

7-20-2000

Can the Vice President Preside at His Own Impeachment Trial?: A Critique of Bare Textualism

Joel K. Goldstein
Saint Louis University School of Law

Follow this and additional works at: <https://scholarship.law.slu.edu/lj>



Part of the [Law Commons](#)

Recommended Citation

Joel K. Goldstein, *Can the Vice President Preside at His Own Impeachment Trial?: A Critique of Bare Textualism*, 44 St. Louis U. L.J. (2000).

Available at: <https://scholarship.law.slu.edu/lj/vol44/iss3/12>

This Articles and Essays is brought to you for free and open access by Scholarship Commons. It has been accepted for inclusion in Saint Louis University Law Journal by an authorized editor of Scholarship Commons. For more information, please contact [Susie Lee](#).

CAN THE VICE PRESIDENT PRESIDE AT HIS OWN IMPEACHMENT TRIAL?: A CRITIQUE OF BARE TEXTUALISM

JOEL K. GOLDSTEIN*

Turn the clock back for a moment to August 1973. In the midst of the burgeoning Watergate scandal, the nation discovered that Vice President Spiro T. Agnew was being investigated for allegedly accepting bribes from contractors, and for committing tax fraud while Governor of Maryland and Vice President. The investigation, by attorneys in the United States Attorneys Office in Maryland, ultimately gathered sufficient evidence to present to a grand jury. To avoid the spectre of likely indictment and prosecution, Agnew elected to resign his office and plead *nolo contendere*.¹

But suppose Agnew had decided not to go quietly.² Instead of resigning and pleading, imagine he decided to go to Congress, to challenge the House to impeach him and, if it did, the Senate to convict him. Although this possibility may seem far-fetched now, Agnew did at one point appear headed in that direction.³ Suppose the House had charged Agnew with committing impeachable crimes that, if proven, justified his removal. As the House considered impeaching President Nixon, the Senate would have faced a trial to determine whether Agnew, the person first in line to succeed Nixon, must be removed.

As the Senate began its deliberations, with Senate president pro tempore James Eastland presiding, let us suppose Agnew entered the Senate chamber and strolled to the front. “I’m here to preside,” Agnew told a startled Eastland. “Give me the gavel. Get out of my chair.” Agnew’s presence in and of itself,

* Professor of Law, Saint Louis University School of Law. It is a pleasure to join so many colleagues in contributing this essay to this issue of the *Saint Louis University Law Journal* in honor of Professor Eileen Searls. Her commitment to our Law School, her extraordinary contributions to our Library, and her many kindnesses have enriched our careers and inspired similar conduct in others.

I am grateful to Patricia Fitzsimmons and John Howard for research assistance and to Mary Dougherty for retyping this essay. Shortcomings are my responsibility.

1. See RICHARD M. COHEN & JULES WITCOVER, *A HEARTBEAT AWAY: THE INVESTIGATION & RESIGNATION OF VICE PRESIDENT SPIRO T. AGNEW* (1974).

2. SPIRO T. AGNEW, *GO QUIETLY . . . OR ELSE* (1980).

3. This supposition is not far-fetched. In fact, Agnew toyed with the idea of asking the House for a hearing barely two weeks before he resigned. See COHEN & WITCOVER, *supra* note 1, at 253-57.

was something of a surprise. During the twentieth century, the Vice President's role as the Senate's presiding officer had atrophied. Like other Vice Presidents, Agnew had spent little time discharging the one on-going responsibility the original Constitution gave them.⁴ In the twentieth century, the Vice Presidency had become essentially an executive office.⁵ Still, the Constitution provides that the Vice President shall be President of the Senate,⁶ and Agnew, in this fantasy, was ready to do that duty—insistent on doing it, in fact.

Now most of us pondering this hypothetical situation would probably be inclined to react, "No way, José. Agnew can't preside at his own trial." Yet if we went looking to the text of the Constitution to confirm our intuition, our next reaction might well be "Eastland, we've got a problem."

Professor Michael Stokes Paulsen recently imagined a scenario like this, examined the text of the Constitution, and, in a clever article, suggested that the Constitution would permit the Vice President of the United States to preside over his own impeachment trial.⁷ "Now *that's* stupid," concluded Professor Paulsen, in nominating this result for a coveted spot on the list of "Constitutional Stupidities."⁸ Professor Paulsen is not the first prominent scholar to express this conclusion. In 1983, Professor Stephen L. Carter concluded "that the Vice President could preside at his own impeachment trial, should he choose to do so," a conclusion he described as one of "a few glaring errors" the founders made.⁹ Seven years later, he confidently repeated his claim that "[t]he founders designed a Constitution in which the Vice President presides at his own impeachment trial" as evidence of the interpretation of the document.¹⁰ Michael Gerhardt, a leading authority on impeachment, endorses this conclusion,¹¹ as did Richard M. Pious,¹² a foremost expert on the Presidency.

4. See JOEL K. GOLDSTEIN, *THE MODERN AMERICAN VICE PRESIDENCY: THE TRANSFORMATION OF A POLITICAL INSTITUTION* 142-44 (1982).

5. See Joel K. Goldstein, *The New Constitutional Vice Presidency*, 30 WAKE FOREST L. REV. 505, 530, 544-46 (1995).

6. U.S. CONST. art. I, § 3, cl. 4.

7. Michael Stokes Paulsen, *Someone Should Have Told Spiro Agnew*, 14 CONST. COMMENTARY 245 (1997).

8. *Id.* at 246 & n.1.

9. Stephen L. Carter, *The Political Aspects of Judicial Power: Some Notes on the Presidential Immunity Decision*, 131 U. PA. L. REV. 1341, 1357 & n.72 (1983).

10. Stephen Carter, *The Role of the Courts in Separation of Powers Disputes*, 68 WASH. U. L.Q. 669, 675 (1990).

11. MICHAEL J. GERHARDT, *THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* 65 (1996).

12. Richard M. Pious, *Impeaching the President: The Intersection of Constitutional and Popular Law*, 43 ST. LOUIS U. L.J. 859, 862 n.15 (1999).

Surely most of us would agree that it would be *tres stupide* to let Spiro Agnew, or any Vice President, conduct his own trial. Indeed, we would probably find that assessment not sufficiently severe. For the nation to face the trauma of an impeachment trial of a bribe-accepting Vice President as a prelude to a similar proceeding concerning a justice-obstructing President would be bad enough. To allow the alleged crook preside over his trial would test our faith in the wisdom of the founders.

But, before we tag the founders with this blunder, it is worth asking whether the Constitution does, in fact, so provide. One cannot lightly dismiss the conclusion of four such eminent scholars, even if it is a judgment on a question on which they did not set out to build their reputations.¹³ Is the Carter-Paulsen-Gerhardt-Pious verdict the most compelling constitutional conclusion? Would the Constitution really sanction such a procedure, which they, and we, would agree is asinine?

Now I know what you're thinking, even those of you who may share my confidence that the Constitution does not mean what Professor Paulsen et al. suggests. "Take a deep breath, Joel," you counsel. "Before you spin out 150 footnotes that 250 million Americans will never read, answer me one question: Who cares? Who cares whether the Constitution would let the Vice President run his own trial? Certainly not Carter, who devoted a mere footnote to it seventeen years ago; not Paulsen, who gave only two pages to the topic in a forum he occasionally uses to advance witty constitutional interpretations.¹⁴ And why should they? Even if they're right, so what? As a practical matter, what Vice President would ever have the chutzpah, not to mention bad judgment, to try to run his own inquest? All it shows, even if Carter et al. are right, is that the framers were fallible; like the rest of us, they made mistakes.

13. To be sure, the four did not think the topic worthy of a full-length exposition. Professors Carter, Gerhardt and Pious basically covered it in a footnote; Paulsen was most loquacious, giving the topic two pages. Several who have reached different conclusions have also managed to say their piece briefly. See, e.g., John D. Feerick, *The Vice-Presidency and the Problems of Presidential Succession and Inability*, 32 FORDHAM L. REV. 457, 462 & n.30 (1964) (noting in text that "no presiding officer was mentioned for a trial of the Vice President" and in a footnote observing that "[p]resumably" the Senate President pro tempore would preside); Brian C. Kalt, *Pardon Me?: The Constitutional Case Against Presidential Self-Pardons*, 106 YALE L.J. 779, 795-96 & n.101 (1996) (criticizing Vice-President-Presides thesis in one paragraph); Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113, 122 n.59 (1995) (same).

14. See, e.g., Michael Stokes Paulsen, *Is Bill Clinton Unconstitutional? The Case for President Strom Thurmond*, 13 CONST. COMMENTARY 217 (1996); Michael Stokes Paulsen, *I'm Even Smarter than Bruce Ackerman: Why the President Can Veto His Own Impeachment*, 16 CONST. COMMENTARY 1 (1999). It is possible that Professor Paulsen is kidding here, too. If so, his satire is more subtle than I can process. In any event, he is not alone in offering this constitutional interpretation as a valid one but is joined by other thoughtful scholars.

But who ever could have thought they were perfect? Fortunately, this “mistake” is one that won’t come home to roost.”

Now I agree with most of this. (After all, I wrote it). Whether Agnew could have presided is not one of the two or three most urgent topics in constitutional law. Historical circumstance has never forced us to address the question, and propriety and common sense make it unlikely that we will. The republic will not fall if the Vice President-Presides thesis stands unchallenged.

But this thesis does raise another, and a rather basic, issue in American government—how should one go about interpreting the Constitution? Both Professors Carter and Paulsen rely exclusively on textual arguments to reach and defend their conclusion here under discussion.¹⁵ But what is the proper role of textual analysis in searching for constitutional meaning especially where, as is the case here, the text speaks only indirectly to a subject and the conclusion it might support, is, as Professor Paulsen aptly put it, “stupid?”

In recent years, textual arguments have made something of a comeback in constitutional interpretation. Whereas much constitutional argument was conducted not so long ago with little reference to the text, judicial and academic discussions now stress textual arguments.¹⁶ The Vice President-Presides conclusion makes manifest a weakness in certain applications of textual argument. It provides us with a cautionary tale about the way in which clever textual arguments, disembodied from other constitutional anchors, can mislead. Rather than relying solely on the text where, as here, it speaks indirectly and unclearly, a more appropriate mode of constitutional interpretation would also consider other types of constitutional argument to reach a conclusion. Such an approach has been formulated by leading constitutional theorists.¹⁷ It would not support the Vice President-Presides result.

This essay begins by outlining the similar arguments that Professors Carter and Paulsen advance which rely exclusively on textual analysis. It then briefly discusses whether the issue is a political question. After briefly describing other types of conventional constitutional arguments the authors might have used to address this topic, the essay shows how these arguments would have presented a fuller and more satisfactory constitutional conclusion.

15. Professors Gerhardt and Pious simply state the conclusion in passing.

16. See, e.g., *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995); *Clinton v. New York*, 524 U.S. 417 (1998); Michael Stokes Paulsen, *The Merryman Power and the Dilemma of Autonomous Executive Branch Interpretation*, 15 *CARDOZO L. REV.* 81 (1993); Edwin Meese, III, *The Law of the Constitution*, 61 *TUL. L. REV.* 979 (1987); Akhil Reed Amar, *Marbury, Section 13 and the Original Jurisdiction of the Supreme Court*, 56 *U. CHI. L. REV.* 443 (1989).

17. PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* (1982); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 *HARV. L. REV.* 1189 (1987).

I. PROFESSOR PAULSEN'S ANALYSIS

Professor Paulsen points out that the Constitution provides that the Vice President “shall be President of the Senate.”¹⁸ The Senate’s power to make its rules of proceeding, Professor Paulsen argues, “cannot be used to strip the Vice President of his specific constitutional prerogative”¹⁹ Since the Constitution grants the Vice President the power to preside, only some constitutional exception can limit this grant. To be sure, the Constitution, in two separate places, mentions instances when the Vice President does not preside. In the President Pro Tempore Clause,²⁰ Professor Paulsen points out, the Constitution empowers the Senate to choose “a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.” But a Vice President under trial is certainly not exercising the Office of President (let us hope). And, Professor Paulsen points out, a Vice President attending his Senate trial is not absent from its chamber.²¹

The Constitution also provides that when the Senate tries the President on impeachment, “the Chief Justice shall preside,” not the vice president.²² But the text does not withdraw the Vice President’s right to preside when *he* is tried for impeachment. Thus, Professor Paulsen argues the “Chief Justice shall preside” clause encourages the inference that the framers did not intend to disqualify the Vice President from presiding over his own trial. “Applying the principle of *expressio unius*, it is clear that if the framers had meant to disqualify the Vice President in the case of his own impeachment, they would have said so.”²³

Professor Carter’s discussion, though more abbreviated, generally follows the same lines. His conclusion—the Vice President can preside at his own impeachment trial—rests on four propositions. 1) The Vice President is President of the Senate; 2) The Constitution only requires the Vice President “to turn over the gavel to another individual” when the Senate tries the President; 3) the Vice President, too, is subject to impeachment and Senate trial; 4) Since the Constitution does not require the Vice President to relinquish his chair during his trial he may preside over it.²⁴

18. U.S. CONST. art. I, § 3, cl. 4.

19. Paulsen, *supra* note 7, at 245.

20. U.S. CONST. art. I, § 3, cl. 5.

21. Paulsen, *supra* note 7, at 245.

22. U.S. CONST. art. I, § 3, cl. 6.

23. Paulsen, *supra* note 7, at 246.

24. Carter, *Political Aspects*, *supra* note 9, at 1357, n.72.

II. A POLITICAL QUESTION?

Now, it is perhaps tempting to think constitutionalists may be able to avoid the merits of this issue by resorting to that familiar filter, the case or controversy requirement. The courts have articulated several factors which may render an issue nonjusticiable or not fit for adjudication.²⁵ It is quite possible that a court, if presented with the issue, would regard it as a political question beyond judicial competence. Indeed, in *Nixon v. United States*,²⁶ the Supreme Court held that at least some issues relating to impeachment are political questions which courts cannot decide on the merits. Judge Walter L. Nixon, Jr. had challenged a Senate rule which allowed a Senate committee, instead of the whole body, to listen to and observe witnesses and issue a report to the Senate pertinent to his impeachment. Judge Nixon complained that this procedure violated the Impeachment Trial Clause which provides that “[t]he Senate shall have the sole Power to try all Impeachments.”²⁷ What “try” meant in the Senate impeachment clause was a political question, the Court held.

The Court gave various reasons for its conclusion, but at least four would seem to preclude judicial review of a decision regarding who would preside over Agnew’s impeachment. First, based on the historical record, the Court found no evidence the framers intended judicial review of impeachment.²⁸ Second, the Court deemed questions regarding impeachment nonjusticiable, because finality was required for presidential impeachment. It simply would not do to have the nation endure a protracted period in which the courts adjudicated whether a President had been wrongfully removed from office. The Court seemed to imply that since the Constitution does not distinguish between impeachment proceedings for the President and federal judges in this respect at least, the same concerns which would preclude review of a presidential impeachment would inhibit judicial review of Judge Nixon’s trial.²⁹ If that consideration prevented review of an impeachment of a district court judge it would apply all the more so to impeachment of a Vice President, especially one only an impeachment-and-conviction-of-Richard-M.-Nixon away from the Presidency. Moreover, the court feared judicial review of impeachments would slide it down a slippery slope. Certain remedial problems could arise. Could a court order a removed federal judge reinstated? Could it direct Congress to create another judgeship if Judge Nixon’s spot was filled?³⁰ Finally, the court concluded that it would be inappropriate for the

25. See, e.g., NORMAN REDLICH, JOHN ATTANASIO & JOEL K. GOLDSTEIN, UNDERSTANDING CONSTITUTIONAL LAW 24-46 (2d ed. 1999).

26. 506 U.S. 224 (1993).

27. U.S. CONST. art. I, § 3, cl. 6.

28. *Nixon*, 506 U.S. at 233-34.

29. *Id.* at 236.

30. *Id.*

judiciary to review an impeachment conviction since it might later preside over a criminal prosecution of the same officer.³¹ In Agnew's case, that would hardly have been a hypothetical concern. Indeed, a full scale investigation was underway and the Department of Justice was prepared to seek an indictment.

Of course, the issue here differs from that in *Nixon* in two obvious respects. First, some different parts of the constitutional text are involved. In *Nixon*, the Court held that the language giving the Senate "the sole power to try all Impeachments" did not implicitly require "that the proceedings must be in the nature of a judicial trial."³² It reached that conclusion in part because the Constitution explicitly imposed three requirements on the Senate—that its members be under oath or affirmation, that the Chief Justice preside over presidential impeachments, and that a two-thirds vote be required for conviction;³³ the perceived precision of these limits caused the court to conclude that "the Framers did not intend to impose additional limitations on the form of the Senate proceedings by the use of the word 'try'"³⁴ On the other hand, advocates of the Vice President-Presides interpretation might argue that this situation is different, and accordingly would be justiciable, for two reasons. A separate clause of the Constitution provides that "[t]he Vice President of the United States shall be President of the Senate."³⁵ The effort to oust Agnew would arguably conflict with that entitlement. Accordingly, this issue involves a discrete clause which requires judicial interpretation. Moreover, one of the three limitations—the Chief Justice shall preside when the President is impeached—arguably implies that when someone else is impeached no special arrangements are required.

Moreover, some considerations regarding checks and balances, which influenced the Court in *Nixon* do not apply so forcefully here. There the Court concluded that judicial review of judicial impeachments was contrary to the basic system of checks and balances, since "impeachment was designed to be the *only* check on the Judicial Branch by the Legislature."³⁶ It would not do to leave the checkee power to review checkers. But here that constraint would not arise. On the contrary, here the parties disputing the coveted right to preside presumably would be the Vice President, a member of the Executive Branch, and the President pro tempore of the Senate. The Court would umpire this dispute not involving a judicial officer. The system of judicial checks and balances would not be undermined.

31. *Id.* at 234.

32. *Id.* at 229.

33. *Nixon*, 506 U.S. at 230.

34. *Id.*

35. U.S. CONST. art. I, § 3, cl. 4.

36. *Nixon*, 506 U.S. at 235.

The possibility the issue poses a political question offers no easy escape from this riddle. First, the Court might reject the political question escape, in which case it would have to address the merits. Moreover, the fact that a court deems an issue a political question does not mean the Constitution does not address it. It simply may mean the Constitution speaks in a language judges cannot or will not interpret. The Constitution speaks to Congressmen as well as to judges; they, too, are duty bound to act consistently with its directions. Somebody (other than just law professors) would need to address the constitutional question and act accordingly. The Vice President-Presides analysis, therefore, requires consideration on the merits. Accordingly, we are left with the question of how we should interpret the Constitution in such a case.

III. MODES OF INTERPRETATION

The conclusion that Professor Paulsen et al. reach rests entirely on textual analysis. Textual arguments use fragments of the constitutional document to support conclusions about constitutionality. Although usage admits different understandings of textual arguments, generally speaking they address “the present sense of the words” of some provision.³⁷

In recent years, textualism has gained new prominence, and appropriately so. It is, after all, a constitution being interpreted, and that implies some measure of fidelity to its text. Clearly, the words of the document are not irrelevant; far from it. But to acknowledge their relevance is not to treat them as invariably dispositive.

In fact, constitutional interpretation resorts to a battery of modes of constitutional arguments,³⁸ only one of which emphasizes the text. Those engaged in constitutional analysis often invoke three types of historical argument. They often identify the Constitution’s meaning with the intent of the founders, the drafters and/or ratifiers of the document. Although shortcomings of originalism have not remained secret,³⁹ judicial and academic discussions generally pay some homage to the founders’ intent. A second type of historical argument, on-going history, though less prominent, also appears in discussions of constitutional meaning.⁴⁰ It rests upon the premise that constitutional meaning can emerge from the repeated practices of governmental institutions which are accepted and relied on over time.

37. BOBBITT, *supra* note 17, at 7.

38. See, e.g., BOBBITT, *supra* note 17; Fallon, *supra* note 17; MICHAEL J. GERHARDT & THOMAS D. ROWE, JR., *CONSTITUTIONAL THEORY: ARGUMENTS AND PERSPECTIVES* (1993); REDLICH, ATTANASIO & GOLDSTEIN, *supra* note 25, at 2-4.

39. See, e.g., Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980).

40. See, e.g., *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316 (1819); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-13 (1952) (Frankfurter, J., concurring).

Precedent constitutes a third type of constitutional argument. Much constitutional discussion addresses not what the text says but rather the doctrines judges have crafted during the last two centuries. Terms like “strict scrutiny,” “over breadth,” or “clear and present danger” are not found in the text of the Constitution; rather they are part of the gloss judges have placed on it. Like originalism and on-going history, judicial doctrine really reflects an historical approach to constitutional analysis. It differs, however, in its focus on the role of judges in shaping constitutional meaning, an emphasis our common law experience supports and which *Marbury v. Madison*⁴¹ reinforces.⁴²

Structural arguments represent another common mode of constitutional interpretation. “Structural arguments are claims that a particular principle or practical result is implicit in the structures of government and the relationships that are created by the Constitution among citizens and governments.”⁴³ Structural argument enjoys the advantage that it may sometimes produce rational and satisfying answers to questions in situations where textual analysis may suggest preposterous answers. As Charles L. Black, Jr., the dean of structuralists put it:⁴⁴

I am inclined to think well of the method of reasoning from structure and relation. I think well of it, above all, because to succeed it has to make sense - current, practical sense. The textual-explication method, operating on general language, may often - perhaps more often than not - be made to make sense, by legitimate enough devices of interpretation. But it contains within itself no guarantee that it will make sense, for a court may always present itself or even see itself as being bound by the stated intent, however nonsensical, of somebody else.

The Agnew-Could-Preside argument suffers from the fact that it rests entirely on a textual argument. To be sure, the text is not a bad place to rest if the props are sturdy and not easily shaken. When the support does not enjoy that advantage, textual arguments need reinforcement. Conformity, in constitutional interpretation and elsewhere, may not be an unmitigated virtue but occasionally it does have its merits. The fact that judicial and scholarly discussions generally invoke several types of appeals suggests that many are pluralistic in their taste in constitutional arguments. The descriptive fact that

41. 5 U.S. (1 Cranch) 137 (1803).

42. See generally David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996).

43. BOBBITT, *supra* note 17, at 7.

44. CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 28 (1969).

constitutional interpretation in practice generally enlists multiple types of arguments lends some support to that methodology.⁴⁵

Considering different types of arguments often helps us better understand constitutional meaning. Even if clear textual language should be followed, exploring other modes of argument may help determine what the text means. What the framers intended the text to mean may shed some light on what it does mean. So, too, what interested parties and judges have thought the Constitution means may help us understand what it means today. Similarly, the structures and relations the text suggests may illuminate a phrase under consideration. Thus, exploring other types of arguments serves a useful function. When we are uncertain about what the text means, these other conventional types of arguments may help us understand. If we feel certain regarding the text's meaning, they may furnish a useful check. When all or most of the other conventional arguments point in the same direction, it may appropriately fortify our commitment to that conclusion. On the other hand, when the other modes suggest a different answer, perhaps our first read of the text should not be our last.⁴⁶

It is worth consciously considering other types of arguments for another reason. Interpretation requires not only a text but a reader. When we read a provision of the Constitution we do so, consciously or not, against a background of knowledge and understanding. We often know, when we read the text, how the provision has been interpreted and perhaps what the founders thought; structural arguments may also inform our understanding. Thus, we may find the text clear not only because it *is* clear but also because nothing in our experience or knowledge clouds our understanding of its language. As an example, consider the constitutional provisions relating to the Electoral College.⁴⁷ We might conclude that the text clearly allows a candidate with fewer popular votes but more electoral votes to become President not only because its language so suggests but also because this meaning fits with our knowledge of the framers' intent and comports with our nation's actual experience.

Resort to arguments in addition to the text also contributes to civic education. Constitutional argument is one important way in which we seek to understand the essence of our nation. That discussion becomes far richer and more productive if not confined to textual exegesis. We are likely to be more convinced that the Constitution is being expounded correctly when a proffered interpretation comports with, say, the framers' intent, ongoing practice, judicial doctrine, structural ideas, and good sense.

45. On the efficacy of practice based theory, see Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 CAL. L. REV. 535 (1999).

46. See generally Fallon, *supra* note 17.

47. U.S. CONST. art. II, § 1, cl. 3; amend. XII.

Finally, a pluralistic approach to constitutional decision-making is needed because the text often is not alone dispositive. Try as we might to find answers in the text, we sometimes find it mute or garbled with respect to problems we face. This is not to say that the text has no importance in these instances when it gives uncertain direction. It remains a touchstone of interpretation, a necessary starting point which sets some boundaries to channel discussion and behavior.⁴⁸

Some clauses of the Constitution confer some general power or status, or impose some general limit without addressing a specific problem that eventually arises. On occasion, the difficulty is not so much that the Constitution speaks to a problem in an ambiguous voice; it is rather that we cannot be sure that the text really speaks to the specific problem under discussion. In these instances in particular, textual analysis can mislead, not reveal. In such cases, the inferences which pieces of text might suggest may lead us astray. But, the other modes of constitutional argument, which judges and constitutional lawyers typically employ, may help suggest a resolution.

The textual argument here is not dispositive as its proponents suggest. The Paulsen et al. thesis is a clever interpretation of textual fragments. But it is not the only viable reading. The Vice President-Presides thesis clashes with the conclusions other types of arguments suggest. It is worth considering other data to interpret the Constitution even for a question as remote from actual experience as whether Agnew could have presided (had he sought to) at his impeachment trial (had he not resigned and been impeached).

IV. A CRITIQUE OF THE VICE PRESIDENT-PRESIDES THESIS

To be sure, Professor Paulsen is right when he points out that “[n]owhere does the Constitution say that the Vice President is stripped of his power as presiding officer of the Senate just because the business at hand is his own impeachment trial.”⁴⁹ Although the text does not say the Vice President cannot preside, it does not say that he can preside at his own trial either. On the contrary, the text does not speak specifically to the subject of who presides when the vice president is tried. It is, in essence, silent. Accordingly, we cannot determine whether Agnew can preside over his own trial simply by reading the text; we must invoke other tools of constitutional analysis.

Now Professor Paulsen et al. might contest this point by arguing that since the text names the Vice President as President of the Senate it is not totally silent regarding whether the Vice President can preside at his own trial. The Vice President is entitled to preside unless some specific text withdraws that power. The President of the Senate clause tilts the scale in favor of the Vice President; he should benefit from a presumption.

48. See, e.g., Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 428-29 (1985).

49. Paulsen, *supra* note 7, at 245.

This swing does not quite ring the bell. There are several answers. First, the President of the Senate Clause may be understood simply as conferring an office on the Vice President without defining the scope of his duties. In other words, that clause may simply designate the Vice President as the Senate's president without specifying the full scope⁵⁰ of his authority.⁵¹ Under this approach, Congress, under the Necessary and Proper Clause, or perhaps the Senate, would retain authority to structure the vice president's powers.

Alternatively, the President of the Senate Clause is at best a general grant of power. It tells us generally that the Vice President is President of the Senate but it does not address whether he can preside over his own inquest. The President of the Senate Clause might have read:

The Vice President of the United States shall be President of the Senate in which capacity he shall have the right to preside over its deliberations in all cases, including when he shall be tried for impeachment subject to the Chief Justice Clause and the President pro tempore clause.

In that event, the text at least would address the problem. But here the very generality of the clause might reasonably send us searching for other clues to provide a more specific authorization before allowing the Vice President to do something as bizarre as presiding at his own trial.

But the President of the Senate Clause is not the only textual fragment pertinent to this issue. The President Pro Tempore Clause empowers the Senate to choose a president pro tempore to preside "in the absence of the vice president or when he shall exercise the office of president of the United States."⁵² Clearly Agnew was not exercising presidential powers. But if he was absent during his impeachment trial the Constitution would specifically authorize the president pro tempore to preside.

Of course, the Vice President presumably would attend his impeachment trial, and accordingly Professor Paulsen argues he would not be "'absent' when he's before the Senate for his impeachment trial"⁵³ Since he is not absent, the president pro tempore cannot preside. Whether Professor Paulsen is right depends on *from what* absence is measured. If "absent" means "not present in the chamber," then the Vice President under impeachment would not be absent if he attends the proceedings. But alternatively absent may refer simply to absence from the presiding chair. In that case, Vice President Agnew's presence in the chamber would not necessarily mean he was entitled to preside. There might be situations when the Vice President were in the room but

50. The clause does emphasize that the vice president does not vote unless a tie occurs.

51. A similar argument is sometimes made regarding the vesting clause in Article II. *See, e.g.,* EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS 1787-1957* 4 (4th ed. 1957) (asking whether vesting clause constitutes "a mere designation of office").

52. U.S. CONST. art. II, § 3, cl. 5.

53. Paulsen, *supra* note 7, at 245.

necessarily absent from the chair. The Constitution does not, on its face, resolve this question; it speaks simply of “the absence of the Vice President” as necessitating a president pro tempore, without specifying absences from what.

This second meaning of absence, measured with reference to his availability to preside, would seem the more plausible one. Two examples suggest why. Presumably there are times when the president pro tempore or his designee presides while the Vice President makes his way to or from the presiding officer’s chair or stops to chat with a Senator or two. The Vice President is present in the Senate but no one would argue that the president pro tempore cannot preside in these situations. It is the Vice President’s absence from the chair that seems significant. That certainly is the way Senate practice has interpreted the clause. If the Vice President’s presence in the room does not disable the president pro tempore from presiding in this instance it should not do so simply because the Vice President attends his own trial. In either case, the Vice President is present in the chamber but absent from the chair.

Of course, there is a difference between these two situations. When Agnew leaves the podium to kibbitz with some lucky senator⁵⁴ he presumably is content to allow Eastland or some other member pound the gavel from the big chair. But when he gets tried on impeachment he wants to make sure the trial is run right. Accordingly, he is not content to allow Eastland or anyone else discharge the prerogatives of the chair. In the first case, Agnew’s absence from the chair is voluntary; in the second, not.

But it is not clear that this distinction should make any difference. First, on a textual analysis, which is, after all, Professor Paulsen’s approach, the distinction is irrelevant. The text empowers the president pro tempore to preside when the Vice President is absent. It may make a difference from what he must be absent, i.e., the chamber or the chair, but the text is indifferent to the reason the Vice President is absent or his wishes regarding whether he presides. In other words, the text does not make the right of the president pro tempore to preside dependent in any way on whether the Vice President wants to preside; it is simply a question of absence.

Moreover, the Vice President’s physical presence, in the chamber or chair, and desire to preside cannot be the sole criteria of her right to preside. Let us suppose that a Vice President entered the Senate chamber but was physically or mentally unable to preside. Although she would be present at the Senate’s place of business, she would be incapable of conducting its business. Surely the Senate would not be expected to dispense with functioning simply because

54. Agnew once left the chair to lobby Republican Senators to vote for a measure. Senator Len Jordan of Idaho “chewed him out.” The Republican leadership agreed to the Jordan rule – whenever Agnew lobbied them, they would vote the opposite way! John Robert Greene, *“I’ll Continue to Speak Out”: Spiro T. Agnew as Vice President*, in *AT THE PRESIDENT’S SIDE: THE VICE PRESIDENCY IN THE TWENTIETH CENTURY* 127-28 (Timothy Walch ed., 1997).

a deranged Vice President showed up each day to preside even though too infirm or irrational to do so. The Constitution would not tolerate such a result, for it would undermine critical structural principles of government. It would, for instance, subvert the bicameral nature of the national legislative process. By disabling the Senate, it would, in effect, prevent Congress from legislating, or advising and consenting to treaties or appointments. It would convert a tripartite system into a bipartite system thereby undermining basic principles of separation of powers and eliminating checks and balances. It could also undermine the president who could not get advice and consent from a Senate to appoint executive or judicial officers or enter into treaties.

The requisite “absence” empowers Eastland to preside. But here, since Agnew wants to preside, his absence from the chair must be compelled. Two paths take us to this destination. For reasons developed below, I believe the Constitution precludes the Vice President from presiding at his own trial. Alternatively, one might conclude that the Constitution does not require Agnew to preside but does not proscribe it either. In that event, Agnew’s absence from the chair could be compelled either by a Senate rule or by statute passed pursuant to the Necessary and Proper Clause. All of this suggests that the text of the Constitution fails to commit us to the Agnew-gets-to-preside argument.

Interestingly, the president pro tempore clause identifies two quite different contingencies when the president pro tempore presides. One, discussed above, deals with the “absence” of the vice president; the other addresses situations in which the Vice President “shall exercise the office of president of the United States.” The first clause is indifferent to why the Vice President is absent or what he is doing. The point seems to be that just because the Vice President is absent, the Senate does not grind to a halt. The show, not to mention the government, must go on. The second clause proceeds from a totally different impulse. It addresses one particular contingency in which a surrogate is required. The implication is that a Vice President acting as President could not preside over the Senate even if not absent.

But is that language necessary to disqualify from presiding over the Senate a Vice President exercising presidential powers? Suppose the framers left that clause out. Could a Vice President acting as President then preside over the Senate? I doubt it. Although the text would not dictate the result, the structure of the Constitution would. The Constitution creates three separate branches of government and imposes a system of checks and balances inconsistent with parliamentary government. Specific clauses reflect that aversion. The Incompatibility Clause,⁵⁵ for instance, precludes members of Congress from assuming executive or judicial offices. It serves as a directive that executive and legislative personnel must be kept separate. As Akhil Amar put it, “You

55. U.S. CONST. art. I, § 6, cl. 2.

can't basically be at both ends of Pennsylvania Avenue at once."⁵⁶ The possibility that an Acting President could veto a law and that the Senate (and House) could override that veto seems inconsistent with the Acting President presiding. The Acting President should not be able to have two bites at the apple; he should not intrude on the legislative process by presiding over the deliberations and then vetoing the measure presented to him.

If this analysis is correct, it suggests that a Vice President acting as President could not preside over the Senate even had the president pro tempore clause only included the absence contingency.⁵⁷ Such a Vice President would be acting inconsistent with the structure of the Constitution. Thus, if a Vice President showed up to preside, the Senate might properly tell him to get lost, since the constitutional principles of separation of powers and checks and balances compelled his absence. Similarly, a Vice President who attempted to preside over his impeachment trial might also be told his absence was constitutionally compelled if, as I will argue below, the Constitution's structure mandated his absence.

To be sure, as Professor Paulsen points out, the Constitution specifically provides that the Chief Justice is to preside at the President's trial but is silent

56. Akhil Reed Amar, *A Few Thoughts on Constitutionalism, Textualism, and Populism*, 65 *FORDHAM L. REV.* 1657, 1660 (1997).

57. There is one embarrassment to this notion that the Constitution separates personnel such that an Acting President could not preside over the Senate even without the language in the president pro tempore clause. The Vice Presidency itself seems something of a hybrid. The original Constitution designated him as President of the Senate with the power to vote in case the Senate was deadlocked. The early vice president was essentially a legislative officer, although to some extent put there by default. The Vice Presidency was largely an expedient to facilitate the original electoral system. Without that duty, founder Hugh Williamson argued, he would be without employment. His power to break deadlocks gave the presidential runner-up the occasional power to make the House of Representatives or the President pass on legislative issues he favored. In the twentieth century the vice president migrated to the executive branch, a change the Twenty-fifth Amendment confirmed in 1967. See Goldstein, *New Constitutional Vice Presidency*, *supra* note 5, at 530, 544-46.

To be sure, the fact that the Vice President, this executive officer, retains a formal Senate role cuts against my argument that the president pro tempore clause is not the source of an acting president's inability to preside over the Senate. Clearly the Constitution tolerates, to some degree, an executive official presiding over the Senate. Yet I think the wound is not too deep. Far from being the President's man in the Senate, the Vice President originally was the presidential runner-up and, as such, likely to have been a rival of the Chief Executive. As the Vice Presidency migrated to the Executive Branch, the Senate role was not repealed, but it has atrophied and now commands little of his time. His power to break ties simply means the president wins if the Senate is evenly divided, a circumstance that rarely arises. That outcome could be achieved as well by simply providing that a Senate tie goes to the President, not the opposition. Moreover, no one really takes the vice president's Senate role very seriously (except perhaps for law professors who write about it). Vice Presidents openly neglect it; yet, to my knowledge, no one has ever seriously suggested impeaching a Vice President for this dereliction of duty.

regarding the Vice President's. Invoking *expressio unius*, Professor Paulsen argues that the textual silence means the Vice President can preside.

Yet this argument credits *expressio* with more oomph than it has. The principle of *expressio unius* is hardly an absolute; it is honored in the breach. The Constitution provides that it is supreme over contradictory state law but does not say it trumps federal statutes, but *expressio unius* has not been thought to defeat the principle of judicial review of statutes Congress passes. The Constitution provides that Congress can remove "all civil officers of the United States" on impeachment and conviction but does not authorize the President to remove cabinet officers or ambassadors, yet this power is firmly established. Although *expressio* is occasionally invoked in constitutional cases it does not universally command assent. In two recent constitutional cases, eight of the nine members of the Court have rejected it when it conflicted with other modes of constitutional argument.⁵⁸ In many modern applications, *expressio unius* appears to be a weak principle of constitutional law, something of a makeweight. Courts invoke it typically when some other modes of constitutional argument support it. Thus, the inferences drawn are not dependent simply on textual silence but rest on other supports.

Finally, *expressio unius* is inapplicable here because so many alternative, more plausible theories explain why the Constitution does not specifically disqualify the Vice President from presiding. That the framers made provisions for the impeachment trial of the President but not of the Vice President does not mean they did not intend that the Vice President be disqualified from presiding over his own trial. They may have thought the principle that no man would be judge of his own trial so firmly embedded in law as to require no constitutional restatement. Alternatively, they may have focused on the presidency because of its importance. The Vice Presidency, which was an after-thought contrived in the convention's closing days, attracted less attention. Congress or the Senate could work out appropriate principles at a later time.

Surely the text should be taken seriously. But it cannot always be read literally when so doing leads to silly results that would frustrate its apparent purposes. The Constitution provides that the Chief Justice will preside over the President's impeachment trial. Suppose there was no Chief Justice when the President was impeached. Would that mean the Senate could not try the President? Could the President prevent his own removal by refusing to appoint a Chief Justice when the job fell vacant? Suppose the Chief Justice died or

58. See *Printz v. United States*, 521 U.S. 898, 969-70 (1997) (Stevens, J., dissenting) (rejects *expressio unius* argument that conflicts with historical practice; joined by Souter, Ginsburg and Breyer, JJ.); *U.S. Term Limits*, 514 U.S. at 868, 870 (Thomas, J., dissenting) (rejects *expressio unius* argument that conflicts with structural principal of federalism; joined by Rehnquist, C.J., and O'Connor and Scalia, JJ.).

resigned during the trial; would the proceedings grind to an immediate halt? The text does not provide that anyone else can preside at the President's impeachment trial and accordingly *expressio unius* would suggest the Chief Justice's entitlement to be exclusive, but I would feel pretty confident that the senior justice would discharge that function even though the text specifically requires the Chief.

V. WHERE OTHER ARGUMENTS LEAD

The textual argument is accordingly hardly persuasive. This frailty is fatal to the Vice-President-Presides thesis, for the textual argument is its only support. The notion that Agnew could preside at his own impeachment is not simply stupid, as Professor Paulsen suggests. We view it as misguided because it wars with basic structural ideas implicit in the Constitution.

Fundamental structural principles preclude a Vice President from presiding over his own impeachment trial. First, such a practice would offend ideas intrinsic to the notion of the rule of law, one of the fundamental concepts of our Constitution.⁵⁹ Agnew presiding at his trial would violate the injunction against being judge in one's own cause. The principle, which dates to Dr. Bonham's case,⁶⁰ is deeply embedded in our common law tradition and is central to our jurisprudence. James Madison articulated the aversion to self-judging in *Federalist No. 10*, "[n]o man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improperly, corrupt his integrity," he wrote.⁶¹ Indeed, the Chief Justice Clause might be understood as articulating this concept. Since the Vice President would benefit from the President's removal, he "would be judging his own cause."⁶²

Allowing a Vice President to preside would offend another strand of the rule of law. *Marbury v. Madison* made clear that the rule of law requires a remedy for every violation of a right.⁶³ The availability of a remedy presumes the possibility of a potentially effective one. Yet the problem with self-judging or self-presiding is that it destroys the efficacy of the remedy. In this respect, the spectre of a Vice President presiding over his own trial is even more objectionable than a President pardoning himself.⁶⁴ Since the pardon specifically does not extend to impeachment, a President who tried to pardon himself (putting aside the question of whether he could) would still be subject

59. See Richard H. Fallon, Jr., "The Rule of Law" as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1 (1997).

60. 8 Co. Rep. 113b, 118a, 77 Eng. Rep. 638, 652 (C.P. 1610).

61. THE FEDERALIST NO. 10, at 59 (Jacob E. Cooke ed., 1961).

62. Amar & Amar, *supra* note 13, at 122.

63. 5 U.S. at 163.

64. See Kalt, *supra* note 13.

to impeachment and removal. But the impeachment remedy could be rendered ineffective against a Vice President who presided at his own impeachment trial.

Second, the Constitution reflects an aversion to conflicts of interest in impeachment proceedings. The Court recognized as much in *Nixon v. United States*. Courts could not review decisions in impeachments of judges, the Court held, because such a power “would place final reviewing authority with respect to impeachments in the hands of the same body that the impeachment process is meant to regulate.”⁶⁵ Indeed, the requirement that the Chief Justice preside at the President’s impeachment trial seems to reflect this same concern. It would be unseemly for the vice president to preside at an impeachment proceeding that might oust the Chief Executive and lead to the vice president’s promotion. He has a conflict of interest that offends the Constitution. In order to remove any taint from so important a proceeding, the Chief Justice presides. But if the Constitution finds it impermissible for the Vice President to preside over a trial that “could vault him into the oval office,”⁶⁶ the prospect of the Vice President presiding at his own trial would seem at least equally suspect. If the Constitution sees a disabling conflict when presiding unfairly might facilitate the Vice President’s promotion, it would seem equally offended when presiding might prevent his demise.

Finally, the Constitution imposes a system of checks and balances to enforce constitutional limits and produce good and consensus government. The notion that government officials should be subject to various checks reflects a commitment to limited government and a belief that enforcement requires proper arrangement of obstacles and counter weights. The Constitution imposes few checks on the Vice President (perhaps because it gives him little power); one such check is the prospect of impeachment. It would be anomalous if the Constitution allowed him to preside over his own trial.⁶⁷

Not only do these structural arguments cut powerfully, indeed, compellingly, against the Vice-President-Presides theory. In addition, the history of the period of the drafting and ratifying the original Constitution offers reason to believe the framers would not have intended a Vice President to preside over his impeachment. In particular, it helps explain some of the textual fragments in ways that undermine this thesis.

First, the Vice Presidency was an afterthought, first proposed in the closing days of the Constitutional Convention. In all likelihood, it was conceived as an expedient to facilitate the presidential elections. The framers feared that

65. *Nixon*, 506 U.S. at 235.

66. Amar & Amar, *supra* note 13, at 122.

67. Cf. *Nixon*, 506 U.S. at 234-35 (structural arguments preclude judicial review of impeachment, which is significant check on judiciary).

electors would all support their own states' favorite son, thereby frustrating efforts to choose a national, unifying Chief Executive. To control this temptation, they added a second vote with the proviso that electors could not cast both votes for home state candidates. To induce electors to take seriously the second vote, they added a second office. The framers directed little attention to the Vice Presidency, regarding it as a device to facilitate the election of a national president.⁶⁸

Moreover, the framers gave little thought to the impeachment of a Vice President. They were preoccupied with impeachment of the President, debating the topic at length on July 20, 1787⁶⁹ and returning to the subject repeatedly during the next several weeks.⁷⁰ It was not until September 4, 1787, that the Committee of Eleven recommended that the Vice Presidency be created. It also recommended empowering the Senate to try impeachments. The Vice President would be *ex officio* President of the Senate but would not preside when the President was tried. Four days later the Convention discussed the impeachment provisions regarding the President in some detail. Near the end of the debate, the Convention, for the first time, extended the impeachment remedy to the Vice President and the civil officers of the United States.⁷¹ A committee on style was appointed to clean up the prose and organization but without authority to fiddle with substance. It reported a draft on September 12 which, with little modification, became the proposed Constitution five days later.⁷²

These historical circumstances may help explain the framers failure to specify that the Vice President could not preside at his own trial. The historical data suggests an alternative, more plausible explanation than Professor Paulsen's conclusion that "the omission [of language precluding the vice president from presiding at his own trial] can scarcely have been accidental, for the impeachment clause specifically provides that the Chief Justice, not the Vice President, presides when the President of the United States is impeached."⁷³ Professor Paulsen's conclusion would make sense only if some parity existed between the treatment of the Presidency and Vice Presidency at the Constitutional Convention. There was none. The framers labored over the presidency, debating it exhaustively. The Vice Presidency received little attention; impeachment of a Vice President even less. The Convention had substituted the Chief Justice for the Vice President to preside over a presidential impeachment trial several days before it even extended

68. See Goldstein, *New Constitutional Vice Presidency*, *supra* note 5, at 512-13.

69. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 64-69 (Max Farrand ed., 1966).

70. See John D. Feerick, *Impeaching Federal Judges: A Study of the Constitutional Provisions*, 39 FORDHAM L. REV. 1, 19-21 (1970).

71. 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 69, at 552.

72. See Feerick, *supra* note 70, at 23.

73. Paulsen, *supra* note 7, at 246.

impeachment to the Vice Presidency. It is hardly surprising that under the circumstances the framers did not focus on the issue Professor Paulsen et al. raised two centuries later. They were, no doubt, tired and hot and homesick, and eager to adjourn. If they had radar screens, the question of who would preside at a vice-presidential impeachment would not have been anywhere on them. It was a detail that slipped through the cracks in the closing days of the founders' deliberations.

To the extent Professor Paulsen believes that the "omission of any such exception [to the Vice President presiding over his impeachment] can scarcely have been accidental,"⁷⁴ he is, I believe, mistaken. It is inconceivable to imagine James Madison and the other founders consciously considering with equanimity the prospect of an impeached Vice President presiding over his own trial and concluding that it was good, especially given Madison's opposition to self-judging. Its omission does not reflect a conscious intent to distinguish between the situation of the President and the Vice President. Had they thought of it, the framers surely would have provided that either the president pro tempore or the Chief Justice would preside over the Vice President's impeachment trial.

Or perhaps they thought they had, in fact, specifically so provided, at least for most occasions. The framers conceived the Vice President as a legislative officer. As such, it was unlikely that occasion would arise to remove him by impeachment and conviction. The time when the Vice President would be at risk would be on those occasions when he exercised the office of the President. The weight of the evidence suggests that the framers did not intend the Vice President become President upon the death, resignation, removal or inability of his predecessor; they intended him only to exercise the powers and duties of the office.⁷⁵ Thus, the framers conceived that when the Vice President acted as President, and accordingly would be most vulnerable, he could not preside over the Senate! It would be odd to conclude that the framers intended the Chief Justice to preside when the President was tried for impeachment but not if the Vice President acting as president was. More likely, the framers' intent was that the President pro tempore preside whenever the Vice President acted

74. *Id.*

75. *See, e.g.*, JOHN D. FEERICK, FROM FAILING HANDS: THE STORY OF PRESIDENTIAL SUCCESSION 39-56 (1965); Goldstein, *New Constitutional Vice Presidency*, *supra* note 5, at 516-18; Amar & Amar, *supra* note 13, at 118.

as President but that the Chief Justice⁷⁶ would preside over the impeachment trial of the President or Vice President acting as President.⁷⁷

The Vice President has evolved into an officer of the Executive Branch. He rarely presides over the Senate, except on ceremonial occasions or to break ties in favor of the Administration. In view of this ongoing history, it would be anomalous if he sought to preside over a substantive event as momentous as his own trial!

VI. CONCLUSION

The Vice President-Presides thesis illustrates the fallacy of textualism pushed to extremes. To the extent the text supports that theory, it does so inferentially, not explicitly, and only if the reader accepts three questionable propositions: a) the President of the Senate Clause means the Vice President can always preside unless the Constitution, in explicit language, precludes him from doing so; b) absence, in the President Pro Tempore Clause, is absence from the chamber, not the presiding chair; and c) *expressio unius* can support a totally anomalous result when invoked with no other support. Even if the interpreter makes these moves, she has still not established the thesis. For the interpreter must also accept the proposition that the textual argument is sufficiently strong to ignore the structural arguments that explode it and the historical data that tends to impeach it.

“[W]e must never forget that it is a Constitution we are expounding,” Chief Justice Marshall reminded us.⁷⁸ If it is to endure for the ages, as he told us was the idea, it must continue to command the respect and assent of the people. That it will not do if it is construed in ways that violate basic structural

76. Since the Presidential Succession Act of 1792 placed the Senate President pro tempore after the Vice President in the line of succession, an additional reason then existed to prefer the case of Justices as presiding officers over a vice-presidential trial. The present law places the Speaker of the House ahead of the President pro tempore of the Senate. The ability of the President to fill a vice-presidential vacancy with approval of the House and Senate, *see* U.S. CONST. amend. XXV, § 2, minimizes the possible conflict of a president pro tempore presiding. Thus, I think Dean Feerick's suggestion that the president pro tempore will preside is very reasonable, and especially compelling when the vice president is not the Acting President.

77. To be sure, this history does not specifically address Agnew's situation. In our hypothetical, he was not impeached for offenses committed while acting as President but (in part) as Vice President. Yet, the facts may be closer than suggested above. Under the framers' design, when the Vice President exercised the Presidency he became an executive officer who could not preside over the Senate. If then impeached, he specifically could not preside over his impeachment. This reinforces the idea that whenever the Vice President is impeached as an executive officer, he cannot preside over the proceedings. This reading brings the theory close to Agnew's situation. For Agnew, in the hypothetical, was impeached for actions taken in part as Vice President. Of course, for other reasons he cannot preside, regardless of the basis of his impeachment.

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

commitments and accordingly produce results that are fundamentally dubious. To be sure, real constitutional stupidities may exist which the text makes so compelling that an interpreter cannot escape. When that occurs, we can expect to see the text reinforced by other modes of constitutional argument—the framers’ intent, ongoing history, judicial doctrine, structural concepts, pragmatism. But, there is no need to accept without challenge a conclusion as problematic as the Vice President-Presides thesis which rests on a naked, and not very convincing, textualism at odds with all other constitutional arguments. The Constitution would not support an effort of a Vice President to preside over his own impeachment.