President Eisenhower put Earl Warren, William Brennan, and Potter Stewart on the Court during Senate recesses in the 1950s. And in 1960, the Senate itself adopted a recommendatory resolution generally advising against recess appointments to the highest court in the land. But presidents of both parties have continued to name recess appointees to the lower federal judiciary, and senators have continued to confirm many of these appointees to permanent posts.[15]

The strongest argument in support of the constitutionality of these curious appointments thus comes not from text or structure, but from longstanding usage. Here, as elsewhere, an ambiguous text has been definitively glossed by what has in fact been done early and often by leaders from across the political spectrum. All three branches have blessed probationary appointments to the bench—the president by continuing to make recess appointments without extracting a public pledge of temporary tenure; the Senate by continuing to confirm some recess appointees and to reject others, based, in part, on the judicial rulings of these probationary appointees; and the judiciary by allowing these merely provisional judges to wear robes and sit on the bench.[16]

LIKE THE SYSTEM OF JUDICIAL REPLENISHMENT, the process of legislative replenishment has involved elements of both written and unwritten constitutionalism.

The senatorial renewal process usually works quite smoothly. Members leave the Senate early upon death, resignation, or expulsion. Otherwise, a senator departs the Senate whenever his term is up, unless, of course, he is reelected and reseated. New members arrive by dint of their popular election or their temporary gubernatorial appointment, pursuant to the rules of the Seventeenth Amendment. Officially, the Senate itself decides—"Judge[s]," in the phraseology of Article I, section 5—whether a newly elected (or appointed) senator was *duly* elected (or appointed) and whether he meets the Constitution's eligibility rules.[17]

The Senate is structured to ensure that it never turns over all at once in the wake of a regular biennial election. Ordinarily, two-thirds of the Senate's members remain in their seats after an election, and at any single moment the vast majority of senators are typically duly seated holdovers

from previous election cycles. Thus, there is virtually always a quorum of continuing senators able to rule on any questions that might arise concerning the contested credentials of a new senator or group of new senators—even a sizable group, as when the holdover senators in late 1865 confronted a significant number of controversial southern claimants simultaneously seeking admission.

House replenishment is far more edgy, because the House is not a continuing body. Every two years, the old House legally dies and an entirely new House legally springs to life. Although many members—most members, nowadays—seek and win reelection time and again, none of these old hands, legally speaking, are holdovers from a previous election cycle. No member, not even a thirty-year House veteran who has been the speaker for the past decade, is already a member of the new House before any other member, even an incoming freshman.

The formal noncontinuity of the House raises profound theoretical questions. On Day One of the new House, who organizes it? Who sits in the chair, and who guards the doors? Who decides (at least provisionally) who has been duly elected? Who decides (at least for the moment) who meets the eligibility rules? Who decides who decides? Who decides who decides who decides? And so on. In other words, how does the new House give birth to itself? How does it bootstrap itself into operation at its first meeting?

Ordinarily, these deep questions are rather academic. Typically, only a few seats in any election cycle are plausibly subject to contestation on Day One.

But in December 1865, the issue was not merely theoretical. It was real and it was huge, as the credentials of virtually all the self-proclaimed representatives of the old South were reasonably subject to challenge on Day One. Recall that northern Republican critics of these southern claimants argued that all the underlying southern "elections" were constitutionally invalid, having been held in states that failed to meet the basic elements of proper Article IV republican government. But by what right did *some* (northern) representatives claim to be the true House on Day One, the House that would properly judge the contested credentials of the *other* (southern) self-proclaimed representatives—others who were made to

stand aside on December 4, 1865, while representatives from the true-blue states, and only the true-blue states, were seated and allowed to take the official oath?

Before we examine how things actually played out in late 1865, let's ponder the theoretical possibilities. Perhaps the old House could unilaterally designate an official to organize the new one. But since every old House lapses before the new one begins, arguably the authority of its officials likewise lapses. (For example, its sergeant at arms loses all power to incarcerate for contempt the instant the old term ends.) To finesse this problem, perhaps the outgoing House could simply meet after the November election and certify the membership of the incoming House. This approach, however, would routinely oblige the House to meet in lame-duck session—a democratically awkward result if key decisions end up being made by discredited incumbents who have just been tossed out by the voters. And even if the old House were to certify official members of the new House, this mere certification of membership could not determine who, in the critical opening moments of Day One of the new House, should call the roll, guard the doors, or sit in the chair as the new House begins to organize itself.

Perhaps the Senate, as a continuing body, could jumpstart the new House in the spirit of bicameral assistance. Article I envisions a Congress with two houses working together to form one legislature. Indeed, a specific clause provides that the two houses should generally sit in the same place and that neither should unilaterally adjourn for more than three days without the other's consent "during the Session of Congress." Invoking the spirit and structure of Article I, the Senate could plausibly claim a special elder-sibling role vis-à-vis the House. An analogy to judicial practice might further support senatorial involvement. Judges, who can be viewed as the continuous upper house of a bicameral judiciary, routinely take the lead in organizing and jumpstarting individual juries, which can be seen as the judiciary's noncontinuous lower house. Yet even if the Senate could plausibly claim an analogous jumpstarting authority, its right to intervene would only be implicit. No clear constitutional text instructs the Senate to organize the House, even provisionally.

Or perhaps the president might claim the right to organize the new

House by dint of the unique way in which his office is designed to be continuous and thanks to his specific grant of Article II authority to convene either of both houses of Congress "on extraordinary Occasions." But isn't the biennial first meeting of the House best viewed as a routine and regular matter, not an "extraordinary" one? Whatever might be the rules in England, where kings could dissolve parliaments at will, does it make sense in America to rely solely on the president to ensure the convening of every new House? What if a president neglects to perform his duty? What if he sits on his hands because in the absence of a duly convened House, there will be no one who can vote to impeach him for mischief that he has perpetrated after the old House left town?

Thus, each of America's three leading policymaking institutions, acting alone in the 1860s, could have plausibly claimed implicit authority to jumpstart the new House, but each faced plausible objections to its pretensions, were it to proceed unilaterally. The obvious alternative was for the three institutions to work together to devise a statutory fix. Such, indeed, is the invitation of Article I's necessary-and-proper clause, which empowers Congress to enact laws (laws that of course must pass both houses and then be presented to the president for possible veto) designed to "carry[] into Execution the foregoing Powers"—including the power of the House to spring to life biennially.

On March 3, 1863, the Thirty-seventh Congress in its waning hours enacted just such a law to solve the Day One problem already visible of the horizon. (The immediate aim of the law was to provide rules for the impending first meeting of the Thirty-eighth Congress in December 1863, but the statute operated more generally, specifying the procedures that would apply at every opening of a new Congress.) Under this law, whenever a new House met for the first time, it would be the responsibility of the clerk of the previous House to call the roll of the new House and to place on that roll-call list only those persons whom the clerk deemed to be "regularly elected."

On December 4, 1865, at the first meeting of the Thirty-ninth Congress, it was this law that enabled the clerk of the Thirty-eighth Congress, Edward McPherson, to freeze out the self-proclaimed representatives of the ex-Confederate states. McPherson, in the chair as the session began, simply refused to allow the southerners to take their seats, to take the requisite

oath, or to take part in the organizing of the new House that immediately ensued (with the election of a speaker as the first item of business). In making these momentous House decisions, McPherson was following instructions from an earlier caucus of congressional Republicans, in keeping with a script that also had the strong approval of the continuing Senate leadership. (Recall from Chapter 2 that after northern Republicans in both houses froze out the ex-Confederate states on Day One, the two houses continued to closely coordinate their policies about what the South would need to do to regain admission to Congress.)[18]

Over the past century and a half, actual institutional practice has followed the general pattern firmly established in the 1860s—first by the March 1863 statute, next by its high-profile implementation in December 1865, and finally by the enactment of a revised statute in 1867. (The 1867 act specified a fallback list of officials—a kind of line of succession—in the event the clerk of the previous House was not able to perform his Day One duties. First after the clerk on this line of succession was the sergeant at arms of the previous House.) This 1867 law, with some modifications, has remained in effect to the present day.[19]

It's worth stressing one highly unusual feature of the 1867 law and its 1863 predecessor: The officials empowered to sit in the chair and call the roll on Day One are chosen by the outgoing House of Representatives. Usually, neither Congress as a whole nor either house is allowed to pick officers who enforce or adjudicate the law. Ordinarily, Article II insists that law-enforcing or law-adjudicating officers must be appointed only by executive or judicial figures—by the president, the heads of executive departments, or the courts of law. But the 1860s legislation established a structurally sensible exception to these general principles, given that the legal rules to be enforced and adjudicated on Day One govern the internal operations of the House itself. The legal questions involved in properly organizing the House concern not how ordinary citizens should behave, but how the House itself operates within its own walls. For the same reason that the House is allowed under Article I to pick its own "Officers" to govern its own proceedings—to select its own speaker, its own clerk, its own sergeant at arms, its own doorkeeper, and so on—the House is likewise allowed to pick its own men to help birth its own successor House.[20]

But nothing in the text of the Constitution says this with crystal clar-

ity. In particular, nothing in the text says that a House may authorize its own officers to wield power for even a nanosecond after the authorizing House itself has legally expired. Without the 1860s legislation, the precise boundary between the House of Representatives' Article I power to pick their own "Speaker and other Officers" and the president's Article II power to pick almost all other officers might have been debatable. Today, that boundary, at least in the context of the first meeting of every new House, has been firmly established—not by dint of the Founders' text standing alone, but thanks also to a century and a half of practice rooted in one of the first and most interesting (if rarely noticed) Reconstruction statutes.*

"the Number of Representatives…Senators…Judges"

CLOSELY RELATED TO THE ISSUE of institutional replenishment are issues of institutional size and shape. Here, too, the Constitution's bare text tells only part of the story.

True, the size of the Senate is textually straightforward. The Constitution lays down a clear rule—two senators per state, no more and no less—and actual practice over the centuries has honored this rule. But the precise *shape* of the Senate is more complicated. Article I, section 3, provided that as soon as the first Congress assembled, one-third of the senators would be initially assigned two-year terms; another third would be assigned four-year terms; and the final third would receive the ordinary six-year term. Thanks to this initial first-term disparity, only one-third of the Senate's seats would ordinarily become vacant in any given election year. Section 3, however, failed to specify with crystalline clarity that a similar initial-term disparity would apply to the first set of senators from any new state later joining the Union, so as to preserve the staggered system and to align the

* The constitutionality of this particular boundary line draws support not only from 150 years of continuous practice, but also from the fact that the jumpstarting authority of the old House's clerk was a prominent and pivotal part of the process by which the Fourteenth Amendment actually came to be enacted—a process that, as noted in Chapter 2, famously began with the exclusion of the ex-gray states from Congress in December 1865. In the vocabulary of this book, McPherson's jumpstarting actions in 1865 are thus part of America's *enacted* Constitution, whereas the jumpstarting actions of all subsequent House clerks are part of America's *institutional* Constitution.