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### Who's Next? Proposals to Reform New York's Gubernatorial Line of Succession

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**Who's Next? Proposals to Reform New York's  
Gubernatorial Line of Succession**

*Fordham Law School Rule of Law Clinic*

Jolie Gentzkow, Alex Kasdan, & Greta Kaufman  
December 2023

Executive Summary of Recommendations

The Rule of Law Clinic proposes the following reforms to the line of succession framework:

- The line of succession should comprise the following officials in this order: lieutenant - governor, temporary president of the Senate, Speaker of the Assembly, comptroller, attorney general, and secretary of state.

Current Line of Succession		Clinic Recommendations	
<i>New York State Constitution Article IV § 6 Line of Succession</i>	<ol style="list-style-type: none"> <li>1. Lieutenant-Governor</li> <li>2. Temporary President of the Senate</li> <li>3. Speaker of the Assembly</li> </ol>	<u>Amended Constitutional Line of Succession</u>	<ol style="list-style-type: none"> <li>1. Lieutenant-Governor</li> <li>2. Temporary President of the Senate</li> <li>3. Speaker of the Assembly</li> </ol>
<i>Defense Emergency Act of 1951 § 1-A</i>	<ol style="list-style-type: none"> <li>4. Attorney General</li> <li>5. Comptroller</li> <li>6. Commissioner of Transportation</li> <li>7. Commissioner of Health</li> <li>8. Commissioner of Commerce</li> <li>9. Industrial Commissioner</li> <li>10. Chairman of Public Service Commission</li> <li>11. Secretary of State</li> </ol>	<u>Amended Statutory Line of Succession</u>	<ol style="list-style-type: none"> <li>4. Comptroller</li> <li>5. Attorney General</li> <li>6. Secretary of State</li> </ol>

- Successors should become governor upon permanent ascension to the office, rather than serving as acting governor. Successors who might temporarily serve as governor in the event of inability, absence, or impeachment, will remain acting governor. Successors, even if acting as governor temporarily, should have all the powers of someone elected to the governor's office.
- Successors who serve as acting governor for more than 60 days should be required to resign from their underlying position or step down as acting governor. During the 60-day

period while they are serving as acting governor, lawmakers should not be able to exercise their legislative powers.

- The constitution and the line of succession statute should be amended to clarify that a successor does not need to continue serving in their prior office in order to be qualified to serve as governor or acting governor. When an officeholder relinquishes their office to assume the governorship and that office's vacancy is filled, the right to the governorship should not shift to this next official to hold their prior office.
- Like the temporary president of the Senate, the Speaker of the Assembly, as a potential successor, should not be eligible to vote in gubernatorial impeachment proceedings.
- Like the temporary president of the Senate, the Speaker of the Assembly should assume gubernatorial power until "inability shall cease or until a governor shall be elected." Currently, the language for the two successors is inconsistent in the relevant constitutional provision.
- The temporary president of the Senate should never discharge the lieutenant-governor's powers. The constitution currently calls for the temporary president to do so when there is a vacancy in the lieutenant-governor's office.
- The constitution should provide that officials designated to ascend the governorship may decline to serve.
- The constitution should provide for a simultaneous pre-inaugural unavailability of the governor-elect and lieutenant-governor-elect to take office on inauguration day.
- The acting heads of executive departments should not be eligible to serve as successors.
- The statutory line of succession should make clear that it can be used in various situations where gubernatorial vacancy, impeachment, inability, or absence may occur. The current statute only provides for use of the statutory line of succession in the event of an "attack or a natural or peacetime disaster" that causes a "vacancy" in the governor's office.

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## Introduction

A workable line of succession to the governor's office is critical to a functioning state government. Far from an esoteric procedural mechanism, an adequate line of succession is necessary to maintain stable leadership in a variety of possible scenarios. Gubernatorial vacancies, inabilities, absences from the state, and impeachment proceedings trigger the line of succession.

New York's gubernatorial succession line is flawed in several ways. Some of these weaknesses stem from the designation of lawmakers as the next successors after the lieutenant-governor. The possibility that the temporary president of the Senate or Speaker of the Assembly—the lawmakers the constitution identifies as successors—could discharge the governor's powers raises separation of powers concerns. A leader of the legislative branch should not simultaneously run the executive branch.

The statutory line of succession, which identifies successors after the temporary president and Speaker, is another aspect of the line of succession framework that should be reformed. This law has not been changed since the early days of the Cold War, and it does not meet the challenges of modern times. In many succession scenarios, it would be impossible to use the succession statute because it only covers cases where the governor's office is "vacant" due to "an attack or a natural or peacetime disaster." In addition to removing this provision of the statute, the heads of the executive branch departments in the line of succession should be rearranged to better reflect practical realities and New York's current political climate.

A modern New York requires a modernized line of succession, and the Rule of Law Clinic has identified several meaningful reforms that could provide just that. The existing line of succession framework should be reformed to include the following successors: lieutenant-governor, temporary president of the Senate, Speaker of the Assembly, comptroller, attorney general, and secretary of state.

Part I describes the current line of succession framework. Part II discusses principles and considerations that should guide reforms to succession laws. Part III proposes reforms to the constitutional line of succession, which identifies and provides the procedures for the first three successors. Part IV proposes reforms to the statutory line of succession, which provides for succession beyond the constitutional line.

### I. The Current Line of Succession Framework

Article IV, Section 6 of the New York State Constitution and the Defense Emergency Act of 1951 provide the current line of succession. The constitution states that should the governor's office become vacant, the lieutenant-governor becomes governor.<sup>1</sup> If the governor is impeached, absent from the state, or "otherwise unable" to discharge their powers, the constitution makes the lieutenant-governor the acting governor. After the lieutenant-governor, the temporary president of the Senate, followed by the Speaker of the Assembly, are the next successors listed in the

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<sup>1</sup> N.Y. CONST. art. IV, § 6.

constitution.<sup>2</sup> Additionally, the constitution allows the Legislature to statutorily expand the line of succession.<sup>3</sup>

The Legislature did just that in the Defense Emergency Act of 1951. Section 5 of the Act mandates that if a vacancy in the governor’s office occurs “as a result of an attack or a natural or peacetime disaster,” eight additional successors from the executive branch may be called to act as governor.<sup>4</sup> These officials are, respectively, the attorney general, comptroller, commissioner of transportation, commissioner of health, commissioner of commerce, industrial commissioner, chairman of the public service commission, and secretary of state.<sup>5</sup>

In the event of vacancies in the offices of both governor and lieutenant-governor, a new governor and lieutenant-governor would be elected for the remainder of the term in the next general election happening within three months of the vacancy. A lieutenant-governor cannot be elected at any time other than during a gubernatorial election.

## **II. Qualities of Good Successors and the Context of Succession**

In identifying successors to the governor’s office, the clinic has emphasized two primary considerations: (1) the democratic legitimacy of possible successors and (2) their practical expertise and preparedness to serve as governor. We have also considered the events that could cause successors to serve and the broader context of their succession.

### **A. The Principles of Succession and Their Manifestation in Successors**

The primary priority in determining individuals best suited to serve as successors is their democratic legitimacy as a successor. The principle of democratic legitimacy reflects the idea that the people recognize their government as legitimate because it sufficiently represents their will.<sup>6</sup> Democratic legitimacy has received increased emphasis in state policy choices on gubernatorial succession since the country’s founding.<sup>7</sup> It is closely related to the elective principle, which posits that those who hold public office should be democratically elected.<sup>8</sup> As such, potential successors should have a mandate from the people to govern. The successors suggested by the clinic are individuals who have been popularly elected or appointed by the governor and confirmed by the Senate. The appearance of democratic legitimacy is similarly important, which supports the selection of potential successors who are known to the electorate and free from perceived conflicts of interest.<sup>9</sup>

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<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> N.Y. Defense Emergency Act 1951 art. 1-A, §§ 5–6.

<sup>5</sup> *Id.* at § 5.

<sup>6</sup> *Skelos v. Paterson*, 13 N.Y.3d 141 (2009).

<sup>7</sup> T. Quinn Yeagain, *Democratizing Gubernatorial Succession*, 73 RUTGERS L. REV. 1145 (2021); John T. Buckley, *The Governor—From Figurehead to Prime Minister: A Historical Study of the New York State Constitution and the Shift of Basic Power to the Chief Executive*, 68 ALB. L. REV. 865, 895 (2005).

<sup>8</sup> *Skelos*, 13 N.Y.3d at 151.

<sup>9</sup> Fordham Law School Rule of Law Clinic, *Changing Hands: Recommendations to Improve New York’s System of Gubernatorial Succession* (2022); Second Fordham University School of Law Clinic on Presidential Succession, Report, *Fifty Years After the Twenty-Fifth Amendment: Recommendations for Improving the Presidential Succession System*, 86 FORDHAM L. REV. 917 (2017) [hereinafter Second Fordham Succession Clinic].

The practical skills necessary to serve as governor are also important in successors. As chief executives, governors must have a wide breadth of public policy experience to oversee the administration of the state government. In New York, the governor has significant responsibilities related to developing the state’s budget.<sup>10</sup> Since the early 20<sup>th</sup> century, constitutional reorganization of the executive and legislative branches has led the governor to “become the undisputed master of financial affairs of the State.”<sup>11</sup> Accordingly, economic and budgetary expertise are of special consideration in evaluating gubernatorial successors. Relatedly, governors must also be competent in working with the legislative branch.

## **B. Balancing Succession Principles Based on Context**

The context in which the line of succession is reached also factors into the assessment of potential successors. Because the lieutenant-governor was elected by the people to be the first successor to the governor’s office, the lieutenant-governor has a strong claim to democratic legitimacy as acting governor. If a successor beyond the lieutenant-governor served as acting governor, it could be the result of a crisis. When the state is experiencing an acute crisis, and the state government is particularly fragile, different factors take on importance. These factors include the efficiency with which a successor can step into a leadership vacuum and the ability of the successor to take on the governor’s responsibilities. Inevitably, however, some principles of succession, including democratic legitimacy, efficiency, and experience, will be compromised to some extent as lower-ranked successors are reached.

## **III. The Constitutional Succession Framework**

The temporary president of the Senate and the Speaker of the Assembly both have inherent democratic legitimacy and public policy expertise, and they should remain at the top of the line of succession after the lieutenant-governor. But there are drawbacks of having lawmakers in the line, particularly separation of powers concerns. Therefore, the clinic recommends amending the state constitution to mitigate these issues. The constitution should require that successors other than the lieutenant-governor resign from their prior office when serving as governor beyond 60 days. There must also be clear procedures in place to pass gubernatorial power to the next individual in the line of succession. Some constitutional provisions—such as those that give the temporary president the powers of the lieutenant-governor and the ability of the Assembly Speaker to vote on the governor’s impeachment—conflict with important succession principles and must be removed.

### **A. Maintaining the Temporary President of the Senate and the Speaker of the Assembly in the Line of Succession**

The constitutional line of succession should remain the lieutenant-governor, followed by the temporary president and Assembly Speaker, followed by successors established by statute.<sup>12</sup> Lawmakers should be high in the line of succession because they provide democratic legitimacy, public policy expertise, and reliability.

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<sup>10</sup> John T. Buckley, *The Governor—From Figurehead to Prime Minister: A Historical Study of the New York State Constitution and the Shift of Basic Power to the Chief Executive*, 68 ALB. L. REV. 865 (2005).

<sup>11</sup> *Id.*

<sup>12</sup> See *infra* Part IV.



## 1. Lawmaker Successors Provide Democratic Legitimacy

Democratic legitimacy and the elective principle both weigh heavily in favor of maintaining the temporary president of the Senate and the Speaker of the Assembly second and third in the line of succession. These principles are most plainly supported by ensuring that the most likely gubernatorial successors have been elected by some group of citizens.<sup>13</sup> Lawmakers are elected, while other possible successors, such as the secretary of state or other executive department heads, are not and may have never held any elected office.

While lawmakers are only elected in a legislative district, as opposed to statewide like governors, the temporary president and the Speaker are selected by their respective legislative bodies. This is a proxy for a popular vote, as each legislator is voting in representation of their respective constituents. Albeit one step removed from a statewide popular vote, the legislative bodies' mandate to the temporary president and Speaker lends necessary democratic legitimacy to their positions in the line of succession.

## 2. Lawmakers Have Public Policy Experience

Another benefit of lawmakers' inclusion is that they have public policy experience.<sup>14</sup> This is even more true of high-ranking legislative leaders, like the temporary president and Speaker, who are often chosen at least in part due to their experience and character. Lawmakers, unlike some executive branch officials, have a wide breadth of policy experience.<sup>15</sup> They are likely well versed in a variety of important policy issues, such as economic, social, and public health policies. This makes them particularly well-suited to step into the highest executive's role, especially in a time of crisis.<sup>16</sup>

There is a secondary benefit to legislators' experience beyond substantive policy expertise. Given their leadership roles, the temporary president and Speaker have experience working with the Legislature. This capability would be particularly beneficial when the state is experiencing challenging times that demand quick action from the government. Other potential successors, such as the comptroller, attorney general, and secretary of state, may not have similar experience.

Lawmakers' potential lack of executive experience is a critique of their inclusion in the presidential line of succession.<sup>17</sup> But this concern carries less weight in the gubernatorial context. Unlike at the federal level, particular presidential executive skills, like diplomacy and national security, are less relevant at the state level. These skills are not required in the same way for

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<sup>13</sup> Yeagain, *supra* note 7; Fordham University School of Law's Clinic on Presidential Succession, Report, *Ensuring the Stability of Presidential Succession in the Modern Era*, 81 FORDHAM L. REV. 1 (2012); Second Fordham University School of Law Clinic on Presidential Succession, *supra* note 9.

<sup>14</sup> Second Fordham Succession Clinic, *supra* note 9.

<sup>15</sup> *Id.* at 946-47.

<sup>16</sup> Some scholars argue against the presence of lawmakers in the presidential line of succession due to lawmakers' lack of familiarity with the many political and policy issues relevant to the president, especially relative to Cabinet members. JAMES M. RONAN, *LIVING DANGEROUSLY: THE UNCERTAINTIES OF PRESIDENTIAL DISABILITY AND SUCCESSION* 124-27 (2015); Second Fordham Succession Clinic, *supra* note 9, at 946-47. However, at the state level, a lawmaker-successor's preparedness is likely to be the same or superior to that of many executive department heads due to the siloed functioning of those department roles.

<sup>17</sup> Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 STANFORD L. REV. 113 (1995).

effective gubernatorial leadership. Additionally, any other official, whether from the executive or legislative branch, will have a learning curve when they enter the governor's office. Other factors like elective legitimacy, policy experience, and experience working with the Legislature thus weigh in favor of lawmakers' positions as the second and third successors.

### **3. Lawmakers Provide Reliability**

Lawmakers provide reliability in the line of succession because vacancies in the temporary president and Speaker positions can be filled relatively easily. Vacancies in other offices are more difficult to permanently fill. The Legislature can fill vacancies in the offices of the attorney's general and comptroller. However, this cannot be done as quickly as choosing new legislative leaders. Both chambers would have to vote on a new attorney general or comptroller, and it may take time to identify worthy replacements. The Senate or Assembly can quickly elevate a lawmaker with a position in the chamber's leadership to serve as temporary president or Speaker. The ability of lawmakers to rapidly replenish the line of succession supports their placement higher in the line of succession.

#### **B. Limitations To Lawmakers in the Line of Succession are Outweighed by their Benefits**

##### **1. Party Continuity**

Lawmakers in the line of succession may belong to a different political party than the governor, which means party control of the governor's office could switch without a popular vote.<sup>18</sup> Party continuity could be preserved by replacing the temporary president and Speaker with the highest ranked member of the governor's party in each chamber. However, the highest ranked member of the governor's party could be a chamber's minority leader, who is not elected by the full house. Thus, neither the voters nor the majority of their representatives would have had a say in selecting the successor, creating questions about this individual's mandate to lead the state.

Additionally, party continuity concerns also exist with other potential successors. Because the comptroller and attorney general are both popularly elected statewide, there is no guarantee they will belong to the same party as the governor. Furthermore, the attorney general and comptroller present other concerns that weigh against ranking them higher in the line of succession. The comptroller may have less public policy experience than lawmakers, and the attorney general has potential perverse incentives stemming from their independent authority to investigate the governor and lieutenant-governor. Lawmakers can also launch investigations, but their power is less unilateral. The attorney general's investigative power, combined with the reality that many New York attorney generals have sought the governor's office, might create the perception of a conflict of interest.<sup>19</sup>

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<sup>18</sup> Second Fordham Succession Clinic, *supra* note 9, at 948.

<sup>19</sup> In New York's recent history, multiple former attorneys general have gone on to the governorship, including Andrew Cuomo and Eliot Spitzer. Current Attorney General Letitia James also briefly ran for governor. Ben Brachfeld, *The Evolving Powers of the New York State Attorney General*, GOTHAM GAZETTE (May 18, 2017), <https://www.gothamgazette.com/state/6939-the-evolving-powers-of-the-new-york-attorney-general>; Katie Glueck & Nicholas Fandos, *Letitia James Drops Out of N.Y. Governor's Race*, N.Y. TIMES (Dec. 9, 2021), <https://www.nytimes.com/2021/12/09/nyregion/letitia-james-drops-out-governor.html>; Patrick Healy, *In N.Y. Races,*

While placing the secretary of state, who the governor appoints, higher in the line of succession may assure party continuity, the secretary of state has the least democratic legitimacy and public policy experience of all of the successors recommended by the clinic. The secretary of state is not elected, and they focus primarily on administrative and record-keeping functions, meaning the secretary of state could have more limited public policy experience than lawmakers, the comptroller, and the attorney general.

Department heads are gubernatorial nominees who are appointed upon legislative confirmation. They have some democratic legitimacy because they are selected by a governor who has a popular mandate to make such choices and because they are confirmed by a Legislature that is a proxy for its members' constituents. That said, the department heads' democratic legitimacy is not grounded in direct election by the people. Officials like the secretary of state have less democratic legitimacy than legislative leaders, who are elected, albeit not statewide. Guaranteed party continuity does not outweigh all of these important factors to warrant placing of the secretary of state before elected officials in the line of succession. No succession solution is perfect. In times of crises, democratic legitimacy and necessary public policy experience are of the utmost importance, so those principles should be prioritized in the line of succession.

## **2. Policy Continuity**

Policy continuity is more difficult to ensure than party continuity. While potential successors may belong to the governor's party, they may not hold the same policy beliefs.<sup>20</sup> The most reliable way to ensure that a successor is aligned with the governor on policy issues is to make a department head the first successor after the lieutenant-governor. But, as mentioned, this presents concerns about democratic legitimacy and substantive expertise. Much like party continuity, policy continuity is difficult to guarantee because the governor's appointees might not share all of their policy views. Nonetheless, questions of policy continuity should not overshadow more fundamental principles of succession, such as democratic legitimacy, the elective principle, and policy experience.

## **3. Democratic Legitimacy Relative to Statewide Elected Executive Officials**

Even though lawmakers may not provide party and policy continuity, their democratic legitimacy and policy expertise still supports their placement high in the line of succession.

Gerrymandering does not undermine lawmakers' democratic legitimacy. One counterargument against maintaining lawmakers as successors is that their democratic legitimacy is diminished by

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*a Historic Sweep*, N.Y. TIMES (Nov. 7, 2006), <https://www.nytimes.com/2006/11/07/nyregion/08york.html>; Nicholas Confessore, *Cuomo Cruises to Win in New York Governor's Race*, N.Y. TIMES (Nov. 2, 2010), <https://www.nytimes.com/2010/11/03/nyregion/03nygov.html>; Katie Glueck, *Letitia James Declares Her Candidacy for N.Y. Governor*, N.Y. TIMES (Oct. 29, 2021), <https://www.nytimes.com/2021/10/29/nyregion/letitia-james-governor.html>.

<sup>20</sup> There has been a recent trend of intra-party division in New York. Infighting between "upstate" and "downstate" Democrats makes it seem increasingly unlikely that sharing a party affiliation will mean two elected officials will share policy stances on a range of policy issues from taxation to social services, to education. Ross Barkan, *The Democratic Party in New York is a Disaster*, N.Y. TIMES (Feb. 22, 2023), <https://www.nytimes.com/2023/02/22/magazine/new-york-democrats.html>; Daphne Jordan, *New York's Deepening Upstate-Downstate Divide*, N.Y. STATE SENATE (Oct. 5, 2019), <https://www.nysenate.gov/newsroom/in-the-news/2019/daphne-jordan/nys-deepening-upstate-downstate-divide>.

gerrymandering of legislative districts.<sup>21</sup> But concerns about gerrymandering are less applicable in New York. The Brennan Center for Justice finds that the existing New York election maps are among the most competitive and politically balanced in the country.<sup>22</sup> In 2014, then-Governor Andrew Cuomo spearheaded a constitutional amendment intended to change the way the maps were drawn to create legally enforceable protections against gerrymandering.<sup>23</sup> While the new system has not functioned well when one party controls a supermajority in both houses, the courts provide a backstop. When the process breaks down, courts may step in to draw districts, as happened for the 2022 election cycle.<sup>24</sup> Courts are generally known to draw fair maps,<sup>25</sup> so while unforeseen problems may arise with court-drawn maps, gerrymandering is generally less of a concern in New York than in other states.<sup>26</sup>

The realities of the selection of the temporary president and the Speaker may not align with the high-minded ideal that we expect. Purely political considerations will undoubtedly influence the process to varying degrees. This was evident during the 2009 New York Senate leadership crisis, when shifting party allegiances and angling for the temporary president position created a deadlock in the Senate. Typically, though, leaders have served for an extended time and their selection by a majority of their house is still meaningful.

#### 4. Potential for Perverse Incentives of Lawmakers

At the federal level, the role of top legislators in impeachment processes counts against their position in the presidential line of succession.<sup>27</sup> In New York, the same concerns are not applicable for the temporary president of the Senate because the constitution prevents the temporary president from voting in gubernatorial impeachment trials.<sup>28</sup> We propose including the Assembly Speaker in this rule. Even if this prohibition is not implemented, the Speaker only has one vote. A Speaker casting a vote for impeachment that could lead to their elevation to the governor's office might diminish the public's faith in the process. But other lawmakers could thwart an unmerited impeachment by voting against it, which would limit any untoward effect of these perverse incentives.

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<sup>21</sup> Yeagain, *supra* note 7.

<sup>22</sup> Michael Li, *What Went Wrong with New York's Redistricting*, BRENNAN CTR. FOR JUST. (Jun. 7, 2022), <https://www.brennancenter.org/our-work/research-reports/what-went-wrong-new-yorks-redistricting>. While the congressional maps were judicially overturned in 2022, the state electoral maps were upheld. Notably, these maps are currently being challenged before the New York Court of Appeals, and the court's decision may overturn the existing court-drawn maps. Nika Schoonover, *New York Congressional Maps Disputed at State's High Court*, COURTHOUSE NEWS SERV. (Nov. 15, 2023), <https://www.courthousenews.com/new-york-congressional-maps-disputed-at-states-high-court/>.

<sup>23</sup> In the new system, a bipartisan commission draws legislative maps in the first instance for consideration by the Legislature. If the Legislature rejects two proposed maps in a row, then the Legislature is granted authority to draft legislative maps. Li, *supra* note 22.

<sup>24</sup> When the commission was unable to reach an agreement with the Legislature due to a democratic supermajority, the final say on the maps went to the courts, resulting in the relatively fair current districts. *Id.*

<sup>25</sup> *Redistricting 101: Why Maps Go to Court*, DEMOCRACY DOCKET (Aug. 10, 2021), <https://www.democracydocket.com/analysis/redistricting-101-why-maps-go-to-court/>; Li, *supra* note 22.

<sup>26</sup> Li, *supra* note 22.

<sup>27</sup> Second Fordham Succession Clinic, *supra* note 9.

<sup>28</sup> N.Y. CONST. art. VI, § 24 (stating "On the trial of an impeachment against the governor or lieutenant-governor, neither the lieutenant-governor nor the temporary president of the senate shall act as a member of the court.").

Some may argue that the inability to vote in an impeachment proceeding is mostly symbolic, given that the temporary president likely has outsized influence in the body. But the attorney general's conflict of interest is still more significant. The temporary president must have the support of the Impeachment Court, which includes the Senate and Court of Appeals, to secure a conviction in an impeachment trial. In sharp contrast, the attorney general's discretion to investigate the governor is subject to no such check.

### **C. Proposed Constitutional Reforms**

The clinic's proposed reforms to the constitutional succession provisions are intended to ensure a steady line of succession with new rules, such as a resignation requirement for successors, an expanded bumping provision, a prohibition on the Senate temporary president discharging the lieutenant governor's powers during vacancies in that office, and changes to limit conflicts of interest during impeachment proceedings. The reforms would also clarify the current constitutional provisions regarding the powers of successors, clarify how and when gubernatorial power shifts, and reconcile inconsistent language used to describe succession situations.

#### **1. Requiring Resignations**

Succession of lawmakers raises concerns about the protection of separation of powers. These generalized separation of powers concerns may be less significant in New York because the state constitution shares certain critical powers between the Legislature and the governor, particularly related to the budgetary process.<sup>29</sup> Still, reforms are needed to protect separation of powers in a succession scenario.

Lawmakers who succeed to the governor's office should not be allowed to simultaneously exercise their legislative powers. The temporary president of the Senate and Speaker of the Assembly play key roles in negotiating passage of the governor's proposed budget and passing other major legislation. It would be inappropriate and undermine constitutional principles to allow lawmakers to simultaneously hold executive and legislative power.

Therefore, legislators who succeed to the governor's office in the event of a vacancy in that office should be required to resign from their legislative positions.<sup>30</sup> When a lawmaker's service as acting governor might be temporary, such as due to the governor's inability, impeachment, or absence, the lawmaker should not be required to resign immediately.<sup>31</sup> Instead, the acting governor should be prohibited from exercising their legislative powers for the first 60 days of their service as acting governor. After 60 days, the acting governor should be required to resign from the Legislature to continue acting as governor.

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<sup>29</sup> Buckley, *supra* note 10, at 895.

<sup>30</sup> NEW YORK STATE BAR ASSOCIATION, GUBERNATORIAL SUCCESSION IN NEW YORK: REPORT AND RECOMMENDATIONS OF THE NEW YORK STATE BAR ASSOCIATION COMMITTEE ON THE NEW YORK STATE CONSTITUTION 17 (2023) [hereinafter NYSBA].

<sup>31</sup> *Id.*

This reform, which was first advanced by the New York State Bar Association (NYSBA), would require a constitutional amendment, as lawmakers cannot be barred from exercising their legislative power by legislation.<sup>32</sup>

The clinic recommends adding a clarification to the NYSBA recommendation. The proposal should make clear exactly what legislative powers are denied to a lawmaker who is acting as governor during the 60-day period preceding the resignation requirement. At minimum, a lawmaker should not have the power to vote or preside over their chamber. Additionally, the temporary president of Senate should not be able to discharge the lieutenant governor's powers when the lieutenant governor's office is vacant. The clinic recommends eliminating the temporary president's powers in all circumstances. Lawmakers carry out many other important activities in their legislative capacity, such as advocating on behalf of and meeting with constituents. Lawmakers should not necessarily be barred providing these often vital services.

The 60-day period during which lawmakers may defer resignation creates an incentive for lawmakers to step in as a temporary successor, knowing they will not have to relinquish their elected role. This prevents potential confusion about who the acting governor is because, ideally, the line of succession will not skip over successors who decline to serve. An exception to the resignation requirement is necessary to ensure the highest-ranking available successor will want to rise to the governorship in scenarios that are expected to be temporary. If the governor does not reassume their office within 60 days, then it is unlikely they will in the near future.

The 60-day threshold should not be lengthened. Lawmakers' constituents are entitled to active representatives in the Legislature. To go more than two months without a representative is significant, and the 60-day threshold appropriately balances the needs of the executive branch with those of the legislative branch. Notably, the 60-day resignation requirement should be in effect even during the second half of the year, when the Legislature is not traditionally in session. Legislators are full-time employees and work on behalf of their constituents year-round. Therefore, after 60 days, the temporary president or the Speaker must resign their legislative role to continue as acting governor, regardless of the period in the calendar year.

## **2. "Bumping" Provision**

The state constitution indicates that in the case of the governor's incapacity, inability, absence, or impeachment, the lieutenant-governor followed by the temporary president and the Speaker are next in line to serve as governor or acting governor.<sup>33</sup> The governor returns to power as soon as they are available, "bumping" the successor from the governor's responsibilities. However, the constitution is unclear about what happens if there is a lawmaker serving as acting governor, and the lieutenant-governor becomes available to serve as governor: does the lawmaker continue serving as acting governor or does the lieutenant governor start serving in that position?<sup>34</sup> The most sensible option is for the lieutenant governor to take over.

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<sup>32</sup> *Silver v. Pataki*, 96 N.Y.2d 532, 537 (2001).

<sup>33</sup> N.Y. CONST. art. 4, §§ 5–6.

<sup>34</sup> It is possible that Article 4, § 6 of the constitution can be read to mean that when the lieutenant-governor's inability "shall cease" or "during such vacancy or inability," the temporary president or Speaker will respectively be removed from the governorship in favor of the lieutenant-governor. The clause could also be read to only refer to the governor's inability, meaning it would not allow the lieutenant-governor to "bump" a legislative leader.

The clinic recommends applying the bumping provision for all constitutional gubernatorial successors. This would allow higher-ranked successors, whenever they became available to serve, to “bump” those lower in the line from serving as acting governor. For example, the temporary president should be able to “bump” the Speaker.

The Defense Emergency Act further delineates the line of succession after the successors listed in the constitution.<sup>35</sup> This law states that any of the statutory successors are bumped from the acting governor position if either the lieutenant-governor, temporary president, or Speaker becomes able to serve as governor.<sup>36</sup> However, it also states that no individual delineated in the line of succession by this statute should give up their position if another higher-ranking individual listed by that legislation becomes able.<sup>37</sup> In other words, one statutory successor cannot bump another.

Consistent with our earlier proposals, the clinic recommends extending the bumping provision to those in the succession statute to preserve democratic legitimacy. The governor and lieutenant-governor were elected to serve in those roles and thus have a clearer democratic mandate to serve in the governor’s office than the legislative successors. So too, each statutory successor is ranked in the line based on the strength of their claim to these principles. For our revised statutory succession statute,<sup>38</sup> there should be a bumping provision for cases of temporary inability, absence, or impeachment. Whenever anyone higher in the line of succession can take on the powers of the governor’s office, they should be allowed to do so.

It is true that our recommended bumping provision could lead to many successors over a short period. However, the clinic firmly believes that the individual with the most democratic legitimacy and policy expertise should serve as governor. This must be prioritized even understanding there may be a scenario with an unexpectedly large number of transitions. Those circumstances, while admittedly dire, are unlikely. It is good policy to insist that the able individual highest in the line of succession serve as governor.

### **3. Removing the Lieutenant-Governor’s Powers from the Temporary President**

The constitution provides that when the lieutenant-governor vacates his office, is impeached, absent from the state, or otherwise unable to perform his duties, the temporary president “shall perform all the duties of the lieutenant-governor during such vacancy or inability.”<sup>39</sup> This provision should be eliminated. It is undemocratic for any lawmaker to have two votes. Additionally, separation of powers concerns are raised by allowing lawmakers to have powers specifically granted to executive branch officials while maintaining major legislative powers.<sup>40</sup> The temporary president would be in a position to vote once as a lawmaker, and once on behalf of the executive branch.

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<sup>35</sup> N.Y. Defense Emergency Act 1951 §§ 5–6.

<sup>36</sup> *Id.* at § 6.

<sup>37</sup> *Id.*

<sup>38</sup> *See infra* Part IV.

<sup>39</sup> N.Y. CONST. art. 4, § 6.

<sup>40</sup> NYSBA, *supra* note 30, at 11.

The NYSBA report advocates for preventing a temporary president who is performing the lieutenant-governor’s duties from exercising their casting vote in the Senate.<sup>41</sup> We propose eliminating the provision instead because it is outdated and unnecessary. The constitution provides the temporary president acting as lieutenant-governor with no power other than the tie-breaking role,<sup>42</sup> so prohibiting the temporary president from discharging that power, as NYSBA recommends, would remove any reason for having the powers of the lieutenant-governor. One may argue that designating the temporary president to discharge the lieutenant-governor’s powers allows the Senate to function efficiently by providing a tie-breaking vote. However, since the governor can quickly fill a vacancy in the office of lieutenant-governor,<sup>43</sup> the efficiency of the government is not a strong enough reason to maintain this power.

#### **4. Extending the Protections against an Impeachment Scenario Conflict of Interest**

The New York Constitution attempts to limit conflicts of interest for the temporary president as a gubernatorial successor by preventing the temporary president from voting in impeachment trials of the governor.<sup>44</sup> This ensures no one taking part in the impeachment trial is in a position to succeed to the governorship. Anyone with such a personal stake should not have input on the outcome.<sup>45</sup> Accordingly, the constitution should be amended to similarly forbid the Speaker of the Assembly from voting on whether to impeach the governor or lieutenant-governor. The same conflict of interest principle applies, as the Speaker is also in the line of succession and can benefit personally from the outcome.

#### **5. Having Full Gubernatorial Powers**

The constitution should be amended to clarify that when the gubernatorial role devolves to the temporary president or Speaker, they have all the powers of the elected governor. This is currently unclear as the current language says they are acting as governor.<sup>46</sup>

Permanent successors should “become” governor, not “act” as governor. This would eliminate ambiguities that may suggest a successor lacks full gubernatorial powers, or does not hold the office of governor. This is similar to the U.S. Constitution’s 25<sup>th</sup> Amendment, which clarified that the vice president becomes president when there is a vacancy in that office. The successor in that case inherits the office, not merely the powers, except in certain situations where they are only “acting” as president.<sup>47</sup>

Successors who may temporarily serve as governor in the event of inability, absence, or impeachment, should remain acting governor, but the constitution should be amended to clarify they have all the powers of the governor. Clarifying the source and depth of the authority to act as governor is necessary for these situations. In these kinds of scenarios, it is unclear if the legislator will need to permanently serve as governor, but there should be no ambiguities about

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<sup>41</sup> *Id.* at 18.

<sup>42</sup> N.Y. CONST. art. 4, § 6.

<sup>43</sup> *Skelos, supra* note 6.

<sup>44</sup> N.Y. CONST. art. VI, § 24.

<sup>45</sup> Amar, *supra* note 17, at 122.

<sup>46</sup> N.Y. CONST. art. IV, §§ 5–6.

<sup>47</sup> *See* U.S. CONST. amend. XXV, § IV.



their powers during this time. It is very important to have a fully functioning chief executive. Witnessing the chaos of the COVID-19 pandemic, it is clear that a crisis can arise which demands a governor whose role has no ambiguities.

## **6. Power Shifting**

A question that has arisen in other states is whether a successor must continue in their prior office to be entitled to serve as acting governor.<sup>48</sup> The constitution and the line of succession statute should be amended to clarify that a successor does not need to continue in their prior office. When a temporary president or Speaker relinquishes their position to become governor or acting governor and the respective chamber elects a new leader, the right to the governorship should not shift to the new leader.<sup>49</sup> If this were the case, the turnover would never end. A temporary president would resign to become governor, and then the Senate would elect a new temporary president who could assert that they are the rightful governor. This would lead to unacceptable instability in the leadership of the executive branch.

## **7. Successors May Decline to Serve**

The constitution should be amended to clarify that any official in the line of succession may decline to serve as governor or acting governor. The reasons one may want to decline succession include avoiding the requirement that they resign from their prior office and the possibility that an official might feel ill-prepared to serve, particularly in a sudden crisis. No one should be forced to serve as governor, especially for a brief time. Elevating unwilling successors would not serve the interests of continuity or stability. In cases where a successor declines to ascend the governorship, the governor's powers should simply devolve to the next individual in the line of succession.

## **8. Conforming the Two Constitutional Provisions for Temporary President and Speaker of the Assembly**

The constitution uses inconsistent language to describe when the temporary president and Speaker act as governor.<sup>50</sup> Specifically, a temporary president assumes gubernatorial power until “inability shall cease or until a governor shall be elected,” while a Speaker does so “during such vacancy or inability.”<sup>51</sup> Like NYSBA, the clinic recommends amending the constitution to conform these provisions so they use the language used for the temporary president,<sup>52</sup> which will add specificity, certainty, and stability to the succession provisions.

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<sup>48</sup> See Yeargain, *supra* note 7, at 1158-60; see also Rule of Law Clinic, *supra* note 9, at 18; Stevenson Jean, Gubernatorial Succession in New York State (Jan. 2023), [https://www.academia.edu/97694883/GUBERNATORIAL\\_SUCCESSION\\_IN\\_NEW\\_YORK\\_STATE](https://www.academia.edu/97694883/GUBERNATORIAL_SUCCESSION_IN_NEW_YORK_STATE) (unpublished manuscript).

<sup>49</sup> Jean, *supra* note 48, at 6–8.

<sup>50</sup> NYSBA, *supra* note 30, at 18.

<sup>51</sup> N.Y. CONST. art. IV, §§ 5–6.

<sup>52</sup> NYSBA, *supra* note 30, at 18.

## **9. Providing a Procedure in the Event of a Pre-Inaugural Vacancy in the Governor-Elect and Lieutenant-Governor-Elect's Offices**

The constitution provides for a pre-inaugural scenario in which the governor-elect “decline[s] to serve” or dies but does not address succession in the unlikely event that both the governor-elect and the lieutenant-governor-elect become unavailable to take office on inauguration day.<sup>53</sup> The presidential succession framework addresses this scenario. The U.S. Constitution’s 20<sup>th</sup> Amendment allows Congress to legislate a succession procedure for a dual vacancy or inability of the president-elect and vice president-elect.<sup>54</sup> New York’s constitution should be similarly amended to provide for this contingency by allowing the state Legislature to create a succession procedure should there ever be a simultaneous pre-inaugural unavailability of the governor-elect and lieutenant-governor-elect.

### **IV. Reforms to the Statutory Line of Succession Framework**

The line of succession statute is flawed in several ways. In some scenarios, it is not even functional. Indeed, use of the statutory line of succession is contingent on an attack on the state or a disaster, and it is silent as to other situations in which it may be used. Additionally, the current line includes heads of executive departments that either no longer exist or whose names have been changed, leaving gaps in the current line if it is triggered.

A reformed succession statute should apply in the full range of succession contingencies that are covered by the constitutional succession provisions: vacancy, inability, absence, and impeachment—regardless of the cause. Additionally, the statute should identify the following officials as successors beyond the constitutional successors: comptroller, attorney general, and secretary of state. The selection of these officials reflects an emphasis on principles of democratic legitimacy, political continuity, and policy expertise, with a recognition that these priorities may not be as fully realized as the line reaches lower-ranked officials. To keep the state functioning under what would likely be dire circumstances, these compromises are necessary.

#### **A. When the Statutory Line of Succession May Be Triggered**

The current statutory line of succession provides for the succession of the attorney general, comptroller, and various department heads only “if, as a result of an attack or a natural or peacetime disaster, the office of governor becomes vacant.”<sup>55</sup> This means that if the lieutenant-governor, temporary president, and Speaker are unavailable, the vacancy will only be filled with the remaining line if the vacancy occurs because of an attack on the state or a disaster. This is problematic for two reasons.

First, there are other scenarios besides an attack or disaster that would necessitate an individual in the line of succession to act as governor. For example, incapacities of the constitutional successors might occur due to a cause other than an attack or disaster. The attack or disaster triggers should be removed from the statute.

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<sup>53</sup> N.Y. CONST. art. V, § 4.

<sup>54</sup> U.S. CONST. amend. XX, § 3. Congress designated successors for pre-inaugural contingencies in the Presidential Succession Act of 1947.

<sup>55</sup> N.Y. Defense Emergency Act 1951 art. 1-A.

Second, the statutory line of succession should not only be available in the event that the governor's office is "vacant." If the governor becomes physically unable to serve and a successor must act as governor, the governor continues to hold the governor's office, even though a successor is discharging the governor's powers. Accordingly, the succession statute is currently only usable as a result of events that cause the governor to leave office: death, resignation, or removal. The statute should be usable when the governor is unable and absent from the state, too. The statute, like the constitution already does, should list all of the contingencies that would require its uses: gubernatorial vacancies, impeachments, absences from the state, or inabilities. Removing the narrow trigger of attack or disaster and mirroring the language used for the constitutional contingencies for the line of succession would make for a much more functional and more broadly applicable statute.<sup>56</sup>

## **B. Comptroller**

The comptroller should be the first successor in the line of succession statute.

### **1. Democratic Legitimacy**

The comptroller is elected statewide, just like the attorney general and the governor. This means the comptroller has the public's confidence to serve in a key role in the executive branch, giving the comptroller elective legitimacy as a successor. Additionally, this elective legitimacy is not undermined by a potential conflict of interest, a problem with the attorney general due to the attorney general's investigative powers. The reduced likelihood that the comptroller will have an adversarial relationship with the governor is a critical consideration in ranking the comptroller above the attorney general in the line.

### **2. Familiarity with Budgetary Responsibilities**

The comptroller's familiarity with budgetary issues is an important asset for a successor to the governor. In many states, the state treasurer is a high-ranking member of the line of succession.<sup>57</sup> In New York, the comptroller is well versed in fiscal oversight of the state, having a familiarity with state, city, and other local finances.<sup>58</sup> The governor's budgetary responsibilities make familiarity with the fiscal responsibilities and policies of the governor a highly desirable trait for a successor.<sup>59</sup> The comptroller's responsibilities would provide a helpful understanding of the fiscal inner workings of New York State for the comptroller to build upon after succeeding to the governor's office. The comptroller also has responsibilities for some social services, such as housing and pension funds. The accompanying skills and experience related to social services provide the comptroller with a quality of social awareness that voters often appreciate in an

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<sup>56</sup> N.Y. CONST. art. IV, § 6.

<sup>57</sup> See ARIZ. CONST. art. IV, § 6; OR. CONST. art V, § 8a.

<sup>58</sup> *About the New York State Comptroller's Office*, OFF. OF N. Y. ST. COMPTROLLER, <https://www.osc.ny.gov/about/about-comptrollers-office/>.

<sup>59</sup> Buckley, *supra* note 10, at 886; N.Y. CONST. art. VII.

executive official. For example, during his 2022 run, current Comptroller Thomas DiNapoli received endorsements from major labor unions and other social justice organizations.<sup>60</sup>

### **C. Attorney General**

The attorney general should be the second successor in the line of succession statute.

#### **1. Democratic Legitimacy and Substantive Expertise**

Unlike many other states, New York's attorney general is popularly elected statewide. This lends the attorney general elective legitimacy as a gubernatorial successor because it prevents a non-elected official from filling an elected office.

The attorney general's experience heading the Department of Law provides experience that contributes to the attorney general's desirable qualities as a successor. Running the Department of Law familiarizes the attorney general with significant public policy issues, including economic, law enforcement, and social justice issues.<sup>61</sup> Additionally, the attorney general gains practical experience running an executive agency. The Administrative Division of the Department of Law includes management of the Budgetary and Fiscal Bureau, providing the attorney general some familiarity with the fiscal state and processes of New York, though perhaps not as comprehensive a familiarity as the comptroller's awareness.

The Office of the Attorney General attracts individuals who might be well suited to serve as governor. In the past 20 years, two out of the five governors of New York previously served as attorney general. Voters apparently believe that at least some individuals who have served as attorney general have the necessary skills and experience to be governor. But the fact that past attorneys general have been competent governors, does not mean that *all* attorneys general will be competent governors. Therefore, perceived conflicts with the Office of the Governor still weigh in favor of placing the attorney general lower than the constitutional successors and the comptroller.

#### **2. Attorney General as an Adversary**

The attorney general is a notable potential adversary to the governor. An investigation into the governor can be unilaterally initiated by the attorney general.<sup>62</sup> Investigations of the governor by the attorney general can be especially acrimonious due to the political ambitions of the individuals who often hold the office of attorney general. For instance, former New York Governor Andrew Cuomo, in response to Attorney General Letitia James' report on whether he sexually assaulted various women, argued that James manipulated the investigation to pursue her own campaign for governor.<sup>63</sup> If an opponent of the governor succeeded to the governor's office, the adversarial nature of their relationship with their predecessor could be a distraction during a

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<sup>60</sup> Christian Evanko, *DiNapoli Leading Rodriguez in State Comptroller Race*, LEGIS. GAZETTE (Oct. 25, 2022), <https://legislativegazette.com/dinapoli-leading-rodriguez-in-state-comptroller-race/>; *Thomas DiNapoli's Ratings and Endorsements*, VOTE SMART, <https://justfacts.votesmart.org/candidate/evaluations/4303/thomas-dinapoli>.

<sup>61</sup> *About the Office*, OFF. OF THE N.Y. ST. ATT'Y GEN., <https://ag.ny.gov/about/about-office>.

<sup>62</sup> Executive Law § 63.

<sup>63</sup> Ayana Archie, *Andrew Cuomo Files a Complaint Against Letitia James for Her Sexual Harassment Report*, N.P.R. (Sept. 14, 2022), <https://www.npr.org/2022/09/14/1122894632/andrew-cuomo-letitia-james-new-york>.

challenging time for the state, potentially causing some members of the public to view the successor as illegitimate. Even if a Department of Law investigation does not result in criminal charges or negative findings, the act of initiating an investigation might signal to voters that they have reason to distrust the current governor, which weakens public confidence in the governor on a socio-political level and provides an investigating attorney general with gubernatorial aspirations a potential advantage in gubernatorial elections.<sup>64</sup>

At the same time, the power to investigate can hurt the public's perception of the attorney general. If the attorney general has political aspirations, including campaigning, when a vacancy in the governor's office occurs, the ascension of the attorney general could be viewed as illegitimate. Because the attorney general often is perceived as a potential political opponent of the governor, upon ascension, the attorney general's legitimacy could be called into question by the voters. This possibility is not sufficiently troubling to exclude the attorney general from the line of succession. For the reasons discussed, the attorney general has valuable qualities as a successor. However, these concerns do support ranking the comptroller higher in the line.

#### **D. Secretary of State**

The secretary of state should be the third successor in the line of succession statute.

##### **1. Democratic Legitimacy**

Should the sixth official in line of succession be reached, it would almost necessarily be due to a major crisis. During a crisis, the qualities valued in a successor should change to meet the moment. Instead of prioritizing the democratic legitimacy that comes from popular election, maintaining functionality in a crisis should take precedence.

The secretary of state is not elected, but they would probably provide administrative continuity from the previous governor. That the governor appoints the secretary of state increases the likelihood that the secretary of state would continue the governor's policies upon succession. The secretary of state's succession would still provide meaningful democratic legitimacy: continuing the governor's policies also likely continues the preferred policies of the voters who supported the governor.<sup>65</sup> Additionally, because the secretary of state is appointed by the governor and confirmed by the Legislature, the office possesses dual validation by *all* democratically representative branches.<sup>66</sup> As such, New Yorkers, in a time of crisis, would find solace and confidence in incremental leadership change.<sup>67</sup>

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<sup>64</sup> See Shaila K. Dawan, *Cuomo Quits Race and Backs McCall For Governorship*, N.Y. TIMES, Sept. 4, 2002, at A1; Confessore, *supra* note 19; Healy, *supra* note 19.

<sup>65</sup> Eric A. Richardson, *Of Presumed Presidential Quality: Who Should Succeed to the Presidency When the President and Vice President Are Gone*, 30 WAKE FOREST L. REV. 617, 636 (1995).

<sup>66</sup> David A. Erhart, *I am in Control Here: Constitutional and Practical Questions Regarding Presidential Succession*, 51 U. LOUISVILLE L. REV. 323, 348 (2013).

<sup>67</sup> Constituents fear major institutional change, which could result from legislators' succession to executive positions presents. If New Yorkers do not feel jarred by the transition of power, they are more likely to have confidence in the new governor, providing him or her legitimacy. Providing for succession of an official appointed by the governor provides a power transition that is logically streamlined in the eyes of constituents. Richardson, *supra* note 65, at 635.

## 2. Addressing Budgetary Responsibilities and Experience

The secretary of state is viewed by some as a ceremonial position that is typically held by an ally of the governor who might have limited governing experience. Yet, the secretary of state's statutory responsibilities compliments the governor's administrative responsibilities.<sup>68</sup> The regulation of business and Uniform Commercial Code compliance allows familiarity with the fiscal state of New York. The secretary of state also manages gubernatorial documents, presents the legislative manual, and promulgates state rules and codes.<sup>69</sup> These responsibilities provide the secretary of state familiarity with the governor's responsibilities and policies. Additionally, the secretary's responsibility in intergovernmental agreements among New York and other states or the federal government<sup>70</sup> could be particularly important should a gubernatorial vacancy occur due to an attack, pandemic, or other scenario requiring coordination with other states or the federal government.

### E. Requiring Executive Officers' Resignations

Like lawmakers in the line of succession, executive department heads should be required to resign upon permanent ascension to the governorship due to competing interests and split responsibilities. It is unwise to allow one person to hold the powers of a major executive department *and* the governor's office. Furthermore, the attorney general's power to check the governor through investigation would be threatened, if not obliterated, if the attorney general were to succeed the governor's office and continue as attorney general. The attorney general acting as governor would have no check on him or herself, placing far too much power in one person.

There is also the practical concern about split responsibilities. The roles of comptroller, attorney general, and secretary of state, let alone the governor, require extraordinary effort, focus, and time. To expect a person to split his or her abilities between two positions that are already all-encompassing on their own would threaten the government's functionality during an uncertain time, harm constituents' faith in the state's new leadership, and hinder successor to the governor's office.

As with lawmaker successors discussed above, when the executive officer's service as governor is temporary, due to an inability or absence of the governor, the officer should not be required to resign. But in contrast with the clinic's recommendation for lawmakers serving as acting governor, we do not recommend prohibiting department heads from exercising the powers of their underlying office during the first 60 days of their service as acting governor. After 60 days, should the governor still not be able to serve, an executive officer serving as acting governor should be required to resign from his executive office.

### F. Acting or Vacant Executive Officials

Acting department heads should not be in the line of succession. If the line of succession reaches a department led by an acting officer, the acting officer should be skipped in favor of the next official in the gubernatorial line of succession. This approach maximizes democratic legitimacy.

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<sup>68</sup> Executive Law § 90.

<sup>69</sup> *Id.*

<sup>70</sup> Executive Law § 107.

When there is a vacancy in the offices of the attorney general and comptroller, an acting department head fills it, until a new head is legislatively appointed. Legislatively-appointed department heads permanently fill the vacancy and are not considered acting officials. Should the comptroller position become vacant, the first deputy comptroller acts as comptroller until a replacement is legislatively appointed.<sup>71</sup> If there is a vacancy in the attorney general's office, the solicitor general is acting attorney general, until the Legislature can appoint an attorney general.<sup>72</sup> Similarly, should there be a vacancy in the secretary of state's office, the executive deputy secretary of state becomes acting secretary, until a new secretary is appointed by the governor.<sup>73</sup>

Acting executive officers themselves do not provide strong democratic legitimacy because they are not elected and have not been confirmed by the Senate for the top positions in their departments. While vacancies in the offices of comptroller and attorney general can be and are filled by the Legislature, to rely on such a process to fill the office of governor would make for unnecessary instability and a drawn-out process. Additionally, executive appointments by the Legislature might have never been elected, as opposed to the filling of the temporary president or the Speaker, who both would have to be elected to be eligible to fill those two respective positions. This would provide meaningful democratic legitimacy and stability during a time of uncertainty, should the fourth, fifth, or sixth successor need to be invoked. As such, only elected or legislatively appointed comptrollers and attorneys general should be eligible successors, because then they are permanent, rather than acting department heads.

### **G. Shortened Line of Succession**

While our proposed reforms shorten the line of succession, this reform does not pose a risk to the state. Vacancies in most offices included in the line of succession can be filled quickly. As discussed, the Legislature can replenish the line by selecting a new temporary president or Speaker.<sup>74</sup> The respective legislative bodies would simply elect a new temporary president or Speaker, thereby providing for a large source of successors before having to reach the executive officers in the line of succession. This safeguards against a potential dead end in the statutory line of succession due to a vacancy by making it highly unlikely that members further down the line of succession will be reached. Because lawmakers are placed near the top of the line of succession, a longer line of succession is unnecessary.

The likelihood that the line of succession would “run out” is further lessened by the existence of a lieutenant-governor replacement process. As first in the line of succession, should the lieutenant-governor need to step into the governor's office, the lieutenant-governor's office would not remain vacant indefinitely. The successor-governor would be able to fill this vacancy,

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<sup>71</sup> *DiNapoli Names Sanzillo First Deputy Comptroller*, OFF. OF N.Y. ST. COMPTROLLER (Mar. 7, 2007), <https://web.archive.org/web/20110610014725/http://www.osc.state.ny.us/press/releases/mar07/030707a.htm>; Public Officers Law § 41.

<sup>72</sup> Public Officers Law § 41.

<sup>73</sup> N.Y. CONST. art. V, § 4.

<sup>74</sup> Notably, legislative replenishment is ideologically consistent with the state constitution, which vests the Legislature with the authority to statutorily provide for more successors when the line devolves passed the temporary president and the Speaker. N.Y. CONST. art. IV, § 6.

as has been demonstrated in recent years with Governor Hochul’s rise to the governorship and her subsequent filling of the lieutenant governor’s office. This mechanism provides another source of succession line replenishment.

Many other states have significantly shorter gubernatorial lines of succession.<sup>75</sup> New York’s line is one of the longest in the country.<sup>76</sup> An excessively long line could be a negative feature given the reality that there are a limited number of capable successors in state government. Some officers whose duties are so siloed or niche, such as the chairman of the Public Service Commission or the commissioner of transportation, may be unprepared to step into the shoes of the governor. Our proposed line of succession framework balances the need for a capable successor with multiple sources of replenishment, thus warranting a shorter line of succession.

### **Conclusion**

New York’s gubernatorial succession line has not been reassessed in more than 50 years, and it is time for an overhaul. Anyone who is “a heartbeat” (or two, or three) from the governorship could become responsible for a state of nearly 20 million people under a myriad of circumstances and at any time. As recent history has shown, it is not unlikely or unrealistic that the members of the line of succession can have tangible impacts on the functioning of state government and citizens. The Rule of Law Clinic proposals balance the ideals of democratic legitimacy and separation of powers with the leadership skills demanded of a successor-governor.

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<sup>75</sup> *States’ Lines of Succession of Gubernatorial Powers*, NAT’L EMERGENCY MGMT. ASS’N, <https://www.nlga.us/wp-content/uploads/States-Lines-of-Gubernatorial-Succession-2.pdf>.

<sup>76</sup> *Id.*