

With this old law on the books, however, Senator Wade found himself in an awkward position at the outset of Johnson's trial. Senators sympathetic to Johnson demanded that Wade recuse himself in obedience to the venerable *nemo judex* principle. As they saw it, Wade's status as Johnson's legal successor made it impossible for Wade to take the requisite impeachment oath to do "impartial justice" and thereafter to sit as a proper judge and juror in what the Constitution itself labeled a "Trial."²³

Wade's defenders countered that his recusal would deprive the state of Ohio of its constitutional entitlement to two votes in the Senate chamber at a particularly important moment. Counterbalancing the venerable principle of *nemo judex in causa sua* was a common-law doctrine called "the rule of necessity." This rule allowed a judge with an otherwise disqualifying self-interest to hear a case if his participation were truly necessary or if all other judges would likely have a comparable conflict of interest. For example, the Constitution says that federal judicial salaries may not be decreased. Were Congress nevertheless to try to cut these salaries, would every federal judge be barred from hearing a judicial challenge to the cut? Judges over the centuries have answered this question differently; but the modern Supreme Court has proclaimed itself competent to hear such cases under the necessity exception to the *nemo judex in causa sua* principle. Similarly, Wade's senatorial allies explicitly argued that necessity required his participation, lest his state lose its constitutionally guaranteed equality in the Senate.²⁴

In theory, Wade could have kept his Senate seat and his full constitutional voting privileges, and also avoided a personal conflict of interest, simply by renouncing his statutory right to succeed Johnson. Yet renunciation would not really have cured the self-interest problem; rather, it would have made House Speaker Schuyler Colfax the constitutional heir apparent, even though Colfax himself had played a prominent role earlier in the impeachment process, when the House in effect had acted as a grand jury, indicting Johnson for alleged high crimes and misdemeanors. A self-interested grand-jury foreman hardly seems much better than a self-interested trial judge or juror. Had *both* Wade and Colfax renounced their succession claims, there would have been no one left to replace Johnson, creating a vacuum that would have only widened the constitutional crisis.

Although Congress was formally free to repeal and replace the 1792 act in 1868, any replacement law would have come about with Johnson's impending removal in mind. Thus the new law would have lacked the virtues of a succession statute enacted impersonally and impartially, behind a suitably thick veil of ignorance obliging lawmakers to focus on long-term succession principles rather than short-term politics.

In short, no constitutionally perfect option existed in early March 1868. Both Wade's supporters and his critics made good points, and the real problem was that an old law made no sense, but could not be fixed in time for the trial.

After hours of public debate, the Senate eventually decided to seat Wade on March 6. Wade thereafter sat in judgment over Johnson and at the trial's end voted in a self-serving way—to convict. Rumor had it that by then Wade had already selected his would-be cabinet. But his self-interested vote did not tip the balance. Johnson ultimately had enough votes to remain in power. The final vote to convict was 35 to 19—just shy of the two-thirds needed to oust Johnson and crown Wade.

Looking back on the Wade affair, late nineteenth-century Americans found little to commend in the flawed 1792 statute that had created the conflict of interest. In 1886, Congress repealed the 1792 act, replacing it with a proper system of cabinet succession that excluded House and Senate members from the line of presidential succession and thereby freed the impeachment process from the specter of self-interested adjudication.

This might seem a happy ending to our saga, but history does not always yield happy endings. In 1947 Congress changed the succession rules yet again, inserting the House speaker and Senate president pro tempore (in that order) ahead of various cabinet officers in the line of succession.²⁵

THE TAKE-HOME LESSON OF OUR story thus far is that sound constitutional interpretation involves a dialogue between America's written Constitution and America's unwritten Constitution. The latter, at a minimum, encompasses various principles implicit in the written document as a whole and/or present in the historical background, forming part of the context against which we must construe the entire text. The constitutional analysis in the preceding pages has not flowed from a literalistic and clause-bound