Constitution, which was established on July 9, 1793, and which has been amended in 1828, 1836, 1850, 1870, 1883, 1913, 1924, 1954, 1964, 1974, 1982, and 1986. See VT. CONST., *reprinted in* VT. STAT. ANN. (1985 & Supp. 1991); see also RECORDS OF THE COUNCIL OF CENSORS OF THE STATE OF VERMONT 3-18, 85-100, 137-151 (Paul S. Gillies & D. Gregory Sanford eds., 1991) [hereinafter COUNCIL OF CENSORS] (containing the early versions of the Vermont Constitution). In this note, early versions of the Vermont Constitution are referenced by date, as above. If no date is provided, then the reference is to the current state constitution, as amended.

substituted for the title "Deputy Governor."⁶² The first substantial difference in the language of the executive power provisions between the original document and the present version lies in section three. It is significant more for what does not appear than what does. Chapter two, section three of the Vermont Constitution of 1777 reads: "The supreme executive power shall be vested in a Governor and Council."⁶³ No provision is made for the lieutenant or deputy governor to fill in for the governor if that office is vacant for any reason.⁶⁴ This omission may indicate that the original framers did not believe that the chief executive's power would pass automatically to the lieutenant governor as the governor's substitute when the governor is unable to fulfill the gubernatorial duties.

Despite the omission of the deputy or lieutenant governor within the provision vesting executive powers, the lieutenant governor was recognized in several other sections of the original constitution.⁶⁵ The lieutenant or deputy governor was authorized to act on behalf of the governor for certain official responsibilities. However, unlike the two later versions of the Vermont Constitution, the lieutenant or deputy governor was not vested

62. Compare VT. CONST. of 1777, ch. II, § 1 ("The Commonwealth or State of Vermont, shall be governed hereafter, by a Governor, Deputy Governor, Council, and an Assembly of the Representatives of the Freemen of the same, in a manner and form following.") with VT. CONST. ch. II, § 1 ("The Commonwealth or State of Vermont shall be governed by a Governor (or Lieutenant-Governor) . . ."). This title was changed based on the recommendation of the Council of Censors, although no reason has been given for the change. COUNCIL OF CENSORS, *supra* note 61, at 82.

63. VT. CONST. of 1777, ch. II, § 3.

64. Compare VT. CONST. of 1777, ch. II, § 3 ("The supreme executive power shall be vested in a Governor and Council.") with VT. CONST. of 1786, ch. II, § 3 ("The supreme executive power shall be vested in a governor (or, in his absence, a lieutenant-governor) and Council.") and VT. CONST. ch. II, § 3 ("The Supreme Executive power shall be exercised by a Governor, or in his absence, a Lieutenant-Governor.").

65. Section seventeen provides in relevant part: "The Supreme Executive Council of this State, shall consist of a Governor, Lieutenant-Governor, and twelve persons . . ." VT. CONST. of 1777, ch. II, § 17. In addition, several other sections recognize that the lieutenant governor may constitutionally substitute for the governor for some of his official functions. See, e.g., VT. CONST. of 1777, ch. II, § 18 ("The Governor, and in his absence the Lieutenant or Deputy Governor, with the Council—seven of whom shall be a quorum—shall have power to commissionate all officers . . ."); *id.* § 19 ("All commissions shall be in the name of the freemen of the State of Vermont, sealed with the State seal, signed by the Governor, or in his absence the Lieutenant-Governor, and attested by the Secretary; which seal shall be kept by the Council."); *id.* § 20 ("All impeachments shall be before the Governor or Lieutenant-Governor and Council, who shall hear and determine the same.").

with supreme executive power.⁶⁶ Amending the state constitution to acknowledge the lieutenant governor within the provision vesting supreme executive power may indicate that the framers intended the lieutenant governor to assume not only certain powers in the governor's absence, but also the full powers of office of governor upon a permanent vacancy. The framers certainly did not intend for the supreme executive power of the state to remain dormant if the governor were to be permanently incapacitated.

By 1786, the Vermont Constitution recognized that the lieutenant governor on occasion may possess the supreme executive power of state government.⁶⁷ There appears to be no indication within this document for the rationale underlying this subtle, yet substantively important, change from the original Vermont Constitution. Similar to the earliest version of the state constitution, the sections establishing the powers of the executive consistently recognize that the lieutenant governor may substitute for the governor for several important functions.⁶⁸ These changes in the Vermont Constitution of 1786 essentially were left intact by the Vermont Constitution of 1793, which as amended is Vermont's present day state constitution.⁶⁹

From the subtle amendments made to the Vermont Constitution during the state's early history, it can be inferred that the framers of the document had some concern with the actual line and scope of duties created by the gubernatorial succession provisions. Even though the state constitution needed modification to conform with changes required by the ratification of the

66. See *supra* notes 63, 64 and accompanying text.

67. See VT. CONST. of 1786, ch. II, § 3; see *supra* note 64 (providing the text of this provision).

68. See VT. CONST. of 1786, ch. II, § 10. This provision states in relevant part: "The supreme executive council of this State, shall consist of a governor, lieutenant-governor, and twelve persons, chosen in the following manner . . ." *Id.* Specific powers also are recognized in this version of the Vermont Constitution. See, e.g., *id.* § 11 ("The governor, and in his absence the lieutenant-[or Deputy] governor, with the council, [seven of whom] (a major part of whom, including the Governor or Lieutenant-Governor, shall be a quorum to transact business) shall have power to commissionate all officers . . ."); *id.* § 20 ("All commissions shall be in the name of the freemen of the State of Vermont, sealed with the State seal, signed by the governor, or in his absence, the lieutenant-governor, and attested by the secretary, which seal shall be kept by the council.").

69. See VT. CONST. ch. II, §§ 3, 20, 22; see *supra* note 46 (providing the relevant text of these provisions).

U.S. Constitution in 1788, the provisions dictating gubernatorial succession were modified only slightly, retaining the intent and spirit of the original document. Viewed comprehensively, these changes imply that the framers increasingly recognized situations that would require the lieutenant governor to step into the governor's office to assume the chief executive duties. To a limited extent, the framers vested the state legislature with the power to determine the line of gubernatorial succession.⁷⁰ However, they did not grant the legislature with the power to determine the central issue raised in this dispute: whether a lieutenant governor possesses the full range of gubernatorial power and responsibility upon the governor's death.

An analysis of the language of the current Vermont Constitution, together with an investigation of amendments made to earlier versions of the state constitution, reveals that the Vermont Constitution does not definitively answer all issues concerning gubernatorial succession. Because the constitutional language does not address whether a succeeding executive possesses the full range of gubernatorial power, it is necessary to consider other authority for possible interpretations of the Vermont Constitution.

III. VERMONT ATTORNEY GENERAL'S INTERPRETATION OF THE GUBERNATORIAL SUCCESSION PROVISIONS

The issue raised by the present controversy, whether a lieutenant governor becomes governor or merely acts as governor upon a permanent vacancy in the governor's office, has never been challenged in the Vermont court system.⁷¹ Therefore, the Vermont Supreme Court, the final arbiter of disputes concerning interpretation of the Vermont Constitution, has not addressed this issue. Although other state courts have interpreted the gubernatorial succession provisions of their own constitutions, these authorities are of marginal persuasive value because the language employed by these provisions is not identical to that of the

70. For instance, the Vermont Constitution expressly grants the legislature the power to create a statutory line of succession in the event both the governor and lieutenant governor's offices are vacant. VT. CONST. ch. II, § 24; *see supra* note 46 (providing the text of this provision); *see also supra* notes 47-51 and accompanying text.

71. In the three other instances in Vermont's history when the governor's office was vacated, the succeeding executive did not attempt to appoint an interim lieutenant governor. Op. Att'y Gen., *supra* note 2, at 7.

Vermont Constitution. Therefore, the Vermont Attorney General's opinion, although only an advisory opinion, is the only relevant source of authority concerning this issue.

The opinion issued by Vermont Attorney General Jeffrey Amestoy, dated September 3, 1991, was prompted by a request from acting Governor Howard Dean. Governor Dean wanted to know if he possessed the power to appoint a lieutenant governor for the remainder of the term.⁷² The stated purpose of the resulting opinion was to provide "advice on the question whether Vermont law authorizes the appointment of a Lieutenant Governor in the event that the person elected to that office assumes the role of Governor."⁷³ This broad statement of purpose encompasses any situation where the lieutenant governor assumes the role of governor. The statement indicates that the opinion was intended to provide a comprehensive analysis of the Vermont law pertaining to gubernatorial succession, not to address simply the specific series of events that prompted the opinion in the first place.

The major substantive premise of the opinion is that the Vermont Constitution intends the lieutenant governor to assume the power and responsibility of the governor's office, without actually becoming governor, upon a permanent vacancy in that office.⁷⁴ Amestoy reached this conclusion by considering judicial interpretations of "similar" state constitutions,⁷⁵ by considering an early Vermont advisory opinion,⁷⁶ and by analogizing to federal executive succession law.⁷⁷ The opinion concluded that the office of lieutenant governor is not technically vacant when the lieutenant governor is exercising the duties of the governor's office.⁷⁸ Therefore, the opinion ruled that "there is no constitutional authority for the appointment of a new Lieutenant Governor."⁷⁹ As a result of this opinion, Dean abandoned his effort to

72. Op. Att'y Gen., *supra* note 2, at 1.

73. *Id.*

74. *Id.*

75. *Id.* at 2-6.

76. *Id.* at 2-3.

77. *Id.* at 6-7.

78. *Id.* at 1.

79. *Id.*

exercise the power of appointment to name an acting lieutenant governor for the remainder of the unexpired term.⁸⁰

Amestoy began the analysis by setting out the constitutional provisions recognizing that there are occasions when the lieutenant governor is authorized to act as governor.⁸¹ According to the Attorney General, a natural and automatic shift of power from governor to lieutenant governor is a "universally accepted principle" because at no time should there exist "a temporary gap in leadership."⁸² Citing from an early advisory judicial opinion for the proposition that the Vermont Constitution has been interpreted to create a system where the lieutenant governor "substitutes" for the governor if that office is vacant,⁸³ the Attorney General's opinion suggests that no vacancy exists in the governor's office as long as the lieutenant governor is available to fulfill the duties of the office.⁸⁴ According to the Attorney General, this interpretation of the Vermont Constitution is

80. The lieutenant governor's office has remained vacant since Howard Dean took the oath of office to uphold the duty and responsibility of the executive branch as Vermont's governor on August 14, 1991. See *supra* note 4 and accompanying text. Because this vacancy left the Vermont Senate without a presiding officer, this body has utilized its constitutional grant of authority to select one of its members to act as interim president *pro tempore*. See VT. CONST. ch. II, § 19; Meg Dennison, *Senate President Is Moving Up and Stretching Out*, BURLINGTON FREE PRESS, Jan. 3, 1992, at B1.

81. Op. Att'y Gen., *supra* note 2, at 1-2.

82. Op. Att'y Gen., *supra* note 2, at 2.

83. The events leading to this advisory opinion were that an election delay resulted in a supposed vacancy in both the lieutenant governor and governor's offices because the terms of the previous office holders had expired. *Id.* at 3. The advisory opinion, which was issued by the Chief Justice and a single Associate Justice of the Vermont Supreme Court, concluded that the incumbents should hold over until their successors could be elected. *Id.* The reasoning cited in the opinion is as follows:

Having attached this importance to the office of Governor, and rendered the continued existence of that office, or the Lieutenant Governor as his substitute, indispensable to the action of both the executive and legislative power in the government, it can, with no propriety, be supposed, that the framers of that instrument intended to create, in certain emergencies, an absolute vacancy in the office, or to present to the world the anomaly of a Government which contained, within itself, a periodical suspension of its powers.

8 RECORDS OF THE GOVERNOR 280 (E.P. Walton ed., 1880).

84. Op. Att'y Gen., *supra* note 2, at 3.

consistent with prevailing judicial interpretations of similar state constitutions.⁸⁵

In view of this extensive authority, the Attorney General concedes that in the majority of the cited cases, the state constitutions use language different from that contained in the Vermont document.⁸⁶ Most of the state constitutions so interpreted provide that the powers of the governor's office "devolve upon" the lieutenant governor in the event of a vacancy in the office of governor.⁸⁷ The Vermont Constitution does not use this language; instead, it states that "[t]he Supreme Executive power shall be *exercised by* a Governor, or in his absence, a Lieutenant-Governor."⁸⁸ Furthermore, language indicating that the lieutenant governor shall exercise the duties and powers of the governor's office in the event of an absence appears throughout chapter two of the Vermont Constitution.⁸⁹ The Attorney General concluded that the use of this language in the Vermont Constitution "implies a transfer of power like that expressed in the word 'devolve.'"⁹⁰

The Attorney General's opinion notes that a different result is warranted when constitutional language expressly provides that the lieutenant governor becomes governor upon a vacancy in the governor's office.⁹¹ This analysis applies to the Pennsylvania

85. The Attorney General's Opinion cites the following cases for this proposition: *Futrell v. Oldham*, 155 S.W. 502, 504 (Ark. 1913); *State v. Garvey*, 195 P.2d 153, 154 (Ariz. 1948); *People v. Budd*, 45 P. 1060 (Cal. 1896); *Henderson v. Maddox*, 179 S.E.2d 770 (Ga. 1971); *State v. Mitchell*, 34 P.2d 369, 372 (Mont. 1934); *State v. Sadler*, 47 P. 450 (Nev. 1897); *Clifford v. Heller*, 42 A. 155, 157-58 (N.J. 1899); *State v. McBride*, 70 P. 25, 26 (Wash. 1902); *State v. Ekern*, 280 N.W. 393, 399 (Wis. 1938). *But see Chadwick v. Earhart*, 4 P. 1180 (Or. 1884) (calling it an "exceptional" ruling); *Op. Att'y Gen.*, *supra* note 2, at 3-5.

86. *Op. Att'y Gen.*, *supra* note 2, at 6.

87. *Id.*

88. VT. CONST. ch. II, § 3 (emphasis added).

89. *See, e.g., id.* §§ 19, 24; *see supra* note 46 (providing the text of these provisions).

90. *Op. Att'y Gen.*, *supra* note 2, at 6.

91. *Id.* The opinion noted that the Pennsylvania Constitution succession provision reads in relevant part that "[i]n the case of the death, conviction on impeachment, failure to qualify or resignation of the Governor, the Lieutenant Governor shall become Governor for the remainder of the term." PA. CONST. art. IV, § 13. Although the Pennsylvania Constitution likely provided the basis for the Vermont Constitution, *see supra* note 42 and accompanying text, the Attorney General interpreted the language of the Vermont Constitution more consistently with the language of state constitutions using the term "devolve."

Constitution.⁹² The same holds true for the federal government when a vacancy occurs in the office of the President of the United States.⁹³ The Vermont Constitution, however, does not use the word "become," and is more closely analogous to state constitutions that use the term "devolve." The Attorney General interpreted the Vermont constitutional provisions as indicating that the framers intended the governor's office to remain vacant, as long as the lieutenant governor can exercise the duties of the state's chief executive office while retaining the position of lieutenant governor.

This interpretation of the Vermont gubernatorial succession provisions is not persuasive for several reasons. First, no genuine analysis of the language of the Vermont Constitution or the intent of the framers has been undertaken. Second, the opinion relies heavily on analogies drawn from judicial interpretation of other state constitutions. However, these constitutions contain language that the powers of the governor devolve upon the succeeding executive upon a permanent vacancy, whereas the Vermont Constitution states that the lieutenant governor "shall exercise the office of Governor" upon such a vacancy.⁹⁴ This is an important difference. Third, the opinion notes that there may be policy arguments against the naming of an interim lieutenant governor,⁹⁵ but fails to recognize the compelling counter-arguments supporting a ruling that the succeeding executive possesses the power to appoint an interim lieutenant governor.

Several policy arguments support an interpretation of the gubernatorial succession provisions that would enable Howard Dean to appoint an interim lieutenant governor. First, the effect of the Attorney General's opinion is that any person exercising the

92. PA. CONST. art. IV, § 13; *see supra* note 33 (providing the full text of this provision).

93. U.S. CONST. amend. XXV, § 1; *see supra* note 34 (providing the text of this amendment).

94. VT. CONST. ch. II, § 19.

95. Op. Att'y Gen., *supra* note 2, at 9. The opinion states:

[T]he risks of appointing a new Lieutenant Governor absent clear authority to do so outweigh any benefit. Every tie breaking vote cast by the appointee as President of the Senate would be subject to challenge, as would other actions and decisions made both as Senate President and as acting Governor. The relevant legal authority would lend considerable support to any challenge.

duties of the governor's office, whether on an interim or permanent basis, does not possess the full range of supreme executive power. As a result, Vermont is left with a weakened executive office when the governor leaves the state or is permanently incapacitated. This may be only slightly problematic when the governor is temporarily absent from the state, but the consequences are likely to be greater when the state is left with a succeeding executive for a long period of time. Second, allowing the succeeding executive to appoint an interim lieutenant governor would not leave the Vermont Senate shorthanded. Although the senate has been given the constitutional authority to select an interim presiding officer from among its body, during the 1992 legislative session a voting member of the senate presided over debate, which reduced the voting membership on the floor. For these reasons, the outcome advocated by the Attorney General leaves the executive power of state government in a compromised position when a Vermont governor is permanently incapacitated.

IV. PROPOSALS TO AMEND VERMONT'S GUBERNATORIAL SUCCESSION PROVISIONS

A. Recent Legislative Proposals

During the 1992 term, three separate proposals were introduced in the Vermont Legislature to remedy the perceived inadequacies in Vermont gubernatorial succession law. Although each would significantly impact gubernatorial succession law in Vermont, the three proposals assume very different forms, and would have dramatically different results. Two of the proposals have been designed to address directly whether the lieutenant governor becomes governor upon the governor's death. The third proposal does not address this fundamental problem with the present constitutional scheme. As a result, these three proposals will be discussed independently.

The first proposal is a direct attempt by a state legislator at statutory clarification of gubernatorial succession law in Vermont. This bill is entitled "An Act Relating to Succession to the Office of Governor" and was introduced by Representative Bouricius of

Burlington during the 1992 legislative session.⁹⁶ The bill's stated purpose is to "provide by statute that the lieutenant-governor shall become governor on the death of the governor and shall have the authority to appoint a new lieutenant-governor."⁹⁷ To achieve this purpose, the bill proposes to amend the Vermont statutes⁹⁸ to include a provision explicitly stating that the lieutenant governor assumes the full power and responsibility of the governor's office upon the governor's death.⁹⁹ Despite this stated purpose, this provision does not explicitly state that the lieutenant governor shall become governor upon the governor's death; instead, it states that "[i]n the event of the death of the governor, the lieutenant governor shall succeed to the office of governor."¹⁰⁰

This proposed statutory provision also would expressly grant a succeeding governor the power to appoint a lieutenant governor for the remainder of the term.¹⁰¹ This provision to appoint a "qualified person" is consistent with the governor's general power of appointment authorized by the Vermont Legislature under existing law.¹⁰² As proposed, this bill attempts to clarify the status of the lieutenant governor upon the governor's death by having the succeeding executive's powers mature into the full governing powers as if this person had been elected to the office.

There are three primary weaknesses with this proposal. First, and most important, a threshold determination must be made about whether the legislature possesses the authority to enact a statute dictating the means by which, and under what terms and conditions, the governor's office will be succeeded when the person elected to that office dies. The Vermont Constitution,

96. H. 626, 1992 Sess. (Vt. 1992).

97. *Id.*

98. VT. STAT. ANN. tit. 3, § 1 (1985). In its current form, this statute provides for the executive leadership of the state when there is a vacancy in both the offices of governor and lieutenant governor, and when both officers are absent from the state. *Id.*; see *supra* notes 48-50 and accompanying text (providing the relevant statutory language, as well as a discussion of this statutory provision).

99. H. 626, 1992 Sess. (Vt. 1992).

100. *Id.*

101. *Id.* "In the event of the death of the governor, the lieutenant governor shall succeed to the office of governor and may appoint a qualified person to fill the office of lieutenant governor." *Id.*

102. See *supra* notes 53-55 and accompanying text.

as the primary document establishing the plan of government, creates the basic framework for gubernatorial succession in the state. Several provisions of this document indirectly address issues of gubernatorial succession.¹⁰³

The Vermont Constitution establishes a system for the substitution of the lieutenant governor for the governor when the governor is absent from the state.¹⁰⁴ In addition, this document declares that the lieutenant governor may exercise the duties and responsibilities of the governor's office upon the governor's absence,¹⁰⁵ which encompasses a temporary absence, incapacitation, death, resignation, failure to qualify for office, or impeachment. Nevertheless, the only time that the Vermont Constitution expressly delegates power to the state legislature to pass laws dictating the line and scope of gubernatorial succession is when both the offices of governor and lieutenant governor are vacant.¹⁰⁶ Seemingly, the framers of the Vermont Constitution intended that the legislature determine the line of gubernatorial succession and extent of power only in the rare situation when both executive offices are vacant. The framers provided for this situation, but did not specifically vest the legislature with the ability to determine the line and extent of power when only the governor permanently vacates office, for instance, at death. It can be inferred from this constitutional silence that the framers intended other constitutional provisions to answer this issue. Because the framers apparently intended the Vermont Constitution to address all issues of gubernatorial succession other than the specific situation delegated to the legislature, the statutory proposal to clarify gubernatorial succession law in Vermont is arguably beyond the constitutional power vested in the state legislature.

Second, assuming that the legislature does possess the power to dictate the extent of the lieutenant governor's power upon the governor's death, the proposed statutory amendment is still inadequate. Ambiguous language in the gubernatorial succession provisions led to the present controversy. The language of the

103. See *supra* note 46 and accompanying text.

104. VT. CONST. ch. II, § 20.

105. *Id.* §§ 19, 20; see *supra* note 46 (providing the relevant text of these provisions).

106. *Id.* § 24.

proposed statute is similarly ambiguous because it intends that the lieutenant governor "become" governor upon the governor's death but does not say so.¹⁰⁷ Instead, this proposal uses language similar to that contained in the present constitution: "[Upon the governor's death] the lieutenant governor shall succeed to the office of governor."¹⁰⁸ As emphasized in this note, language that does not explicitly state that the lieutenant governor becomes governor upon the governor's death is subject to multiple interpretations.¹⁰⁹

The third weakness of this statutory proposal is that it addresses only a permanent vacancy created when a governor dies in office.¹¹⁰ A permanent vacancy in the governor's office also can result from resignation, removal or impeachment, failure to qualify for office, or other permanent incapacitation, such as a debilitating illness. Although history shows these events to be even more rare than a governor's death,¹¹¹ any proposal to clarify gubernatorial succession law in Vermont should be comprehensive in scope, addressing all possible events leading to a permanent vacancy in the governor's office. Otherwise, a vacancy in the governor's office created by an event other than the governor's death could result in a controversy similar to the current one. These weaknesses make this statutory proposal undesirable for clarifying gubernatorial succession in the State of Vermont.

The second proposal introduced to clarify gubernatorial succession law in Vermont would amend the state constitution, enabling the lieutenant governor to become governor upon the governor's death, impeachment, or resignation.¹¹² In situations

107. See *supra* notes 99-101 and accompanying text (providing the language of this proposal); *supra* note 97 and accompanying text (providing the bill's statement of purpose).

108. H. 626, 1992 Sess. (Vt. 1992). The Vermont Constitution states that "[t]he Supreme Executive power shall be exercised by a Governor, or in his absence, a Lieutenant-Governor." VT. CONST. ch. II, § 3.

109. See *supra* accompanying notes 57-70.

110. As previously noted, this situation has arisen only three times in Vermont history. See *supra* note 2.

111. Only once in Vermont history has any of these events occurred. See *supra* note 2.

112. Prop. Amend. 21 to VT. CONST., reprinted in *Journal of the Senate* (Vt. Feb. 27, 1992).

where the governor is temporarily absent from the state or unable to perform his duties, the responsibilities would “devolve” upon the lieutenant governor.¹¹³ When the governor returns to the state or his incapacitation is terminated, the governor again possesses the chief executive powers of the state.¹¹⁴ Thus, the operative mechanism of this proposal clarifies the language of the constitution, the primary framework of state government, and provides explicitly that the lieutenant governor becomes governor upon the governor’s death.

This proposal also explicitly provides for succession to the office of lieutenant governor. In any situation leading to a vacancy in the office of lieutenant governor, the president pro tempore of the state senate shall become the lieutenant governor for the remainder of the two year term.¹¹⁵ This amendment to the Vermont Constitution also would grant the legislature the power to decide what state officer shall act as governor when both the offices of governor and lieutenant governor are vacant, or when both officers are absent from the state or unable to exercise their duties.¹¹⁶ This proposed amendment, as introduced by Senator Spaulding, passed the Vermont Senate by a unanimous vote.¹¹⁷ It was then referred to the Vermont House for approval.¹¹⁸

Resolving the gubernatorial succession issue in Vermont by changing the constitutional frame of government is a desirable approach for several reasons. First, because this proposal amends the constitution in the manner set out by this document, it is not beyond the power of the state legislature. Second, changing the fundamental plan of government in a comprehensive manner provides an opportunity to clarify all potential and existing problems with executive succession provisions in Vermont governance. Because this proposed constitutional amendment provides that the lieutenant governor becomes governor upon a permanent incapacity of the governor, this alternative does not

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Journal of the Senate 224-25 (Vt. Feb. 27, 1992).*

118. *See infra* note 131 (requirements to amend the state constitution in Vermont).

suffer from the ambiguity inherent in the present frame of government. Further, this amendment to the Vermont Constitution comports with the Pennsylvania Constitution. This document provided the basis for the frame of government established by the Vermont Constitution.

Nevertheless, the second proposal also has significant weaknesses. The primary, and most glaring, deficiency in the proposed amendment is that it strips the state's highest executive of the power of appointment. Under this proposal, the governor would not possess the power to appoint a lieutenant governor to fill in for the remainder of the term; rather, the president pro tempore of the state senate automatically would succeed to this office.

As discussed earlier, the Vermont Constitution explicitly grants the governor power to appoint persons to fill any vacated state offices.¹¹⁹ The constitutional provision granting this power of appointment only limits it in that offices should "be filled in the manner directed by law or this constitution."¹²⁰ This limitation governs the method by which the appointment power can be exercised; it does not state or imply that the scope of state offices subject to the appointment power may be limited by statute or constitutional amendment. The current proposal, providing for direct succession to the lieutenant governor's office without appointment by the new governor, is inconsistent with this other constitutional grant of power. To change the gubernatorial succession provisions to provide for direct succession of any state offices other than that of governor, a constitutional amendment should address any inconsistency with the power of appointment. The current proposal does not address the power of appointment, leaving it unclear which provision is dominant. Such an ambiguity could only be resolved by the Vermont Supreme Court. Furthermore, any proposal to amend the constitution to clarify the line of gubernatorial succession should leave fully intact the governor's power of appointment as expressed by the framers.

A second weakness inherent with this proposal is that it requires the senate president pro tempore to assume the position

119. See *supra* notes 53-55 and accompanying text.

120. See VT. CONST. ch. II, § 20.

of lieutenant governor in the event of any permanent vacancy. As there exists no corresponding provision for succession to the office of president pro tempore, or for the voters to select a new state senator, the Vermont Senate would be left with one less voting member for the remainder of a two year term.¹²¹ The weaknesses associated with this proposal to amend the Vermont Constitution should be resolved before this alternative is adopted.

The third proposal that would have a significant impact on gubernatorial succession law in the State of Vermont also is a proposed amendment to the Vermont Constitution.¹²² As the purpose of this proposal is to "amend the Vermont Constitution to abolish the office of Lieutenant Governor,"¹²³ its adoption would have far-reaching impact beyond the present issue of gubernatorial succession. This proposal would amend the language of many sections of the Vermont Constitution, eliminating any reference to the office of lieutenant governor.¹²⁴ Gubernatorial succession law in Vermont would be impacted by this proposal because the "contingent executive" responsibilities would need to pass from the lieutenant governor to some other state officer, presumably either the speaker of the house or the president pro tempore of the state senate.

This proposal would not significantly impact the underlying issue concerning gubernatorial succession law in Vermont because the powers of the governor's office would still be "exercised by" the contingent executive upon the governor's death. Thus, the contingent executive still only would be an acting governor as the

121. As mentioned previously in this note, the Vermont Senate operated with one fewer voting member during the 1992 legislative term because a member was selected to preside over this body during debate. See *supra* note 95 and accompanying text. Having a legislative body operate in this fashion is not desirable for several reasons. First, it reduces the voting membership of the body. Second, depending on the party affiliation of all the members of this body, requiring one voting member to serve as presiding officer may skew any existing political balance. Third, it leaves a district of voters in Vermont unrepresented in actual votes that take place on the senate floor. Finally, it may cause disruption in committee assignments and work as the new president pro tempore will need to devote more time and resources toward presiding over all floor debate, rather than working on individual bills and other committee work.

122. Prop. Amend. 16 to VT. CONST., reprinted in *Journal of the Senate* (Vt. 1992).

123. *Id.* § 1.

124. The proposed amendment would change the language of the Vermont Constitution chapter II, §§ 3, 19, 20, 22-24, 43, 47-49, 54 and 56. Prop. Amend. 16 to VT. CONST., *supra* note 122.

Attorney General's opinion described Howard Dean.¹²⁵ Although this proposal eliminates the need for the new state chief executive officer to appoint a new lieutenant governor, the question still remains whether this new executive would possess the full range of gubernatorial power and responsibility, as though elected governor. Accordingly, this proposal should be viewed for its more expansive purposes,¹²⁶ rather than as a constitutional amendment intended to address the problems existing in Vermont's current gubernatorial succession provisions. Since it does not address or impact the fundamental deficiencies present in the current gubernatorial succession provisions, this proposal, even if adopted, will not clarify gubernatorial succession law in the State of Vermont. Therefore, an alternative approach is necessary to resolve the inadequacies present in the existing Vermont gubernatorial succession provisions.

B. An Alternative Constitutional Amendment to Clarify Vermont Gubernatorial Succession Law

An effective solution designed to address the inadequacies present in Vermont gubernatorial succession law requires a proposal that fits within the existing constitutional framework. In addition, an effective proposal must resolve the underlying controversy following the death of Governor Snelling: whether an executive succeeding to the governor's office due to a permanent vacancy is an "acting governor," or whether this person in fact becomes governor. An analysis of the Vermont Constitution reveals that its express language does not compel either result. An investigation into the framers' intent produces the same outcome: the Vermont Constitution is unclear and subject to either interpretation.¹²⁷ To avoid a controversy similar to the one encountered by the Vermont state government when Governor Snelling died, and to vest the full supreme executive power with the succeeding executive upon a permanent vacancy in the governor's office, the Vermont Constitution should be amended so

125. See Op. Att'y Gen., *supra* note 2, at 9.

126. For example, elimination of the office of lieutenant governor can be viewed as a necessary budgetary reduction for a state currently facing a substantial deficit, or as a political statement that the lieutenant governor's office is not necessary for the proper governance of the State of Vermont.

127. See *supra* text accompanying notes 39-70.

that the lieutenant governor becomes governor upon a governor's death, removal, resignation, or other permanent incapacity.

This proposal assumes the form of an amendment to the language of chapter two, section twenty-four of the Vermont Constitution.¹²⁸ The following sentence should be inserted before the existing text of this constitutional provision: "Upon the Governor's death, failure to qualify, removal from office, resignation, or other permanent incapacity, the Lieutenant Governor shall become Governor." This straightforward change will clarify gubernatorial succession law in Vermont by specifically providing that the lieutenant governor is vested with the full range of state supreme executive power upon a permanent vacancy in the governor's office. In addition, several other sections of chapter two of the Vermont Constitution would require minor changes to maintain internal consistency within the provisions creating the frame of government. No explicit statement that the succeeding executive shall have the power to name an interim lieutenant governor is necessary because the succeeding governor will now possess the full range of gubernatorial power, including the power of appointment contained in chapter two, section twenty of the Vermont Constitution.¹²⁹

For several reasons, this amendment will resolve the deficiencies of Vermont's current gubernatorial succession law in a manner superior to the existing proposals. First, changing the frame of government through constitutional amendment is not an action arguably beyond the constitutional power of the acting body. Chapter two, section seventy-two of the Vermont Constitution provides the means by which the constitution can be amended.¹³⁰ Second, this proposal clarifies the Vermont Constitution by explicitly stating that the lieutenant governor becomes governor upon a permanent vacancy in the governor's office, precluding political controversy and uncertainty similar to the events precipitating this note. Third, the proposal operates

128. VT. CONST. ch. II, § 24. This section is entitled "Vacancy in office of governor, lieutenant-governor and treasurer." *Id.*; see *supra* note 46 (providing the relevant text of this provision).

129. See VT. CONST. ch. II, § 20; see *supra* note 46 (providing the relevant text of this provision).

130. See VT. CONST. ch. II, § 72.

during all events that could create a permanent vacancy in the governor's office. Fourth, this amendment will grant any succeeding governor the full range of executive power necessary for the adequate administration of state government. Finally, it will not leave the Vermont Senate shorthanded as the governor will possess the power to appoint a new lieutenant governor, who presides over this body. With this amendment, the State of Vermont will never again face the prospect of one and one-half years without a lieutenant governor.

One drawback of this proposal is the relatively long time period that will lapse before a constitutional amendment is adopted.¹³¹ This problem will confront any proposal to amend the fundamental frame of government established by the Vermont Constitution. As discussed previously, however, a constitutional amendment is necessary to successfully and thoroughly clarify the Vermont gubernatorial succession provisions.

CONCLUSION

The death of Governor Richard Snelling, which shocked and saddened Vermont residents in August, 1991, has brought to the political forefront problems existing in the current Vermont gubernatorial succession provisions. A clear and self-executing line of gubernatorial succession is important for several reasons. First, as chief executive officer and administrator of state government, the governor plays an invaluable role in managing state affairs. Second, the absence of a well understood and well defined executive succession provision leads to confusion when something happens to the governor, leaving the contingent executive unable to exercise the full duties of office. The events that took place following Governor Snelling's death require clarification of gubernatorial succession law in Vermont.

131. Chapter two, section seventy-two of the Vermont Constitution requires constitutional amendment proposals to pass the senate by a two-thirds vote, then to pass the house by a majority vote. VT. CONST. ch. II, § 72. A proposed amendment must then be referred back to the senate and house at their next biennial session (two years later), where it must pass by a majority vote. *Id.* Public notice of the proposed amendment then must be given by proclamation of the governor. *Id.* As a final step, the amendment must pass public referendum by a majority vote in an election established by the legislature. *Id.* Upon passing public referendum, the amendment becomes a part of the Vermont Constitution. *Id.*

Although a statutory clarification for gubernatorial succession law was introduced during the 1992 legislative session, this proposal is arguably beyond the power designated to the state legislature. A constitutional amendment is needed to clarify the line of succession to the governor's office in Vermont properly. The presently proposed constitutional amendments leave intact the basic flaws inherent in the current gubernatorial succession provisions. One is aimed primarily at eliminating the office of lieutenant governor. The other proposal provides for the president pro tempore of the Vermont Senate to succeed to the office of lieutenant governor, while the lieutenant governor succeeds to governor. To amend the status of gubernatorial succession law effectively, in a manner that is consistent with the framers' intent, the language of the Vermont Constitution should be changed to state simply that the lieutenant governor becomes governor upon the governor's death. By enacting such an amendment, the legislature and people of Vermont will shore up an inadequacy severely impacting the executive branch of state government.

J. Patrick Kennedy

